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IN THE SUPREME COURT OF PENNSYLVANIA

Docket No. 159 MM 2017

LEAGUE OF WOMEN VOTERS OF PENNSYLVANIA, et al.,
***Petitioners*,**

v.

THE COMMONWEALTH OF PENNSYLVANIA, et al.
***Respondents*.**

BRIEF OF AMICI CURIAE, PENNSYLVANIA AFL-CIO AND OTHER PENNSYLVANIA UNIONS IN SUPPORT OF PETITIONERS

Upon Review of the Commonwealth Court's Recommended Findings of Fact and Conclusions of Law in Case No. 261 M.D. 2017

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I. STATEMENT OF INTEREST OF AMICI CURIAE

Pursuant to Pennsylvania Rule of Appellate Procedure 531, the following Amici Curiae submit this brief in support of Petitioners:[1] The Pennsylvania AFL-CIO is a federation of labor organizations whose affiliated local unions, district councils, regional councils, central labor councils and area labor federations represent over 800,000 working men and women across Pennsylvania. The American Federation of Government Employees represents 700,000 employees of the federal and District of Columbia governments, including many living and headquartered in Pennsylvania. AFSCME Council 13 and its affiliates represent approximately 65,000 employees of the Commonwealth of Pennsylvania and hundreds of public and private sector employers across Pennsylvania. The American Federation of Teachers Pennsylvania represents more than 36,000 Pennsylvanians working in educational institutions across the state, including the Philadelphia, Pittsburgh and Scranton School Districts, among others. The Association of Pennsylvania State College and University Faculties represents approximately 5,500 faculty and coaches employed by Pennsylvania's State System of Higher Education. The Communications

[1] No person or entity other than these Amici Curiae or their counsel has paid for the preparation of this brief or authored the brief, in whole or in part.

Workers of America ("CWA") District 2-13 services CWA Locals in five states and the District of Columbia, including 15,000 employees in Pennsylvania. The SEIU Pennsylvania State Council represents nearly 60,000 workers throughout Pennsylvania in healthcare, public services, property services, school employees, laundry and distribution services. The United Food and Commercial Workers, Local 1776, represents employees of the Commonwealth, as well as other public and private sector employees across the Commonwealth, totaling 21,000 workers. UNITEHERE International is responsible for servicing all UNITEHERE Locals, including those representing approximately 6,000 workers in Pennsylvania.

Together, the Amici Curiae represent hundreds of thousands of public and private sector employees who, along with their families, comprise a very substantial portion of the Pennsylvania electorate. Among their goals are the protection, assurance and advancement of the cause of social and economic justice for the residents and citizens of our Commonwealth at the workplace, in civic affairs, in their Pennsylvania communities, and in political participation through the free and fair elections that are critical to our representative form of government. Therefore, the Amici Curiae have a direct and substantial interest in Petitioners' challenge to the extremely gerrymandered congressional districts adopted in 2011 which were

engineered not to serve the interest of the electorate in full and equal political participation through representatives of their own choosing, but instead solely to serve the goal of partisan control. This brief is offered to provide the Court with an overview and analysis of the historical and legal foundations for the state constitutional provisions at issue, which show that our constitution's framers intended all elections to be free and fair, with all voters having an equal voice in the process, regardless of party affiliation.

II. SUMMARY OF ARGUMENT

Ultimately, this case is about Petitioners' and all Pennsylvanians' right to meaningfully participate in the voting process by which we select our representatives to the U.S. Congress. Amici Curiae file this brief in support of Petitioners' position that this Court should apply a separate legal analysis from that required under the federal constitution in determining the breadth and applicability of Pennsylvania constitutional provisions on free speech, assembly, voting, equality, and non-discrimination to the issue of political gerrymandering. As argued by Amici Curiae, these state constitutional provisions provide far greater protections than the federal constitution and bar the type of hyper-partisan political gerrymandering achieved by the General Assembly in 2011. By improperly relying upon federal precedent in interpreting these state constitutional provisions, the Commonwealth Court failed to recognize and enforce the Pennsylvania Constitution and the rights enshrined therein.

The legal history regarding the state constitutional provisions on the rights to free speech and assembly, voting and free and equal elections, and equality and non-discrimination demonstrate that they provide heightened protections beyond any analogous provisions in the federal constitution. Therefore, under this Court's instruction in *Commonwealth v.*

Edmunds, 526 Pa. 374, 586 A.2d 887 (1991) and its progeny, Petitioners' state constitutional claims deserve a separate legal analysis from the one employed by the Commonwealth Court to give them meaning and force. Additionally, because fundamental rights are involved, strict scrutiny should apply in analyzing the constitutionality of congressional districting in Pennsylvania.

By ignoring the unique constitutional history of these provisions, particularly the non-discrimination provision found in Article I, Section 26 of the Pennsylvania Constitution, the Commonwealth Court failed to effectuate the will of the framers of our constitution. Those framers believed that the principles of free speech, free association, voting, free and equal elections, equality, and non-discrimination are essential to ensure that the will of the people would be sovereign and their views and opinions on the political issues of the day would be heard by their elected representatives. Despite this unique history, this Court and the Commonwealth Court thus far have avoided giving these provisions their full and intended meaning. This Court should recognize the unique nature of our state constitutional provisions and finally give them the legal force they were meant to have.

III. ARGUMENT

The Pennsylvania Constitution affords more robust protections than the federal constitution for free speech and assembly, voting and free and fair elections, and equality and non-discrimination. Their inclusion in the original and current state constitution ensures popular sovereignty and a representational democracy in our Commonwealth. They demand this Court interpret them separate and apart from the federal constitution. If so treated, the 2011 congressional plan cannot withstand constitutional scrutiny.

A. Pennsylvania's Constitutional Framework.

Pennsylvania enjoys the distinction of being among the first States to create meaningful popular sovereignty whereby the people select their elected officials. Ken Gormley, *et al*., *The Pennsylvania Constitution: A Treatise on Rights and Liberties* 216 (2004); Matthew J. Herrington, *Popular Sovereignty in Pennsylvania 1776-1791*, 67 Temp. L. Rev. 575, 588-92 (1993); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 Temp. L. Rev. 541, 548-61 (1989). Pennsylvania's very first constitution, the Pennsylvania Constitution of 1776 ("1776 Constitution"), represented a radical break from governance by elites to governance by the people brought about by election of representatives:

"The [supporters of the 1776 Constitution] intended to bring the entire government – legislature and executive – within the control of the people, whom they naturally identified with themselves." Herrington, *supra*, at 588. The whole purpose of the effort of popular sovereignty was to make significant strides toward what President Lincoln would later describe as "a government by the people, for the people, and of the people." *Id*. at 580.

