Beyond *Edmunds*: The State Constitutional Legacy of Chief Justice Ronald D. Castille

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INTRODUCTION

The occasion of Chief Justice Ronald D. Castille’s retirement from the Pennsylvania Supreme Court1 is a fitting one to assess his state constitutional legacy. The major aspect of that legacy is the impact the Chief Justice has had in changing the way that the Pennsylvania Constitution is interpreted, along with the resulting likelihood that Pennsylvania jurisprudence will follow federal constitutional interpretations of parallel constitutional provisions.2 This is especially so in the realm of search and seizure. That is why the title of this evaluation mentions *Commonwealth v. Edmunds*,3 a search case that, in 1991, outlined for the first time in Pennsylvania history, a methodology for the interpretation of parallel rights. The Chief Justice has changed the way that *Edmunds* is used by the

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1. Chief Justice Castille retired on December 31, 2014, pursuant to the operation of the Pennsylvania Constitution’s mandatory judicial retirement provision, article V, section 16(b).
2. Twenty years ago, I resisted the term “parallel” to describe rights contained in both a state and the Federal Constitution and applicable to actions by state and local officials. I suggested the phrase, “potentially applicable state constitutional provisions,” instead. Bruce Ledewitz, *The Role of Lower State Courts in Adapting State Law to Changed Federal Interpretations*, 67 Temp. L. Rev. 1003, 1004 (1994). Needless to say, this innovation did not catch on, though it still has the merit of emphasizing the equality of state and federal constitutions in protecting individual liberty.
Pennsylvania judiciary, thus changing the meaning of the Pennsylvania Constitution far into the future.

But the title of this article—Beyond Edmunds—also suggests that this simple narrative is not the whole story of the impact of the Chief Justice on the Pennsylvania Constitution. It is not even the whole story of his impact on Edmunds. All of the different aspects of the Chief Justice’s state constitutional decision-making must be looked at before his legacy can be fairly evaluated. That is what I propose to do, briefly, here. The analysis will not be exhaustive, but I hope I can hit the high points.

Every state supreme court justice in America confronts state constitutional issues in three domains: (1) separation of powers, for which federal precedents are merely suggestive; (2) interpretive issues involving parallel rights, in which federal constitutional law may be treated as determinative, but need not be; and (3) non-parallel rights, in which federal precedent will usually be lacking. It is in the second category that Edmunds issues arise.

Over the course of his over twenty years on the Pennsylvania Supreme Court, Chief Justice Castille has left a mark in all three areas. But, certainly his least noted impact has been in the field of the separation of powers. There, the Chief Justice has been underappreciated. That is where I will begin.

I. INTERPRETATION OF THE SEPARATION OF POWERS

While unheralded, probably the most important decision rendered by Chief Justice Castille in his entire judicial career is his opinion for a unanimous court in Pennsylvania State Association of County Commissioners v. Commonwealth (PSACCII),4 which appears to have finally ended the decades-long constitutional crisis over court funding in Pennsylvania. The background of the crisis goes back to 1985, when Allegheny County filed suit against the Commonwealth for a declaratory judgment directing the Commonwealth to directly fund the operating costs of all of the local courts, including the Court of Common Pleas of Allegheny County (Allegheny County I).5 Allegheny County was relying on language in article V, section 1 of the Pennsylvania Constitution vesting the “judicial power of the Commonwealth in a unified judicial system . . . .”6 At the time of the litigation, the Commonwealth directly funded

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6. Id. at 1268.
some of the costs of local courts and required that counties pay the remainder of the costs—that cost amounted to millions of dollars that had to come from county budgets.\(^7\)

The Commonwealth Court dismissed the action, which had been filed under that court’s original jurisdiction, on the ground that the case was not justiciable.\(^8\) The court noted both the absence of any “concrete” indication in the Pennsylvania Constitution as to the requirement of centralized court funding and the questionable “power to fashion a judicial remedy . . . .”\(^9\)

On appeal, the Pennsylvania Supreme Court reversed and entered judgment for Allegheny County (Allegheny County II).\(^10\) Tellingly, all four votes in the majority came from Justices residing in Allegheny County: Justice John Flaherty wrote the majority opinion, joined by Justices Rolf Larsen, Stephen Zappala, and Nicholas Papadakos. Chief Justice Robert Nix wrote a dissenting opinion, joined by Justice James McDermott.\(^11\) Following the decision, the Governor and the General Assembly filed applications to intervene, but an equally divided court denied these.\(^12\)

The mandated change in court funding was never carried out. At the time of its decision, the court stayed its mandate in order to give the General Assembly time to enact a new funding scheme.\(^13\) But no such legislation was passed. Presumably, the main reason for legislative inaction was the sheer size of the sums involved and the new taxes that would be required to fulfill the court’s order. But in addition, the weak justification for such an enormous result and the politicized context of the vote on the court, doubtless also contributed to the lack of legislative response.

Whatever the reason, the inability of the court to enforce its judgment soon became a “public embarrassment for the court.”\(^14\) Five efforts to enforce the court’s mandate failed in the years that followed. The year after the decision, in 1988, Philadelphia County tried to force the court’s hand by dropping funding for its court of

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7. In dissent, Chief Justice Nix estimated that the General Assembly would have to come up with an additional $239,000,000 for local court funding to comply with the court’s mandate to take over all court funding in Pennsylvania. Allegheny Cty. v. Commonwealth (Allegheny County II), 534 A.2d 760, 768 n.3 (Pa. 1987) (Nix, C.J., dissenting).
8. Allegheny County I, 500 A.2d at 1270-71.
9. Id.
10. Allegheny County II, 534 A.2d at 765.
11. Id. (Justice Hutchinson did not participate in the decision of the case).
12. Id. at 768. Justice Papadakos joined the two dissenters in favor of granting intervention and hearing re-argument.
13. Id. at 765.
common pleas, which led to a *per curiam* order by the court to Philadelphia County to fund the local courts.\(^{15}\) The next year, a request for mandamus to enforce the court’s mandate was denied by a *per curiam* order.\(^{16}\) In 1991, Allegheny County filed a motion to lift the stay and enforce the judgment, and in 1992, the Pennsylvania State Association of County Commissioners filed a motion to enforce the judgment. Both motions were denied.\(^{17}\) In late 1992, another attempt to enforce the judgment was made, this time seeking restoration of funding. In a majority opinion, Justice Flaherty denied relief, pointing out that the original case had had nothing to do with funding levels per se (*Allegheny County III*).\(^{18}\)

Frustration with this course of events was manifested in *Allegheny County III* in a dissent by Chief Justice Nix reiterating the argument of his original dissent in 1987 that the funding order was “unenforceable” and a dissent by Justice Larsen, who had joined the original majority, stating that failure to enforce the judgment “leaves this Court’s proclamation of law . . . perpetually unenforceable and thus a mere abstraction.”\(^ {19}\)

In the next round of the litigation, the stakes rose considerably. In 1996, the court finally granted mandamus relief.\(^ {20}\) The issuance of the *per curiam* order, which appointed former Justice Frank Montemuro, Jr. as master to prepare an interim report containing recommendations to implement a unified judicial system, was a very close thing. The vote in favor was only 4-2, in which Justice Sandra Schultz Newman expressed considerable reluctance in joining the majority.\(^ {21}\) Then-Justice Castille both joined a dissent by Chief Justice Nix\(^ {22}\) and authored his own dissent,\(^ {23}\) which the Chief Justice joined.

The Interim Report was issued on July 30, 1997, after what Chief Justice Castille would later describe as “the culmination of remark-

\(^{19}\) *Id.* (Nix, C.J., & Larsen, J., dissenting).
\(^{20}\) *PSACC I*, 681 A.2d at 703.
\(^{21}\) In concurrence, Justice Newman expressed her reservations with joining the majority opinion, but recognized that the rule of *stare decisis* required that the holding of *Allegheny County II* be applied to the case before them. *Id.* at 706 (Newman, J., concurring).
\(^{22}\) *Id.* at 707 (Nix, C.J., dissenting).
\(^{23}\) *Id.* at 707–10 (Castille, J., dissenting).
able, and surely unprecedented, inter-branch participation and cooperation." The Report noted some genuine system-wide cooperation and consolidation, but left the issue of statewide funding, the genesis of the original litigation, to the future. The court did not formally adopt or reject the Interim Report.

