Chief Justice Ronald Castille, the Pennsylvania Supreme Court and State Constitutional Law*

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I. INTRODUCTION

> Citing this Court's decision in *Commonwealth v. Edmunds* . . . Pap's accurately notes that, on questions sounding under our state charter, this Court is not bound by decisions of the U.S. Supreme Court on similar federal provisions, but may find that Pennsylvania provides greater protection for individual rights. *See Edmunds* . . . ("we are not bound by the decisions of the United States Supreme Court which interpret similar (yet distinct) federal constitutional provisions"). Pap's further notes that this Court already has recognized that our Declaration of Rights was the "direct precursor of the freedom of speech and press," *see Edmunds* . . . and that this Court has long construed the freedom of expression provision in [a]rticle I, § 7 as providing greater protection of expression than its federal counterpart. Pap's adds that other states also have provided greater protection for expression under their state charters than has been afforded by the U.S. Supreme Court under the First Amendment.
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> Justice Ronald Castille[1]

I would like to thank Dean Ken Gormley of Duquesne University School of Law for his kind invitation to participate in the celebration of Chief Justice Ronald Castille's retirement from the Supreme Court of Pennsylvania, the oldest state high court in the United States.[2] I suppose one might ask what business a law professor teaching in New Jersey has commenting on Chief Justice Castille and the Supreme Court of Pennsylvania. I have been a student of the Pennsylvania Supreme Court since I began teaching at Rutgers-Camden Law School, across the river from Pennsylvania, thirty-five years ago. I have argued two cases before the court (losing them both),[3] have written about the court fairly extensively,[4] the court

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1. Pap's A.M. v. City of Erie, 812 A.2d 591, 601 (Pa. 2002); *see infra* notes 14–33 and accompanying text.

2. Ken Gormley, *Foreword: A New Constitutional Vigor for the Nation's Oldest Court*, 64 TEMP. L. REV. 215 (1991).

3. Local 22, Phila. Fire Fighters' Union v. Commonwealth, 613 A.2d 522 (Pa. 1992); Ritter v. Commonwealth, 548 A.2d 1317 (Pa. Commw. Ct. 1988), *aff'd per curiam*, 557 A.2d 1064 (Pa. 1989).

4. *See, e.g.*, Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541 (1989); *State Constitutional Limits on Legislative Procedure: Problems of Judicial Enforcement and Legislative Compliance*, 48 U. PITT. L. REV. 797 (1987); *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to State Constitutional Equality*

has even cited my work on occasion,[5] and, possibly most important, my wife Alaine S. Williams has practiced extensively before the court for many years.[6] Perhaps these factors provide me with the "street creds" to make the following comments.

My topic is to review some of the leading state constitutional opinions written by Chief Justice Castille, and to draw from them some larger, sometimes national, lessons on the current subject of state constitutional law. I will review both cases dealing with state constitutional rights and state constitutional separation/distribution of power.

Many cases involving *state* constitutional rights will also involve *federal* rights claims. In such situations, our American constitutional rights regime provides a "dual" system of protection for citizens.[7] State constitutional rights provisions may actually provide more protection than their federal counterparts, which provide a national minimum standard of rights. By contrast, in separation-of-powers cases, there are no minimum *federal* standards[8] such as in rights cases, so there should not be any concern about federal constitutional analysis when a state court resolves its state constitutional separation of powers cases.[9]

II. INDEPENDENT RIGHTS UNDER STATE CONSTITUTIONS: CASES WITH BOTH FEDERAL AND STATE CONSTITUTIONAL CLAIMS

A. State Constitutional Rights

All state constitutions contain rights guarantees that are often identical or similar to, but sometimes quite different from, the more

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Doctrine, 3 WIDENER J. PUB. L. 343 (1993) [hereinafter *State Constitutional Equality Doctrine*].

5. Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d 383, 408 (Pa. 2005); Safe Harbor Water Power Corp. v. Fajt, 876 A.2d 954, 973 n.16 (Pa. 2005); City of Phila. v. Commonwealth, 838 A.2d 566, 586 n.18, 588–89 (Pa. 2003); Stlip v. Hafer, 718 A.2d 290, 295 (Pa. 1998) (Newman, J., dissenting); Pa. State Ass'n of Jury Comm'rs v. Commonwealth, 64 A.3d 611, 615 n.9 (Pa. 2013); *In re* Bruno, 101 A.3d 635, 660 n.13 (Pa. 2014); Robinson Twp v. Commonwealth, 83 A.3d 901, 944 n.33 (Pa. 2013) ("Of note among academic commentary on state constitutionalism, especially regarding Pennsylvania's decisional law, is the work of Professor Robert F. Williams.").

6. *See, e.g.*, Council 13, AFSCME *ex rel.* Fillman v. Rendell, 986 A.2d 63 (Pa. 2009); *see also infra* notes 87–94 and accompanying text; Ziccardi v. Commonwealth, 456 A.2d 979 (Pa. 1982); Odgers v. Commonwealth, 525 A.2d 359 (Pa. 1987); City of Phila. v. District Council 33, AFSCME, 598 A.2d 256 (Pa. 1991); Office of Att'y Gen. v. Council 13 AFSCME, 844 A.2d 1217 (Pa. 2004).

7. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 114 (Oxford Univ. Press 2009).

8. *Id*. at 240.

9. *Id*. at 240–42.

familiar federal constitutional rights. The Declarations of Rights in the constitutions of the original states such as Pennsylvania predated the Federal Bill of Rights, and served as models not only for other states,[10] but for the Federal Bill of Rights itself.[11] How such state constitutional rights guarantees should be interpreted in cases that also raise federal constitutional claims has been one of the most important areas of state constitutional law for several generations now. This phenomenon is referred to as the New Judicial Federalism.[12] The Pennsylvania Supreme Court has been a leader in this movement.[13]

1. Nude Dancing as Protected Expression

In 1998, the Pennsylvania Supreme Court was presented with the question of whether nude dancing at a club in Erie was constitutionally protected free expression such that the city ordinance banning it was unconstitutional.[14] The challenge to the ordinance was based on both the Federal First Amendment and the Pennsylvania Constitution's free speech and expression guarantee.[15] The majority of the court ruled that the city ordinance violated the Federal First Amendment.[16] Then-Justice Castille concurred, arguing that in all likelihood the city ordinance would not violate the First Amendment, but concluded it must be struck down under the Pennsylvania Constitution's free speech and expression guarantee.[17] Justice Castille saw the state constitution's provision as broader and more protective than the federal guarantee:

> Although I believe that Sections 1(c) and 2 of the Ordinance at issue here do not fail under the First Amendment in light of *Barnes*, I nevertheless concur in the result reached by the majority since I believe that those provisions must be stricken under [a]rticle I, § 7 of the Pennsylvania Constitution, which provides: "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely

10. Ken Gormley & Rhonda G. Hartman, *The Kentucky Bill of Rights: A Centennial Celebration*, 80 KY. L.J. 1, 5 (1990–91).

11. BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 53–54, 85–86, 90–91 (1977).

12. WILLIAMS, *supra* note 7, at 113.

13. KEN GORMLEY, *State Constitutional Law: The Building Blocks*, *in* THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 17 (2004).

14. Pap's A.M. v. City of Erie (*Pap's I*), 719 A.2d 273 (Pa. 1998).

15. *Id*. at 276.

16. *Id*. at 280.

17. *Id*. at 281 (citing PA. CONST. art. I, § 7.).

> speak, write and print on any subject, being responsible for the abuse of that liberty . . ." Pa. Const. art. I, § 7. This Court has repeatedly determined that [a]rticle I, § 7 affords greater protection to speech and conduct in this Commonwealth than does its federal counterpart, the First Amendment.
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> I believe that the dissent authored by Justice White in *Barnes* is persuasive and that this Court should adopt it for purposes of interpreting [a]rticle I, § 7 of the Pennsylvania Constitution.[18]

Because the majority opinion in *Pap's I* was based on the U.S. Constitution, this decision was not based on an "adequate and independent state ground."[19] Therefore, the United States Supreme Court would have jurisdiction and might accept the case and decide the federal constitutional question. This is exactly what happened.[20]

2. United States Supreme Court Accepts Jurisdiction and Reverses

The U.S. Supreme Court, as Justice Castille had predicted, determined the matter was not moot,[21] and reversed the Pennsylvania

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18. *Id*. at 283. *See* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result,* 35 S.C. L. REV. 353, 375–76 (1984) ("It is now becoming clear that Supreme Court dissenting opinions may influence the legislative branch or state courts as well as current or future Court majorities. That is, Supreme Court dissents can and do have a significant impact upon state courts confronting the same constitutional problem the dissenter believes the Court decided incorrectly. In this sense, state courts have become a new audience for Supreme Court dissents on federal constitutional questions that may also arise under state constitutions. Thus, dissenters may be vindicated more quickly, but only on a state-by-state basis. One might ask, then, whether Justice Brennan's and Marshall's dissents, among others, have not enjoyed a much higher vindication rate in state cases than Holmes ever achieved in later Supreme Court decisions."). For an argument that Justice Brennan's approach does not serve the interests of federalism, see Earl Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988). *Contra* Robert F. Williams, *Justice Brennan, The New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763 (1998). Justice Brennan made the point about the possible influence of Supreme Court dissents in developing state constitutional law. William J. Brennan, Jr., *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986).

19. Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision"); *see* GORMLEY, *supra* note 13, at 26; WILLIAMS, *supra* note 7, at 122–25.

20. City of Erie v. Pap's, 526 U.S. 1111 (1999) (granting certiorari).

21. Pap's A.M. v. City of Erie, 527 U.S. 1034 (1999) (Pap's had discontinued nude dancing).

Supreme Court's decision in *Pap's I*.[22] The U.S. Supreme Court's decision was deeply divided, with no majority opinion.[23] Of course, the U.S. Supreme Court does not have jurisdiction to decide *state* constitutional questions, so the Court remanded the matter to the Pennsylvania Supreme Court.[24]

Under these circumstances, where the United States Supreme Court's decision may decide only federal constitutional questions, and not their state counterparts, and because we have a "double source of protection" in our federal system, state courts are not required to interpret their state constitutions in "lockstep" with federal constitutional interpretations.[25] This is particularly true because when the United States Supreme Court interprets the Federal Bill of Rights against the *states*' it must consider the fact that it is setting rules for all fifty states, and may possibly be establishing a "least common denominator" of rights because of a form of deference or "federalism delusion."[26]

3. Pennsylvania Supreme Court Strikes Down City Ordinance under State Constitution

On remand from the United States Supreme Court, in *Pap's II*, the Pennsylvania Supreme Court reinstated its decision striking down the Erie ordinance, but this time based the decision on the state constitution, in an opinion by Justice Castille.[27] Justice Castille agreed that the case was not moot,[28] and began with the structured state constitutional analysis established by the landmark decision, *Commonwealth v. Edmunds*.[29] This mandated an approach to analyzing whether state constitutional rights guarantees should be interpreted more broadly or protectively than their federal constitutional counterparts. This approach is not applied in an ironclad way by the Pennsylvania Supreme Court, but it does serve to

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22. Pap's A.M. v. City of Erie, 529 U.S. 277 (2000).
23. *Id*. at 281.
24. *Id*. at 302.
25. WILLIAMS, *supra* note 7, at 113–14.
26. *Id*. at 173–74; *see infra* notes 30 and 51.
27. Pap's A.M. v. City of Erie (*Pap's II*), 812 A.2d 591 (Pa. 2002).
28. *Id*. at 599–601. Both parties agreed, as did Chief Justice Castille, that the United States Supreme Court's mootness analysis was not binding on the state court, and he evaluated the issue of mootness under the Pennsylvania Constitution. See also Justice Castille's opinion in *Stilp v. Commonwealth General Assembly*, 940 A.2d 1227, 1231–35 (Pa. 2007), finding no taxpayer standing; *see generally* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking The Judicial Function*, 114 HARV. L. REV. 1833, 1852–68 (2001); WILLIAMS, *supra* note 7, at 298–99.
29. *Pap's II*, 812 A.2d at 603 (citing Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991)).

discipline lawyers and the court when it is deciding whether to "diverge" from the United States Supreme Court.[30]

Justice Castille indicated that the Pennsylvania Constitution's freedom of expression provision predated the First Amendment and was broader (stating the right *affirmatively* rather than *negatively*).[31] He reviewed the special meaning of freedom of expression in Pennsylvania history, noted that federal law in this area was quite unclear and still in a state of flux, and emphasized that the Pennsylvania Supreme Court would be deciding for only the Commonwealth, rather than the nation as a whole.[32] Further, he relied on the reasoning of the dissenting opinions in the U.S. Supreme Court.[33]

These are all the kinds of arguments that courts take into account when trying to determine whether they should "diverge" or "go beyond" what the United States Supreme Court has said about federal constitutional rights. Chief Justice Castille took these arguments seriously in deciding whether to "disagree" with the United States Supreme Court.

