The Role of Lower State Courts in Adapting State Law to Changed Federal Interpretations

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What's Really Wrong with the Supreme Court of Pennsylvania

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In the midst of criminal indictment, allegations of judicial corruption, charges of nepotism and cronyism, and disputes over secret budgets,¹ the question remains, aside from all that, how well does the Supreme Court of Pennsylvania do its job? The justices exercise their most important and independent authority in the area of institutional relations among the branches of Pennsylvania's government. In this field, where their powers are greatest, the justices consistently overstep reasonable boundaries of their powers. Of course, critics always say that courts are too activist. The Pennsylvania situation is unique, however, because the justices are not acting to protect powerless minorities or fundamental rights, but instead, are maintaining and expanding their own influence and prerogatives. What is really wrong with the Supreme Court of Pennsylvania is the lack of a genuine sense of judicial restraint and modest institutional role.

The purpose of this article is to outline a series of areas in which the court has either manifested institutional aggressiveness or the

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¹ For a general summary of the recent charges and allegations swirling around the Supreme Court of Pennsylvania, see the series of articles in The Pittsburgh Post Gazette.

² Stuart, Bill Munchey and Tim Reeves et al., The Loudmen on the High Court, Post

³ Post Gazette, October 10-14, 1993. Some of these issues came to a head recently with the indictment of Justice Rolf Larsen on 27 counts of illegally obtaining prescription drugs. See Post

⁴ Post Gazette, October 29, 1993. As this article was written, the Judiciary Committee of the Pennsylvania House of Representatives was considering beginning impeachment proceed

ings against Justice Larsen.
court has failed to carry out its responsibilities. The first section
delineates the court's claims over supervision of the legal profes-
sion and rulemaking. Here the court asserts unwarranted judicial
supremacy. Part II sets forth the court's approach to justiciability,
particularly in the state constitutional realm. Here, the court is
willing to decide issues that should not be heard. Part III describes
two lines of cases—labor relations and taxes—in which the court's
view of desirable policy has come to dominate adjudication. Here
the court is willing to supersede legislative policy preferences. Part
IV reviews the court's strained state constitutional decisions that
have the effect of favoring the justices' personal interests. Finally,
Part V describes the court's approaches to three important state
constitutional issues and finds a fundamental lack of coherence.

What is missing in these areas is a willingness on the part of the
justices to subordinate themselves: In the area of policy, to
subordinate their views in favor of those of the legislature; in the
area of self-interest, to subordinate their needs to the appearance
of propriety; and in the area of doctrinal development, to
subordinate their approaches to those of prior case law. Perhaps
the recent difficulties of the court will help the justices develop a
sense of a more restrained role.

I. ARTICLE V, SECTION 10 POWERS

In 1968, the Pennsylvania Constitution was rewritten to grant to
the supreme court extensive administrative, supervisory and
rulemaking powers. The Pennsylvania Constitution now provides:
Section 10. (a) The Supreme Court shall exercise general supervisory and adminin-
tative authority over all the courts and justices of the peace, including authority to
temporarily assign judges and justices of the peace from one court or district to
another as it deems appropriate.

(c) The Supreme Court shall have the power to prescribe general rules governing
practice, procedure and the conduct of all courts, justices of the peace and all offi-
cers serving process or enforcing orders, judgments or decrees of any court or justice of the
peace, including the power to provide for assignment and reassignment of classes of
actions or classes of appeals among the several courts as the needs of justice shall
require, and for admission to the bar and to practice law, and the administration of
all courts and supervision of all officers of the judicial branch, if such rules are consist-
tent with this Constitution and neither abridge, enlarge nor modify the substantive
inghts of any litigant, nor affect the right of the General Assembly to determine the
jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of
limitation or repose. All laws shall be suspended to the extent that they are inconsis-
tent with rules prescribed under these provisions.

2 Pa. Const. art. V, §§ 10(a) & 10(c).
grants through broad interpretation of its powers under article V.

A. Inherent Powers

The justices on the supreme court have suggested that they possess certain powers by virtue of the existence of the court, without regard to the constitutional text. This attitude was illustrated under the current constitution at the time the 1968 amendments, including article V, were adopted. In Stander v. Kelley, the validity of the limited constitutional convention that rewrote article V was challenged. Justice Roberts, in his concurrence, responded to the allegation that the language in section 2(c) of article V—that the supreme court "shall have such jurisdiction as shall be provided by law"—eliminated the court's King's Bench power, unless the legislature chose to invest the court with that authority. Justice Roberts concluded that the phrase in question did not have the effect of subjecting the King's Bench power to legislative definition and control.

Justice Roberts failed to consider that the argument's premise was flawed. The plaintiffs were suggesting that if the new article V had curtailed the King's Bench power, or some other aspect of the court's jurisdiction, such curtailment would be unconstitutional. But it is article V that defines the jurisdiction of the Pennsylvania Supreme Court. It makes no sense to suggest that article V could itself be unconstitutional.

In a system based on law, the notion that the court must have powers other than those included in the constitution is a strange

4. Stander, 250 A.2d at 479-80. Justice Roberts was joined by Justices Jones and Pomeroy. Id. at 485-87.
5. PA. CONST. art V, § 2(c).
6. The powers of the King's Bench refer to the supreme court's authority to intervene and review proceedings in inferior courts at any stage of litigation. The authority first appears to have been asserted in In re Pollard, 17 A. 1087 (Pa. 1889). The authority is codified as follows:

   Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.


Of course, the point of the discussion in Stander was the assertion that the King's Bench authority is not premised on statutory authorization, but is inherent.

7. Stander, 250 A.2d at 486-87.
8. Id. at 487 (Roberts, J., concurring).
one. Where would such powers come from? To put the matter in federal perspective, although writers have suggested that congressional limits on United States Supreme Court jurisdiction might be unconstitutional, no one has ever suggested that if Article III of the federal constitution allowed such restrictions, Article III itself might be unconstitutional.10

The implied view of Justices Roberts, Jones and Pomeroy is not an isolated one. Recently, in Lavelle v. Koch11 and Snyder v. Snyder,12 the court reaffirmed its "inherent power" to compel expenditures necessary to fund the courts.13 The most candid statement of the doctrine of inherent powers is contained in the Pennsylvania Rules of Disciplinary Enforcement—the enforcement mechanism for the Rules of Professional Conduct. Rule 103 of the Rules of Disciplinary Enforcement provides as follows:

The Supreme Court declares that it has inherent and exclusive power to supervise the conduct of attorneys who are its officers (which power is reasserted in Section 10(c) of Article V of the Constitution of Pennsylvania) and in furtherance thereof promulgates these rules.14

Does this language mean that the people of Pennsylvania are powerless to remove attorney discipline and legal ethics from the control of the court, even if the citizens rewrite the constitution? Considering that this same court voted only 3-2 to protect the lawyers who supervise judicial discipline from being subjected to disciplinary enforcement,15 a desire by the public to remove attorney discipline from the court is a real possibility. There is no doubt that despite the language of rule 103, the voters are free to accomplish this result. It would be better, however, if the justices removed this exaggerated language from rule 103. The doctrine of inherent judicial power has no place in a legal system ruled by law.16

10. In Commonwealth v. Carsio, 517 A.2d 956 (Pa. 1986), a unanimous court read a similar phrase—"shall exercise such powers and perform such duties as may be imposed by law"—as creating legislative control over the duties of the Pennsylvania Attorney General without suggesting that such control raised separation-of-powers issues. Carsio, 517 A.2d at 959.
13. Lavelle, 617 A.2d at 321; Snyder, 620 A.2d at 1136.
16. For another example of the idea of inherent judicial authority, see Commonwealth v. Farrish, 528 A.2d 101, 154-55 (Pa. 1987) (Larsen, J., dissenting) (inherent jurisdiction...
B. Rulemaking Power

The language of article V, section 10(c) grants to the supreme court “the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . .” The authority of such rules is superior even to that of the General Assembly: “All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.”

The court’s use of the rulemaking power has led to four serious problems. The court has expanded what is a broad power to begin with, by its broad interpretation. The court has substituted rulemaking for constitutional interpretation. The court has never developed fair and consistent procedures for rulemaking. And, the court has allowed rulemaking to lead to conflict with the Executive Power.

While the procedural rulemaking power is broad, the justices have expanded that power by their broad understanding of when a rule and a law are “inconsistent.” In Commonwealth v. Sorrell, the court determined that section 5104(c) of title 42 of the Pennsylvania Consolidated Statutes, which granted an absolute right to the commonwealth to demand a jury trial in a criminal case, conflicted with rule 1101 of the Pennsylvania Rules of Criminal Procedure, which gave discretion to the trial judge to decide whether to accept a defendant’s waiver of a jury trial. In effect, section 5104(c), as written, prevented a criminal defendant from obtaining a court trial unless the district attorney agreed.

Justice Roberts’ majority opinion described section 5104(c) as “inconsistent” with rule 1101 and thus “suspended” by operation of article V, section 10(c). This “inconsistency” did not consist of the physical or logical impossibility of complying with both rule and statute. A trial judge could satisfy both section 5104(c) and rule 1101. To ensure accommodation, the court could have instructed trial judges that waivers of juries ordinarily should not be granted against the expressed wishes of the district attorney. In that way, actual conflicts between statute and rule would rarely arise and could be dealt with on a case-by-case basis.
What the justices did, instead, was to approach inconsistency as if the issue were analogous to preemption of state law by Congress. The justices assumed that the field of jury waiver had been occupied by the rules of procedure, leaving no room for the legislature to supplement regulation of the area by legislation.\(^{22}\)

When considering inconsistency, as in so many institutional issues, the question turns on the amount of deference the court will grant to the legislature. Ordinarily, we expect courts to defer to the legislature in the absence of a constitutional violation. There is no such violation in section 5104(c)'s requirement of criminal jury trials. Unless the constitutional text is read as granting exclusive rulemaking power to the court, legislative policy initiative is not absolutely forbidden. What was involved in Sorrell was a legislative view of policy, something normally left to the legislature.

Is Sorrell then premised implicitly on the view of the justices that the rulemaking power is exclusive? The justices did describe the rulemaking power as “exclusive” in *In re 42 Pa.C.S. § 1703.*\(^{23}\) The Third Circuit Court of Appeals has gone so far as to say of Pennsylvania that the legislature “is without power to control procedure.”\(^{24}\) And, in Sorrell itself, the statute was struck down after a determination that the matter legislated was procedural in nature.\(^{25}\)

Nevertheless, it is hard to imagine the court pursuing consistently an either/or approach to the procedure/substance distinction. For one thing, the procedure/substance distinction has elsewhere proved unworkable\(^{26}\) and has no inherent appeal.\(^{27}\) Additionally, the text of section 10(c) does not support an exclusive power. If the text were interpreted as meaning that all procedural legislation is invalid, why would the text mandate that only “inconsistent” legislation be suspended?

The court does not seem committed to exclusivity. Sorrell was decided in the context of a purported conflict between statute and

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23. 394 A.2d 444, 446 (Pa. 1978) [hereinafter *In re § 1703*].
25. Sorrell, 456 A.2d at 1229.
rule. In the context of judicial silence, however, the justices have not searched every legislative act to inquire whether the statute in question regulates procedure. Many statutes regulate procedure—the death penalty statute$^{28}$ and the Mental Health Procedures Act,$^{29}$ for example—and have not been overturned on that basis.$^{30}$

In at least one instance the court has appeared to acknowledge that the legislature has authority concurrent with the rulemaking power to regulate procedure. In In re John Doe Corporations A, B, C, D and E,$^{31}$ the court held that the statutory provision governing enforcement of Pennsylvania Crime Commission subpoenas violated due process for failure to provide a pre-enforcement hearing on the substance of the subpoena.$^{32}$ Rather than strike the commission's enforcement power, however, Justice Hutchinson, exercising authority "under Article V, Section 10(c)," suspended the statutory provision at issue and "adopt[ed]" section 520 of the Administrative Code, a statutory section governing enforcement of other administrative subpoenas, "pending further appropriate action by the Legislature, or this Court . . . ."$^{33}$ If the rulemaking were truly exclusive, section 520 itself would presumably be unconstitutional and there could be no suggestion that the legislature could provide a new mechanism in the future.