In the final step of the litigation leading to the end of the court-funding constitutional impasse, a motion was filed in 2008 to compel the General Assembly to implement the recommendations contained in the Report. Chief Justice Castille’s unanimous opinion in *PSACC II* held that the court would neither grant further relief nor overrule the court’s original holding in *Allegheny County II*. The opinion struck a pragmatic and conciliatory tone:

> We are optimistic that recent progress on budgetary questions will continue; indeed, the General Assembly’s arguments in this case confirm that it will; and we are encouraged that the changes implemented as a result of the 1997 Interim Report have served as a foundation for further evolution toward a better, administratively unified judicial system.

With these simple words, a constitutional crisis that had festered for over thirty-five years finally came to an end. The Chief Justice had earlier indicated, in *PSACC I*, that he was unpersuaded by the Court’s rationale in *Allegheny County II*, but he spared the court any further institutional damage by not returning to that issue. Similarly, the Chief Justice clearly sought to mend fences with the legislature by not pointing to the General Assembly’s consistent refusal to obey the court’s mandate, but emphasizing instead the degree of interbranch cooperation that had been shown in streamlining the state courts. It was judicial statesmanship by a Chief Justice able to bring the entire court along with him.

In general terms, Chief Justice Castille did not manifest an overall theory of the separation-of-powers, in the same sense that he did not have a general jurisprudential orientation. State court judges usually do not approach their work in that way. But it is fair to say that the Chief Justice took the notion of the independence of the branches of government, and of the prerogatives of each branch, seriously. This was most obviously so with regard to the prerogatives

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25. *Id.* at 1233.
26. *Id.*
27. *PSACC I*, 681 A.2d at 709.
of the judicial branch. But, outside of clashes between the court and the legislature, the Chief Justice was also supportive of the independent powers of the General Assembly. The way that the Chief Justice resolved the court-funding crisis illustrates both points, but so do a loose collection of otherwise unrelated cases that I will mention here briefly.

The deference that Chief Justice Castille gave to the legislature in its own realm was manifested in his approach to the single subject rule and to the power of the legislature over municipal governments in Spahn v. Zoning Board of Adjustment in 2009. Chief Justice Castille’s majority opinion held both that an amendment to the First Class City Home Act (Act) controlled the issue of taxpayer standing to challenge local zoning decisions rather than a local ordinance—standing in such cases is not a matter of “purely local concern” and that the amendment did not violate the article III, section 3 requirement that “[n]o bill shall be passed containing more than one subject . . . .”

Although decisions in these fields are fact specific, the effect of Spahn was to modestly enhance the flexibility and authority of the General Assembly. The Chief Justice held that the broad subject of civil remedies sufficiently united the various provisions in the bill.

That it had been the intention of the Chief Justice to legitimate that broad topic under the single subject rule, and thus to enhance legislative flexibility, became clear in a 2013 decision that found a violation of the rule: Commonwealth v. Neiman. The court held that an Act governing deficiency judgments and county park police jurisdiction, to which a wide variety of civil and criminal provisions were added, violated article III, section 3. Chief Justice Castille filed the lone dissent, in which he admitted that the single subject rule issue was close. But he wrote that he would have upheld the Act as one “refining civil remedies,” which the rest of the court denied could constitute a single category for purposes of the rule.

The Chief Justice emphasized the “highly deferential nature of our review,” quoting the language of presumptive constitutionality that

29. In re Bruno, 101 A.3d 635, 641 (Pa. 2014) (holding that when orders of the Court of Judicial Discipline and the Pennsylvania Supreme Court conflict, the Pennsylvania Supreme Court controls judicial discipline under its King’s Bench power).
31. Id. at 1144-45.
32. PA. CONST. art. III, § 3.
33. Id. at 1148.
34. 84 A.3d 603, 616 (Pa. 2013) (Castille, C.J., dissenting).
35. Id. at 619.
is ritually invoked in nearly all cases passing on the constitutionality of statutes. Thus, the Chief Justice signaled a general deference to the legislature when the General Assembly was engaged in its core constitutional function of legislating.

In terms of the independent powers of the judiciary, the Chief Justice wrote two opinions in highly controversial cases: one of the two opinions in support of affirmance in *Gmerek v. State Ethics Commission* in 2002 and the majority opinion in *Stilp v. Commonwealth*, the 2006 pay raise case. *Gmerek* affirmed, by an equally divided court, the holding by the en banc Commonwealth Court that the Lobbying Disclosure Act was unconstitutional. *Stilp* upheld both a pay raise and its repeal, but excluded from the repeal any additional monies that had been granted to judges prior to the repeal.

In *Gmerek*, the three votes in favor of affirming the judgment of the Commonwealth Court could not agree on rationale. For Chief Justice Zappala, joined by Justice Cappy, the case was a fairly straightforward application of the “well established,” “exclusive jurisdiction” of the Pennsylvania Supreme Court “over the conduct of attorneys.” Legislative regulation of lobbying, when engaged in by attorneys, is regulation of attorneys and is therefore unconstitutional.

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36. *Id.* at 616.

37. Although he did not write the dissent, but only joined it, Justice Saylor’s dissent in *Mesivtah Eitz Chaim of Bobov, Inc., v. Pike Cty Bd. of Assessment Appeals*, 44 A.3d 3, 9 (Pa. 2012), is an excellent example of Chief Justice Castille’s tendency to defer to the legislature. The court held that satisfaction of statutory charity criteria is not enough to gain a tax exemption—an applicant must satisfy the court’s judicially created test defining a “purely public charity.” In contrast, the dissent would have reassessed that judicial test in light of the legislature’s enacted policy.

Of course, such deference cannot be absolute, which is why it is so difficult to discuss general themes in attempting to assess Chief Justice Castille’s approach to the separation of powers. Thus, the Chief Justice recently joined the rest of the court in finding the Act permitting elimination of jury commissioner constitutional as a violation of the single subject rule. *Pa. State Assoc. of Jury Commrs. v. Commonwealth*, 64 A.3d 611 (Pa. 2013).

It should also be remembered that sometimes separation of powers issues involve disputes between the Executive and Legislative branches, in which case the model of deference cannot really be applied. See, for example, Chief Justice Castille’s opinion for a unanimous court in *Jubelirer v. Rendell*, 953 A.2d 514 (Pa. 2008), in which the court held that article IV, section 16 does not permit the Governor to veto language defining a specific appropriation unless the Governor vetoes the funding itself. *Jubelirer* is also important in that the Chief Justice’s opinion held that application of the four-factor *Edmunds* analysis was not required because the state constitutional provision at issue did not have a federal counterpart.

38. 807 A.2d 812 (Pa. 2002).