In 1776, Pennsylvania served as the "laboratory" of constitution-making for other States to observe. Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 85 (1969). That constitution reflected an "urban variant of republicanism that fostered egalitarianism as well as economic enterprise." Robert Shalhope, *Republicanism and Early American Historiography*, 39 Wm. & Mary Q. 334, 341 (3d ser. 1982*).* The document literally "mark[ed] the outer limits of the Revolution." Richard A. Ryerson, *Republican Theory and Partisan Reality in Revolutionary Pennsylvania: Toward a New View of the Constitutionalist Party,* in *Sovereign States in an Age of Uncertainty* 95, 96 (Ronald Hoffman & Peter J. Albert eds., 1981).

Today, the 1776 Constitution still forms the basis of Pennsylvania's current constitution. Its egalitarian quality has to do with the *structure* of the government as well as *popular participation in governing*

through voting and office-holding. The rights specified in both the Pennsylvania Declaration of Rights and the Frame of Government in the 1776 Constitution were aimed more at reinforcing republican government than at guaranteeing individual rights. Robert Palmer, *Liberties as Constitutional Provisions, 1776-1791*, in William Nelson & Robert Palmer, *Liberty and Community: Constitution and Rights in the Early American Republic* 64, 68 (1987). Among the primary means by which the 1776 Constitution achieved its goal of providing representational democracy were its provisions ensuring the rights to free speech, association, voting, free and equal elections, and equality.

The Declaration of Rights in the 1776 Constitution included provisions guaranteeing the rights of speech, press, assembly, and to petition the government for a redress of grievances. Section XII of the Declaration of Rights states: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." Pa. Const. of 1776, ch. 1 (Decl. of Rights), § XII. The 1776 Constitution was the first state constitution to protect "the freedom of speech and of writing." Livingston Rowe Schuyler, *The Liberty of the Press in the American Colonies Before the Revolutionary War* 77 (1905).

Additionally, the Declaration of Rights included a provision to protect the right to assembly and to petition the government for redress of grievances. Section XVI of the Declaration of Rights states "[t]hat the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance." Pa. Const. of 1776, ch. 1 (Decl. of Rights), § XVI. This provision was unique during the revolutionary period as only the Vermont Constitution of 1777 and the North Carolina Constitution of 1776 included a similar provision. Gormley, *supra*, at 251 n.3. Meaningful petitions to redress grievances can only be achieved if voices of the people can be heard – gerrymandered districts by their very nature undermine this goal.

Pennsylvania's original 1776 Declaration of Rights also reflected a number of equality concerns. Palmer, *supra*, at 68. This early, written enumeration of rights was influential in other States, as well as in Europe. *See* Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights* 85-91 (1977); George A. Billias, *American Constitutionalism and Europe, 1776-1848*, in *American Constitutionalism Abroad* 13 (1990). Section I of the 1776 Pennsylvania Declaration of Rights provided: "All men are born equally free and independent, and have certain

inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const. of 1776, ch. 1 (Decl. of Rights), § I. Only two others in the early group of newly-independent States that wrote constitutions included similar provisions in theirs: Virginia in 1776, several months prior to Pennsylvania, and Massachusetts in 1780. *See* Va. Const. of 1776, ch. 1 (Decl. of Rights), § 1; Mass. Const. of 1780, pt. I, art. I. These provisions set a pattern for later clauses now contained in many state constitutions.

Furthermore, the 1776 Constitution achieved its goal of representational democracy by extending the franchise to an entire class of individuals who had otherwise been barred from voting. Gormley, *supra*, at 216; Herrington, *supra*, at 580; Williams, *supra*, at 557. In a remarkable break from Pennsylvania's past as well as that of other fledgling States in the Americas, the 1776 Constitution extended the franchise to the non-propertied, making Pennsylvania among the first States to do so. Gormley, *supra*, at 216; Herrington, *supra*, at 580. As stated by one legal scholar:

> [The 1776 Constitution] undeniably lived up to its radical moniker . . . in the extension of the franchise. The dramatic reduction in property requirements brought thousands of farmers, artisans, and mechanics into the electorate for the first time and instigated the development of a new breed of

> politics and politicians. The masses were, suddenly, politically relevant.

Herrington, *supra*, at 580. Rather than limit the franchise to those who owned property, the 1776 Constitution allowed all freemen to vote, regardless of race, as long as they had paid taxes within the year prior to the election. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*, 329 (2000).

The 1776 Constitution also achieved greater participatory democracy through a provision that remains, although slightly modified, in our constitution to this day. Gormley, *supra*, at 216-17. That provision stated: "That all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or be elected into office." *Id*. at 217 (citing Pa. Const. of 1776, ch. 1 (Decl. of Rights), § VII).

As discussed below, all these provisions remain in some form in the current Pennsylvania Constitution, with most dramatically strengthened throughout our history. The rights to free speech, assembly, equality under the law, voting, and free and equal elections have further provided greater protections than any federal constitutional provisions with the adoption in 1967 of Article 1, Section 26 of the current Pennsylvania Constitution. Article

I, Section 26 now states: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right." Pa. Const. art. I, § 26. Article I, Section 26 reinforces the various civil rights, such as the right to free speech, the right to assembly, the right to equality, and the right to vote already protected in other provisions of the document. It declares that neither the Commonwealth, nor any municipalities will infringe on these basic liberties, or discriminate among those who exercise these rights, ensuring the continuation and health of popular sovereignty.

Despite all these constitutional protections, on December 22, 2011, the Pennsylvania General Assembly ("General Assembly") passed and then-Governor Thomas W. Corbett ("Governor") signed a new law, Act 131 of 2011 (Act of December 22, 2011, P.L. 599, 25 P.S. §§ 3596.101-.1510), commonly known as the Congressional Redistricting Act of 2011 ("2011 Plan"). A detailed description of the statute can be found in the Brief of the Petitioners filed on January 5, 2018, which the Amici Curiae incorporate by reference. The 2011 Plan effectuates hyper-partisan political gerrymandering, constituting an affront to the rights to free speech and assembly, voting and free and equal elections, and equality and non-discrimination enshrined in the Pennsylvania Constitution. Hyper-partisan

gerrymandering destroys these rights to exercise popular sovereignty. Instead, it ensures sovereignty by political party, in which one of the two major political parties control congressional districts based not on a battle of ideas, voter consideration of those ideas, and an election, but on gerrymandering.

B. This Court Must Engage in an Independent and Separate Analysis of the State Constitutional Provisions Protecting the Rights to Free Speech and Assembly, Voting and Free and Equal Elections, and Equality and Non-Discrimination.