The justices are apparently committed to the position that in cases involving procedural disputes, the court's policy will prevail. Though the court specifically said in In re § 1703 that its powers were exclusive,$^{34}$ such an approach would quickly prove unmanageable were the justices to attempt to apply it. One is thus left with the view that the legislature is free to legislate in the procedural realm. But, if this is the case, the court should interpret inconsistency quite narrowly, so that the normal presumption of legislative constitutionality applies.

The court has also expanded the procedural rulemaking power by applying it as a substitute for constitutional interpretation. This tendency is illustrated in the interaction of Commonwealth v.

32. In re John Doe Corps., 489 A.2d at 184.
33. Id. at 184-85.
34. In re § 1703, 394 A.2d at 448.
Milliken, and rule 2003 of the Pennsylvania Rules of Criminal Procedure. In Milliken, the court held that article I, section 8 of the Pennsylvania Constitution does not require that all facts relied upon to establish probable cause for a search warrant be reduced to writing. Nevertheless, because judicial review of the issuance of the warrant can be difficult without a written record, Justice Roberts' majority opinion exercised the court's "supervisory powers" to formulate a prospective "procedural" rule mandating a contemporary written record. Later, presumably pursuant to this supervisory power and the rulemaking power, the court adopted rule 2003, which explicitly requires that probable cause for search warrants be based upon information contained within the four corners of the written affidavit.

The policy contained in rule 2003—that search warrants be supported by writing—is certainly defensible. Indeed, Justices Manderino and Pomeroy would have held that this is required by article I, section 8. But assuming, as the justices held, that there is no requirement of writing in article I, section 8 of the constitution, the question becomes, did the justices have authority to add this requirement? Like other prophylactic rules of criminal procedure, the "four-corners" requirement can act to frustrate law enforcement and free the guilty. While section 10 does not expressly state the limits of the supervisory and rulemaking powers, the examples listed, assignment of judges and causes of actions, are housekeeping measures. There is no hint in section 10 that important matters of policy are to be decided by virtue of the rulemaking power. If not of constitutional dimension, such decisions should

36. Milliken, 300 A.2d at 81.
37. Id.
(a) No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits.
(b) At any hearing on a motion for the return or suppression of evidence, or for suppression of the fruits of evidence, obtained pursuant to a search warrant, no evidence shall be admissible to establish probable cause other than the affidavits provided for in paragraph (a).
Id.
40. Milliken, 306 A.2d at 83 (Manderino, J., dissenting) and at 85 n.2 (Pomeroy, J., dissenting).
be left to the legislature or to the people.

In at least one instance, the people of Pennsylvania have reversed a judicial action that they felt had enhanced the rights of the accused to too great a degree. In November 1984, the voters of Pennsylvania adopted an amendment to article I, section 9 that provides that "...the use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself." The purpose of this amendment was to overturn the result in Commonwealth v. Triplett, which rejected the federal rule announced in Harris v. New York and held that statements of a defendant inadmissible for any reason— including violation of Miranda rights—could not be used to impeach the defendant on cross examination. The amendment applied the contrary federal rule as a matter of state constitutional law.

Whatever one thinks of the amendment and whatever one thinks in general of popular initiatives overturning judicial decisions, no one can doubt that this amendment was within the legal prerogatives of the voters. Would the justices now be free to ignore this amendment by the device of adopting a rule of procedure setting forth the Triplett restriction on cross examination? While one could argue that such a rule would enlarge the substantive rights of criminal defendants and, hence, would be constitutionally invalid, the same argument could be made about the requirements of a written record for valid warrants. Ironically, if the justices had ruled in Milliken that the "four-corners" requirement were a mat-

42. Pa. Const. art. I, § 9. As amended, article I, section 9 provides:
In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to meet the witnesses face to face, to have compulsory process for obtaining witnesses in his favor, and, in prosecutions by indictment or information, a speedy public trial by an impartial jury of the vicinage, he cannot be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land. The use of a suppressed voluntary admission or voluntary confession to impeach the credibility of a person may be permitted and shall not be construed as compelling a person to give evidence against himself.

43. 341 A.2d 82 (Pa. 1975).
44. 401 U.S. 252 (1971).
46. Article V, section 10(c) allows the court to adopt only rules of procedure that do not "abridge, enlarge nor modify the substantive rights of any litigant." Pa. Const. art. V, 10(c).
ter of state constitutional interpretation, the voters would be free to amend the "four corners" requirement. There is, however, no mechanism for popular override of a rule of procedure.

The better practice for the court under the current rulemaking system would be to adopt rules of procedure that are non-controversial housekeeping measures. This standard already describes most of the content of Pennsylvania's current rules. In the long run, Pennsylvania should subject the rule-making power to legislative oversight.

A third way in which the rulemaking power is used inappropriately is the justices' failure to maintain fair and consistent procedures in rulemaking. Rulemaking is a form of legislation. Like all decisionmaking, rulemaking should be done primarily in open session. But in In re § 1703 the justices struck down an attempt by the legislature to subject judicial rulemaking to the Pennsylvania Open Meeting Law.

One can sympathize with the justices' position in In re § 1703 that in carrying out core constitutional functions, each branch of government is to be free of interference by the other branches. Rulemaking is, after all, defined by article V, section 10 as such a core function. But even if section 1703 were regarded as unconstitutional, the court was free to adopt its policy of openness nevertheless, as an appropriate manner in which to carry out the court's responsibility. Nothing prevents the justices from deferring to the legislature's policy.

Another aspect of fair and consistent rulemaking is the existence of a formal method for the rulemaking power to be invoked. Rule 103 of the Pennsylvania Rules of Judicial Administration actually sets up formal rulemaking procedures. But in In re John Doe Corporations, Justice Hutchinson simply announced that the court would "exercise its power under Article V, Section 10(c) of our Pennsylvania Constitution to prescribe such judicial procedures as are necessary for the enforcement of [Commission subpe-
nas),” which the court then did in the opinion.52
In another instance of breach of formal process, the justices have, in effect, twice struck down statutes pursuant to their rulemaking power without advance warning and without affording the commonwealth an opportunity to respond. In announcing that the Open Meeting Law could not be applied to the court as a legis-
lated mandate, the justices literally wrote a letter to the Governor, the President of the Senate and the Speaker of the House.53 This is a pretty strange way for a court to do business, reminiscent in form of the Correspondence of the Justices in 1793, refusing to an-
swer certain questions put to the Justices by President Wash-
ton.54 But the Justices of the United States Supreme Court refused to answer the questions put to them. In contrast, the justices of the Supreme Court of Pennsylvania opined—held?—that section 1703 was unconstitutional.
Not only was the form of the decision perhaps an advisory op-
ion, but the format gave no opportunity for an adverse party to be heard. Of course, the justices had already decided that section 1703 was unconstitutional. But, unless the justices believe that no one outside the court can have anything to say on issues of the separa-
tion of powers, they should have awaited the very event they de-
scribed in their letter—a lawsuit challenging rules adopted without conforming to the new statute.55 Perhaps such a lawsuit would never have been brought. In that event, no constitutional decision would have been needed. Perhaps the plaintiffs’ brief would have convinced the court. In either event, the result could have changed.
Another example of an abrupt invocation of the rulemaking power occurred in regard to section 8355 of title 42 of the Pennsyl-
vania Consolidated Statutes.56 Section 8355 provided that if a pleading or motion is signed by an attorney or party in “bad faith,” the opposing party shall be entitled to costs and reasonable attorney fees and the unsuccessful attorney may be liable to a civil penalty of up to $10,000.57
In response to section 8355, the justices amended rule 1451 of

52. In re John, Doe Corp., 489 A.2d at 185. In contrast, the court in Commonwealth v.
Milliken, 300 A.2d 78, 81 (Pa. 1973), announced that it would adopt governing rules in the
future.
53. In re § 1703, 394 A.2d 444.
54. See Paul M. Bator et al., The Federal Courts and the Federal System 64-66
(2d ed. 1973).
55. In re § 1703, 394 A.2d at 446.
57. Id.
the Pennsylvania Rules of Civil Procedure, thus suspending the statute before its effective date. In addition, presumably because the usual procedures under section 103(a)(3) of the Rules of Judicial Administration would have taken too long, the order suspending the statute was immediately promulgated "in the interest of justice and efficient administration."

Thus, not only did the court suspend a statute without ever seeing it in action, the justices also acted without giving to the commonwealth any notice of their intentions. The commonwealth never had a chance to respond to this challenge to its statute. Nor was the court forced to explain its rationale, as at least it did in its letter concerning section 1703.

The final concern about the rulemaking power is conflict between the rules and Executive Branch discretion. The justices have recently suggested that their rulemaking power is superior to concepts of constitutionally protected prosecutorial discretion. In Commonwealth v. Lutz, the court upheld prosecutorial discretion not to move for the admission of criminal defendants into Accelerated Rehabilitative Disposition in drunk driving cases. This discretion, however, was not premised on any concept of executive power. Justice Flaherty's majority opinion emphasized that such decisions were made "under the rules [of ARD disposition] promulgated by this court . . . ." In Commonwealth v. Benz, Chief Justice Nix held for a three-justice plurality that, pursuant to rule 133 of the Pennsylvania Rules of Criminal Procedure, the prosecutorial decision not to prosecute because of the lack of a prima facie case is reviewable in the courts. Justice Larsen, concurring in the result, would have held that prosecutorial discretion

59. Id.
61. In re § 1703, 394 A.2d 444.
62. 455 A.2d 928 (Pa. 1982).
63. Lutz, 495 A.2d at 933.
64. Id. at 932. Justice Nix's dissent, joined by Justice Zappala, would have restricted prosecutorial discretion. Id. at 936.
66. Benz, 565 A.2d at 768. Chief Justice Nix would have deferred to prosecutorial discretion if the reason for not prosecuting had been related to policy concerns. Id. at 787 n 4.
is always reviewable.\textsuperscript{97} Justices Papadakos and McDermott would have subjected prosecutorial discretion to judicial review only at the trial court level.\textsuperscript{98} Thus, all of the justices in these cases were willing, at least to some extent, to subordinate the exercise of executive authority to the rulemaking power.

C. 

Supervisory Power

Although related to the rulemaking power and sometimes utilized interchangeably with it,\textsuperscript{99} the supervisory power of the court is separate from rulemaking. Article V, section 10 of the Pennsylvania Constitution grants to the court "general supervisory and administrative authority" over the courts in subsection (a).\textsuperscript{76} In subsection (c), the court is granted the "power to prescribe general rules governing practice, procedure and the conduct of all courts ... and ... for admission to the bar and to practice law, and the ... supervision of all officers of the Judicial Branch ... ."\textsuperscript{71}

The important distinction between subsections (a) and (c) is that only the rulemaking power is accorded hierarchical authority over inconsistent legislation. The general power to supervise is not given such weight. Nor does the general supervisory power extend to the conduct of attorneys. These differences undermine the persuasiveness of a line of cases placing exclusive authority in the supreme court to regulate the conduct of judges, court personnel and attorneys.

This line of cases originated with \textit{Wajert v. State Ethics Commission}.\textsuperscript{72} In \textit{Wajert}, the justices held unanimously that the State Ethics Act was unconstitutional insofar as it purported to prohibit a retired common pleas judge from representing clients in that court within the first year of the judge's retirement.\textsuperscript{73} The statute was unconstitutional because it infringed "the Supreme Court's inherent and exclusive power to govern the conduct of those privileged to practice law in this Commonwealth."\textsuperscript{74}

\textit{Wajert} is a very broad holding in three respects. First, there is no inconsistent rule of procedure under which the Ethics Act could...
be suspended. There are only rules of ethics that generally govern appearances of impropriety. In addition, there was a provision in the Code of Professional Responsibility that prohibited a lawyer from accepting representation in a matter in which he had acted in a judicial capacity.76 But the Ethics Act was not "inconsistent" with that provision and the opinion did not hold that it was. The constitutional basis of the opinion was that governing attorney conduct is an exclusive power of the court.78

The second aspect of Wajert's breadth is that it appears to prohibit legislative regulation not only of judges and court personnel, but also of any aspect of attorney conduct or admission to the bar. Indeed the court emphasizes the decision's potential in a footnote.77 Under this approach, the court could rule that attorneys are not subject to criminal prosecution for acts undertaken pursuant to client representation.