41. *Gmerek*, 807 A.2d at 817.
Then-Justice Castille did not disagree with this position in his separate opinion in support of affirmance, but the sweeping nature of Justice Zappala’s opinion prevented him from joining it:

Although the points cogently made in Mr. Justice Saylor’s Opinion in Support of Reversal have given me pause, I nevertheless find myself, after considered review, in a posture of affirmance. Because I have reached this conclusion for what I believe are reasons somewhat narrower than those expressed by Mr. Chief Justice Zappala in his Opinion in Support of Affirmance, I write separately.42

Justice Castille stated expressly that much of the act was constitutional in his view, even as applied to lobbyists who were attorneys.43

In Stilp, the difficult issues in the case concerned whether the original pay raise had itself been unconstitutional, whether directly or through nonseverability.44 Once it was determined that the pay raise had been constitutional, Justice Castille treated the pay raise as immediately effective. Therefore, article V, section 16(a) did not allow the judicial portion of the pay raise to be repealed.45

Justice Castille has been a consistent supporter of the prerogatives of the judicial branch in less controversial contexts as well. One such context was standing and jurisdiction in Housing Authority of County of Chester v. Pennsylvania State Civil Service Commission.46 In that case, the commission ordered the Housing Authority to offer a position to a qualified veteran and the Housing Authority appealed the order on the ground, inter alia, that the commission lacked standing to enforce the Military Affairs Act on its own initiative. Justice Castille held, in a lead opinion that was not a majority opinion on this point, that, while the commission would lack standing under the federal constitutional doctrine of cases and controversies, the jurisdiction of the Pennsylvania Supreme Court is not constitutionally limited in the same way as is that of the Article III courts. The Pennsylvania Constitution allows jurisdiction “as

42. Id. at 820.
43. The Act itself provided, in Section 1311(b), that if portions of the Act were declared invalid, the entire act was to be declared invalid.
44. 905 A.2d at 949, 981.
45. “Justices['] . . . compensation shall not be diminished during their terms of office, unless by law applying generally to all salaried officers of the Commonwealth.” PA. CONST. art. V, § 16(a).
46. 730 A.2d 935 (Pa. 1999).
47. Justice Saylor, the fourth vote, did not concur in this part of Justice Castille’s opinion. Id. at 950 (Saylor, J., concurring).
shall be provided by law...}

Justice Castille repeated in a footnote an earlier holding by the court that the "powers" of the court go even further, to include all powers vested in the Pennsylvania Supreme Court at the time the 1968 Constitution was adopted. 49 This was dictum, but demonstrates the consistent determination of the Chief Justice throughout his career to defend the authority of the court.

Another example of the defense of the prerogatives of the courts is his opinion for a unanimous court in In re Buchanan, 50 holding that an autopsy report could be sealed by a court if the Commonwealth established that release of the report threatened to hinder the investigation of a homicide. The separation of powers issue arose because the Coroner's Act provides that autopsy reports must be released within thirty days after the end of the year. 51 A majority of the Pennsylvania Superior Court panel held that courts retain an inherent authority to seal an autopsy report upon a showing of necessity. 52 That result was affirmed. 53 But, as in Gmerek above, Justice Castille wrote a narrow opinion, holding only that the Coroner's Act was aimed by its terms at the authority of coroners rather than the traditional and inherent powers of the courts to seal certain sensitive information for temporary periods. The opinion carefully noted that the court was in fact "bound" by the "plain terms" of the Coroner's Act. 54 Buchanan illustrates the tendency of the Chief Justice to try to avoid direct confrontations between the authority of the Pennsylvania Supreme Court and the courts generally, on the one hand, and the authority of the legislature on the other, and where that has not been possible, to narrow or soften the conflict. In Commonwealth v. Mockaitis, however, neither avoidance nor softening was possible and Justice Castille, not surprisingly, held for a unanimous court that it was a violation of the separation of powers for a sentencing court to be given "executive functions" by statute. 55 Justice Castille wrote a narrow opinion, holding only that the Pennsylvania Act, which vested the authority to seal an autopsy report upon a showing of necessity in the authority of the court, was aimed by its terms at the authority of coroners rather than the traditional and inherent powers of the courts to seal certain sensitive information for temporary periods. The opinion carefully noted that the court was in fact "bound" by the "plain terms" of the Coroner's Act. 55 Buchanan illustrates the tendency of the Chief Justice to try to avoid direct confrontations between the authority of the Pennsylvania Supreme Court and the courts generally, on the one hand, and the authority of the legislature on the other, and where that has not been possible, to narrow or soften the conflict. In Commonwealth v. Mockaitis, however, neither avoidance nor softening was possible and Justice Castille, not surprisingly, held for a unanimous court that it was a violation of the separation of powers for a sentencing court to be given "executive functions" by statute. 55

50 In re Buchanan, 880 A.2d 568 (Pa. 2005).
53 In re Buchanan, 880 A.2d 568, 559 (Pa. 2005).
54 Id. at 576.
portation as a condition precedent to license restoration, and to certify to the department that the offender has complied.\textsuperscript{56} All of this, Justice Castille held, forced courts to serve the functions of the department in violation of the Pennsylvania Constitution.\textsuperscript{57}

Finally, Chief Justice Castille has attempted to protect the judicial branch as an institution even in dire circumstances. In \textit{In re Interbranch Commission on Juvenile Justice},\textsuperscript{58} Chief Justice Castille wrote a majority opinion ordering the Judicial Conduct Board to disclose certain information and documents under seal to the Interbranch Commission on Juvenile Justice, which was investigating the judicial scandal involving a juvenile justice in Luzerne County.\textsuperscript{59} In a portion of his opinion that was not joined by a majority of the court, the Chief Justice responded to the argument in Justice Joan Orie Melvin’s concurring and dissenting opinion that the information at issue should not only be disclosed to the Interbranch Commission on Juvenile Justice (ICJJ), but should in effect be made public. The closing words of the Chief Justice’s opinion express not only his disappointment with the judicial misconduct underlying the case, but his care to uphold constitutional strictures even when unpopular, in order to maintain the independence and authority of the judicial branch. These words are a fitting summary of the Chief Justice’s overall approach to the separation of powers throughout his career on the bench:

The situation in Luzerne County is shocking and disappointing beyond words; the various interventions of this Court, and the very existence of an Interbranch entity such as the ICJJ alone are testament to that fact. The public and political debate, of course, may encompass all voices, responsible and irresponsible, learned and reckless, and citizens in that debate are entitled to voice their opinions giving scant or no attention to salutary restrictions existing in the law, where foundational commands and precedent must hold sway. Our task is different from that of the litigant, the politician, or the editorialist, and

\textsuperscript{56} \textit{Id.} at 490-91.
\textsuperscript{57} Even in \textit{Mockaitis}, Justice Castille narrowed the conflict. The opinion went on to explain, under a severability analysis, how the ignition lock requirement could continue to function. \textit{Id.} at 502-03.
\textsuperscript{58} 988 A.2d 1269 (Pa. 2010).
\textsuperscript{59} The Commission was created by statute in 2009 “to investigate circumstances that led to corruption in the juvenile court of Luzerne County resulting in federal criminal charges against two judges, to restore public confidence in the administration of justice and to prevent similar events from occurring there or elsewhere in the Commonwealth.” \textsc{interbranch commission on juvenile justice}, \url{http://www.pacourts.us/news-and-statistics/archived-resources/interbranch-commission-on-juvenile-justice} (last visited Feb. 25, 2015).
it is inevitably less understood and often less popular. Our sworn task is to apply the law; and in so doing we cannot ignore, rewrite or torture settled language and propositions, and then apply that construct retroactively without affording the parties an opportunity to be heard, in order to reach a perceived favored conclusion, no matter how extreme the circumstance that brings a dispute to our attention.60

II. INTERPRETATION OF PARALLEL PROVISIONS OF THE PENNSYLVANIA CONSTITUTION

Undoubtedly, the aspect of Chief Justice Castille’s state constitutional legacy that attorneys and students of the constitution will most remember is his role in reinterpreting the methodology by which parallel provisions of the State Constitution are interpreted—in other words, his reinterpretation of Commonwealth v. Edmunds.61

The story of Edmunds begins, as the entire field we know today as state constitutional law begins, in 1969, with the end of the Warren Court and the beginning of the Burger Court. The history of the United States Supreme Court in the late twentieth and early twenty-first centuries can be understood as a continuing conservative reaction against the methods and substantive decisions of the Warren Court. Since the end of the Warren Court in 1969, American liberalism has lacked a consistent jurisprudential vision. That consistent vision, both in terms of constitutional methods—such as textualism and originalism—and outcomes—the recognition of the constitutional rights of corporations, for example—has come from a series of conservative Courts: the Burger, Rehnquist, and now the Robert’s Courts. Meanwhile, liberals on the United States Supreme Court could sometimes win judicial victories—Roe v. Wade62 in 1973, for example—but only as isolated, interest group decisions rather than elements of an overall approach to constitutional government.