B. Search and Seizure

Chief Justice Castille has written a number of decisions dealing with search and seizure, all of which are characterized by state constitutional analysis that is independent of the United States Supreme Court's interpretation of the Federal Fourth Amendment. Search and seizure is one of the most common areas of litigation

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30. Both Dean Gormley and I have written on *Edmunds*, he more favorably than I. *Compare* GORMLEY, *supra* note 13, at 1, 3–16 *with* WILLIAMS, *supra* note 7, at 155–57, 169–77. I have expressed concern that this "criteria approach" can give an unnecessary "presumption of correctness" to United States Supreme Court decisions interpreting a different constitution under circumstances where it must be concerned with all fifty states and therefore its decisions might be diluted by federalism concerns. *See* WILLIAMS, *supra* note 7 and accompanying text.

31. *Pap's II*, 812 A. 2d at 603 ("The text of the First Amendment of the [F]ederal Constitution provides, in relevant part, that, 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .' U.S. CONST. amend. I. As a purely textual matter, [a]rticle I, § 7 is broader than the First Amendment in that it guarantees not only freedom of speech and the press, but specifically affirms the 'invaluable right' to the free communication of thoughts and opinions, and the right of 'every citizen' to 'speak freely' on 'any subject' so long as that liberty is not abused. 'Communication' obviously is broader than 'speech.'").

32. *Id*. at 603–05, 611 ("The provision is an ancestor, not a step-child, of the First Amendment.").

33. *Id*. at 599, 602; *see also supra* note 18 and accompanying text.

where lawyers and state courts have looked to their own state constitutions.[34] In this area, by contrast to freedom of expression, Chief Justice Castille has tended to reach the same conclusions as the United States Supreme Court in similar search and seizure cases. This has been true for more than fifteen years.[35] In each of these decisions Chief Justice Castille applied the *Edmunds* analysis. This has been referred to as "reflective adoptionism," where the state court acknowledges that it may render a more protective decision under the state constitution, analyzes that option, but concludes that it should reach the same conclusion as the United States Supreme Court.[36]

For example, in *Commonwealth v. Russo*,[37] the question was whether a Pennsylvania statute authorizing Game Commission officers to enter land without a warrant[38] violated either the Fourth Amendment or article I, section 8 of the Pennsylvania Constitution. Then-Justice Castille, writing for the majority of a divided court, considered whether the United States Supreme Court's "open fields doctrine," should be applied under the Pennsylvania Constitution.[39] Game Commission officers had entered the defendant's property without a warrant after a tip that he had "baited" his property for the purpose of hunting bears. Justice Castille carefully evaluated the United States Supreme Court decisions,[40] and concluded:

> There can be no question that the search *sub judice* was lawful under the Fourth Amendment, given the open fields doctrine. The issue, however, is whether Pennsylvania has departed, or should depart, from that doctrine when applying [a]rticle I, [s]ection 8 of our Constitution. To determine whether the open fields doctrine as enunciated in *Oliver* is consonant with [a]rticle I, [s]ection 8, we will undertake an independent analysis of that provision as guided by our seminal decision in *Commonwealth v. Edmunds* . . . .[41]

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34. Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L. REV. 225 (2007); GORMLEY, *supra* note 13, at 23; David Rudovsky, *Searches and Seizures*, in GORMLEY ET AL., *supra* note 13, at 299.

35. Commonwealth v. Williams, 692 A.2d 1031 (Pa. 1996); Commonwealth v. Glass, 754 A.2d 655 (Pa. 1999); Commonwealth v. Russo, 934 A.2d 1199 (Pa. 2007); Commonwealth v. Duncan, 817 A.2d 455 (Pa. 2013).

36. WILLIAMS, *supra* note 7, at 197–200.

37. 934 A.2d 1199 (Pa. 2007).

38. 34 PA. CONS. STAT. § 901(a)(2).

39. *Id.*; *see also Russo*, 934 A.2d at 1200.

40. *Russo*, 934 A.2d at 1203–05.

41. *Id.* at 1205; *see* Rudovsky, *supra* note 34, at 306–07.

As indicated, Justice Castille provided a detailed analysis of the *Edmunds* factors, and concluded that Pennsylvania constitutional law in this area should mirror that under the Federal Constitution:

> In short, the baseline protections of the Fourth Amendment, in this particular area, are compatible with Pennsylvania policy considerations insofar as they may be identified. More importantly, there is nothing in the unique Pennsylvania experience to suggest that we should innovate a departure from common law and from federal law and reject the open fields doctrine.[42]

Three Justices dissented, primarily by evaluating the *Edmunds* factors differently from Justice Castille.[43]

In a recent 2014 decision,[44] Chief Justice Castille followed an earlier decision rejecting the United States Supreme Court's "good faith exception" to the exclusionary rule.[45] While expressing some misgivings about the court's earlier precedent,[46] he adhered to it.[47]

C. Excessive Fines

In 2014, Chief Justice Castille authored the majority opinion in *Commonwealth v. Eisenberg*,[48] striking down a gambling statute's mandatory minimum fine of $75,000 for a first offense, as contrary to the Pennsylvania Constitution's cruel punishments clause.[49]

He first reviewed the history of the provision, dating from 1776, together with its judicial interpretation.[50] Notably, in a challenge to an excessive *sentence* a year earlier (where the state constitutional claim was not adequately raised and argued), Chief Justice Castille had concurred in the court's federal constitutional analysis, but stated:

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42. *Id.* at 1213; *see also* Commonwealth v. Williams, 692 A.2d 1031, 1038–39 (Pa. 1996).