Finally, this exclusive supervisory power is not tied to the constitutional text, but is referred to as an "inherent power."79 Perhaps this reliance was necessitated by the absence of textual support for a claim of exclusive supervisory power. Subsection (a) does not suggest such exclusivity; nor does the supervisory power it enumerates go beyond simple administrative matters. Subsection (c) does grant a rule-making power, but does not suspend statutes in the absence of inconsistency. Wajert, then, amounts to an unsupported assertion of supreme judicial authority.

Wajert has proved an enduring precedent. In Kremer v. State Ethics Commission,80 the court held that subjecting judges to financial disclosure requirements would violate the court's "power to supervise courts."81 In Snyder v. Unemployment Compensation Board of Review,82 a plurality opinion held that a statute permitting partisan political activity is suspended insofar as it applies to any person who is governed by a state supreme court directive forbidding such activity.83 In Maunus v. State Ethics Commission,84 the court upheld the application of financial disclosure requirements to attorneys employed by the commonwealth. But the

76. Wajert, 420 A.2d at 442.
77. Id. at 442 n.5.
78. Id. at 442.
80. Kremer, 469 A.2d at 595.
82. Snyder, 502 A.2d at 1234.
83. 544 A.2d 1324 (Pa. 1988).
ground of decision for Chief Justice Nix was not the power of the government to regulate attorneys, which is specifically reaffirmed as exclusive to the court in *Maunus*, but the authority of an employer to prescribe reasonable regulations for an employee.\(^{64}\) In *Lloyd v. Fishinger*,\(^{65}\) an equally divided court affirmed a superior court decision that title 42, section 7101(a)(3) of the Pennsylvania Consolidated Statutes, prohibiting fee arrangements during the first fifteen days of confinement in a hospital or sanitarium, violated the court’s supervisory power.\(^{66}\)

On the strength of *Maunus* and the fragmented decision in *Lloyd*, one might assume that the court is weakening in its commitment to exclusive supervision. However, the suspension of title 42, section 8355 of the Pennsylvania Consolidated Statutes without comment and without dissent\(^{67}\) suggests that *Wajert* currently remains the foundation of judicial analysis of separation-of-powers issues affecting the legal community in Pennsylvania.

II. JUSTICIABILITY

In his concurrence in *United States v. Richardson*,\(^{68}\) Justice Powell made the point that “[r]elaxation of standing requirements is directly related to the expansion of judicial power.”\(^{69}\) The same could be said of any large-scale increase in the availability of a judicial forum to resolve controversial issues. In recent years, the Supreme Court of Pennsylvania has lowered restrictions on access to the state courts. The court has done this, moreover, in cases that do not raise issues of individual liberty but concern divisions of power among governmental units. The result has been to enhance the role of the court in Pennsylvania’s public life.

A. Standing

With little fanfare, the court has moved dramatically to the establishment of citizen standing to challenge broad and general assertions of illegal government conduct. This expansion may be said to have begun, ironically, with a case that narrowed the previously liberal approach to taxpayer standing, *In re Application of*

\(^{64}\) *Maunus*, 544 A.2d at 1326-27.


\(^{66}\) *Lloyd*, 605 A.2d at 1193.

\(^{67}\) *Pa. R. Civ. P. 1451*, see notes 56-61 and accompanying text.


\(^{69}\) *Richardson*, 418 U.S. at 188.
Biester. In Biester, the court held that the prevention of a waste of tax revenue is insufficient to grant standing because it is an interest held in common with all other taxpayers. All citizens have an interest in having others comply with the law, but standing requires more than that.

But the court qualified this general restriction with a “policy” exception so potentially broad that it threatens to undermine the general restriction. Taxpayer standing can still be granted “to ensure judicial review which would otherwise not occur.” An illustration of this principle is said to occur when those immediately affected are benefitted by the alleged illegality. Obviously, such persons will not sue.

This point of view—that there must be someone who can sue about a matter of alleged government illegality—stands in total contrast to the view of a majority of justices on the United States Supreme Court in United States v. Richardson.

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.

There is nothing illegitimate, of course, about a state court disagreeing with the United States Supreme Court. Standing and the role of courts are certainly state constitutional issues. Nor is there anything wrong with disagreeing with the United States Supreme Court without acknowledging the difference in viewpoint. What is surprising, however, is for a state court to ignore the United States Supreme Court’s view on what anyone would say is an important issue of judicial restraint and then to adopt the opposite conclusion, without justification or discussion, as if the view adopted were a self-evident proposition.

To be fair, in Biester the justices concluded that standing did not exist in that case and so perhaps attention was not drawn to

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90. 409 A.2d 848 (Pa. 1979).
91. Biester, 409 A.2d at 851-52.
92. Id.
93. Id. at 852.
94. Id.
96. Richardson, 418 U.S. at 170.
the parameters of this described exception. But in *Consumer Party of Pennsylvania v. Commonwealth*\(^{97}\) and *Sprague v. Casey*,\(^{98}\) the policy exception grew to engulf whatever limits on standing the *Biester* court had in mind.

In *Consumer Party*, the justices applied the exception they had only described in *Biester*. *Consumer Party* involved the attempt by that political party and other "citizen-taxpayers," as the court described them, to challenge the constitutionality of a pay raise the legislature had passed.\(^{99}\) Chief Justice Nix's opinion noted that the context was one in which judicial review would otherwise be impossible because those immediately affected—the recipients of the pay increase—were benefitted by the alleged illegality.\(^{100}\) The opinion also raised the policy ground of this exception—"add[ing] to the controls over public officials"—to a more prominent position in the text\(^{101}\) than it had held in *Biester*.\(^{102}\) *Consumer Party* created a list of five factors, which, if satisfied, automatically grant taxpayer standing.\(^{103}\)

In *Consumer Party*, the availability of the policy exception was potentially expanded to a wide variety of cases. Nevertheless, the context of *Consumer Party* was still illegal government spending, rather than illegal government action in general. In *Sprague v. Casey*,\(^{104}\) that distinction was seemingly breached without comment. In *Sprague*, a "taxpayer" was permitted to challenge the scheduled date of judicial elections on the ground that the elec-

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100. Id. at 329.
101. Id. at 328 (quoting *Biester*, 409 A.2d at 851 n.5).
102. In *Biester*, the only reference to this justification was in a footnote, which quoted a *Yale Law Journal* casenote. *Biester*, 409 A.2d at 851 n.5.
103. Consumer Party, 507 A.2d at 329. Chief Justice Nix said:
   To summarize, in *Biester* we held that a taxpayer seeking standing to sue must allege a substantial, direct, and immediate interest in the outcome of the suit unless the taxpayer can show:
1. the governmental action would otherwise go unchallenged;
2. those directly and immediately affected by the complained of expenditures are beneficiarily affected and not inclined to challenge the action;
3. judicial relief is appropriate;
4. redress through other channels is unavailable; and
5. no other persons are better situated to assert the claim.
   Id.
   Although Chief Justice Nix refers to *Biester* in formulating this list, it is *Consumer Party* that organizes these factors.
tions were not scheduled in the year prescribed by the state constitution. Chief Justice Nix found standing based on the exception in Biester that had been applied in Consumer Party. Although Chief Justice Nix did not refer to the list of factors he had set forth in Consumer Party, he did refer to the factors in a general way and found that they were met.

What Chief Justice Nix failed to note in Sprague is that unlike Consumer Party, Sprague involved illegal expenditures only in the sense that all government action costs something. In fact, canceling the election in September probably cost more than holding it as scheduled. Thus, Sprague breaks any connection between taxpayer standing and spending. In effect, Sprague establishes citizen standing in any case alleging a constitutional violation that would otherwise go unlitigated.

It is not the purpose of this article to criticize the particular reasoning of any of these cases. This author's criticism is that the court has, in many different cases, expanded the parameters of its role. Certainly that is the case in recognizing broad citizen standing. But, having said this, such broad citizen standing is certainly a dubious proposition on its own merits. Will the court then hear a suit brought by a citizen when a school district allows Christmas songs and all the parents and students in the district support it? Will the court then hear next friend petitions whenever a condemned prisoner drops all further litigation? The logic of Sprague promotes such review. In effect, the court has invited litigation in these and other contexts.

B. Political Question

The unwillingness of the court to characterize the claim in Allegheny County v. Commonwealth as a nonjusticiable political

105. Sprague, 550 A.2d at 187.
106. Id.
107. Id.
108. See generally, Whitmore v. Arkansas, 495 U.S. 149 (1990) (death row inmate did not have standing in his individual capacity or as "next friend" to litigate whether Eighth Amendment requires an automatic direct appeal in a capital case where the defendant had knowingly, intelligently, and voluntarily waived his right to appeal his conviction and death sentence).
109. 534 A.2d 780 (Pa. 1987). In Allegheny County, the court refers to "non-justiciability," but not to the "political question" doctrine. Nevertheless, as the court notes, all of the formulations of nonjusticiability are based on Baker v. Carr, 369 U.S. 186 (1962), which itself characterized the justiciability issue as the reach of the political question doctrine. Allegheny County, 534 A.2d at 792.
question has led to public embarrassment for the court. The case involved a challenge by the county of the statutory obligation to fund certain aspects of the operation of the courts of common pleas. The en banc commonwealth court, citing *Baker v. Carr*, held that the case was nonjusticiable and dismissed the complaint. The commonwealth court viewed the issue in the case-court funding—as textually committed to the legislative branch and considered it impossible to create an appropriate judicial remedy. The supreme court reversed, holding that the legislature's funding power is subject to constitutional restraint and, by implication, if the obligation to fund the local courts were found to rest in the legislature, the court would simply so order.

There is a sense that the commonwealth court was disingenuous in holding the case to be nonjusticiable. The dismissive tone of the opinion and the holding that the 1968 amendment to article V did not affect the commonwealth's funding obligation clearly suggest that the court thought the county was wrong in its claim on the merits. Nor is there any formal difficulty in ordering relief. If the commonwealth owes a sum of money, it is not usually thought "impossible" to order that the money be paid.

The real issue in the case and the reason a remedy could not be created was obviously that any order would be disobeyed. As estimated in Chief Justice Nix's dissent, the effect of the order in Allegheny County was to require the legislature to come up with an additional $239,000,000 for local court funding. An amount that large would be hard to squeeze out of the existing state budget. Certainly the state legislature was not going to raise taxes to comply with the court's conclusion. What the commonwealth court apparently feared is precisely what has occurred. The supreme court's mandate has been ignored.

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110. Allegheny County, 534 A.2d at 761. Allegheny County also argued that counties in Pennsylvania actually are not bound to fund the courts, but this view was rejected. Id. at 761, 765.
111. 369 U.S. 186 (1962).
113. Allegheny County, 500 A.2d at 1269.
114. Allegheny County, 534 A.2d at 765.
115. Allegheny County, 500 A.2d at 1270.
116. Allegheny County, 534 A.2d at 768 n.3 (Nix, J., dissenting).
117. The seemingly political context of the decision did not help acceptance of the decision. The four justices who voted with the county—Justices Flaherty, Larsen, Zappala and Papadakos—are all from Allegheny County and could not have been elected without Democratic Party support. Chief Justice Nix and Justice McDermott dissented. Certainly
Two attempts to enforce the mandate in Allegheny County have failed. The very next year, 1988, Philadelphia County simply dropped court funding from its fiscal year 1988-1989 budget. In response, the court by per curiam order, directed the city and county to resume funding. A few years later, a number of counties filed a "Motion to Enforce Judgment," which the court held did not squarely raise the issue of enforcement. Chief Justice Nix dissented, arguing that the original mandate should be revoked, while Justices Larsen and Papadakos argued that the mandate should either be enforced or revoked.

What lesson should be learned from Allegheny County? That courts should never insist on unpopular rulings? The United States Supreme Court was the object of criticism and resistance in its attempt to enforce Brown v. Board of Education. What if that effort had failed? Would that decision have "come to be seen as a blunder and symbol of judicial impotence" as one commentator observed? Or, would we view such a failure as a noble attempt to do the right thing? Perhaps there are justices on the Supreme Court of Pennsylvania who feel they did the right thing in Allegheny County. If so, the resulting debacle has nothing to teach them.