At the change point, in 1969, there were still many Warren Court liberals serving as judges in the lower state courts, and serving as justices on state supreme courts. They were by no means done with expanding constitutional rights for Americans. But there was no real tradition at that time of state court liberal activism. The War-

60. Interbranch Comm’n., 988 A.2d at 1283.
62. 410 U.S. 113.
ren Court revolutions in criminal procedure, civil rights, civil procedure and what came to be known as privacy had no parallel in the state courts. Indeed, some of the Warren Court innovations came about because of the failures of state courts to enforce their own state constitutions, as was glaringly the case in the reapportionment cases.63

All this began to change in 1969 as the Warren Court came to an end and state courts began to articulate their own vision of a liberal jurisprudence. But the change did not gain national momentum until U.S. Supreme Court Justice William Brennan published a law review article, which appeared in 1977 in the Harvard Law Review—State Constitutions and the Protection of Individual Rights.64 Justice Brennan in effect called upon state judges to continue the Warren Court revolutions under the authority of state constitutional law.

To understand Justice Brennan’s call, one must remember that in interpreting parallel constitutional rights, that is, rights in state constitutions that parallel rights in the Federal Constitution, state judges are bound to apply federal constitutional jurisprudence by the Supremacy Clause in the United States Constitution and by the doctrine of incorporation. Thus, a search that is unconstitutional under the Fourth Amendment, is unconstitutional whether perpetrated by the FBI or by the state police, and will lead to the same suppression of evidence in federal court or in state court.

But, while state judges must always enforce federal rights, they are also free to go beyond them. So, for example, a criminal defendant who has no right to counsel under the Federal Sixth Amendment might have a right to counsel under a parallel state constitutional right.

Expansions of rights under state constitutions were considered a politically liberal result because, during this period, almost all expansions of constitutional rights worked in favor of criminal defendants, unpopular groups and poor people. Today, in contrast, expansions of constitutional rights, while still often protecting such

63. Stemming from Tennessee’s legislative failure to reapportion the legislative districts based upon changes in population, as was provided in the State’s Constitution, the Supreme Court held in Baker v. Carr that the complaint’s allegations of a denial of Equal Protection presented a justiciable constitutional cause of action. 369 U.S. 186 (1962). Similarly, in Reynolds v. Sims, the Supreme Court held that the existing and proposed plans for apportionment of seats in the two houses of the Alabama Legislature were invalid under the Equal Protection Clause in that the apportionment was not on a population basis and was completely lacking in rationality. 377 U.S. 533 (1964).

groups, might also be promoted by gun owners and corporations. So, today, expansive state constitutional interpretation is not one-sidedly a liberal or conservative proposition.

State judges responded to Justice Brennan’s call to a great extent. And this was true in Pennsylvania as well. Thus, the late 1970s and 1980s were a period of judicial innovation in the Pennsylvania courts, particularly in the field of search and seizure. This was the era of Commonwealth v. DeJohn, which, in 1979, rejected United States v. Miller, and recognized an expectation of privacy in a person’s individual bank records; Commonwealth v. Sell, which, in 1983, rejected United States v. Salvucci, and upheld automatic standing to challenge a search in a possession crime; and Commonwealth v. Melilli, which in 1989, rejected Smith v. Maryland, and held that a pen register constitutes a search. There were other cases, of course, and sometimes they followed federal law and sometimes they did not. It was all rather unpredictable and freewheeling.

The conservative reaction to this judicial activity began, both in Pennsylvania and across the country, almost as soon as Justice Brennan’s article appeared. In a 1981 article in Hastings Constitutional Law Quarterly, a noted conservative law professor, Ronald Collins, called the approach that Justice Brennan was proposing “reactionary”—Reliance on State Constitutions—Away From a Reactionary Approach.

The way that the conservative theory manifested was in a “presumption” that state courts should follow the decisions of the U.S. Supreme Court in interpreting parallel federal provisions unless there was some special reason not to do so under state law. Here is how Pennsylvania Supreme Court Justice William Hutchinson phrased this conservative criticism in his dissent in Sell:

[T]he majority has not shown, nor can I discern a textual distinction between [a]rticle I, [s]ection 8 of the Pennsylvania Constitution and the Fourth Amendment to the United States Constitution which would justify the significant difference in meaning between them which the majority opinion entails . . .

absent compelling reasons, textual or otherwise, I believe the interests of this nation are best served by maintaining common standards of constitutional law throughout its separate jurisdictions. 69

The basic argument of the conservative reaction was that this new, liberal state constitutional jurisprudence was entirely outcome oriented. It had no method and no vision. Essentially, state judges were just disagreeing with the new, more conservative, U.S. Supreme Court.

This reaction raised a serious jurisprudential question. Was it illegitimate for a state court judge, in interpreting a parallel but independent state constitutional provision, to simply disagree with the outcome of a similar question under federal law? Did there have to be some special reason for a state court to depart from the U.S. Supreme Court’s interpretation?

The *Edmunds* case arose out of this rich context. Prior to *Edmunds*, there had been no authoritative method for generally determining whether Pennsylvania would follow federal precedent in interpreting parallel rights. But, as suggested by *Commonwealth v. Gray*, 70 in 1985, a kind of mild presumption of following federal law was perhaps beginning to emerge. In *Gray*, Justice Hutchinson’s majority opinion rejected further reliance on the *Aguilar-Spinelli* test for judging probable cause and adopted the new federal standard of the “totality of the circumstances” enunciated by the U.S. Supreme Court in *Illinois v. Gates*. 71 Justice Hutchinson’s opinion mixed language agreeing with the federal analysis, independently as it were, with the language of presumption:

While we can interpret our own constitution to afford defendants greater protections than the federal constitution does, there should be a compelling reason to do so. In *Chandler*, supra, we already noted that the *Gates* analysis appears more practical. That this is so is even more plain on this record. Besides, there is no substantial textual difference between the Fourth Amendment to the United States Constitution and [a]rticle I, [s]ection 8 of the Pennsylvania Constitution that

70. 503 A.2d 921 (Pa. 1985).
71. Id. at 922 (adapting the federal standard for judging probable cause as stated in *Illinois v. Gates*, 462 U.S. 213 (1983)).
would require us to expand the protections afforded under the federal document.  

After Gray, a lower court state court judge in Pennsylvania would have been justified in either evaluating a federal approach independently or following it in the absence of some special local consideration.

In Edmunds, in 1991, in a majority opinion by Justice Ralph Cappy, the court not only rejected the federal good faith exception to the exclusionary rule, which the U.S. Supreme Court had adopted in United States v. Leon in 1984, but also formally adopted four factors for analysis of Pennsylvania constitutional provisions. The four factors require considering the text, history, holdings in other states, and “policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.”

Edmunds contained no presumption that state constitutional interpretation would follow interpretations by the U.S. Supreme Court, nor did it limit its consideration to unique issues of Pennsylvania policy. So, for example, the final “policy consideration” that Justice Cappy mentioned was “the danger[] of allowing magistrates to serve as ‘rubber stamps’ and of fostering ‘magistrate–shopping,’”—concerns clearly not unique to Pennsylvania.

The lack of a presumption of following federal constitutional interpretation was understood by Justice James McDermott in his dissent in Edmunds. Justice McDermott wrote: “The Supreme Court of the United States is a world landmark for the protection of constitutional rights. What they require we enforce; what they allow we ought not deter except upon clear evidence of positive need.”