This Court has long recognized that, "in interpreting a provision of the Pennsylvania Constitution, [the Court] is not bound by the decisions of the United States Supreme Court which interpret similar (yet distinct) federal constitutional provisions." *Edmunds*, 526 Pa. at 388, 586 A.2d at 894 (citations omitted). The U.S. Constitution establishes minimum levels of constitutional protections that may be meaningful when interpreting analogous state constitutional provisions. *Id.* "However, each state has the power to provide broader standards, and go beyond the minimum floor which is established by the federal Constitution." *Id.* (citation omitted). Recognizing this power, this Court often engages in independent state constitutional analysis. *Id.* at 389, 586 A.2d at 894. While it may "accord weight to federal decisions where they 'are found to be locally persuasive

and well reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees,' . . . [the Pennsylvania Supreme Court is] free to reject the conclusions of the United States Supreme Court so long as we remain faithful to the minimum guarantees established by the United States Constitution." *Id.*, 586 A.2d at 895 (citations omitted).

Noting that state constitutional provisions demand a separate analysis by litigants in a case invoking protections under the Pennsylvania Constitution, this Court has outlined the following four factors that parties should address concerning the state constitutional provisions at issue:

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.

See id. "Depending upon the particular issue presented, an examination of related federal precedent may be useful as part of the state constitutional analysis, not as binding authority, but as one form of guidance. However, ***it is essential that courts in Pennsylvania undertake an independent***

analysis under the Pennsylvania Constitution." *Id.* at 390-91, 586 A.2d at 895 (emphasis added). Part of the necessity of an *Edmunds* analysis is to determine the appropriate standard of review in cases involving individual rights. *See DePaul v. Commonwealth*, 600 Pa. 573, 591, 969 A.2d 536, 541 (2009) (recognizing the necessity of an *Edmunds* analysis to determine the appropriate standard of review when a litigant challenges a statute on grounds that it thwarts his or her right to freedom of expression under the state constitution).

Independent analyses of the Pennsylvania Constitution's provisions on free speech, assembly, voting, and free and equal elections, equality, and non-discrimination demonstrate that these provisions provide higher level of protections than the federal constitution. Thus, they all constitute fundamental rights that demand the highest standard of judicial review. For these reasons, the Commonwealth Court erred when it failed to employ the *Edmunds* analysis and to apply strict scrutiny in considering and evaluating Petitioners' state constitutional claims challenging the 2011 Plan. This conclusion is supported by the following *Edmunds* analysis.

C. The Text and History of the Relevant Pennsylvania Constitutional Provisions Demonstrate They Provide Greater Protections Than Analogous Provisions in the Federal Constitution.

1. Article I, Sections 7 and 20 Protect Pennsylvanians' Right to Free Speech and Assembly.

Article I, Section 7 provides expansive protections for the right to free speech. It states:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

Pa. Const., art. I, § 7. Similarly, Article I, Section 20 ensures Pennsylvanians may peaceably assemble and seek redress of grievances from their government. That Section states: "The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance." Pa. Const., art. I, §

20. Similar provisions were included in the 1776 Constitution. *See* Pa. Const., ch. 1 (Decl. of Rights), §§ XII, XVI.

This Court has long recognized that Article I, Section 7 provides far more protections for free speech than the First Amendment to the U.S. Constitution. *See Uniontown Newspapers, Inc. v. Roberts*, 576 Pa. 231, 244, 839 A.2d 185, 193 (2003) ("Article I, Section 7 has been recognized as providing broader freedom of expression than the federal constitution."); *Melvin v. Doe*, 575 Pa. 264, 272 n.9, 836 A.2d 42, 47 n.9 (2003) (This Court "has repeatedly determined that Article I, section 7 affords greater protections to speech and conduct in this Commonwealth than does its federal counterpart, the First Amendment."); *Pap's A.M. v. City of Erie*, 571 Pa. 375, 399, 812 A.2d 591, 605 (2002) (Article I, Section 7 "is an ancestor, not a stepchild of the First Amendment."). Pennsylvania's free speech and assembly provisions constitute a bulwark to ensure popular sovereignty and representational democracy. *See* Gormley, *supra*, at 259.

Undoubtedly, the 2011 Plan constitutes a violation of the free speech and assembly protections afforded under Article I, Sections 7 and 20 of the Pennsylvania Constitution. (For the Court's convenience, a copy of

the chapter on Article I, Sections 7 and 20 from Gormley and his coauthors' treatise is attached to this brief as Exhibit "A.")

2. Article I, Section 5 Protects Pennsylvanians' Rights to Vote and Free and Equal Elections.

Article I, Section 5 of the Pennsylvania Constitution states: "***Elections shall be free and equal***; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Pa. Const. art. I, § 5 (emphasis added). There is no similar provision in the federal constitution. "'Free and equal' elections were considered, by leaders of the Revolutionary era responsible for the creation of the first Pennsylvania Constitution, to be a cornerstone of the democratic republic created by the severance of the colonies from England." Gormley, *supra*, at 215. (For the Court's convenience, a copy of the chapter on Article I, Section 5 from Gormley and his coauthors' treatise is attached to this brief as Exhibit "B.") Partisan gerrymandering destroys free and equal elections, because the votes of one political party in any congressional district are rendered meaningless.

The 1776 Constitution represented a radical break in governance in Pennsylvania and America at large. Gormley, *supra*, at 215; Herrington, *supra*, at 580. Prior to its adoption, Pennsylvania, under the Frame of

Government of Pennsylvania, only allowed persons to vote who were free males of at least twenty-one (21) years of age who owned either fifty (50) acres or were worth at least fifty (50) pounds. *Gormley*, *supra*, at 216. The Declaration of Rights in the 1776 Constitution greatly expanded the franchise with a provision that stated: "That all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or to be elected into office." Pa. Const. of 1776, ch. I (Decl. of Rights), § VII.

The 1790 Constitution revised the provision to state: "That the general, great and essential principles of liberty and free government may be recognised and unalterably established, WE DECLARE . . . That elections shall be ***free and equal***." Pa. Const. of 1790, art. IX, § V (emphasis added). This provision was modified in later constitutional conventions, but the requirement that elections be free and equal remains to this day. Gormley, *supra*, at 217 (citing Pa. Const. of 1790, art. IX, § V). During the 1837-1838 constitutional convention, an attempt to revise this provision failed, and the provision remained unaltered in the Pennsylvania Constitution of 1838. *Id*. at 218.