But Allegheny County is not Brown. Allegheny County is a squabble over money. Worse, since overall spending will be unaffected, it is a squabble over which politicians will receive credit for lowering taxes. It was not a sufficiently important matter to press the court's institutional powers to their limits. Allegheny County was the perfect case to avoid a confrontation and defer to the will of the people. The appearance is that the decision was influenced by the need of Commissioner Tom Ponsiter, the most powerful figure in the Allegheny County Democratic Party, to find new sources of revenue. This political connection is enforced because, as Chief Justice Nix demonstrated and as the reader can plainly see by reading the majority opinion, the decision is not at all convincing on the merits. This enormous transfer of tax responsibility and this enormous change in prior practice is ordered merely because article V, section 1 provides that the judicial power "shall be vested in a unified judicial system." Because all cases filed in Pennsylvania are heard by the same courts in the same way on appeal, the system could certainly be said to be "unified" already.

120. Allegheny County, 528 A.2d at 493 (Nix, J., dissenting).
121. Id. at 493 (Larsen, J., joined by Papadakos, J., dissenting).
123. Lino A. Graglia, The Brown Cases Revisited: Where Are They Now?, 1 Bench-
Mark, Mar.-Apr. 1984, at 23, 27.
of the legislature. It was the perfect case to exercise the "Passive Virtues" which Professor Bickel so recommended.\textsuperscript{124}

III. CASES OF BROAD PUBLIC IMPORTANCE

In two areas, the court has entered a tangled public policy arena and has imposed its own vision of the way things ought to be. Whether the court has solved a crisis or provoked one is a matter of dispute. What is apparent in these cases is a willingness to impose impressively broad notions of policy in areas that courts are usually loath to enter.

A. Labor Relations

The first case, \textit{Masloff v. Port Authority of Allegheny County},\textsuperscript{125} was certainly a case decided against a backdrop of crisis. On March 16, 1992, Amalgamated Transit Union Local 85 went on strike, thus terminating most mass transit in the City of Pittsburgh and greatly disrupting transportation in the city.\textsuperscript{126} For two weeks, the city endured the strike and its dislocations. Then on March 31, 1992, the mayor of Pittsburgh, Sophie Masloff, sued to enjoin the strike and at the same time filed an application for extraordinary relief, requesting that the Supreme Court of Pennsylvania assume plenary jurisdiction over the case.\textsuperscript{127}

Despite the numerous allegations that have been made about this case as the result of the investigation of Justice Larsen,\textsuperscript{128} the case was fairly simple. Given the governing statutory framework, the case should have been immediately dismissed. Prior to 1986, employees of the Port Authority Transit ("PAT") did not have a right to strike, but they did have a right to insist on binding arbi-

\textsuperscript{124} Alexander M. Bickel, \textit{The Passive Virtues}, 75 Harv. L. Rev. 40 (1961); Alexander M. Bickel, \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics} (1962). Allegheny County is not the only case in which the political question doctrine would have helped the court. Ironically, given its ultimate ruling upholding legislative action, the court expanded judicial oversight of the legislative process in \textit{Consumer Party v. Commonwealth}, 507 A.2d 323 (Pa. 1986), by overturning the well-established entitled bill doctrine. \textit{Consumer Party}, 507 A.2d at 332-34. Under that doctrine, procedural irregularities in the passage of legislation were not subject to judicial review. See \textit{Kiger v. Magee}, 85 Pa. 401, 412 (1877). Given the embarrassing nature of the decision upholding the pay increase in \textit{Consumer Party}, the court would have been better advised to avoid deciding the merits altogether. See notes 97 & 99-103 and accompanying text.

\textsuperscript{125} 613 A.2d 1186 (Pa. 1992).

\textsuperscript{126} \textit{Masloff}, 613 A.2d at 1187.

\textsuperscript{127} Id. at 1187-88.

\textsuperscript{128} See \textit{The Louder}. 
In the 1986 amendments to the Port Authority Act, employees gained the right to strike but lost the right to require binding arbitration. A strike may only be ended by court order if the court further mandates binding arbitration. Such a lawsuit, however, can be brought only by PAT, “[n]o party, other than the authority, shall have any standing to seek any relief in any court of this Commonwealth under this subsection.”

The 1986 amendments created a careful balance of power between PAT and its employees. Whereas prior to the amendments a union could force concessions from PAT by the threat of initiating binding arbitration, always something of a gamble, especially for the party paying the bills, under the amendments a union can force concessions only by means of a threat to strike. PAT can end such a strike by suing for relief, but only if it is willing to submit the matters to binding arbitration. Both sides have a certain amount of leverage in this scenario, but neither side has total control.

Without explanation and in the face of the statute's grant of exclusive standing to PAT, the court did not dismiss the mayor's suit. Instead, the court assumed jurisdiction and, again without explanation, dismissed PAT's preliminary objection to the mayor's standing to bring the case. The court then remanded the case to a chancellor of the commonwealth court, who ultimately enjoined the strike but did not order binding arbitration. The court, in an opinion by Justice Zappala, subsequently affirmed the result below.

Since the threat to public welfare is easily shown in a mass transit strike in a major urban area, there were really two issues before the court: first, could the city sue; and second, must binding arbitration be ordered whenever a transit strike is enjoined?

133. Id.
134. Id. Technically, even if it does, PAT cannot ensure that a strike will be enjoined. The Act requires that PAT show that the strike “creates a clear and present danger or threat to the health, safety or welfare of the public . . . .” Id. As a practical matter, however, a lasting transit strike will certainly meet this standard.
136. Id.
137. Id. at 1192.
138. Justice Lamen, joined by Chief Justice Nix, did dispute this showing. Id. at 1193.
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The court held that the mayor had standing to sue because the exclusive grant of standing to PAT, in light of the statutory recognition of the strike's harm as a basis for suit, violated the constitution's open courts provision. In essence, under the statute, the strike's harm remained a legal "injury," but the ability of the public to enforce a remedy for this injury had been extinguished. The court held that it was proper not to order binding arbitration because the statute provides that only a lawsuit by PAT may trigger a mandate of binding arbitration.

Justice Larsen's dissent is surely right in observing that the majority wanted to have it both ways. The sentence in the statute that limits the right to sue is unconstitutional, but somehow, still has enough effect to prevent binding arbitration when anyone else sues. The remaining part of the statute, however, is quite compatible with ordering binding arbitration regardless of who sues.

In *Masloff*, the court took it upon itself to "solve" the transit strike. The open courts holding was ad hoc—there is hardly any precedent applying article I, section 11 and what there is was not cited. Furthermore, it would seem that the reason binding arbitration was not ordered is that the justices were not sure that PAT could afford whatever contract would have resulted.

Adjusting labor relations is not something courts are equipped to do. Although the strike was resolved, the court has created an incentive for PAT not to bargain, and if struck, not to sue. The next time a union is ordered by the supreme court to go back to work, the workers may simply refuse to go. Fortunately *Masloff* can be reversed by a number of legislative expedients. The easiest would be simply to eliminate the union's right to strike once PAT invokes binding arbitration, but not to permit anyone, including PAT, to sue to enjoin a transit strike until binding arbitration is invoked.

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139. *Masloff*, 613 A.2d at 1190-91. See Pa. Const. art. I, § 11. The provision states: 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.


141. *Id.* at 1192 (Larsen, J., dissenting).
B. Taxes

In Hospital Utilization Project ("HUP") v. Commonwealth, the court rendered a decision that threatens the non-profit industry in Pennsylvania, especially colleges and hospitals. HUP involved a non-profit corporation created by several hospitals to provide a uniform system for the collection and collation of statistical data on area-wide hospital utilization. The court held that the corporation was not entitled to tax exemption under article VIII, section 2(a)(v) of the Pennsylvania Constitution.

The structure of the constitutional text helps to explain why HUP was a state constitutional case at all, since at the federal level and in most other states the granting of tax exemptions would be purely a matter of legislative policy. Article VIII, section 1 of the Pennsylvania Constitution provides that "[a]ll taxes shall be uniform . . . ." This language has been interpreted not only to prohibit progressive taxation of income, but to require rough equality of tax burden for all members of the class that is subject to a tax. Thus, for example, exempting individuals or institutions that own property from a property tax violates uniformity. In order to grant such exemptions, which hospitals and universities enjoy by statute, the Pennsylvania Legislature has to have a source of authority in the constitution.

Article VIII, section 2 gives to the legislature the authority to craft various tax breaks. For example, churches and cemeteries may be made exempt. The non-profit sector as a whole, however, lacks such specific exemptions. The constitution only gives to the legislature the power to exempt "[i]nstitutions of purely public charity" from taxation. The HUP court decided that the Hospital Utilization Project was not such an "institution."

143. HUP, 487 A.2d at 1309.
144. Id. at 1317-18. Article VIII, section 2(a) states: "The General Assembly may by law exempt from taxation . . . . Institutions of purely public charity, but in the case of any real property tax exemptions only that portion of real property of such institution which is actually and regularly used for the purposes of the institution." Pa. Const. art. VIII, § 2(a)(v).
151. HUP, 487 A.2d at 1317-18.
HUP could have been a simple and insignificant case. Essentially, the project sold services for income, like any business. Even by statute, the project's entitlement to a tax exemption was tenuous. The justices chose instead to write an extremely broad opinion. In retrospect, the three most significant aspects of HUP are, first, that the court wrote a generally applicable test for determining whether an institution can be considered a "purely public charity." Second, the HUP test gives no deference whatsoever to legislative treatment of that term, no matter how reasonable or traditional the statutory definition is. Finally, the HUP test is so stringent that hospitals, universities, and most other institutions, may be unable to satisfy it, and thus may be subject to all state and local taxes in Pennsylvania.

The HUP test for a purely public charity requires the satisfaction of five factors:

An entity qualifies as a purely public charity if it possesses the following characteristics:

(a) Advances a charitable purpose;
(b) Donates or renders gratuitously a substantial portion of its services;
(c) Benefits a substantial and indefinite class of persons who are legitimate subjects of charity;
(d) Relieves the government of some of its burden; and
(e) Operates entirely free from private profit motive.143

The full meaning and application of the HUP test are still unsettled and are beyond the scope of this article. The commonwealth court, which at one point suggested that all hospitals might not have to satisfy the HUP test,144 now seems to agree that any institution seeking a "charitable" tax exemption must satisfy HUP.145 The state supreme court itself seemed to soften HUP by suggesting in G.D.L. Plaza Corporation v. Council Rock School District146 that compliance with prior case law would satisfy HUP as well.147 As currently interpreted, however, HUP does not seem to exempt most traditionally tax-exempt organizations. University

152. Id. at 1317.
155. 526 A.2d 1173 (Pa. 1987)
156. G.D.L. Plaza Corp., 526 A.2d at 1175-76.
students, for example, probably are not "legitimate subjects of charity"; nor do most of these institutions make "a bona fide effort to serve primarily those who cannot afford the usual fee."\[157\]

In terms of the court’s role, the precise contour that the constitutional text ultimately assumes is not important. The point is that the supreme court should not be determining tax policy at all. It cannot be doubted that wholly removing these tax exemptions would be an economic shock to one sector that has helped sustain Pennsylvania’s economy while manufacturing has declined. It is not clear, however, that hospitals, universities and research centers would be able to compete for students, staff and resources if Pennsylvania alone taxed them fully. Whether these institutions should be tax exempt is a matter upon which reasonable people may differ. But what is beyond dispute is that the consequences of such taxation are serious.

In this context, in which no matters of individual right are involved and in which no unpopular minority group is harmed, the court should apply an almost irrefutable presumption of constitutionality to the legislature’s own definitions and applications of the "purely public charity" exemption. Instead of granting any such presumption, however, the court treats its own view as a threshold question before statutory definitions may even be considered.\[158\] It is instructive to contrast the court’s willingness to defer to the legislature’s judgment that the death penalty is not a "cruel punishment,"\[159\] an area in which fundamental rights and unpopular minorities are clearly implicated, with its unwillingness to give the legislature any say at all in what constitutes a "purely public charity."