But, despite lacking a presumption, Edmunds certainly permitted the Pennsylvania courts to follow federal precedent under the four factors. During the rest of the 1990s, the Pennsylvania Supreme Court tended to do just that, becoming more conservative, less likely to expand constitutional rights under the Pennsylvania Constitution. Chief Justice Castille joined the court in 1993 and was part of that trend. From the start of his career on the court,

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72. Id. at 926.
75. Id. at 904.
76. Id. at 909 (McDermott, J., dissenting).
Justice Castille used the *Edmunds* factors to show that there was no justification in most cases for not following federal precedent.\(^{77}\)

But it was in his dissent in *Commonwealth v. Shaw*,\(^{78}\) in 2001, that Justice Castille first expressed the view that *Edmunds* analysis might generally lead the court to adopt federal precedent—that the case’s methodology might appropriately limit idiosyncratic interpretations of the Pennsylvania Constitution. In *Shaw*, the court held, in a majority opinion by Justice Stephen Zappala, that a warrant is required for seizure of hospital-administered blood–alcohol content test results under article I, section 8 of the Pennsylvania Constitution.\(^{79}\) Justice Castille, joined by Justice Thomas Saylor, objected both to the outcome of the case and to what he considered the lack of a proper method by the majority:

I am particularly wary of novel expansions of [article I, section 8] that are unaccompanied by an *Edmunds* analysis. A novel and unexplained holding under [article I, section 8] is a practice that permits a jurisprudence of contrariness or, even worse, arbitrariness. Such an unexplained holding is at least as likely to be a mere expression of a Court majority’s personal disagreement with contrary Fourth Amendment jurisprudence, dressed in state constitutional garb in order to avoid correction by the United States Supreme Court, as it is to be an affirmative expression of what the state provision uniquely means it embraces. By previously requiring that novel state constitutional claims be considered in light of our actual experience with [article I, section 8] and with the experience of this court and other courts with similar search and seizure questions, and with policy concerns “unique” to our jurisprudence, the *Edmunds* construct at least provides some semblance of a principled constitutional analysis of a particular issue. The inability to even begin to defend a novel holding pursuant to *Edmunds*, on the other hand, betrays a total disregard for the experience of other courts as well as for this Court’s own

\(^{77}\) See, e.g., *Commonwealth v. Williams*, 692 A.2d 1031 (Pa. 1997) (holding that the Pennsylvania Constitution provided parolee with no greater protection than United States Constitution with regard to search of his bedroom); *Commonwealth v. Glass*, 754 A.2d 655 (Pa. 2000) (acknowledging that the standard for evaluating probable cause is the same under the United States Constitution and the Pennsylvania Constitution and holding that anticipatory search warrants, i.e., warrants based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place, do not per se violate search and seizure provision of the State Constitution).

\(^{78}\) 770 A.2d 295 (Pa. 2001).

\(^{79}\) Id.
considered experience and, in my view, raises a presumption that the state constitutional holding is erroneous.\textsuperscript{80}

This view of *Edmunds* was at least arguably a reinterpretation of that case. Specifically, the policy factors in the fourth prong in *Edmunds* crucially utilized the word “including” in describing “unique issues of state and local concern.” And, in *Edmunds* itself, the simple disagreement with the outcome of Federal Fourth Amendment analysis was treated as a proper basis for a different result under the Pennsylvania Constitution. Assuming that the Fourth Amendment did not require a warrant in circumstances like those in *Shaw*—there was not actually controlling U.S. Supreme Court precedent either way—a state supreme court justice might just feel that the privacy interests at stake had been given too little weight. While it is true that interpretations of article I, section 8 are not subject to correction by the U.S. Supreme Court, that is a matter of federalism’s genius rather than “a way to avoid” U.S. Supreme Court precedent.

Another way that Justice Castille utilized *Edmunds* to limit the independence of state constitutional decision-making was in requiring a robust *Edmunds* analysis to maintain a line of state court precedent when federal law in an area of parallel rights changed. It sometimes happens that state court decisions that might originally have been based on federal sources, come, over time, to protect rights to a greater extent than does federal law.\textsuperscript{81}

That had happened in *Commonwealth v. Matos*\textsuperscript{82} in 1996. In *Matos*, in which the Pennsylvania Supreme Court conducted an *Edmunds* analysis in rejecting the rule of *California v. Hodari D.*,\textsuperscript{83} which held, under the Fourth Amendment, that discarded drugs were not obtained as the result of an illegal seizure when the drugs were discarded before the suspect had actually been restrained. In rejecting the federal rule, Justice Cappy’s majority opinion relied heavily upon “clear precedent in Pennsylvania” that defined a seizure more narrowly than did the Fourth Amendment.\textsuperscript{84} Under that definition of seizure, the suspects in *Matos* had been illegally seized at the time they discarded their drugs and the evidence was thus properly suppressed under article I, section 8.

\textsuperscript{80} Id. at 304–05 (Castille, J., dissenting).
\textsuperscript{82} 672 A.2d 769 (Pa. 1996).
\textsuperscript{84} *Matos*, 672 A.2d at 774.
The problem for this analysis was that this “clear precedent in Pennsylvania” had been premised on prior Federal Fourth Amendment law that *Hodari D.* obviously rendered obsolete. Justice Cappy remedied the lack of state constitutional precedent by retroactively re-conceptualizing this state precedent as state constitutional holdings:

We do not find that because these cases were decided to some degree by reliance upon the federal Fourth Amendment that they are not representative of the law of this Commonwealth pertaining to [a]rticle I, [s]ection 8. At best, nothing can be discerned from the Court’s failure to note specifically that Pennsylvania Constitutional rights were also being considered. The federal Constitution provides a *minimum* of rights below which the states cannot go. Where our Court . . . finds that the police violated the defendant’s federal constitutional rights, there is no reason for the Court to go further and address what additional protections the Pennsylvania Constitution might also provide.\(^{85}\)

The same issue of the status of state precedent originally premised on federal law arose in 2003, in *Commonwealth v. Hall*.\(^{86}\) But this time, Justice Castille, who had filed the lone dissent in *Matos*, wrote a majority opinion rejecting the *Matos* approach without mentioning it.

The topic in *Hall* was the constitutionality of a jury charge that the jury could infer intent to commit aggravated assault from the use of an unlicensed firearm. The defendant argued that this instruction violated due process under both the United States and Pennsylvania Constitutions.

Both sides framed the due process inquiry as concerning whether the instruction comported with the standard of proof beyond a reasonable doubt. The defendant acknowledged that that the U.S. Supreme Court had held in *Ulster County v. Allen*\(^{87}\) that a permissive inference must satisfy the reasonable doubt standard “in the context of the overall evidence.”\(^{88}\) But the defendant relied on three Pennsylvania Supreme Court decisions predating *Ulster County* that required an inference to “withstand reasonable doubt scrutiny on its own.”\(^{89}\)

\(^{85}\) *Id.* at 769 n.7.
\(^{86}\) 830 A.2d 537 (Pa. 2003).
\(^{87}\) 442 U.S. 140 (1979).
\(^{88}\) *Hall*, 830 A.2d at 546.
\(^{89}\) *Id.*
This context replicated the Matos issue of the meaning of state precedent in a context of changed federal law. Justice Castille concluded, “the stricter due process test” of the earlier case law had not been “premised upon [a]rticle I, [s]ection 9 of the Pennsylvania Constitution.”

But instead of holding that the earlier precedent should be re-conceptualized as the current standard of the State Constitution, as the Matos decision had done, Justice Castille concluded that past state precedent premised on federal law was irrelevant to a current state constitutional analysis, which required an Edmunds analysis as if the prior case law had never existed:

Of course, the fact that DiFrancesco neither explicitly nor implicitly rendered a state constitutional holding does not foreclose the possibility that a stricter due process standard could be held applicable under [a]rticle I, [s]ection 9 in a case where the issue is squarely presented. In this case, however, it is notable that appellant’s brief, which is quite capably argued, does not suggest that the text or history of [a]rticle I, [s]ection 9, or concerns of policy, recommend or require the DiFrancesco standard as a matter of Pennsylvania constitutional law. The mere fact that this Court predicted in DiFrancesco that federal law might evolve differently than it ultimately did does not require divergence from the federal standard. Moreover, in other instances, this Court has declined to afford greater due process protections under our state charter.