43. *Williams*, 692 A.2d at 1213–18. I have observed this phenomenon in other states that apply what I have called the "criteria approach." WILLIAMS, *supra* note 7, at 168 (noting that the "[m]ajority and dissent here focus on their disagreement on the application of the criteria rather than on the content and application of the state constitutional provision at issue. Is a dissenter's accusation that the majority has misapplied the criteria any different from an accusation that the majority has simply resorted to the state constitution in a result-oriented attempt to 'evade' U.S. Supreme Court precedent?").

44. Commonwealth v. Johnson, 86 A.3d 182 (Pa. 2014).

45. *See* United States v. Leon, 468 U.S. 897 (1984).

46. *Johnson,* 86 A.3d at 189 n.4.

47. *Id.* at 191; *see also* Theodore v. Del. Valley Sch. Dist., 863 A.2d 76, 88–96 (Pa. 2003).

48. 98 A.3d 1268 (Pa. 2014).

49. *Id.* at 1287 (citing PA. CONST. art. I, § 13).

50. *Id.* at 1279–83.

> There is a colorable claim to be made that the federal test for gross disproportionality should not be followed lockstep in Pennsylvania, certainly at least insofar as it includes a *federalism-based constraint* that looks to sentences for similar offenses in other states . . . [A] defendant pursuing a Pennsylvania sentencing disproportionality claim may allege that comparative and proportional justice is an imperative within Pennsylvania's own borders, to be measured by Pennsylvania's comparative punishment scheme. In that circumstance, it may be that the existing Eighth Amendment approach does not sufficiently vindicate the state constitutional value at issue, where sentencing proportionality is at issue.[51]

In the *Eisenberg* context of excessive *fines*, Chief Justice Castille concluded for a unanimous court:

> In our view, the fine here, when measured against the conduct triggering the punishment, and the lack of discretion afforded the trial court, is constitutionally excessive. Simply put, appellant, who had no prior record, stole $200 from his employer, which happened to be a casino. There was no violence involved; there was apparently no grand scheme involved to defraud either the casino or its patrons. Employee thefts are unfortunately common; as noted, appellant's conduct, if charged under the Crimes Code, exposed him to a maximum possible fine of $10,000. Instead, because appellant's theft occurred at a casino, the trial court had no discretion, under the Gaming Act, but to impose a minimum fine of $75,000—an amount that was 375 times the amount of the theft.[52]

D. Protection of Reputation

The United States Constitution, as interpreted by the United States Supreme Court provides no protection for a person's reputation.[53] By contrast, in Pennsylvania, the constitution contains a textual protection for reputation:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those

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51. Commonwealth v. Baker, 78 A.3d 1044, 1055 (Pa. 2013) (Castille, C.J., concurring) (emphasis added). *See supra* note 26 and accompanying text.

52. *Eisenberg*, 98 A.3d at 1285.

53. Siegert v. Gilley, 500 U.S. 226, 234 (1991).

> of enjoying and defending life and liberty, of acquiring processing and protecting property and *reputation*, and of pursuing their own happiness.[54]

In *Castellani v. Scranton Times, L.P.*,[55] a defamation action was brought against a newspaper and reporter by persons who were accused in newspaper articles of impeding the work of a grand jury, a criminal offense.[56] In response to the defense raised under the Pennsylvania Shield Law,[57] the plaintiffs argued for a "crime-fraud" exception to the statute, along with their reliance on the constitutional protection for their reputation.[58] Chief Justice Castille, for a divided court, upheld the Shield Law defense, but specifically acknowledged the importance of the constitutional right to protection of reputation:

> Our holding does not discount the important interests implicated in every defamation action, notably, the individual's fundamental right to his or her reputation as guaranteed under the Pennsylvania Constitution. The proper balance between that compelling interest and the Shield Law, however, was already struck by this Court in *Hatchard* when it refined our interpretation of the Shield Law. [59]

III. GOVERNMENT STRUCTURE UNDER STATE CONSTITUTIONS

A. Introduction

Notably, in the area of state constitutional government structure, by contrast to state constitutional rights, there are virtually no minimum standards or "least common denominators" imposed by the Federal Constitution on the states.[60] It is true that the Guarantee Clause[61] requires states to have a "republican form of government," but the United States Supreme Court has deemed this nonjusticiable.[62] Consequently there need not be any specific influence from

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54. PA. CONST. art. I, § 1 (emphasis added); s*ee generally* Elizabeth Wachman & Ken Gormley, *Inherent Rights of Mankind*, *in* GORMLEY ET AL., *supra* note 13, at 84.
55. 956 A. 2d 937 (Pa. 2008).
56. *Id*. at 939–41.
57. 42 PA. CONS. STAT. § 5942.
58. *Castellani*, 956 A.2d at 939, 942.
59. *Id*. at 953 (citing Hatchard v. Westinghouse Broad. Co., 532 A.2d 346, 348–51 (Pa. 1987)). Justice McCaffery dissented on the basis of article I, section 1. *Id*. at 954.
60. WILLIAMS, *supra* note 7, at 240–42. *See also supra* notes 7–8 and accompanying text.
61. U.S. CONST. art. IV, § 4.
62. Pacific States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 150 (1912).

the United States Supreme Court's interpretations of federal separation/distribution of powers questions.[63] State constitutions reflect a fairly wide variety of arrangements such as elected versus appointed judiciaries, plural as opposed to unitary executives, and even one unicameral legislature.[64] That said, there are not any wide disparities such as the establishment of a parliamentary system of state government.[65]

B. Reapportionment and Redistricting

One of the most politically and legally contentious elements of state government constitutional structure is the internal reapportionment and redistricting of the state legislature.[66] In *Holt v. 2011 Legislative Reapportionment Commission*,[67] Chief Justice Castille confronted the extremely complex interaction of the 1960's federal constitutional one-person-one-vote mandate and the state constitutional requirements for the structuring of legislative districts. He provided a deep analysis of the evolution of reapportionment and redistricting litigation in Pennsylvania, both before and after the one-person-one-vote requirement from the United States Supreme Court. He noted that the state constitutional requirements were still applicable, if they could be enforced within the supreme federal mandate.[68] Chief Justice Castille noted:

> The operative mandates under [a]rticle II, [s]ection 16 are to devise a legislative map of fifty senatorial and 203 representative districts, compact and contiguous, as nearly equal in population "as practicable," and which do not fragment political subdivisions unless "absolutely necessary." Although all of these commands are of Pennsylvania constitutional magnitude, one of the factors, that districts be "as nearly equal in population as practicable," also exists as an independent command of federal constitutional law, including decisional law which changes and evolves.[69]

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63. WILLIAMS, *supra* note 7, at 240–41.
64. NEB. CONST. art. III, § 1.
65. *See* Jonathan M. Zasloff, *Why No Parliaments in the United States?*, 35 U. PENN. J. INT'L LAW 269 (2013).
66. *See* James A. Gardner, *Foreword: Representation Without Party: Lessons From State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881 (2006); David Schultz, *Redistricting and the New Judicial Federalism: Reapportionment Litigation Under State Constitutions*, 37 RUTGERS L.J. 1087 (2006).
67. 38 A.3d 711 (Pa. 2012).
68. *Id.* at 759–60.
69. *Id*. at 738.

C. Governor's Item Veto

Although the United States Constitution does not provide the President with an "item veto," virtually all of the state constitutions authorize governors to veto parts or "items" of appropriations bills.[70] Pennsylvania's Constitution is no exception.[71] Important questions, concerning the relationship between executive and legislative branches, refereed by the judiciary, have arisen in many states concerning two key questions under their item veto provisions: (1) What is an appropriation bill? and (2) What is an item?[72] In *Jubelirer v. Rendell*,[73] Chief Justice Castille confronted the second question: "[W]hether [a]rticle IV, [s]ection 16 of the Pennsylvania Constitution . . . permits the Governor, when presented with an appropriation bill, to delete portions of the language defining a specific appropriation without disapproving the funds with which the language is associated."[74]

It is very common for legislators to insert substantive language into appropriation bills. This technique, though common, is problematic for several reasons. First, such budget legislation goes through different committees from those that have jurisdiction over the substantive area affected by the language in the appropriation bill. This bypasses the expertise developed by the members of those committees. Second, major appropriations legislation must be enacted to fund the ongoing activities of state government. Therefore, insertion of substantive language in such legislation is oftentimes more likely to pass than if it were contained in an ordinary bill, that was referred to the committee with jurisdiction over the subject matter. Finally, insertion of such language in appropriation bills challenges the governor's use of the item veto, thus raising thorny questions of constitutional interpretation in clashes between the legislature and the executive.

Jubelirer was such a case. Notably, the legislative challengers to the governor's use of the item veto briefed the matter in accordance with the *Edmunds* criteria. Chief Justice Castille, writing for a unanimous court, responded:

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70. *See* Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171 (1993).
71. PA. CONST. art. IV, § 16.
72. Briffault, *supra* note 70, at 1174–75.
73. 953 A.2d 514, 517 (Pa. 2008).
74. *Id.* at 517. "Given the parties' agreement that the 2005 GAA is an appropriation bill—which it obviously is—their dispute boils down to the meaning of 'item' for purposes of Section 16—*i.e,* that of which the Governor may disapprove." *Id.* at 529.

> The question presented in *Edmunds* involved the possible tension between federal and Pennsylvania constitutional law.
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> In contrast, this Court is sometimes presented with cases requiring us to interpret a provision of the Pennsylvania Constitution that lacks a counterpart in the U.S. Constitution. In such cases, because there is no federal constitutional text or federal caselaw to consider, we have not engaged in the four-factor analysis set forth in *Edmunds*.
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> Because there is no counterpart to [s]ection 16 in the U.S. Constitution –and thus there is no comparative constitutional argument forwarded—the instant case falls into that category of constitutional cases that does not lend itself well to the traditional *Edmunds* analysis.[75]

Moving to the substance of the controversy, Chief Justice Castille, as with most of his opinions, carefully reviewed the arguments of the parties noting the governor's argument that "if the General Assembly puts in a condition restricting the use of a specific appropriation, that condition qualifies as an 'item' within the meaning of [s]ection 16 . . . ."[76] He then provided some basic or general approaches to state constitutional interpretation,[77] followed by a careful textual analysis:

> Construing "item" for purposes of [a]rticle IV, [s]ection 16 of our Constitution as any part of an appropriation bill would deprive the [s]ection 16 phrase "item[s] of appropriation" of any effect and therefore must be disfavored. Moreover, it seems evident that, in initially using in [s]ection 16 the phrase "item[s] of any bill making appropriations of money," the focus was not on providing a precise definition of "item" but on dis-

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75. 953 A.2d at 523–25. Chief Justice Castille pointed out that "this author has suggested that state constitutional holdings, in the comparative area, that are unsupported by an *Edmunds* analysis have less secure constitutional footing." *Id*. at 523 n.10. He also noted that even though the *Edmunds* factors were not required in cases that did not seek an interpretation of the Pennsylvania Constitution beyond an identical or similar provision of the Federal Constitution, arguments presented according to at least some of the *Edmunds* criteria could prove useful. *Id*. at 525 n.12.

76. *Id*. at 526.

77. *Id*. at 528; *see generally* WILLIAMS, *supra* note 7, at 314.