Taxation is not an area in which the constitutional text is unambiguous and, thus, the court must intervene. The Kentucky Supreme Court, for example, faced with basically the same constitutional text\[160\] has determined that a charity "includes activities which reasonably better the condition of mankind"\[161\] and the

\[157\] Erie v. Hamot, 602 A.2d at 414 (citing HUP, 481 A.2d at 1315 n.9). Hospitals, universities and other non-profit organizations also aggressively seek payment of all fees even though such efforts are sometimes ineffective. Hamot, 602 A.2d at 414.


\[159\] Ky. Const. § 170. Section 170 of the Kentucky Constitution provides that "institutions of purely public charity" are to be exempt from taxation.

\[160\] Kentucky ex rel. Lueckett v. I. W. Bernheim Found., 505 S.W.2d 752, 764 (Ky.)
Kentucky Court of Appeals has upheld tax exempt status for a hospital consortium laboratory service similar to Hospital Utilization Project. 192

The Pennsylvania tax exempt status cases neither discuss precedent from other states, nor do they discuss policy or the proper role of the courts. Instead, the opinions read like formal exercises in definition. This formalism makes it all the easier for the court to impose a new vision of tax policy without having to defend it. The court should overrule or reinterpret HUP before the lower courts begin to enforce it on a large scale. 193

Though not of the global significance of HUP, the justices have recently announced their views of tax policy in two other cases. In Allegheny County v. Monzo, 194 Justice Papadakos' majority opinion struck down the Hotel Room Rental Tax Statute as applied to a Monroeville motel operator, as a "special tax which is prohibited under Pa. Const. Art. 3, § 32." 195 The court found that a motel in the "distant municipality of Monroeville Borough" derived little or no benefit from the Pittsburgh Convention Center that the motel tax helped to fund. 196 In the course of its decision, the justices saw fit to express their view of the central urban hub approach to economic development.

We see no reason to restrict the benefits of the tax to Pennsylvania's only second class county. The opportunity for development of local meeting facilities should be afforded to all of the state's smaller municipalities. The development of civic facilities to stimulate economic growth and to promote tourism are statewide concerns. 197

In Ridley Arms, Inc. v. Township of Ridley, 198 the court was presented with a constitutional and statutory challenge to a garbage collection fee that was more than two times the fee of a private garbage collection business. 199 Justice Flaherty's majority

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198. Most hospitals and universities in Pennsylvania appear to still retain their tax exempt status despite HUP. It is not clear why this is so. Clearly, some municipalities, like the City of Pittsburgh, are content to require smaller payments in lieu of taxes. But, of course, such a procedure invites a taxpayer suit arguing that accepting smaller payments from an institution that should not be tax exempt itself violates the tax uniformity clause.
200. Monzo, 500 A.2d at 1105.
201. Id. at 1104.
202. Id. at 1106.
204. Ridley Arms, 531 A.2d at 417.
opinion held that, although the plaintiff had not met its constitutional burden of proof, the tax would nevertheless be struck down as "unreasonable" under the First Class Township Code.\textsuperscript{170} In the course of that holding, Justice Flaherty penned a broad attack on excessive government spending that certainly sounded like a constitutional challenge.

For many years now, and increasingly, taxpayers have adopted a fatalistic view that no matter how outrageous, how costly, how uncompetitive a government activity is, if it is sponsored by government, it is not open to successful challenge. But governmental systems and classifications which require the payment of taxes or the curtailment of freedoms were never meant to be regarded as unchallengeable, regardless of their fairness, utility and reasonableness. To the contrary, government in this Commonwealth and this nation has always been conceived of as the provider of safe and efficient service, not as a repository for exorbitant costs. If government cannot provide services at least of a quality and at a cost commensurate with similar services provided by private enterprise, it is, by definition, unreasonable to utilize tax dollars for that purpose. That many have lost sight of that patently obvious idea is as unfortunate as it is surprising.\textsuperscript{171}

Neither Monzo nor Ridley Arms is an important tax precedent.\textsuperscript{172} But they do show a surprising willingness on the part of the justices to enter the tax arena, an area in which most courts defer to the political branches of government.

IV. CASES OF APPARENT JUDICIAL SELF-INTEREST

The following cases represent issues that, unlike those in the former cases, the court could not easily sidestep. Nor in these cases does the court necessarily impose its own view of policy. The court does, however, issue rulings that benefit the judiciary itself. Unless absolutely persuasive, which some of these rulings are not, such rulings cast a cloud on the impartiality of the court.

A. Judicial Compensation

In two cases decided in 1989, a court divided over rationale struck down the State Employees Retirement Code of 1974,\textsuperscript{173} which eliminated certain options for retirement contribution and increased retirement contribution rates for Pennsylvania judges.

\textsuperscript{170} Id.

\textsuperscript{171} Id. at 418.

\textsuperscript{172} Indeed, the attempt to apply Monzo to the Philadelphia Convention Center failed. Leventhal v. Philadelphia, 542 A.2d 1328 (Pa. 1988).

entering service after 1974. In effect, the 1974 changes created two tiers of judges in terms of compensation.

Each case contained a three-justice opinion announcing the judgment of the court. In Goodheart v. Casey, Chief Justice Nix argued that lowering retirement benefits for judges entering the judiciary after 1974 conflicts with the court’s “inherent power to determine and compel payment of those sums of money which are reasonable and necessary” for the judicial branch to carry out its tasks. In context, total compensation for post-1974 judges was too low to satisfy the constitution. Chief Justice Nix emphasized that the pre-1974 system represented the legislature’s own view of adequate compensation and thus, departure from that standard was by definition inadequate.

Justice Larsen’s approach to the same issue was different. Along with Justices Zappaia and Papadakos, he concurred in the result in Goodheart. In the companion case, Klein v. Employees’ Retirement System, Justice Larsen argued for these three justices that a different retirement package for judges who joined the bench after 1974, “creates unequal, arbitrary and unreasonable classifications of judges within the same class/level which violate the equal protection provisions of the Constitution of the Commonwealth of Pennsylvania, and are in conflict with the constitutional mandate

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175. The 1974 Code eliminated two voluntary retirement fund contributions—Class E coverage and a Social Security Integration Plan—that had permitted judges to contribute funds in excess of the basic mandatory retirement program. The 1983 amendment to the 1974 Code increased the employee contribution from 5% of gross salary to 6.25% without a corresponding increase in benefit levels. Goodheart, 555 A.2d at 1211.
176. The difference in retirement income between the pre- and post-1974 change is illustrated in Justice Larsen’s opinion in Klein v. Employees’ Retirement System, 555 A.2d 1216 (Pa. 1988). Justice Larsen described two hypothetical judges, one entering the bench immediately before the change and one immediately after. The first judge would receive a maximum annual pension benefit of $66,566 per year, the second, $32,000 per year. Klein, 555 A.2d at 1213.
177. These numbers certainly present a stark contrast. Justice Larsen failed to note, though, that these reduced benefits reflected, in part, reduced contributions by the second judge. Thus, the opinion should have also reflected these contributions personally invested by the judge as contributing to the judge’s retirement income.
179. Goodheart, 555 A.2d 1213. (citing Commonwealth ex rel. Carroll v. Tate, 274 A.2d 197 (Pa. 1971)).
180. Id. at 1218 (Larsen, Zappala, and Papadakos, J.J., concurring in result).
to have a unified judicial system in this Commonwealth.\textsuperscript{181}

Neither of these two accounts is at all convincing. In terms of Chief Justice Nix and passing over the whole idea that judges have inherent power to order legislators to pay them more money, it is not the case that the prior compensation package establishes an absolute floor for constitutional adequacy. Perhaps the judiciary was over-compensated before and the new scheme is now adequate. In terms of Justice Larsen, it is not arbitrary to lower compensation at one point in time because the justices themselves had previously held that changes in compensation could not be applied to any employees already employed when the changes were made.\textsuperscript{182} For the same reason, two tiers of compensation do not violate the requirement of a "unified" system. No doubt the legislature would have preferred to lower the retirement compensation of all the judges, but correctly assumed that the justices would not allow it.

But even if the reader found these opinions persuasive, the issue of the appropriateness of judicial action would remain. The appearance in Goodheart and Klein is certainly one of judges protecting their own. If that were unavoidable, that is, if the legislature had violated some unambiguous constitutional norm, the justices might nevertheless have been justified in enjoining the statutory changes. But, where the constitutional text is either silent or ambiguous, justices who are concerned about the appearance of self-seeking should not act. The justices did act, however, thus contributing to the general public perception of bias in the administration of justice.\textsuperscript{183}

Unfortunately, there is a second episode of bad judicial compensation analysis, probably worse than that of the retirement cases. The case, Consumer Party of Pennsylvania v. Commonwealth,\textsuperscript{184} attracted public attention because it involved a legislative pay raise. The Public Official Compensation Law of 1983,\textsuperscript{185} the enact-

\textsuperscript{181} Klein, 555 A.2d at 1217 (emphasis added).

\textsuperscript{182} Association of Pennsylvania State College and Univ. Faculties v. State Sys. of Higher Educ., 479 A.2d 962 (Pa. 1984) (1983 amendments to retirement system unconstitutional as applied to employees who were already members of the system).

\textsuperscript{183} The appearance of impropriety was strengthened with the acknowledgment upon reconsideration that two of the justices involved in deciding those cases had a pecuniary interest in the result. Though the recusal issue was waived, as Chief Justice Nix held, the presence of it serves to reemphasize the self-interested nature of the entire litigation. Goodheart v. Casey, 565 A.2d 757, 761-62 (Pa. 1989).

\textsuperscript{184} 507 A.2d 323 (Pa. 1986).

ment of which was challenged in Consumer Party, also contained a pay raise for the judiciary, including the justices of the supreme court.\footnote{186}

The circumstances of the enactment of this pay raise reflected an obvious intent to circumvent the procedural requirements of lawmaking contained in article III, sections 1-13.\footnote{187} The Compensation Bill was enacted as Senate Bill 270.\footnote{188} But Senate Bill 270 originally involved a reform of certain county laws, including filling certain vacancies.\footnote{189} That bill, by that title, was passed by the Senate on April 18, 1983, and an amended version was passed by the House on June 1, 1983.\footnote{190} The two differing versions were then sent to conference committee.\footnote{191}

On September 28, 1983, however, a totally new version of Senate Bill 270 was submitted to the House and Senate by the conference committee.\footnote{192} This Senate Bill 270 had as its subject a pay raise for public officials, including judges, legislators and executive branch officials, with the new title reflecting the new subject.\footnote{193}

This new version of Senate Bill 270 was passed by the House and Senate the same day it was presented—September 28, 1983, and the governor signed the bill into law two days later.\footnote{194}

This novel procedure of taking a county vacancy bill and transforming it into a pay raise was obviously done to avoid the normal procedures of lawmaking. Committees, readings, voting and so

\footnote{186} Id. at § 368.2 (repealed 1992).
\footnote{188} Consumer Party, 507 A.2d at 325.
\footnote{189} Id.
\footnote{190} Id.
\footnote{191} Id. at 326.
\footnote{192} Id.

\footnote{193} Consumer Party, 507 A.2d at 325. The old title of Senate Bill 270 was as follows:
An act amending the act of August 4, 1955 (P.L. 323, No. 190), entitled 'an act relating to counties of the third, fourth, fifth, sixth, seventh and eighth classes; amending, revising, consolidating and changing the laws relating thereto further providing for the filling of vacancies in certain circumstances.'

The new title, on September 28, 1983, was as follows:
An act establishing salaries and compensation of certain public officials including justices and judges of Statewide courts, judges of courts of common pleas, judge of the Philadelphia Municipal Court, judges of the Philadelphia Traffic Court, district justices and the Governor, the Lieutenant Governor, the State Treasurer, the Auditor General, the Attorney General and certain other State officers and the salary and the salary and certain expenses of the members of the General Assembly; and repealing certain inconsistent acts.

\footnote{194} Id. at 326.
forth take time. For a pay raise, time—during the passage of which the talk-show hosts whip up opposition—can be fatal. Thus, the new bill was injected into the old shell.