Justice Castille pressed his view of the proper role of Edmunds in a series of constitutional criminal procedure cases. In 2002, in a concurring opinion in Commonwealth v. Perry, Justice Castille argued that Pennsylvania should follow the Fourth Amendment’s automobile exception to the warrant requirement, a view that would ultimately gain majority endorsement in Commonwealth v. Gary in 2014. In 2007, in Commonwealth v. Russo, Justice Castille’s majority opinion not only adopted the federal open fields doctrine, under article I, section 8, but formally endorsed the Chief Justice’s long–held view that the fourth Edmunds factor—policy considerations—should be limited to “public policy considerations unique to Pennsylvania.”

90. Id. at 548.
91. Id. at 548–49.
92. 798 A.2d 697 (Pa. 2002).
93. Id. at 706 (Castille, J., concurring).
94. 91 A.3d 102 (Pa. 2014).
95. 934 A.2d 1199, 1212 (Pa. 2007).
to allow state supreme court justices simply to disagree with existing federal constitutional jurisprudence in interpreting parallel state constitutional provisions “could metamorphose into cover for a transient majority’s implementation of its own personal value system as if it were an organic command.”

While it was Justice Seamus McCaffery, rather than Chief Justice Castille, who wrote the actual opinion in *Gary* relinquishing Pennsylvania’s rejection of the federal automobile exception, it was the jurisprudence of the Chief Justice, over a period of years, that was manifest in the opinion. The *Gary* majority opinion, which the Chief Justice joined, demonstrated in its conclusion that the court had come full circle since *Edmunds* and that a presumption of following federal precedent in parallel provisions would be followed thereafter. Justice McCaffery adopted the standard announced in *Gray* in 1985 that there should be a compelling reason before the Pennsylvania Constitution is interpreted to provide greater protection than does the U.S. Constitution, a standard that *Edmunds* had displaced. Justice McCaffery concluded, “[o]ur review reveals no compelling reason to interpret [article I, section 8 of the Pennsylvania Constitution as providing greater protection with regard to warrantless searches of motor vehicles than does the Fourth Amendment.” And in words strikingly similar to those of Justice Hutchinson’s dissent in *Sell*, the majority expressed support for the maintenance of “a single, uniform standard for a warrantless search of a motor vehicle, applicable in federal and state court, to avoid unnecessary confusion, conflict, and inconsistency in this often-litigated area.”

Partly as a result of Chief Justice Castille’s jurisprudence, the outcome of the application of the *Edmunds* analysis in recent years has usually been to follow the federal standard. Thus, parallel provisions under the Pennsylvania Constitution may now be presumed to follow U.S. Supreme Court precedent. This is the case whether the analysis is done by Justice Castille himself, as in *Commonwealth v. Sam* in 2008 or is done by other Justices as in, for example, *Commonwealth v. Batts*, by Justice Saylor in 2013. The results in Superior Court have been similar.

96. *Id.*
98. *Id.*
This growing restrictiveness is plainly the main story that can be told about the influence of Chief Justice Castille on the interpretation of parallel provisions in the Pennsylvania Constitution pursuant to the *Edmunds* test. However, it should be noted that most of the above precedents have interpreted article I, section 8, rather than other provisions of the Pennsylvania Constitution, even though that fact was not discussed in the jurisprudential development. The Chief Justice’s approach in the context of other constitutional provisions has been somewhat different.

In 2002, at about the same time that Justice Castille was launching his campaign to reform *Edmunds* analysis, he also wrote the majority opinion that greatly expanded the independent reach of free expression under article I, section 7 of the Pennsylvania Constitution. That case was *Pap’s A.M. v. City of Erie (Pap’s A.M. II)*, 102 in which the operator of an establishment featuring nude erotic dancing challenged an Erie city ordinance prohibiting public nudity.

*Pap’s A.M. II* was decided on remand from the U.S. Supreme Court. 103 In the first round in the Pennsylvania Supreme Court, *Pap’s A.M. I*, a majority had decided that the ban on nude dancing in an Erie city ordinance violated free speech under the First Amendment to the U.S. Constitution. 104 In *Pap’s A.M. I*, Justice Castille concurred in the result, arguing that the Erie ordinance did not violate the First Amendment under existing U.S. Supreme Court precedent, but should be held to violate article I, section 7 of the Pennsylvania Constitution. 105 The U.S. Supreme Court reviewed this decision and reversed on the First Amendment ground, upholding the Erie ordinance. 106 The case was then remanded for consideration of the state constitutional ground. 107

After the remand, in a majority opinion by Justice Castille, the Pennsylvania Supreme Court held that strict scrutiny, rather than any intermediate standard, should be applied in the case. 108 Under that standard, which was a clear departure from federal analysis, the Erie ordinance was held unconstitutional as a violation of article I, section 7. 109 This was a clear instance of independent state

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102. 812 A.2d 591 (Pa. 2002).
105. Id. at 281.
106. Pap’s A.M., 529 U.S. at 277.
107. Id. at 283.
108. Pap’s A.M. II, 812 A.2d at 602. The U.S. Supreme Court had applied the *O’Brien* standard in upholding the ordinance. Pap’s A.M., 529 U.S. at 277.
constitutional analysis departing from a federal standard. This result is in contrast to the attitude expressed in the article I, section 8 cases above, in which such departures were opposed by Justice Castille.

In *Pap's A.M. II*, Justice Castille's majority opinion did in fact conduct an *Edmunds* analysis. But his attitude toward *Edmunds* was curiously muted and nothing like the enthusiastic tone that Justice Castille invokes in applying *Edmunds* analysis in cases under article I, section 8. All Justice Castille would say in the *Pap's A.M. II* decision was “that it is helpful to conduct our Pennsylvania constitutional analysis, to the extent possible, consistently with the model suggested by *Edmunds*.”

In search cases, Justice Castille would strongly suggest that an *Edmunds* analysis is mandatory in interpretation of parallel provisions and that decisions that did not engage a formal *Edmunds* analysis were not entitled to full precedential weight.

Not only was the invocation of *Edmunds* ambivalent in tone, but, compared to the kind of standard for which Justice Castille would later argue in *Russo*, there was little justification in *Pap's A.M. II* for departing from the U.S. Supreme Court's holding that the Erie ordinance was constitutional. The *Edmunds* analysis in *Pap's A.M. II* was truncated—the third prong of holdings in other states was dropped altogether—and the text and history treatment, including the robust history of protection of free expression in Pennsylvania precedent, the open-ended language in the Pennsylvania Constitutional text and the nature of the state government versus that of the limited powers of the federal government, should have all been applicable under every article I, section 8 analysis as well. Even the unsettled state of federal law, which had led the majority in *Pap's A.M. I* to mistakenly conclude that the Erie ordinance was unconstitutional under the First Amendment, could not seriously be relied upon as a justification for independent state constitutional interpretations, since Justice Castille himself had no trouble predicting in *Pap's A.M. I* that the Erie ordinance was constitutional under federal law.

When reading Justice Castille's opinion in *Pap's A.M. II*, the impression is very strong that the main reason that Justice Castille

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110. *Id.* at 603.

111. *See*, e.g., Commonwealth v. Shaw, 770 A.2d 295, 305 (Pa. 2001) (“The inability to even begin to defend a novel holding pursuant to *Edmunds* . . . raises a presumption that the state constitutional holding is erroneous”).

did not follow the U.S. Supreme Court had nothing to do with issues of interpretation per se. Instead, Justice Castille simply found federal law unpersuasive because it was insufficiently protective of free expression. This is, of course, what one would want a state supreme court justice to consider when interpreting a parallel state constitutional provision. But, ironically, it is precisely this kind of generalized reconsideration of federal precedent that Russo and following cases have tried to eliminate from Pennsylvania constitutional analysis. In other words, Justice Castille did not follow the U.S. Supreme Court in Pap’s A.M. II for the simple reason that he disagreed with it. And he did not consider his disagreement to be idiosyncratic or novel.