> tinguishing the type of bill to which the Constitution was referring (*i.e.,* an appropriation bill) from that to which it had been referring in [a]rticle IV, [s]ection 15 (*i.e.*, general legislation). Thus, the context of [s]ection 16 indicates that a provision of an appropriation bill is an item if it directs that a specific sum of money be spent for a particular purpose.[78]

He then reviewed, and distinguished, decisions from a number of sister states dealing with their item veto provisions.[79] He then concluded that: "Article IV, [s]ection 16 of the Pennsylvania Constitution prohibits the Governor from effectively vetoing portions of the language defining an appropriation without disapproving the funds with which the language is associated."[80]

D. Judicial Authority over Sentencing

In *Commonwealth v. Mockaitis*,[81] Justice Castille dealt with a statute that required sentencing courts to order installation of approved ignition interlock systems for serial DUI defendants.[82] After resolving jurisdictional issues, he concluded that legislation requiring the judiciary to perform ministerial "executive" functions – including ensuring the systems have been installed and reporting to the Department of Transportation – were unconstitutional intrusions into judicial authority.[83] In other words, the legislature encroached on the Pennsylvania Supreme Court's supervisory authority by assigning executive functions ("deputize") to employees of the courts.[84] Justice Castille stated:

> This scheme essentially forces court employees to serve the function of the Department of Transportation in discharging its executive responsibility of regulating whether and when repeat DUI offenders are entitled to conditional restoration of their operating privileges.[85]

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78. *Id*. at 531–32.
79. *Id*. at 534–35. This kind of reference to the constitutional decisions of other states is, of course, unavailable in federal constitutional interpretation.
80. *Id*. at 537.
81. 834 A.2d 488, 490 (Pa. 2003).
82. 42 PA. CONS. STAT. §§ 7001–03. This law was passed to respond to the "coercive effect" of a condition of receiving federal highway funds. *Mockaitis*, 834 A.2d at 491.
83. *Mockaitis*, 834 A.2d at 499.
84. *Id*. (citing PA. CONST. art. V, § 10).
85. *Id*. at 500.

E. Legislative and Judicial Pay Raises and a Coercive Nonseverability Clause

In 2005, the Pennsylvania General Assembly, utilizing an abbreviated process without floor debate at 2:00 a.m., enacted a law providing for pay raises and future linkage to federal pay levels for officials in all three branches of government ("Act 44").[86] The enactment of this law, which included a legislative pay raise, stimulated a firestorm of popular outrage. In response, the General Assembly repealed Act 44 in its entirety.[87] Normally, such a legislative about-face would not have caused any constitutional problems. However, the provision of Act 44 concerning legislators had delayed their actual *salary* increase, but granted an immediate increase in "unvouchered expenses" that was exactly equal to the future pay raise. The Pennsylvania Constitution prohibits the legislature from *increasing* its own pay during the term for which it has been elected.[88] Notably in this context, however, the Pennsylvania Constitution also prohibits judicial salaries from being *reduced*.[89] As a result, the argument could be made that the legislative pay raise in Act 44 ("unvouchered expenses") was unconstitutional, but that the effect of Act 72, the repealing legislation taking away an enacted judicial pay raise, was also unconstitutional.

Litigation was filed concerning this whole situation and finally reached the Pennsylvania Supreme Court in 2006.[90] Justice Castille wrote the opinion for the court, with Chief Justice Ralph Cappy recusing himself, most likely because he had published several editorials endorsing the judicial pay raise.[91] There was a serious state constitutional challenge to the legislative procedure leading to the adoption of Act 44. This was based upon the provisions in the Pennsylvania Constitution providing certain requirements for the enactment of statutory law.[92] These provisions, aimed at transparent governance in a democracy, require bills to contain no more than one subject, which is expressed in its title, not to be altered on their passage through the legislature to change their original purpose, to be referred to committee, and considered on three different days in

86. Act of July 7, 2005, P.L. 201, No. 44. *See* Stilp v. Commonwealth, 905 A.2d 918, 925 (Pa. 2006).

87. Act of November 16, 2005, P.L. 385, No. 72 [hereinafter Act 72].

88. PA. CONST. art. II, § 8.

89. PA. CONST. art. V, § 16(a).

90. *Stilp*, 905 A.2d at 918.

91. *Id.* at 925.

92. PA. CONST. art. III, §§ 1–4. *See generally* Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Problems of Judicial Enforcement and Legislative Compliance*, 48 U. PITT. L. REV. 797 (1987).

each house. It is possible that the more cautious course for Justice Castille and the court would have been simply to declare the entire Act 44 unconstitutional as violative of these legislative procedure provisions. After detailed analysis, however, Justice Castille applied a deferential analysis to uphold the Act's legislative procedure.[93]

In a fairly transparent attempt to deny the court the judicial pay raise if it struck down the legislative "pay raise," the General Assembly included in Act 44 a "nonseverability provision."[94] In other words, if the court were to strike down the legislative provision the legislative intent was to have the judicial pay raise go down with it. Justice Castille provided a deep analysis of the question of the enforcement of nonseverability clauses, in a context where it seems to have been included in an attempt to coerce the court not to strike down the legislative pay raise. Relying on an important scholarly article,[95] he stated:

> Kameny describes the use of a nonseverability provision as "serv[ing] and in terrorem function, as the legislature attempts to guard against judicial review all together by making the price of invalidation too great." *Id*. at 1001. This sort of practice, he continues, is "especially troubling" because it "represent[s] an attempt by the legislature to prevent the judiciary from exercising a power that rightly belongs to it. . . . These clauses, in other words, amount to coercive threats."[96]

Thus, what might have seemed to be an ordinary expression of legislative intent concerning the possibility of partial invalidation of a statute was revealed to be a separation of powers violation in attempting to coerce the Pennsylvania Supreme Court not to perform its constitutional function of judicial review. Justice Castille noted that retribution against the courts by other branches of government was unacceptable. He continued:

> In this case, the potential "retribution" is built into the statute itself in the would-be automatic effect of the nonseverability provision. It is improper, to say the least, for the Legislature to put a coequal branch of government in such a position.

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93. *Stilp*, 905 A.2d at 951–59.

94. *Id.* at 970.

95. Fred Kameny, *Are Inseverability Clauses Constitutional?,* 68 ALB. L. REV. 997, 997–98 (2005); *see generally* Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 HARV. J. LEGIS. 227, 267–68 (2004).

96. *Stilp*, 905 A.2d at 979 (also citing Israel E. Friedman, *Inseverability Clauses in Statutes*, 64 U. CHI. L. REV. 903, 919–20 (1997)).