In a sense, there were numerous violations of article III in these actions. The original Senate Bill 270 had certainly been “altered” so “as to change its original purpose.”195 The pay raise bill had not been considered in committee,196 nor had it been considered on three different days in each house.197

Chief Justice Nix’s opinion for the court essentially treated Senate Bill 270 as if it had been a real bill that was sent to conference committee and emerged heavily amended, rather than treating Senate Bill 270 as the new bill that it was. The court concluded that, since conference committees are designed to hammer out differences, article III, section 1’s prohibition of material alteration or amendment could not be applied to a bill that emerged from such a consensus building process.198

This concern about the conference committees rings pretty hollow in a situation in which a totally new bill is inserted into an old senate bill number. In fact, application of article III, section 1 to the entire lawmaking process, including the conference committee, need not interfere with any effort to hammer out consensus because section 1 only prohibits changes in a bill’s “original purpose.”199 Conference committees do not make changes in the original purpose of a bill. Or, at least, the justices could interpret the phrase “original purpose” with flexibility so as not to interfere with such conferences or with the amendment process. The only

195. Article III, section 1 of the Pennsylvania Constitution provides, “[n]o law shall be passed except by bill, and no bill shall be so altered or amended, on its passage through either House, as to change its original purpose. Pa. Const. art. III, § 1.

196. Article III, section 2 provides, “[n]o bill shall be considered unless referred to a committee, printed for the use of the members and returned therefrom.” Pa. Const. art. III, § 2.

197. Article III, section 4 provides:
Every bill shall be considered on three different days in each House. All amendments made thereto shall be printed for the use of the members before the final vote is taken on the bill and before the final vote is taken, upon written request addressed to the presiding officer of either House by at least twenty-five per cent of the members elected to that House, any bill shall be read at length in that House. No bill shall become a law, unless on its final passage the vote is taken by yeas and nays, the names of the persons voting for and against it are entered on the journal, and a majority of the members elected to each House is recorded thereon as voting in its favor. Pa. Const. art. III, § 4.

198. Consumer Party, 507 A.2d at 334. The justices also ruled that the article III, section 4 issue—consideration on three different days—had been waived. Id. at 334 n.16.

context in which article III, section 1 need block legislative action is a bad faith substitution of the very sort that occurred in Consumer Party.\textsuperscript{200}

It is not necessarily the case that the justices stretched to uphold this law because their own pay raise would also have been rejected had they struck the law down. And, in Consumer Party, unlike many of the cases discussed in this article, the court was deferring to the legislature. Nevertheless, the justices' weak justification for not applying article III fairly to this sham legislative process does not inspire confidence. Here, the court's very strained interpretation serves the judiciary's immediate financial interests. That sort of situation is precisely the sort in which the justices should be most circumspect. If a judge is going to stretch the constitutional text, let it be to strike down the judge's pay raise rather than to permit it.

B. Judicial Discipline and Selection

In two cases within the past five years, the justices have prevented matters affecting the courts from being placed on a statewide ballot. In Kremer v. Grant,\textsuperscript{201} a unanimous court, led by Justice Papadakos, enjoined a proposed constitutional amendment concerning judicial discipline from being placed on the ballot.\textsuperscript{202} In Sprague v. Casey,\textsuperscript{203} the justices canceled judicial elections for both superior court and supreme court.\textsuperscript{204}

Neither of these two decisions is insupportable on the merits. The constitutional amendment at issue in Kremer, was first ap-
proved by the General Assembly on June 29, 1990.205 Article XI of the state constitution requires that, once adopted by the General Assembly, proposed constitutional amendments shall be published three months before the next general election in at least two newspapers in every county.206 Then the same proposed amendment must be approved again by the legislature.207

There was no real dispute in Kremer that the technical requirements of article XI had not been fulfilled. The secretary of the commonwealth did not mail the required advertisements until four days before the three month deadline.208 For a variety of reasons, only a handful of the advertisements ran by the August 6, 1990 date.209 The rest ran during the month of August, but not three months before the election, as the constitution requires.210 Thus, although there were arguments on the other side,211 the court's legal analysis in blocking an eventual vote on the constitutional amendment certainly was defensible.

But, a plausible legal position is really not enough to justify the court's action. The amendment at issue was a toughening of judicial discipline at a time when one of the supreme court justices,
Justice Larsen, was under investigation. Delaying the vote on the amendment could have had the effect of retaining the old forum to hear his case. Furthermore, as the reader can see, the court that was so lax about article III to obtain a pay raise,\textsuperscript{212} began to vigorously and technically enforce article XI in order to block tougher judicial discipline. This does tend to create an impression of self-interest among the justices.

*Kremer* was one of those cases in which the court should have deferred to the legislature’s judgment concerning the fulfillment of article XI’s requirements, especially since the text provides that amendments shall be presented “as the General Assembly shall prescribe . . . .”\textsuperscript{213} The amendment process is undeniably important, but more important is retaining the confidence of the people in their control over the courts. Where constitutional amendments are aimed at curbing perceived abuses by judges, the courts should refrain from interference unless, of course, minority groups or fundamental rights are threatened. Neither of these conditions applied in *Kremer*.

The second case, *Sprague v. Casey*,\textsuperscript{214} presented a situation in which judicial intervention was more justified than in *Kremer*. There had been one vacancy in superior court and one in the supreme court and an election to fill these vacancies had been scheduled for November, 1988.\textsuperscript{215} But the constitution is not at all ambiguous about requiring that such replacement elections take place in a “municipal” election, which is to say an election in an odd-numbered year.\textsuperscript{216} The justices unanimously canceled the elections

\begin{footnotesize}
\begin{enumerate}
\item See notes 184-200 and accompanying text.
\item Pa. Const. art. XI, § 1(a). See note 206 for the complete text.
\item 550 A.2d 184 (Pa. 1988).
\item *Sprague*, 550 A.2d at 186.
\item Article V, sections 13(a) and (b) provide as follows:
\begin{enumerate}
\item Justices, judges and justices of the peace shall be elected at the municipal election next preceding the commencement of their respective terms of office by the electors of the Commonwealth or the respective districts in which they are to serve.
\item A vacancy in the office of justice, judge or justice of the peace shall be filled by appointment by the Governor. The appointment shall be with the advice and consent of two-thirds of the members elected to the Senate, except in the case of justices of the peace which shall be by a majority. The person so appointed shall serve for a term ending on the first Monday of January following the next municipal election more than ten months after the vacancy occurs or for the remainder of the unexpired term whichever is less, except in the case of persons selected as additional judges to the Superior Court, where the General Assembly may stagger and fix the length of the initial terms of such additional judges by reference to any of the first, second and third municipal elections more than ten months after the additional judges are selected. The manner by which any additional judges are selected shall be provided by
\end{enumerate}
\end{enumerate}
\end{footnotesize}
and rescheduled them for November, 1989.\textsuperscript{217}

No one can fault the court on the merits.\textsuperscript{218} And, if the case had not involved a supreme court vacancy, no one could fault the court at all. But here again, the potential for judicial self-seeking was definitely present.

At the time Sprague was decided, the court had a four-justice majority of democrats from Allegheny County. That number could not have grown in 1988 as things stood because both majority party candidates—Anita Brody and Allen Ertel—were from other parts of the state. By rescheduling the election to November 1989, the court made it possible for Ralph Cappy, a fifth democrat from Allegheny County, to be elected to the court.

It is true that canceling the election was not enough to ensure Justice Cappy's election. Nor could the justices confidently have predicted that result. But, certainly, no Allegheny County democrat was going to be elected to the court in 1988. Thus, canceling the election was the action the justices would have taken had they been determined to add to the Western Pennsylvania dominance on the court. For this reason, the decision in Sprague made the justices look bad even though their decision was proper on the merits.

There were numerous grounds in Sprague, including laches, or even a general equitable consideration of the lateness of the lawsuit, to have permitted the court to announce the timing rule without canceling the election. In retrospect, the justices should have done so.

\section*{V. State Constitutional Interpretation}

As stated at the outset, the most important role of a state supreme court is interpreting its state constitution. In this field, a state court is free from federal oversight unless the interpretation broaches federal rights. In this field, a court is free from direct oversight by the legislators and even the people, except by the extraordinary process of amendment or the rare case of removal. In the field of state constitutional law, a court has the obligation to express the fundamental hopes of the people of its state, as these

\begin{footnotesize}
\begin{itemize}
\item This section for the filing of vacancies in judicial offices.
\item Pa. Conv. art. V, §§ 13(a) & 15(b).
\item Sprague, 550 A.2d at 186.
\item Indeed, at the time this author was one of the voices calling for the court to look into the matter of timing. See Bruce Ledewitz, \textit{is 88 Supreme Court Election Permissible? Under Pa. Law?}, 11 \textit{Pa. Law J. Rep.}, No. 21 (May 23, 1988) at 3.
\end{itemize}
\end{footnotesize}
hopes have been embodied in the state’s fundamental law. This is indeed a great responsibility.

This author believes the Supreme Court of Pennsylvania is failing to carry out its responsibility in the field of interpretation of the state constitution. This statement does not mean that certain decisions in particular areas are badly reasoned or otherwise unpersuasive. That will be true of any court from the perspective of any observer. Rather, in three broad areas, the court has failed to create a coherent context in which specific interpretations can take place. These three areas are: approaches to interpretation, state action, and the role of judicial review in economic and social regulation.

The failure of the court to carry out its role in these areas is serious in its own right. This failure, however, goes further. The careful unfolding of a constitutional tradition requires judicial patience and discipline. It requires that the justices look to the big picture in the long run and not concentrate solely on how this or that case comes out. In addition, it requires a genuine respect for the historical development of precedent. If a justice believes “I am the law,” it is difficult for the justice to see his or her decisions as links in a chain and to strive to place those decisions within a tradition. In these regards, the justices of the supreme court fail. They fail utterly and repeatedly by reason of lack of modesty rather than by lack of ability.

A. Approaches to State Constitutional Interpretation

During the 1980s, interpretation of state constitutions enjoyed newfound interest. In response to this resurgence, some state courts began to think seriously about how state constitutions ought to be interpreted and began to communicate expectations to the bar about how such issues were to be presented.

The Supreme Court of Pennsylvania came fairly late to this sort of self-awareness. But in Commonwealth v. Edmunds, the court finally seemed to create a framework for state constitutional development by declaring:

[In each case hereafter implicating a provision of the Pennsylvania Constitution, ... litigants are to] brief and analyze at least the following four factors:

1) text of the Pennsylvania constitutional provision;
2) history of the provision, including Pennsylvania case-law;
3) related case-law from other states;
4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.\textsuperscript{222}

Now, while it is true that \textit{Edmunds} never promised that future judicial opinions will actually reflect the four factors that it required, the expectation that the judges will do so is certainly a reasonable one. One ought, after \textit{Edmunds}, at least see traces of the four factors in opinions. It is also to be expected that factors outside these four will not usually seem to provide the greatest weight in state constitutional law development. Otherwise, why set forth four factors?

In fact, \textit{Edmunds} has not brought much coherence to judicial opinions in the area of state constitutional development, though for all the bar knows, \textit{Edmunds} may have greatly improved briefs and arguments presented to the courts. It is possible to pinpoint three contexts in which the four factors could be helpful in the future, but have not been utilized by the court.

First, although the \textit{Edmunds} opinion says that its factors are to be looked at “each time a provision of that fundamental document is implicated,”\textsuperscript{223} \textit{Edmunds} itself arises out of a particular state constitutional law context—when the court must decide whether to follow a federal precedent in interpretation of a related state constitutional provision.\textsuperscript{224} This context may exhaust the application of \textit{Edmunds}. It may turn out that \textit{Edmunds} does not apply, for example, to the separation of power field, because there, federal precedent usually counts for little. In two recent court funding cases that examined the court’s “inherent” power to order county authorities to fund local courts at acceptable levels, the \textit{Edmunds} factors played no role.\textsuperscript{225} At this point, one would not expect to see

\begin{itemize}
\item[(222)] \textit{Edmunds}, 586 A.2d at 896.
\item[(223)] \textit{Id.} at 894-95.
\item[(224)] In \textit{Edmunds}, the issue was whether to follow United States v. Leon, 468 U.S. 897 (1984), and to adopt a good faith exception to the exclusionary rule. The court concluded that a good faith exception would violate article I, section 8. \textit{Edmunds}, 586 A.2d at 894-95. See also notes 234-244 and accompanying text.
\end{itemize}
Edmunds mentioned in cases touching on institutional powers, nor those involving state constitutional provisions that plainly lack any federal parallel, such as the public education provision. It may even be that Edmunds does not apply if federal and state provisions reach the same result.