Thus, Pap’s A.M. II represents an alternative approach to constitutional interpretation of parallel provisions from that of recent cases decided pursuant to article I, section 8. Since Pap’s A.M. II, Chief Justice Castille continued to apply a higher level of review under article I, section 7 than does the U.S. Supreme Court under the First Amendment. He did this in joining a dissent by Justice Saylor in 2006, In the Matter of Condemnation by Urban Redevelopment Authority of Pittsburgh113 and in a majority opinion in DePaul v. Commonwealth in 2009.114 In both these instances no formal Edmunds analysis was done.115

Another context that might indicate that Edmunds is not as all-encompassing in Chief Justice Castille’s jurisprudence as one might infer is a case from 1999, Wertz v. Chapman Township.116 Wertz involved article I, section 6, the civil jury trial provision. Since the Seventh Amendment to the Federal Constitution is not applicable to the states, the civil jury trial provision is not technically a parallel provision. Nevertheless, given existing federal precedent, it is significant that Edmunds was not even mentioned in a dissent in Wertz by Justice Castille in which he argued that the majority had interpreted section 6 too narrowly.117

114. 969 A.2d 536 (Pa. 2009).
115. In DePaul, Chief Justice Castille canvassed a number of the Edmunds factors in effect, such as the treatment by other states of the issue in question, but expressly noted that no formal Edmunds analysis was needed:
   Given this Court’s extensive consideration of [article I, section 7] under the Edmunds factors in Pap’s II, and the fact that the Commonwealth does not dispute that the appropriate state constitutional test in this arena is strict scrutiny, there is no reason to engage in a full-blown Edmunds analysis here.
   Id. at 547.
117. Id. at 1280–81 (Castille, J., dissenting).
A related treatment of a federally influenced provision arose in 2006, in *Pennsylvania Turnpike Commission v. Commonwealth*.\(^{118}\) Justice Castille held for the court that the Act that mandated the Turnpike Commission to engage in collective bargaining with first-level supervisors, but did not require any other agency to do so with regard to its first-level supervisors, is a special law in violation of article III, section 32 of the Pennsylvania Constitution.\(^{119}\)

There was not even a mention of *Edmunds* in *Turnpike* despite the recognition that section 32 had been treated in the past as parallel to Federal Equal Protection: “The common constitutional principle at the heart of the special legislation proscription and the equal protection clause is that like persons in like circumstances should be treated similarly by the sovereign.”\(^{120}\)

The ultimate holding in *Turnpike* was that the law reflected a class of one and was thus unconstitutional. The class of one doctrine is unique to Pennsylvania and is in fact idiosyncratic and impractical. But for our purposes, the important thing is that even where Justice Castille could have looked to Federal Equal Protection law for guidance, he did not feel the need to do so. The Act in *Turnpike* would undoubtedly have survived under federal rational basis review.

It is fair to conclude that the strong emphasis upon *Edmunds* analysis, primarily in cases arising under article I, section 8, and the strong tendency of the Chief Justice to promote consistency between federal and state constitutional outcomes, is only a part of his jurisprudential legacy. If all of the aspects of the Chief Justice’s interpretations in the area of parallel rights are taken into account, the matter of independent state constitutional interpretation looks quite different and, in fact, may even have been enhanced by the Chief Justice.\(^{121}\)

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118. 899 A.2d 1085 (Pa. 2006).
119.  *Id*.
121.  I have not mentioned the procedural aspects of interpretation of parallel constitutional provisions because Justice Castille did not emphasize issues of process. In general, if there is a claim in a case under a parallel state constitutional provision, a state supreme court should decide it whether there is also a federal issue in the case or not. Doing so prevents unnecessary U.S. Supreme Court review of the federal claim. The Pennsylvania Supreme Court faced this context in *Pap’s A.M. I.*, but chose to decide only the federal ground, leaving the state ground to be decided only after reversal by the U.S. Supreme Court. Chief Justice Castille warned the majority to decide the state constitutional issue, but stopped short of putting the matter in methodological terms. He simply warned the majority that they were mistaken in their First Amendment analysis.
An even stronger indication of the willingness of the Chief Justice to interpret the Pennsylvania Constitution independently, even fearlessly, can be seen in his opinions in the field of non-parallel rights. While not, strictly speaking, inconsistent with the cases noted here that pushed for a presumption against independent state court interpretation, they also do not suggest a jurist hesitant to make a bold mark in a national debate.

III. INTERPRETATION OF NON-PARALLEL PROVISIONS

Chief Justice Castille will be long-remembered for four decisions he authored as Chief Justice interpreting provisions of the Pennsylvania Constitution that do not have counterparts in the U.S. Constitution. It is not my purpose here to discuss these opinions in depth; other contributors to this issue of the Duquesne Law Review will do that for one or more of them. Rather, my goal is to show that these decisions were rendered against a background of related U.S. Supreme Court decision-making that Chief Justice Castille ignored. Thus, even here, in an area in which federal influence is usually reduced, the tendency of the Chief Justice toward independent state constitutional development was very pronounced.

These four cases concerned uniformity of taxations in 2009, voting rights, reapportionment in 2012, and the environment in 2013. In three of the four instances, there existed federal precedents that could have pointed the court in a different direction. Chief Justice Castille chose instead a Pennsylvania-only approach.

In Clifton v. Allegheny County, the Chief Justice’s majority opinion held the Allegheny County’s base year system for property tax assessment, pursuant to which a property’s assessed value for tax purposes is based upon market value in a base year for an indefinite period of time, violated the uniformity clause of the Pennsylvania Constitution as applied. This holding was based upon evidence in the case that there had been substantial changes in the market value of property in Allegheny County, so that property owners were paying different amounts of property tax on properties with the same current market value. But the Chief Justice also

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126. Justice Max Baer filed a concurring opinion and did not join the majority opinion. Clifton, 969 A.2d at 1231–35 (Baer, J., concurring).
127. See PA. CONST. art VIII, § 1 (providing, in part, that “[a]ll taxes shall be uniform.”).
128. Clifton, 969 A.2d at 1222.
held that the base year method of property tax valuation does not facially violate the uniformity clause.\textsuperscript{129}

The result of these holdings was that Allegheny County was ordered to conduct a reassessment, but other counties in Pennsylvania that were also utilizing base year methods would not necessarily be subject to immediate judicial reassessment orders. This could have meant that there would be breathing room for legislative action by the General Assembly to rationalize property tax assessment in Pennsylvania.\textsuperscript{130} Whatever might have been Chief Justice Castille’s hope in that regard, no such legislative action has yet been forthcoming.

In terms of federal precedent, the U.S. Supreme Court did hold in \textit{Allegheny Pittsburgh Coal Co. v. County Commission}\textsuperscript{131} that a county assessor’s practice of reassessing property values based almost entirely on recent sales—a practice that had produced wide discrepancies in property tax payments for properties with identical current values—was a violation of Equal Protection. But the reason for this holding was not the discrepancies themselves but the fact that this administrative practice was found not to be rationally related to West Virginia’s policy of uniform taxation.\textsuperscript{132} In contrast, in \textit{Nordlinger v. Hahn},\textsuperscript{133} in 1992, the Court upheld California’s acquisition value property tax assessment approach despite differences in assessed values over time of properties with similar current value. Pennsylvania is more like California in that the base year system does not violate state statutory law. The Chief Justice acknowledged the \textit{Allegheny Pittsburgh Coal} case, but noted that:

\begin{quote}
Although the analysis under the federal Equal Protection Clause and Pennsylvania’s Uniformity Clause is largely coterminous, unlike Pennsylvania’s uniformity requirement, “the United States Constitution does not require equalization across all potential sub-classifications of real property (for example, residential versus commercial).”\textsuperscript{134}
\end{quote}