> Whether this effect is the sole or primary purpose of the non-severability provision, and whether it is entirely deliberate, is of less importance than the fact of its existence in such legislation, and the obvious influence such a provision might be designed to exert over the independent exercise of the judicial function. In a case such as this, we conclude, enforcement of the clause would intrude upon the independence of the Judiciary and impair the judicial function. Accordingly, we will not enforce the clause but instead we will effectuate our independent judgment concerning severability.[97]

Based on this assertion of judicial independence, Justice Castille held that the unvouchered expense provision was unconstitutional, and could be validly severed from the "other-wise-constitutionally valid" portions of Act 44, including the judicial pay increase.[98] In an earlier decision, the Pennsylvania Supreme Court had upheld another legislative increase in "unvouchered expenses."[99] Justice Castille distinguished this earlier decision, concluding that in this instance the increased unvouchered expenses had no reasonable relationship to actual expenses.[100] Next, the portion of Act 72 purporting to repeal the judicial pay raise was deemed unconstitutional as an invalid attempt to reduce judicial salaries.[101]

This decision also drew a firestorm of criticism. Again, possibly the more cautious approach would have been simply to declare Act 44 unconstitutional ab initio, therefore invalidating the pay increases for all three branches. Viewed objectively, however, Justice Castille's analysis seems proper, or at least defensible. Seen in this light, it could be characterized as a courageous decision, in the face of almost certain political criticism as a self-serving act of judicial review.

F. Pennsylvania Constitution's Appropriations Clause Preempted by Federal Statute

Pennsylvania's Constitution, like those in most states, provides that no money may be expended by state government unless appropriated by law.[102] For a number of years prior to 2009, when the

97. *Id.* at 980.
98. *Id.* at 981.
99. Consumer Party of Pa. v. Commonwealth, 507 A.2d 323 (1986).
100. *Stilp*, 905 A.2d at 969–70.
101. *Id.*
102. PA. CONST. art. III, § 24.

governor and legislature could not agree on a budget or appropriations bill by the end of the fiscal year, Governor Edward Rendell took the position that he would have to furlough state employees who he deemed nonessential to the health and safety of the state. My wife, Alaine Williams, representing the American Federation of State, County and Municipal Employees, contended that the Federal Fair Labor Standards Act (FLSA) preempted, under the Federal Supremacy Clause,[103] the state constitution's appropriation provision.[104] The governor had been using his view that he could not pay state employees as grounds to bargain with the legislature for programs he wanted in the budget. The union, by contrast, did not want its members to miss paydays ("payless paydays") as bargaining chips in larger political controversies. The union sought a declaratory judgment that the state constitution's appropriations provision was preempted by the FLSA, therefore depriving the governor of the argument that he had to furlough state employees. The matter made its way to the Pennsylvania Supreme Court, and in an opinion by Chief Justice Castille, the court agreed with the union, and declared that the FLSA did in fact preempt the Pennsylvania Constitution's appropriations clause. Chief Justice Castille stated:

> The Union Parties asserted that Section 6 of FLSA preempts [a]rticle III, [s]ection 24 of the Pennsylvania Constitution. Therefore, according to the Union Parties, the view held by the Governor and others in the Administration that [s]ection 24 bars the Commonwealth from continuing to employ and pay all FLSA-covered employees, if a general appropriations act is not enacted by the start of the Commonwealth's new fiscal year, was erroneous as a matter of law.
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> * * *
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> Therefore, we conclude that through conflict preemption, Congress' intent for Section 6 of FLSA to preempt state law provisions such as [s]ection 24 is manifest and clear, and that the presumption against preemption that the Executive Parties rely upon to argue that Section 6 does not displace [s]ection 24 is presently overcome. Furthermore, since [s]ection 24 is

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103. "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every state shall be bound thereby, any Thing in the *Constitution* or laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2 (emphasis added).

104. Council 13 AFSCME *ex rel.* Fillman v. Rendell, 986 A.2d 63 (Pa. 2009).

> preempted, [s]ection 24 is without effect in this instance and thus, ceases to have legal significance. Accordingly, we hold that the Union Parties are entitled to the declaratory judgment they sought: that [s]ection 24 did not prohibit the Commonwealth from continuing to employ and pay all FLSA nonexempt Commonwealth employees in the event that the Pennsylvania General Assembly failed to pass a budget by July 1, 2008.[105]

There have been no payless paydays since.

This holding by Chief Justice Castille illustrates a fundamental characteristic of state constitutions within our federal system: Under the Supremacy Clause, provisions of state constitutions may be preempted or even unconstitutional, as contrary to the United States Constitution or valid federal statutes such as FLSA.[106] Just as in the area of reapportionment, Chief Justice Castille recognized that the Pennsylvania Constitution must coexist, in a subservient position, with the U.S. Constitution and laws.

The state defendants in this litigation argued all along that it was a nonjusticiable "political question."[107] Under this doctrine, state courts should not intrude upon authority assigned to a co-equal branch of government by the Constitution.[108] Just as with the doctrine of mootness, as with many other doctrines, the political question doctrine may be viewed differently by state courts under state constitutions than it is viewed by the United States Supreme Court under the U.S. Constitution.[109] The portion of Chief Justice Castille's opinion concerning the political question doctrine is a landmark in Pennsylvania. His analysis included the following important statement:

> The happenstance that the preemption issue the Union Parties posed to the court arises in political circumstances, when a budget impasse was looming and the Governor was announcing furlough options and decisions, does not change the nature of the jurisprudential issue from one of law that the courts are to decide, to one of executive policy that the courts are not to consider. . . . [T]he political question doctrine is a shield, not a sword. The doctrine exists to protect the Executive branch from intrusion by the courts into areas of political policy and executive prerogative; it does not exist to remove a question of

105. *Id*. at 70, 82.
106. WILLIAMS, *supra* note 7, at 99.
107. *Fillman*, 986 A.2d at 73–74.
108. *Id*. at 74.
109. WILLIAMS, *supra* note 7, at 298–99.