At the 1872 constitutional convention, the delegates adopted a change to the provision to state that military and civil authorities may not interfere with the franchise. With the adoption of the Pennsylvania Constitution of 1874, the provision read: "Elections shall be free and equal; ***and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage***." *Id.* at 219; Pa. Const. of 1874, art. I, § 5 (emphasis added). This provision, that further enhances the protections of Pennsylvanian's right to vote as they existed prior to 1874, was approved by the people and remains in our state constitution to this day as Article I, Section 5. *Id.*; Pa. Const., art. I, § 5. The 2011 Plan is a clear attempt by "civil authorities" – the General Assembly and Governor – to "interfere to prevent the free exercise of the right of suffrage."

This Court has consistently defined "free and equal elections" to mean elections in which constitutionally qualified voters are not denied the franchise and every voter has the same right as any other voter. In *Winston v. Moore*, 244 Pa. 447, 91 A. 520 (1914), this Court declared:

> In a general way it may be said that elections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike: ***when every voter has the same right as any other voter;*** when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or

> make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.

244 Pa. at 457, 91 A.2d at 523 (emphasis added). This Court has quoted this language with approval on several occasions. *See, e.g.*, *In re 1991 Pennsylvania Legislative Reapportionment Comm'n*, 530 Pa. 335, 356, 609 A.2d 132, 142 (1992); *City Council of Bethlehem v. Marcinin*, 512 Pa. 1, 8, 515 A.3d 1320, 1323 (1986); *Shankey v. Staisey*, 436 Pa. 65, 69, 257 A.2d 897, 899 (1969).

Given this history, it is hardly surprising that this Court has recognized that voting and elections, as protected in Article I, Section 5, are fundamental rights. In fact, this Court has quoted with approval the Kansas Supreme Court on the fundamental nature of voting and elections in a representative democracy.

> The right to vote in any election is a personal and individual right, to be exercised in a free and unimpaired manner, in accordance with our Constitution and laws. ***The right is pervasive of other basic civil and political rights, and is the bed-rock of our free political system.*** Likewise, it is the right of every elector to vote on amendments to our Constitution in accordance with its provisions. This right is a right, not of force, but of sovereignty. It is every elector's portion of sovereign power to vote on questions submitted. Since the right of suffrage is a fundamental matter, any alleged restriction or infringement of that right strikes at the heart of orderly constitutional government, and must be carefully and meticulously scrutinized.

Bergdoll v. Kane, 557 Pa. 72, 84, 731 A.2d 1261, 1269 (1999) (quoting *Moore v. Shanahan*, 207 Kan. 645, 649, 486 P.2d 506, 511 (1971)). Certainly, this two-hundred-year-old state constitutional provision regarding the fundamental rights to voting and free elections does not permit a districting system that renders the votes of one political party meaningless.

3. Article I, Section 1 Protects Pennsylvanians' Right to Equality Under the Law.

Section 1 of the 1776 Pennsylvania Declaration of Rights provided: "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const. of 1776, ch. 1 (Decl. of Rights), § I. The provision as written survives in our current Pennsylvania Constitution. Pa. Const., art. I, § 1.

Pennsylvania's Article I, Section 1 was far from an equal *protection* clause. Not only did it originate almost one hundred years before the federal Fourteenth Amendment, but it was also a statement of revolutionary, republican, egalitarian ideology. In its negative sense, it reflected the anti-aristocratic rhetoric that predominated in Pennsylvania,

particularly in Philadelphia, during the agitation for independence, the elections for the convention to frame the constitution, and the drafting of the constitution itself. Williams, *supra*, at 546-47. In its positive sense, Article I, Section 1 reflected the "new beginning" quality of optimistic, republican idealism. But it did not concern itself with the Fourteenth Amendment era problems of the people being *denied* the equal *protection* of the laws, and, at least in the minds of its drafters, had little or nothing to do with race or sex discrimination.

The 1776 republican equality doctrine expressed in Article I, Section 1 was complex. As Gordon Wood has explained:

> The doctrine possessed an inherent ambivalence: on one hand it stressed equality of opportunity which implied social differences and distinctions; on the other hand it emphasized equality of condition which denied these same social differences and distinctions. These two meanings were intertwined in the Americans' use of equality and it is difficult to separate them….
>
> Equality was thus not directly conceived of by most Americans in 1776 . . . as a social leveling…. Rather it was considered to be an equality, which is adverse to every species of subordination beside that which arises from the difference of capacity, disposition, and virtue. By republicanism the Americans meant only to change the origin of social and political preeminence, not to do away with such preeminence altogether…. In a republican system only talent would matter.

Wood, *supra*, at 70-75; *see also* Gormley, *supra*, at 73 ("Section 1 has no precise counterpart in the United States Constitution…. [I]t resembles the sweeping language of the preface to the Declaration of Independence….") (For the Court's convenience, a copy of the chapter on Article I, Section 1 from Gormley and his coauthors' treatise is attached to this brief as Exhibit "C.")

Referring to provisions that were similar to Pennsylvania's, and with like origins, David Schuman has noted:

> An "equal protection" guarantee typically emanates from the privileged as a self-limiting gesture of largess toward the burdened: *"[W]e* hereby grant equal treatment to *you."* It is a *promise* to adhere to the equality principle….
>
> Conversely, state "equal privileges and immunities" provisions typically emanate from the non-privileged as a gesture of warning to those who have or seek special benefits; they are an implied *threat* to adhere to the equality principle.

Wood, *supra*, at 70-75.

The same is true of Pennsylvania's Article I, Section 1. Yet, in cases such as *Love v. Borough of Stroudsburg*, 528 Pa. 320, 597 A.2d 1137 (1991), this Court failed to recognize the distinctions between Article 1, Section 1 and the Fourteenth Amendment. Instead, this Court has analyzed claims brought under Article I, Section 1 in the same manner as federal

courts analyze Fourteenth Amendment due process and equal protection claims. No explanation has been offered as to why the "same standards" approach should apply with respect to this state constitutional provision. An *Edmunds* analysis demonstrates it should not. A proper analysis of this state constitutional provision demonstrates it protects fundamental rights such as elections and voting and prohibits the type of hyper-partisan gerrymandering exhibited in the 2011 Plan.

4. Article I, Section 26 Protects Pennsylvanians Against the Denial or Discrimination of Their Civil Rights.

In 1967, a mere 50 years ago, the Legislature and people of this Commonwealth adopted an addition to the Pennsylvania Declaration of Rights, Article I, Section 26, that states: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of ***any civil right***, nor discriminate against any person in the exercise of ***any civil right***." Pa. Const., art. I, § 26 (emphasis added). There is no similar provision in the federal constitution. By its very language, this modern provision is designed to prevent the Commonwealth and its political subdivisions from depriving Pennsylvania citizens of their civil rights and/or discriminating against them in the exercise of their civil rights, including their rights to free speech, assembly, voting, free and equal elections, and equality

under the law. Pa. Const., art. I, § 26; *see also* Gormley, *supra*, at 743. The 2011 Plan does exactly that, by relegating the votes of those in one political party to the trash bin.