\begin{footnotesize}
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\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} The Chief Justice noted in his opinion that “Pennsylvania is the only state where legislation allows the use of a base year indefinitely.” \textit{Id.} at 1231.
\item \textsuperscript{131} 488 U.S. 336 (1989).
\item \textsuperscript{132} \textit{Id.} at 343.
\item \textsuperscript{133} 505 U.S. 1 (1992).
\item \textsuperscript{134} \textit{Clifton}, 969 A.2d at 1212. Federal precedent did play a role in the Chief Justice’s analysis in determining whether to treat the challenge to the assessment scheme in \textit{Clifton} as a facial or an as applied attack. The Chief Justice noted that the Pennsylvania Supreme Court had yet to “consider thoroughly the standard by which facial challenges are evaluated . . . ” but that the U.S. Supreme Court’s opinion in \textit{Wash. State Grange v. Wash. State Republican Party}, 552 U.S. 442 (1987), was “informative.” \textit{Id.} at 1223. It does not appear
\end{itemize}
\end{footnotesize}
The two voting rights cases, *Holt v. 2011 Legislative Reapportionment Commission* and *Applewhite v. Commission*, offer an even stronger contrast with federal voting rights precedent. *Holt*, in which the Chief Justice’s majority opinion overturned the Legislative Reapportionment plan, contained a very nuanced balance of federal and state constitutional principles in terms of legislative reapportionment. The Chief Justice noted that while Federal Equal Protection requires substantial population equivalence in any redistricting plan, federal law also allows “breathing space” for state constitutional concerns of “contiguity, compactness and the integrity of political subdivisions.” Earlier Pennsylvania precedent misperceived the future development of federal law in this field, which “evolved to permit more flexibility in population deviation” than the Pennsylvania Supreme Court had anticipated. Thus, the Chief Justice encouraged recognition of, but not subservience to, federal constitutional requirements in a dynamic and flexible system.

Chief Justice Castille’s opinion in *Holt* did not even mention U.S. Supreme Court case law that has rendered challenges to partisan gerrymandering practically nonjusticiable. In contrast to that case law, which has struggled to articulate any standard by which partisan political abuse could be identified, the majority opinion in *Holt* straightforwardly recognized the political nature of redistricting and promised that abuses would be dealt with:

> It is true, of course, that redistricting has an inevitably legislative, and therefore an inevitably political, element; but, the constitutional commands and restrictions on the process exist precisely as a brake on the most overt of potential excesses and abuse. Moreover, the restrictions recognize that communities indeed have shared interests for which they can more effectively advocate when they can act as a united body and when

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137. *Holt*, 38 A.3d at 711.
139. Id. at 760.
141. See, e.g., Justice Kennedy’s concurrence in *Vieth*: “we have no standard by which to measure” political gerrymander claims but such a standard may emerge in the future. *Id.* at 313 (Kennedy, J., concurring).
they have representatives who are responsive to those interests.\textsuperscript{142}

The independence of state constitutional interpretation from federal influence was even more pronounced in \textit{Applewhite},\textsuperscript{143} because in that case, the U.S. Supreme Court had earlier faced the same issue of the constitutionality of state voter ID legislation. In \textit{Crawford v. Marion County Election Board},\textsuperscript{144} the United States Supreme Court upheld Indiana’s voter ID legislation. There was no majority opinion. In the opinion announcing the judgment of the Court, Justice Stevens argued that even apparently slight burdens on the right to vote must be justified “by relevant and legitimate state interests,”\textsuperscript{145} but that if such interests were shown, “those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.”\textsuperscript{146} Thus, at least in theory, Justice Stevens was prepared to uphold an unnecessary law that one political party hoped would disenfranchise opposition voters as long as the form of the law was one that might have been passed without such improper motivation. As far as the small number of voters who might actually be disenfranchised because they could not readily obtain the necessary voter ID, Justice Stevens held out scant hope:

Petitioners ask this Court, in effect, to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State’s broad interests in protecting election integrity. Petitioners urge us to ask whether the State’s interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk’s office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.\textsuperscript{147}

For his part, Justice Scalia’s opinion concurring in the judgment did not believe that such a showing, even if it could be made, was

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\textsuperscript{142} 38 A.3d at 745.
\textsuperscript{143} 54 A.3d at 1.
\textsuperscript{144} 553 U.S. 181 (2008).
\textsuperscript{145} \textit{Id.} at 191.
\textsuperscript{146} \textit{Id.} at 204.
\textsuperscript{147} \textit{Id.} at 200.
\end{flushleft}
relevant: “The Indiana photo-identification law is a generally applicable, nondiscriminatory voting regulation, and our precedents refute the view that individual impacts are relevant to determining the severity of the burden it imposes.”

In stark contrast, Chief Justice Castille’s opinion in Applewhite placed the burden squarely on the government to show that no substantial disenfranchisement from the voter ID requirement would take place or an injunction against the law should issue. It is certainly the case that the confused statutory background influenced the response of the Chief Justice, and the procedural context of the case concerning the issuance of a preliminary injunction undoubtedly also played a role. Nevertheless, the contrast of the concern of the Chief Justice with vulnerable populations disadvantaged by the ID requirement certainly resounds compared to the language above of Justice Scalia:

[It is readily understood that a minority of the population is affected by the access issue. Nevertheless, there is little disagreement with Appellants’ observation that the population involved includes members of some of the most vulnerable segments of our society (the elderly, disabled members of our community, and the financially disadvantaged).]

The overall point for our purposes here is that the fundamental right to vote under the Pennsylvania Constitution appears to be far more robust than the right to vote under the Federal Constitution.

The final, and most recent, instance of independent interpretation of the Pennsylvania Constitution by the Chief Justice in an area of non-parallel rights is his celebrated plurality opinion in Robinson Township v. Commonwealth that invalidated several provisions of Act 13, which had substantially preempted local zoning laws as applied to oil and gas exploration. What rendered the opinion of the Chief Justice so extraordinary was not only that the opinion constituted the first serious judicial attempt to enforce the

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148. Id. at 205 (Scalia, J., concurring in the judgment).
149. Applewhite v. Commonwealth, 54 A.3d 1, 5 (Pa. 2012) (explaining that “if the Commonwealth Court is not still convinced in its predictive judgment that there will be no voter disenfranchisement arising out of the Commonwealth’s implementation of a voter identification requirement for purposes of the upcoming election, that court is obliged to enter a preliminary injunction.”).
150. Id. at 4.
broad language of article I, section 27 of the Pennsylvania Constitution, but also that a judge would be willing to take a public stand on the dangers of some of the new technologies of energy exploration, including fracking.

In terms of the theme of this article, Chief Justice Castille could not really have followed federal law in *Robinson Township*, even had he wished to do so. There is not much to go on in the U.S. Constitution in terms of protecting the environment. But, considering the vigor and passion of his opinion, it seems unlikely the Chief Justice would have deferred to a less protective federal standard, even if a federal environmental right of some sort did exist.

CONCLUSION

Undoubtedly Chief Justice Castille has influenced many areas of law during his tenure of over twenty years on the Pennsylvania Supreme Court. But it is hard to think of any Justice in the history of Pennsylvania jurisprudence who has had more of an impact on the development of the Pennsylvania Constitution. I hope this short article has demonstrated that this influence cannot be easily summarized in the usual American legal categories of conservative versus liberal, originalist versus the living Constitution, or strict construction versus open-ended. Nor can anyone pigeonhole the Chief Justice in terms of a model of interpretation, whether that model is Justice Scalia or Ronald Dworkin. The Chief Justice obviously did not approach his task in these ways.

What we are left with is a legacy of serious engagement with the most important role of a state supreme court justice—the interpretation and application of the fundamental law of the State. Politically speaking, sometimes the Chief Justice leaned right and sometimes left. Sometimes he brought about dramatic results and other times deferred to co-equal branches. Sometimes he interpreted independently and other times followed a federal lead. But in all of these turns, Chief Justice Castille blazed his own path, beholden to no preordained ideology or result. I don't think any more than that can be asked of any judge.

152. “The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.” PA. CONST. art. I, § 27.