> law from the Judiciary's consideration merely because the Executive branch has forwarded its own opinion of the legal issue in a political context.[110]

Chief Justice Castille's political question analysis caught the attention of a leading state constitutional scholar, writing about the doctrine. Dean Daniel B. Rodriguez of Northwestern University School of Law cited the case and quoted it in support of his thesis that "[s]tate courts have engaged in fairly substantial policy-type interventions" and "self-confidence has been a conspicuous part of the doctrine in the decided cases."[111]

G. Sovereign Immunity and Governmental Torts

In 2014, the Pennsylvania Supreme Court confronted the case of a schoolgirl who was terribly injured by a school bus operated by a school district.[112] She sued the school district and received a multi-million dollar jury verdict, which was then reduced by the trial court to $500,000 pursuant to Pennsylvania's Tort Claims Act.[113] This statutory "damage cap" was enacted by the legislature pursuant to article I, section 11:

> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.[114]

Statutory caps on damages in civil litigation, against both private and governmental defendants, can be categorized under the broad heading of "Tort Reform."[115] In the absence of any meaningful *federal* constitutional arguments against such damage caps, it is the state constitutions that had been in the forefront of constitutional challenges to them.[116] These cases have relied on a number of state

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110. *Fillman*, 986 A.2d at 76.
111. Daniel B. Rodriguez, *The Political Question Doctrine in State Constitutional Law,* 43 RUTGERS L.J. 573, 584 (2013).
112. Zauflik v. Pennsbury Sch. Dist., 104 A.3d 1096 (Pa. 2014).
113. *Id.*; 42 PA. CONS. STAT. §§ 8501–8564.
114. PA. CONST. art. I, § 11.
115. *Thirteenth Annual Issue on State Constitutional Law: Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897 (2001).
116. Robert F. Williams, *Foreword: Tort Reform and State Constitutional Law*, 32 RUTGERS L.J. 897 (2001).

constitutional provisions such as right to remedy guarantees, right to civil jury trial, separation of powers, as well as others.[117]

In the *Zauflik* litigation, the plaintiff relied on all of these arguments, as well as an equal protection argument.[118] When the case reached the Pennsylvania Supreme Court, Chief Justice Castille, as is his usual approach to state constitutional interpretation, provided an in-depth review of the history of limitation on damages against *governmental* defendants, by contrast to *private* defendants.[119] In this instance, there were earlier cases directly on point upholding such damage caps against governmental defendants.[120]

Ultimately, relying substantially on prior precedent, but also on the distinction between governmental and private defendants, Chief Justice Castille upheld the damage cap. He stated:

> Pennsylvania courts have struggled with the difficult questions raised in this appeal—and the attendant policy implications—since the very beginnings of our common law system. The facts here are tragic, involving a school student who suffered grievous injuries caused by the uncontested negligence of the school district's employee. But, the circumstances are not unprecedented, and the lower courts did not err in relying on our prior cases to uphold the legislation at issue, as against the present constitutional challenges. Moreover, the conclusion that the General Assembly is in the better position than this Court to address the complicated public policy questions raised by the larger controversy has substantial force. Accordingly, we uphold the limitation on damages recoverable under Section 8553(b) of the Act, and therefore affirm the order of the Commonwealth Court.[121]

In the portion of his opinion concerning the equal protection claim, Chief Justice Castille relied, rather uncritically, on prior Pennsylvania Supreme Court decisions interpreting the equality provisions of the Pennsylvania Constitution to be "coextensive" with the Equal Protection Clause of The Fourteenth Amendment.[122] I have been quite critical of these earlier decisions interpreting the

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117. *Id*. at 897–88.
118. *See Zauflik*, 104 A.3d 1096.
119. *Id*. at 1124.
120. *Id*. at 1125–26.
121. *Id*. at 1133.
122. *Id*. at 1117; *see also* Kramer v. W.C.A.B. (*Rite Aid Corp*.), 883 A.2d 518, 532 (Pa. 2005) (explaining "same standards" and "coterminous").

Pennsylvania constitutional equality provisions "in lockstep" with Federal Equal Protection doctrine.[123]

H. State Constitutional Environmental Protection

State constitutions contain a number of *positive* rights guarantees, by contrast to the U.S. Constitution's more familiar *negative* rights.[124] A number of state constitutions now contain environmental rights provisions. Pennsylvania's provision, dating from 1971, provides:

> 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.[125]

In 2013, after remaining relatively dormant since 1971, the Pennsylvania Supreme Court breathed life into the clause in an opinion by Chief Justice Castille.[126] The leading authority on this provision, John Dernbach,[127] analyzes this landmark decision in this issue of the *Duquesne Law Review*.[128]

IV. CONCLUSION

It is clear from this selection of opinions by Chief Justice Castille, including those before he became Chief Justice, that he has delved quite deeply into the Pennsylvania Constitution, confronting a wide variety of circumstances where the state constitution must interact with the U.S. Constitution. In virtually all of these opinions he has

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123. Robert F. Williams, *Pennsylvania's Equality Provisions*, *in* GORMLEY, ET AL., *supra* note 13, at 731; *State Constitutional Equality Doctrine*, *supra* note 4; WILLIAMS, *supra* note 7, at 211–29.

124. EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

125. PA. CONST. art. I, § 27.

126. Robinson Twp., Washington Cnty. v. Commonwealth, 83 A.3d 901 (Pa. 2013) (citing Professor Dernbach prominently).

127. *See* John C. Dernbach, *Natural Resources and the Public Estate*, *in* GORMLEY ET AL., *supra* note 13, at 683.

128. John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335 (2013).

explored the history of the relevant state constitutional clause (including its interaction with the U.S. Constitution) often going all the way back to 1776. Further, his opinions are useful in that they thoroughly review the arguments of the parties, prior to his reaching a holding. His opinions also provide a thorough history of the prior litigation under the particular state constitutional provision being reviewed. Also, he is attentive to the decisions of other states under their constitutions that are identical or similar to the Pennsylvania constitutional provision under review.

If one were to read Chief Justice Castille's state constitutional law opinions, all of the basics of this field would become apparent. These opinions will shape Pennsylvania's constitutional interpretation for years to come. In sum, I agree with Professor Bruce Ledewitz' prediction: "He will go down in history as perhaps the justice who has had more influence on the interpretation of the Pennsylvania Constitution than any other judge."[129]

129. Chris Mondics, *Ron Castille: From Vietnam valor and injury to historic tenure as Pa. Chief Justice*, PHILADELPHIA INQUIRER, Jan. 12, 2015, at A1.