However, instead of recognizing under an *Edmunds* analysis that this provision provides greater protection than that afforded by the federal equal protection provision, this Court has found that Article I, Section 26 and the federal equal protection clause provide analogous constitutional protections. *See Erfer v. Commonwealth*, 568 Pa. 128, 138-39, 794 A.2d 325, 332 (2002) (contending that Article I, Section 26 "is conterminous" with the federal equal protection clause); *Love*, 528 Pa. at 325, 597 A.2d at 1139 (1991) (stating that a claim under Article I, Sections 1 and 26 is analyzed under the equal protection standards of the federal constitution); *Fischer v. Dep't of Pub. Welfare*, 509 Pa. 293, 502 A.2d 114 (1985) (finding that the "most appropriate analysis [of a claim brought under Article I, Section 26] is that utilized by the United States Supreme Court" when reviewing a statute under the federal equal protection clause).

Nonetheless, as this Court noted with respect to the later-enacted equal rights amendment, Article 1, Section 27 is "a state constitutional amendment adopted by the Commonwealth as part of its

organic law. The language of that enactment, not a test used to measure the extent of federal constitutional protections, is controlling." *Hartford Accident & Indemnity Co. v. Ins. Comm'nr of Commonwealth*, 505 Pa. 571, 586, 482 A.2d 542, 549 (1984). Later, in *Edmunds*, this Court declared that "it is essential that courts in Pennsylvania undertake an independent analysis under the Pennsylvania Constitution." 526 Pa. at 390-91, 586 A.2d at 895. Even after *Edmunds*, however, the cases addressing Article I, Section 26 have not engaged in the appropriate analysis. *See Erfer*, 568 Pa. at 138-39, 794 A.2d at 332; *Love*, 528 Pa. at 325, 597 A.2d at 1139; *Fischer*, 509 Pa. at 311, 502 A.2d at 123-24.

The lack of an *Edmunds* analysis is particularly striking given that "[t]he express ban on discrimination against persons in the exercise of their civil rights, in addition to prohibiting the denial of rights, provides a strong textual basis for extending such protection beyond the federal equal-protection doctrine." Gormley, *supra*, at 743. Furthermore, "[t]he legislative history of the 1967 provision is sparse, but one conclusion clearly emerges: The protection of Section 26 was designed to reach beyond that provided by the Fourteenth Amendment and beyond the existing equality provisions

(Article I, Section 1 and Article III, Section 32[2]) in the state Constitution." *Id*. Now is the time to conduct the *Edmunds* analysis of Article I, Section 26.

In the seminal work on the Pennsylvania Constitution, *The Pennsylvania Constitution: A Treatise on Rights and Liberties*, Professor Gormley and his coauthors provide the most comprehensive history on the consideration and adoption of Article I, Section 26, which demonstrates that the provision is not the equivalent of the federal equal protection claim:

> The predecessor of Article I, Section 26 originated as a 1963 proposal by the Committee on the Bill of Rights of the Pennsylvania Bar Association's "Project Constitution." The Committee proposed Article I, Section 26 at the same time

[2] Article III, Section 32 states:

> The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General assembly shall not pass any local or special law:
>
> 1. Regulating the affairs of counties, cities, townships, wards, boroughs, or school districts.
> 2. Vacating roads, town plats, streets or alleys.
> 3. Locating or changing county seats, erecting new counties or changing county lines.
> 4. Erecting new townships or boroughs, changing township lines, borough limits or school districts.
> 5. Remitting fines, penalties and forfeitures, or refunding moneys legally paid into the treasury.
> 6. Exempting property from taxation.
> 7. Regulating labor, trade, mining or manufacturing.
> 8. Creating corporations, or amending, renewing or extending the charters thereof.
>
> Nor shall the General Assembly indirectly enact any special or local law by the partial repeal of a general law; but laws repealing local or special acts may be passed.

Pa. Const., art. III, § 32.

it recommended redrafting Article I, Section 10 to include a separate “clause the wording of which is copied, with the addition of an ‘equal protection’ clause, from the Federal Constitution.”

The Governor’s Commission on Constitutional Revision, however, did not include the proposed “equal protection” language, presumably because it duplicated the existing guarantees provided by Article I, Section 1 and by Article III, Section 32. By contrast, it proposed the adoption of Article 1, Section 26. Thus, at its inception, Article I, Section 26 was regarded as distinct from, and supplementary to, the existing equality guarantees in the state and federal constitutions. The existing provisions must have been viewed as not reaching far enough.

As introduced in the state Senate, in the form of Senate Bill 530 of 1965, Article 1, Section 26 prohibited discrimination on the ground of “race, color, or national origin.” The bill was amended in the House to prohibit discrimination on the basis of “race, creed, color, sex, or national origin,” an amendment that provoked the nonconcurrence of the Senate. The difference was resolved in conference committee by broader language that prohibited discrimination “against any person in the exercise of any civil right.”

Article I, Section 26 was approved in this form by the legislature in December 1965 and ratified by the people on May 16, 1967. This approval was secured one hundred years after the Fourteenth Amendment prohibited states from denying persons the “equal protection of the laws,” almost two hundred years after the adoption of Article I, Section 1, and almost one hundred years after the adoption

of the predecessors of Article III, Section 32 – the equal protection guarantees of the Pennsylvania Constitution.

Article I, Section 26, therefore, supplements the equal protection guarantees of Article I, Section 1 and Article III, Section 32 by specifically prohibiting *discrimination against*, as well as *denial of*, any civil right. In view of the legislative history of Section 26, clearly its language was not lightly chosen. Rather, as the Supreme Court of Pennsylvania noted in a similar situation concerning special laws, "[T]he language of the Pennsylvania Constitution is substantially different from the federal constitution. We are not free to treat that language as though it were not there. Because the framers of the Pennsylvania Constitution employed these words, the specific language in our constitution cannot be readily dismissed as superfluous. [*Kroger v. O'Hara Twp.*, 481 Pa. 101, 117, 392 A.2d 266, 274 (1979).]