There are cases that arise in analogous circumstances to those of Edmunds itself, but that neither cite Edmunds nor in any obvious way take into account the Edmunds factors. For example, in Lyness v. State Board of Medicine, the justices held that the Pennsylvania "notion" of due process was violated by the combining of prosecutorial and adjudicative functions within the State Board of Medicine. Although the opinion was written by Justice Cappy, the author of Edmunds, it did not acknowledge until a footnote toward the end of the opinion, that one way of framing the issue in the case would be whether the Pennsylvania courts should follow the approach of the United States Supreme Court. The same omission of Edmunds and its factors occurred in two 1991 zoning cases: Pennsylvania Northwestern Distributors, Inc. v. Zoning Hearing Board, in which the court, virtually alone among the states, rejected any form of amortization of non-conforming cases; and the original historic zoning case, since reversed, United Artists Theater Circuit, Inc. v. Philadelphia (United

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229. Lyness, 605 A.2d 1204. Since the Pennsylvania Constitution has no due process clause, a fact that the justices have never permitted to get in their way, all that could be violated is our "notion" of due process. The justices need to start over in the due process and equal protection fields—which we also lack—by taking a fresh look at the text of the Pennsylvania Constitution.

230. Id. at 1210, 1215 n.15. Justice Cappy noted: Appellee here relies upon the decision of the U. S. Supreme Court in Withrow v. Larkin, 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). In Withrow, our federal brethren seemingly embraced a different view of due process under the United States Constitution. However, Withrow is not binding upon this Court in determining the meaning of the distinct due process guarantees under the Pennsylvania Constitution and related case-law. Indeed, our decision in Dusia was handed down several months after Withrow. Thereafter, we denied a petition for rehearing of Dusia, indicating our high level of comfort with Pennsylvania law.


Artists II, in which the court declined to follow Penn Central Transportation Co. v. New York City.\textsuperscript{233}

There is nothing illegitimate in the reasoning of any of these cases. They were simply decided by relying upon Pennsylvania precedent. That by itself, however, is enough to indicate that the Edmunds structure is too formal and unwieldy to apply consistently.\textsuperscript{234} Edmunds is perhaps more trouble than it is worth. Certainly the superior court has no business treating the failure to brief issues in the Edmunds style as a form of waiver,\textsuperscript{235} as if litigants could be certain just when Edmunds applies and how to use it. The justices need to create a more flexible structure or to clarify the application of Edmunds.

But the most surprising aspect of the Edmunds experience is that the four factors have not banished an older conception of state constitutional law—that the court should follow federal precedent unless there were some extremely persuasive reason not to. This position is associated with Justice Hutchinson, who articulated it in dissent in 1983 in Commonwealth v. Sell,\textsuperscript{236} stating “absent compelling reason, textual or otherwise, I believe the interests of this nation are best served by maintaining common standards of constitutional law throughout its separate jurisdictions.”\textsuperscript{237}

Justice McDermott, dissenting in Edmunds, took the same approach, saying that “[t]he 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.”\textsuperscript{238}

This position of extreme deference to the United States Supreme Court, particularly insofar as it requires a textual difference before allowing a departure from federal constitutional approaches, should not have survived Edmunds. The four factors in Edmunds do not in any sense defer to the United States Supreme Court’s
interpretation of parallel provisions nor emphasize slight variations in text between the Pennsylvania and United States Constitutions.

Nevertheless, even after Edmunds, these ideas remain as a competing conception of state constitutional adjudication. In 1985, Justice Hutchinson was able to write his “test” into law in Commonwealth v. Gray,239 which adopted the “totality of the circumstances” test of Illinois v. Gates240 as the proper standard for interpretation of probable cause under article I, section 8 of the Pennsylvania Constitution:

While we can interpret our own constitution to afford defendants greater protections than the federal constitution does, see, e.g., Commonwealth v. Sell, 504 Pa. 46, 63-64, 470 A.2d 457, 467 (1983) (collecting cases), there should be a compelling reason to do so. See id. at 70, 470 A.2d at 470 (Hutchinson, J., dissenting). 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 Article I, Section 8 of the Pennsylvania Constitution that would require us to expand the protections afforded under the federal document.241

Since Gray presented a competing vision of state constitutional interpretation, the Edmunds opinion should have distinguished or disapproved its approach. While Gray was discussed in Edmunds for its implications for the good faith exception issue,242 Gray’s interpretative aspects were ignored. Thus Gray’s language sits there, just as authoritative as Edmunds, but representing a completely different world view. Worse, Justice Cappy, the author of Edmunds, himself used language similar to that of Gray in his dissent in the original United Artists opinion:

I note that the majority opinion herein does not address the holding of the United States Supreme Court decision in Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed 2d 631 (1978), but rather focuses on the dissent. In Penn Central, the Court held, inter alia, that the New York City Landmark’s Preservation Law did not constitute a “taking” under the Fifth Amendment to the United States Constitution that would require “just compensation.” Although Penn Central was decided on federal constitutional law and the majority has decided the case sub judice under state constitutional law, I do not believe that the language of our state constitution necessarily mandates a different outcome on the issue of “taking.”243

241. Gray, 503 A.2d at 926.
242. Edmunds, 506 A.2d at 891 n.3.
Thus, the court does not seem to appreciate fully the potential of *Edmunds* to replace formalism in state constitutional analysis in favor of a flexible application of other factors.344 The justices owe the rest of us more care in the resolution of these methodological issues.

B. **State Action**

One of the most significant issues in American constitutional law is state action. In terms of the federal Constitution:

The "state action" doctrine has long established that, because of their language or history, most provisions of the Constitution that protect individual liberty—including those set forth in Art. 1, §§9 and 10, the Bill of Rights, and the fourteenth and fifteenth amendments—impose restrictions or obligations only on government.345

The significance of the state action requirement is that without it, individuals and entities would be subject to constitutional restrictions. Without the state action doctrine, General Motors, for example, might be bound to give procedural due process in firing an employee. Shopping malls might be bound to permit political solicitation and so forth.

The requirement of state action to enforce the Fourteenth Amendment was declared by the United States Supreme Court in 1983.346 Although issues of the meaning of, and scope of, state action have changed and wavered since then, the need for state action has not been altered. In contrast, the Supreme Court of Pennsylvania has not managed to state a simple rule concerning state action. In Pennsylvania, the matter remains open.

There is early support for the proposition that state action is not required by the Pennsylvania Constitution. In *Spayd v. Ringing Rock Lodge*,347 the court held that a union was bound by the free

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344. Of course, the court could resolve the *Edmunds/Gray* dispute by expressly upholding Justice Hutchinson's approach. This author hopes this does not occur. One of the problems with the *Gray* formula is that it tends to overemphasize what are really minor and haphazard differences in constitutional texts. See e.g., *Commonwealth v. Ludwig*, 594 A.2d 281 (Pa. 1991), which rejected closed-circuit television testimony in child abuse cases in large part because the confrontation clause, article I, section 9, contains the phrase "face to face" which the Sixth Amendment does not contain. Whatever one thinks of the result in *Ludwig*, that textual variation is a weak basis on which to reach a result. Obviously "confront" could mean always in person while face to face could reflect a mere preference. If one looks to textual differences, however, *Ludwig* is the sort of decision one is likely to get.


346. CIVIL RIGHTS CASES, 109 U.S. 3 (1883).

347. 113 A. 70 (Pa. 1921).
expression clause in the Pennsylvania Constitution and could not expel a worker from union activities for the expression of his ideas, even if those ideas contradicted the legislative agenda of the union.

Spyd is a remarkable opinion, which, if applied to corporations, would result in the protection of non-union workers from certain forms of employer abuse. But Spyd has never been extended. It may be that Spyd represents nineteenth century judicial hostility against unions, and nothing more.

The most important modern Pennsylvania state action case is Commonwealth v. Tate. In Tate, Muhlenberg College, a private institution, invited FBI Director Clarence Kelley to the campus for a speech to which the public was invited. When peaceful protestors showed up as well, they were arrested, charged with defiant trespass and were convicted.

Because of the federal state action doctrine, Tate presented no First Amendment issue at all. The protestors were on private property. Against the school the protestors had no First Amendment rights. Nevertheless, the Supreme Court of Pennsylvania, in an opinion by Justice Roberts, reversed the trespass convictions. The opinion does not make it clear whether the reversal was based on constitutional grounds or statutory grounds. In part, the issue in the case was whether the requirement of a permit, which would not have been granted, could be considered a “lawful condition[ ]” for purposes of a statutory defense in the trespass statute. Also, in part the issue was whether the Pennsylvania Constitution would protect the defendants from criminal prosecution, perhaps aside from the statutory defense. While Tate did not resolve the state action issue, it certainly suggested that the Pennsylvania Constitution was relevant in contexts the federal constitution would not teach.

248. Spyd, 113 A. at 72.
250. Tate, 432 A.2d at 1384.
251. Id. at 1386. See also section 3503(b)(1) of the defendant trespass statute, which reads in part, “(1) A person commits an offense if, knowing that he is not licensed or privileged to do so, he enters or remains in any place to which notice against trespass is given by: (i) actual communication to the actor; . . . .” 18 Pa. Cons. Stat. § 3503(b)(1) (1990).
252. Tate, 432 A.2d at 1387.
253. Section 3503(c)(2) of the defendant trespass statute further provides: “It is a defense to prosecution under this section that the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining on the premises.” 18 Pa Cons. Stat. § 3503(c)(2) (1990).
254. Tate, 432 A.2d at 1387.
The next case in the state action line involved article I, section 28, Pennsylvania's Equal Rights Amendment, in the context of gender-based automobile insurance rates. In 1980, the superior court, applying pure federal state action analysis, held that because the approval of such gender-based rates by the Insurance Commissioner did not constitute state action, the rates could not be challenged under article I, section 28 as sex discrimination. Subsequently, the Insurance Commissioner disapproved gender-based insurance rates as "unfairly discriminatory" under section 3(d) of the Casualty and Surety Rate Regulation Act. In *Hartford Accident & Indemnity Co. v. Insurance Commissioner*, the Supreme Court of Pennsylvania, in an opinion by Chief Justice Nix, upheld the Commissioner's action.

Like Tate, Hartford involved a mixture of constitutional and statutory interpretation. In a sense the issue before the court was the interpretation of the statutory phrase, "unfairly discriminatory." Nevertheless, Chief Justice Nix dismissed the relevance of state action analysis in broad language, seemingly applicable to all of Pennsylvania constitutional law:

The "state action" test is applied by the courts in determining whether, in a given case, a state's involvement in private activity is sufficient to justify the application of a federal constitutional prohibition of state action to that conduct. The rationale underlying the "state action" doctrine is irrelevant to the interpretation of the scope of the Pennsylvania Equal Rights Amendment, a state constitutional amendment adopted by the Commonwealth as part of its own organic law. The language of that enactment, not a test used to measure the extent of federal constitutional protections, is controlling.

But how is this language-of-the-enactment test to be applied? In application to section 28, Chief Justice Nix held that the key language was "under the law." The under-the-law formulation defines the reach of section 28:


256. *Murphy*, 422 A.2d at 1104.


259. *Hartford*, 482 A.2d at 543.

260. Id. at 549.

261. Id.
Chief Justice Nix's broad language was later relied upon by the
commonwealth court to strike down the legislature's attempt to
amend the Rate Act to allow gender discrimination.268

The Hartford opinion could have represented a new approach to
the issue of the amenability of private persons and entities to con-
stitutional control. Hartford seemed to settle the state action issue
as a general matter and suggested a provision-by-provision analy-
sis, depending on the constitutional text.

Unfortunately, just two years later in Western Pennsylvania So-
cialist Workers 1982 Campaign v. Correctional General Life Ins-
urance Co.,264 the court muddied the state action issue, neither
repudiating Hartford, nor accepting it. In Socialist Workers, a
fractured court affirmed the denial of injunctive relief to political
campaign workers who sought to force the owners of a shopping
design wall to open the mall to their peaceful political petitioning.265
The lead opinion was written by Justice Hutchinson, joined by Justice
Flaherty.266 Justice Hutchinson reaffirmed Tate, but distinguished
it on the ground that the college in Tate had opened its premises
to the public for what amounted to political purposes, whereas the
mall owner had not done so.267 Chief Justice Nix would have reaf-

262. Id.
265. Socialist Workers, 515 A.2d at 1332-33.
266. As they had joined in concurring in Hartford. See Hartford, 482 A.2d at 550-51.
267. Socialist Workers, 515 A.2d at 1336-37.
268. Id. at 1342 (Nix, J., concurring and dissenting).
269. Id. at 1340-41.
for a regime of protection for private property and choices. This was similar to Justices McDermott and Zappala dissenting in *Hartford*. In retrospect, Justice Larsen, by changing sides in *Socialist Workers*, moved the court back toward a state action requirement.

Because only Chief Justice Nix actually mentioned *Hartford*, it is pure speculation whether *Socialist Workers* is a case about a mall for justices sentimental about retailers or a general retreat on the state action issue. Possibly, given the presence of state officials in both *Tate* and *Hartford* and their absence in *Socialist Workers*, the court is looking for some state involvement, even if it is less than that necessary to trigger a federal state action analysis.

The question in terms of our evaluation of the court is, why have these issues not been addressed in a comprehensive way? The justices have an obligation to acknowledge precedent and to explain their later votes in terms of prior case law. They have a responsibility to participate in a tradition of judicial review that does more than decide the issue of the day.

C. The Court’s Role in Pennsylvania Economic Life

The last methodological area reflecting the court’s inability to sustain consistent constitutional interpretation concerns the court’s role in Pennsylvania’s economic life. This area includes zoning and taxes in particular, and due process and equal protection in general. In the *Edmunds* line of cases, an underlying issue is whether the court will follow federal precedent. The court has wavered on this point. But more fundamentally, the justices must decide on the degree to which they will interfere with legislative choices in this area. Thus far, the court has not advanced a convincing justification for an activist role.

Since the late 1930’s, the United States Supreme Court has essentially deferred to the political judgments of legislatures, by refusing to use due process and equal protection to overturn regulations of business and other social and economic laws.270 In terms of federal review of substantive economic rights, “[t]he judiciary has abdicated the field.”271 This great deference extends to review of

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tax policy as well.\textsuperscript{272}

The Just Compensation Clause of the Fifth Amendment\textsuperscript{273} does still provide a basis for some limits on government regulation of economic interest. The last federal substantive due process case in 1937 was in form a just compensation case.\textsuperscript{274} But despite the potential of the Takings Clause to enhance judicial review of economic regulation, the United States Supreme Court has remained extremely deferential, upholding gross restrictions on the rights of property owners without compensation\textsuperscript{275} and holding economic regulation to be a compensatory taking when the regulation has reduced the value of the property essentially to zero.\textsuperscript{276} This approach may change, but at the moment remains the rule.\textsuperscript{277}

In this context, a state court has only two choices: to follow federal law and abdicate review of economic policy or to make its own way. The latter course reflects a minority of states.\textsuperscript{278} Reasonable people can certainly differ on the extent to which courts ought to be involved in this field. At the very least, a state court has the responsibility of acknowledging the trend of federal law and giving an account of why the different approach it is embracing is preferable.

Justice Roberts wrote in this way in two cases that could have set the trend in subsequent Pennsylvania development. In Pennsylvania State Board of Pharmacy v. Pastor,\textsuperscript{279} Justice Roberts' majority opinion acknowledged the trend in federal constitutional law but argued that state courts could legitimately take a more as-

\textsuperscript{272} See e.g., Nordlinger v. Hahn, 112 S. Ct. 2926 (1992) (upholding California's "acquisition value" system for property assessment because there is a "plausible policy reason" for the resulting dramatic disparities in taxation of properties of comparable value).

\textsuperscript{273} "[N]or shall private property be taken for a public use without just compensation." U.S. Const amend. V.


\textsuperscript{277} The United States Supreme Court is much more protective of property rights when even a limited form of physical invasion occurs. See Noileen v. California Coastal Comm'n, 483 U.S. 625 (1987) (requirement of a public easement is a taking).


\textsuperscript{279} 272 A.2d 487 (Pa. 1971).
sive role in substantive due process review:

Our adjudication begins with an acknowledgement that the day has long passed when the Due Process Clause of the Fourteenth Amendment could be used to indiscriminately strike down state economic regulatory statutes. While this test may mean that in the federal courts the “due process barrier to substantive legislation as to economic matters has been in effect removed,” the same cannot be said with respect to state courts and state constitutional law. This difference between federal and state constitutional law represents a sound development, one which takes into account the fact that state courts may be in a better position to review local economic legislation than the Supreme Court. State courts, since their precedents are not of national authority, may better adapt their decisions to local economic conditions and needs. And where an industry is of basic importance to the economy of a state or territory, extraordinary regulations may be necessary and proper.282

Similarly, in the seminal tax uniformity case, Amidon v. Kane,283 Justice Roberts’ majority opinion struck down the prevailing Pennsylvania Income Tax statute as a violation of the tax uniformity clause.284 While Justice Roberts did not actually distinguish federal equal protection and due process in applying uniformity, it was obvious that Pennsylvania uniformity demands a different analysis because the flaw in Amidon was that the tax utilized federal exemptions and deductions prohibited by Pennsylvania law.285 In addition, Justice Roberts cited no federal precedents in his reasoning.

In 1991, Justice Larsen also achieved what appeared to be a comprehensive view of judicial protection of property rights in zoning. In a pair of zoning cases, Pennsylvania Northwestern Distributors, Inc. v. Zoning Hearing Board286 and United Artists Theater Circuit, Inc. v. Philadelphia,287 since withdrawn, Justice Larsen strongly endorsed the rights of private property owners. In Northwestern Distributors, which held amortization of nonconforming uses to be “per se confiscatory,” Justice Larsen pointed out that the use of private property is protected by article I, section 1 of the Pennsylvania Constitution.288 His description of the police power

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280. Foster, 272 A.2d at 490 (footnote and citations omitted).
282. Amidon, 272 A.2d at 54.
283. Article VIII, section 1 provides, “[a]ll taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.” PA Const. art. VIII, § 1.
286. Northwestern Distributors, 584 A.2d at 1376.
was quite far from federal rational basis review: "In this Commonwealth, all property is held in subordination to the right of its reasonable regulation by the government, which regulation is clearly necessary to preserve the health, safety, morals, or general welfare of the people."  

In United Artists I, which struck down Philadelphia's historic zoning ordinance, Justice Larsen wrote: "A man's home and property used to be his castle. Because one's property was built in a certain architectural style or designed by a particular architect does not make it any less his castle." Justice Larsen further stated, in contradiction to article I, section 27 of the Pennsylvania Constitution that zoning in pursuit of aesthetic values "could... never constitute an exercise of the police power."  

Whatever one thinks of these decisions on the merits, Justice Larsen seems to understand very well that he is writing out of a Pennsylvania tradition different from that of federal law. Justice Larsen acknowledged that many jurisdictions permit amortization and cited a dissenting United States Supreme Court opinion in United Artists I. Thus, he and the rest of the justices must have been aware that they were going their own way. This clarity of vision could have served as a basis for further doctrinal development.

But these opinions have been undermined without being overruled, so that there is no way to tell what relationship Pennsylvania law has to federal law. Justice Larsen himself committed the egregious error of quoting from the Pastor opinion and then implying that due process and equal protection analysis are the same under Pennsylvania and federal law. Of course, this was precisely and expressly the opposite of what Justice Roberts had said in Pastor. Justice Larsen's purported state standard actually was not even the proper federal standard.

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287 Id. at 1374. See also Anastine v. Zoning Bd. of Adjustment, 190 A.2d 712 (Pa. 1963).
288 United Artists I, 595 A.2d at 13. (citation omitted).
289 Id. at 12 (citing Medinger Appeal, 104 A.2d 118, 122 (Pa. 1954)).
290 Northwestern Distributors, 584 A.2d at 1374.
293 Pastor, 272 A.2d at 490. Inexplicably, Justice Roberts joined the Hayes opinion without comment. Hayes, 425 A.2d at 420.
294 Compare the language in Hayes with the language approved the previous year in United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980).
in terms of taxation, the court has now repeatedly stated that uniformity and federal equal protection analysis are alike, despite the implication to the contrary in Amidon.\textsuperscript{285} The justices seem completely oblivious to the fact that if uniformity really were the same as equal protection, Amidon would have to be overruled and a progressive state income tax—the great shibboleth of Pennsylvania politics—would be constitutional.

What happened to Justice Roberts' Pastor opinion is characteristic of analysis under the Pennsylvania constitution. The court has often stated or implied that federal equal protection and state "equal protection" are identical,\textsuperscript{286} but the results do not always follow federal law.\textsuperscript{287}

The best example of the court's inability to formulate a simple and consistent starting point in the field of review of economic regulation is United Artists' Theater Circuit, Inc. v. Philadelphia ("United Artists II"),\textsuperscript{288} which replaced Justice Larsen's first opinion. It is embarrassing that the court repudiated its decision of just two years before, as if the first decision had been an oversight. But, far worse, Chief Justice Nix did not simply reach a different conclusion, his opinion bears no relationship to that of Justice Larsen. They share no starting point; there are no common analytic principles; the conclusions are completely different. All of this was done in silence, as if Justice Larsen's opinion had been quite proper at the time, but now the court must start over.

United Artists II actually fails more fundamentally than did the first opinion. Justice Larsen spoke out of a coherent Pennsylvania tradition. United Artists II, in contrast, overturned the first opinion but without presenting an alternative view of property and government that the courts are now expected to follow.\textsuperscript{289} No one


\textsuperscript{287} For example, in Monzo, which states that federal and state law are the same, a motel tax was struck down that obviously would satisfy the federal rational basis test. Monzo, 500 A.2d at 1096. See notes 164-67 and accompanying text. In Klein, the plurality struck down an obviously "rational" judicial compensation plan on the authority of James, which itself purports to represent federal law. Klein, 554 A.2d at 1224-25. See notes 180-181 and accompanying text.


\textsuperscript{289} Chief Justice Nix did state in United Artists II that article I, section 1 does not grant more protection to private property than does the Federal Constitution. Id. at 123.
knows, for example, if Northwestern Distributors has been overturned as well. Logically, since both decisions rested on a particular way of looking at property, they should fall together. But there is no indication that the justices are looking at things this way.

The court has been unable to define its role consistently. The justices have not shown the vision that defines a successful court. Unfortunately the idea of a craft of judging to which judges must conform is itself alien to the justices.

VI. Conclusion

The Supreme Court of Pennsylvania has been under intense attack this year. That attack has centered on the personal behavior of some of the justices, the way the court is run, the way the justices are selected and the way they are disciplined. These issues are certainly important. But it is also important to ask, how good or bad a court is it? How well do the justices do their jobs?

No one article could evaluate the recent work product of a state supreme court. This article has not attempted even an exhaustive evaluation of the court's work in the field of state constitutional law. Rather, this article has looked at cases dealing with the way the court views its own institutional authority, including the court's responsibility for creating a coherent constitutional tradition.

The picture that emerges is not a good one. The court is too ready to rely on its authority and too hesitant to defer to other branches of government. The court also does not perform well in the area of state constitutional interpretation, where its role is unique.

This article does not suggest possible reforms. What reforms could cause the justices to look at their role in a new way? It would have helped, however, if the state constitution had not exacerbated the problem of institutional power by granting the court broad powers in 1968. At the very least, article V, section 10 of the state constitution should be repealed—to be replaced by the simple statement:

The Supreme Court shall exercise such powers and perform such duties as may be imposed by law.

This statement could serve as the foundation of a limited role for judicial review in the economic field. But Chief Justice Nix said nothing about prior case law that held differently, including the 1991 zoning case closely related to United Artist I, Northwestern Distributors. See notes 284-291 and accompanying text. If United Artists II is meant to be a complete starting over, the court will have to say so.