Article I, Section 26 was a change of substance in the Declaration of Rights, and was voted on separately by the voters on May 16, 1967. It was not part of a broader package or revision of the State Constitution. By applying the previously mentioned interpretation approach, the concepts of "discriminate" and "civil rights," therefore, cannot be construed to carry some obscure limitation of meaning: rather, the approach to interpretation should include the normal understanding of such words or concepts when they were ratified by the people of Pennsylvania, which here, reveal a clear mandate of neutrality and a prohibition of favoritism or partiality.

Id. (footnotes omitted). (For the Court's convenience, a copy of the full discussion of Article I, Section 26 by Professor Gormley and his coauthors, including their footnotes, is attached as Exhibit "D.").

With this legislative history in mind, Article I, Section 26 further supports the proposition that voting and elections are fundamental rights, and, therefore, any statute infringing those rights must be reviewed under strict scrutiny. Although Pennsylvania courts have not defined "civil rights" in the context of Article I, Section 26, they have recognized that the right to vote is one of the civil rights possessed by our citizens. *See Commonwealth v. Sherwood*, 2004 Pa. Super. 370, 859 A.2d 807, 809 (2004) (finding that the State must restore three civil rights – the right to vote, the right to hold public office, and the right to serve on a jury – before a convicted felon may legally own firearms under a federal statute); *Commonwealth v. Stiver*, No. 1653 MDA 2011, 2012 Pa. Super. LEXIS 1038, at **7-8 (Pa. Super. May 30, 2012) (same). Consequently, Article I, Section 26 protects, at least, this most basic civil right, and the Commonwealth Court erred when it applied a lesser judicial standard than strict scrutiny to review the 2011 Plan.[3]

[3] Prior declarations by the Pennsylvania Supreme Court stating that Article 1, Section 26 should be read "conterminous with [the U.S. Constitution's Equal Protection Clause]," *Erfer*, 568 Pa. at 138, 794 A.2d at 331, are not binding precedent for later courts. Legal scholars have called this practice by some state courts "prospective lockstepping," and

IV. CONCLUSION

It is incumbent on this Court to recognize the unique and expansive nature of the rights enshrined in the Pennsylvania Constitution which were meant to ensure Pennsylvanians the benefits of popular sovereignty and representational democracy. Those rights grant this Court the authority to find the 2011 Plan unconstitutional and to craft an appropriate remedy.[4] For these reasons and others enumerated above, the Amici Curiae respectfully request that this Court reject the recommended conclusions of law of the Commonwealth Court and instead hold that the 2011 Plan violates rights enshrined in the Pennsylvania Constitution and order the Legislature to enact a constitutionally compliant redistricting plan.[5]

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cautioned against it: "When a court engages in prospective lockstepping, it not only looks back at the case before it and the existing, relevant legal materials, including federal doctrine, but it also purports to foresee, and to attempt to control, the *future*. In other words, it is not within the state judicial authority to receive, wholesale, the law of a different sovereign as part of its domestic law to be applied in the future." Robert F. Williams, *The Law of American State Constitutions* 225 (2009) (emphasis in original). The Alaska Supreme Court has applied this principal in a case interpreting one of its state constitutional provisions. *Doe v. State*, 189 P.3d 999, 1005 (Alaska 2008).

[4] In fact, the U.S. Supreme Court "has acknowledged that state courts should play an important role in matters involving redistricting." Primo J. Cruz, *Note: Pols Gone Wild: Why State Constitutional Equality Provisions Are a Proper Solution to Partisan Gerrymandering*, 42 Rutgers L.J. 927, 935 (2011).

[5] This Court recently has stated that "[j]udicial review stands as a bulwark against unconstitutional…actions by the two political branches," and reaffirmed its ultimate authority to declare if a law violates the Pennsylvania Constitution. *William Penn Sch. Dist. v. Pa. Dep't of Education*, 170 A.3d 414, 435-436 (2017). This Court has the authority to declare that the hyper-partisan politically gerrymandered 2011 Plan violates the Pennsylvania Constitution and should do so.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the preceding Brief of Amici Curiae, Pennsylvania AFL-CIO and Other Pennsylvania Unions in Support of Petitioners (containing 6,997 words) complies with the word count limitation set forth in Pa. R.A.P. 531(b)(3) in that the brief does not exceed 7000 words based upon the word processing system used to prepare the brief.

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EXHIBIT A

Chapter 10

PROTECTION OF FREE EXPRESSION

Article I, Sections 7 and 20

SETH F. KREIMER*

§ 10.1. THE FRAMING OF THE PENNSYLVANIA FREE EXPRESSION CLAUSES

In its current form, Pennsylvania's Constitution extends protection to free expression in two sections.

*Professor of Law, University of Pennsylvania Law School. This material has also been published in Seth F. Kreimer, *The Pennsylvania Constitution's Protection of Free Expression*, 5 U. PA. J. CONST. L. 12 (2002). Reprinted with permission. Research for this chapter was supported in part by the Handler Foundation, whose financial assistance on this project is gratefully acknowledged.

Article I Section 7 provides:

> [a]The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever by made to restrain the right thereof.
>
> [b] The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.
>
> [c] No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."[1]

Article I Section 20 adds:

> The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes by petition, address or remonstrance.

These provisions are hardly recent innovations. In 1776, a decade and a half before the adoption of the federal Bill of Rights, the Constitution of the Commonwealth of Pennsylvania embodied the protection of free expression in three separate provisions.[2] The 1776 Declaration of Rights iden-

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1. The language of Article I, Section 7[c] was said to be "repugnant to" federal First Amendment standards, but severable from the remainder of Article I, Section 7 in Commonwealth v. Armao, 286 A.2d 626 (Pa.1972). Although the Pennsylvania Supreme Court has said that *Armao* "invalidated a portion of Article 1, Section 7," Commonwealth v. Wadzinski, 422 A.2d 124, 127 n.6 (Pa. 1980), the better reading of *Armao* seems to be that these provisons were not sufficient to save Pennsylvania's criminal libel statute from unconstitutionality under the federal requirements of "actual malice" for libel judgments in matters of public interest. *See* Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209 (1964). There is nothing in the protections provided by Article I, Section 7 that is inconsistent with federal mandates; they are simply insufficient. One would think that if the Pennsylvania legislature sought to impose criminal liability on a basis other than defamation (*e.g.*, intellectual property or campaign finance provisions) for publications "proper for public investigation or information," such prosecutions would still require a showing of "malice or negligence" under Article I, Section 7 even if unconstrained by federal standards.

2. Pap's A.M. v. City of Erie, 812 A.2d 591, 605 (Pa. 2002) (Article I, Section 7 "is an ancestor, not a stepchild of the First Amendment.") Uniontown News-

tified rights of speech, press, assembly and petition in two of its provisions,[3] while the Frame of Government added that "[t]he printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government."[4]

papers, Inc. v. Roberts 839 A.2d 185, (Pa. 2003) ("Article I, § 7 has been recognized as providing broader freedom of expression than the federal constitution.") (citations omitted); Melvin v. Doe 836 A.2d 42. n. 9 (Pa. 2003) (Pennsylvania Supreme Court "has repeatedly determined that Article I, section 7 affords greater protection to speech and conduct in this Commonwealth than does its federal counterpart, the First Amendment.") (citations omitted).

3. The first, Article XII, provided: "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." Pa. Const. of 1776, Declaration of Rights, art. XII.

The protection of freedom of the press in Pennsylvania's Constitution was mirrored by the contemporaneous provisions of the Constitutions of Maryland, Md. Const. of 1776, art. XXXVII, Virginia, Va. Const. of 1776, Bill of Rights §12, North Carolina, N.C. Const. of 1776, art. XV, Georgia, Ga. Const. of 1777, art. LXI, South Carolina, S.C. Const. of 1778, art. XLIII, Massachusetts, Mass. Declaration of Rights, pt. 1, art. XVI (1780); and New Hampshire N.H. Const, pt. 1, art. XXII (1784). *See* LIVINGSTON ROWE SCHUYLER, THE LIBERTY OF THE PRESS IN THE AMERICAN COLONIES BEFORE THE REVOLUTIONARY WAR 77 (1905).

Pennsylvania's was the first Constitution to protect "freedom of speech and of writing." Schuyler, is in note 2 at 77. Vermont's Constitution of 1777 adopted language identical to the that of Pennsylvania. Vt. Const. of 1777, art. XIV. But these protections of "speech" stood alone until the adoption of the First Amendment in 1791.

The second Pennsylvania provision, Article XVI of Pennsylvania's 1776 Declaration of Rights recognized: "[t]hat the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance." Unlike its protection of freedom of the press, the antecedent Virginia Declaration of Rights provided no recognition of any right to assemble. J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776 178 (1936). The rights to petition and assembly had been claimed by the Continental Congress in 1774. Continental Cong, N.C. D. 8 Oct 14, 1774; 1 ANNALS OF CONG. 731-745 REPRODUCED, THE FOUNDERS' CONSTITUTION VOLUME 5, AMENDMENT I (Petition and Assembly), Document 13 http://press-pubs.uchicago.edu/founders/documents/amendI_assemblys13.html ("That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.").

Pennsylvania's freedom of assembly provision was mirrored only by Vermont, Vt. Constitution of 1777, art. XVIII, and North Carolina, N.C. Constitution of 1776, art. XVIII.

4. PA. CONST., Frame of Government, Sec. 35. This freedom to examine the proceedings of the legislature was a concomitant of the participation-enhancing innovations of Sections 13, 14 and 15 of the 1776 Frame of Government which guaranteed public access to legislative debates, publication of legislative records and of proposed statutes. *See* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS 249-250 (1980) (Rita & Robert Kimber trans.) (describing confidentiality of debate in Pennsylvania assembly debates through 1764, and innovation of public access to legislative process in the

Under its first Constitution, the Commonwealth experienced both a profusion of what would today be called "uninhibited robust wide-open debate,"[5] and sporadic, largely unsuccessful efforts by officials to curb criticism.[6]

1776 Constitution). The constitutional mandates of open legislative debates and records was retained in modified form in the 1790 Constitution, Pa. Const., Frame of Government secs. 14 and 15, and preserved unchanged to the present 1968 Constitution. PA. CONST., art II, secs. 12 and 13.

5. Selsam, *supra* note 3 at 181, quotes a contemporary observer as commenting "[i]t arouses the sympathies to see how often the Congress is mishandled in these sheets." Similarly, DWIGHT L. TEETER'S STUDY, A LEGACY OF EXPRESSION: PHILADELPHIA NEWSPAPERS AND CONGRESS DURING THE WAR FOR INDEPENDENCE 1775-1783 (1967) (unpublished Ph.D. dissertation University of Wisconsin) is replete with accounts of the vituperative press skirmishes in Philadelphia during the period after the adoption of Pennsylvania's first Constitution. *See* especially *id.* at 258-62 (newspaper publishers "acted as if they had little to fear from publishing severe criticism of the Constitution and government of Pennsylvania"; "printers apparently held the courts in little awe"). *See also* Dwight L. Teeter, *Press Freedom and the Public Printing: Pennsylvania, 1775-83,* 45 JOURNALISM Q. 445, 446-47 (1968) (recounting "choice bits of vituperation": officials "peddling official blunders by the groce" (*sic*), officials accused of profiteering, judge characterized as "Judge Grinner, or The Excrescence" published by Philadelphia printers "beyond the reach of effective government retaliation"); NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 60 (1986) (remarking on "the almost total absence of political libel suits" during the 1780s and 1790s); ROBERT L. BRUNHOUSE, THE COUNTER-REVOLUTION IN PENNSYLVANIA 1776-1790 5 (1971) ("In the 1780s the press descended to unbelievable depths of repulsive muckraking"); *id.* at 125 (describing vituperation "that descended to such depths as to approach the obscene"); *id.* at 289 n.11 (describing cartoons and "filthy attacks").

6. Libel prosecutions were brought to suppress political criticism with only sporadic effect. *See* JOHN K. ALEXANDER, PENNSYLVANIA, PIONEER IN SAFEGUARDING PERSONAL RIGHTS IN THE BILL OF RIGHTS AND THE STATES 325-27 (Patrick T. Conley & John P. Kaminski eds., 1992) (describing events of 1782 during which publisher Eleazer Oswald attacked Pennsylvania's Chief Justice Thomas McKean as biased and unfair, was arrested at McKean's orders for seditious libel, and was ultimately saved from prosecution by the repeated refusal of a grand jury to indict him); DWIGHT L. TEETER, A LEGACY OF EXPRESSION: PHILADELPHIA NEWSPAPERS AND CONGRESS DURING THE WAR FOR INDEPENDENCE 1775-1783, *supra* note 5, at 79-80 and 110 (describing seditious libel law adopted by Pennsylvania's Provisional Constitutional Convention); *id.* at 229-231 (describing repeated unsuccessful efforts by Justice McKean to induce the grand jury to indict Eleazer Oswald for libel). For other accounts of the conflict between McKean and Oswald, *see* Dwight L. Teeter, *The Printer and the Chief Justice: Seditious Libel in 1782-83,* 45 JOURNALISM Q. 235; and ROSENBERG, *supra* note 5, at 60.

The public commitment to liberty of expression in this early period, however, fell considerably short of modern standards. *See e.g.* BRUNHOUSE, *supra* note 15 at 16-21. (describing loyalty oath of 1776 prerequisite to voting that was interpreted to prevent working for changes in the Constitution); *id.* at 40-41 (describing loyalty oath of 1777 prerequisite to voting, suing for debts, and transferring real estate); *id.* at 77-79 (describing 1779

These efforts climaxed in 1788 with *Respublica v. Oswald.*[7] Contentious newspaper editor Eleazer Oswald had found himself subject to civil arrest in the course of a libel suit brought by Andrew Browne, the "master of a female academy in the city of Philadelphia," and a friend of Oswald's political opponents. In response, Oswald published a bitter attack on all of the parties to the libel action, alleging that both the plaintiff and the court had sought to exact political retribution against him, making the claim that "the doctrine of libels" was incompatible with Pennsylvania's constitutional protection of free communication and free press and voicing the hope that his "fellow citizens" would vindicate him in the impending jury trial. Oswald thereupon found himself haled before the Pennsylvania Supreme Court to defend against charges of contempt of court.

The opinion of Chief Justice Thomas McKean, who had previously attempted without success to punish Oswald for his criticism of McKean himself[8] began by affirming the "doctrine of libels" that Oswald denied: "libeling is a great crime, whatever sentiments may be entertained by those who live by it," announced McKean, ". . . the heart of the libeler . . . is more dark and base than that of the assassin."[9] Pennsylvania's protection of freedom of the press, according to the opinion "precludes any attempt to fetter the press by the institution of a licensor" and gives "every citizen a right of investigating the conduct of those who are entrusted with the public business."[10] But while the Constitution authorized "candid commentary" and "permits every man to publish his opinions," once publication occurs an individual was protected against subsequent legal action in only the case of "[publications] meant for use and reformation, with an eye solely to the public good." Publications "meant to delude and defame" were unprotected, and since in the view of Chief Justice McKean, the evident "object

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abolition of College of Philadelphia because of political opposition of Trustees); *id.* at 127 (describing 1782 statute mandating death penalty for adherents of secessionist movement); *id.* at 147 (describing 1783 refusal to legalize theatrical entertainment in Philadelphia).

7. 1 U.S. (1 Dall.) 319 (Pa. 1788). *See* TEETER, LEGACY *supra* note 5, at 237-39.

8. McKean endeavored to have Oswald indicted for criticizing him seven years earlier. *See supra* note 6.

9. Oswald, 1 U.S. (1 Dall.) at 324. McKean was an enthusiast for the law of libel. In addition to his prior efforts regarding Mr. Oswald, he successfully obtained a 5700 L. libel verdict against another printer. TEETER, LEGACY *supra* note 5, at 125. See Commonwealth v. Duane 1 Binn. 601 (1809) (libel prosecution for statements regarding McKean as governor of Pennsylvania); Republica v. Cobbet, 3 Yeates 93 (1800) (McKean as Supreme Court Justice imposed $2000 bond conditioned on good behavior of publisher).

10. *Id.* at 325.

and tendency" of Oswald's publications was to "raise a prejudice against his antagonist . . . in the minds of those that must ultimately determine the dispute between them" and to "dishonor the administration of justice," Oswald's publications were subject to punishment as contempts of court.[11]

The Constitutional convention of 1790 rewrote Pennsylvania's free expression provisions into the lineal ancestors of their current form. All of the provisions were consolidated in the Declaration of Rights, which was promulgated as the final article (Article IX) of the 1790 Constitution. Introduced by the new admonition "[t]hat the general, great, and essential principles of liberty and free Government may be recognized and unalterably established, WE DECLARE," Article IX concluded (Section XXVI): "Everything in this article is excepted out of the general powers of government, and shall for ever remain inviolate."[12]

Protections of press and speech which had previously appeared in both the Frame of Government and the Declaration of Rights were consolidated in a new section of the Declaration of Rights (Section VII), "Of the liberty of the press," which read (as revised):

[a] That the printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government: And no law shall ever be made to restrain the right thereof.

[b] The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

[c] In prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence: And, in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases.[13]

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11. *Id.* at 326. Oswald was fined 10L and imprisoned for one month. *Id.* at 328. His effort to obtain relief in Pennsylvania's unicameral legislature failed after several days of discussion by a vote of 34-23. *Id.*

12. Both the introductory and concluding language were retained unchanged by subsequent Constitutions.

13. Sections [a] and [b] were retained unchanged in the Constitutions of 1838, 1874 and 1968, and are now contained in Article I, Section 7. Section 7 [c] was retained in the Constitution of 1838, but amended in 1874 to read:

> No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, *where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury*; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases."

This substitution of a requirement of

The right to assemble and petition was retained in Article IX, Section 20 of the 1790 Constitution in wording which has remained unchanged to the present Constitution (Article I, Section 20).

Finally, the 1790 Constitution added reputation to the "inherent and indefeasible" rights recognized in Section 1 of the Declaration of Rights.[14]

In this final form, the free expression provisions of Pennsylvania's Constitution manifest three overlapping commitments: political, epistemic and libertarian.

§ 10.2. THE POLITICAL FUNCTIONS OF FREE SPEECH

It is clear from the Pennsylvania Constitution's text and heritage that free expression serves crucial political functions. Freedom of the press—originally a part of the Frame of Government—is guaranteed to "every person who undertakes to examine the proceedings of the legislature, or any branch of government" (Article I, Section 7 [a]); protections against criminal prosecution are provided to publications "investigating the official conduct of officers, or men in a public capacity" (Article I, Section 7[c]); citizens are protected in their right to assemble and "to apply to those invested with the powers of government" for relief (Article I, Section 20).

§ 10.2[a]. REMONSTRANCE AND CRITICISM: THE CHECKING FUNCTION

Pennsylvania's constitutional heritage from the beginning has viewed freedom of the expression, in the words of Philadelphia lawyer Andrew Hamilton, as a "bulwark against lawless power . . . a right which all freemen

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negligence or malice, both of which required a showing of both falsehood and a state of mind for a simple right to introduce truth for jury consideration was regarded as a more protective standard. *See* ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 107 (1960).

This language was retained in the 1968 Constitution.

14. Section 1 of the Declaration of Rights had previously announced "that all men have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety." As revised, in 1790 recognized "inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property *and reputation*, and of pursuing their own happiness." (emphasis added). It is not directly relevant to this essay to explore the alterations that omitted the proposition that the rights in question were "natural," or that there is a right of "pursuing . . . safety" or the elimination of the right of "obtaining . . . happiness and safety." The wording of this provision has, again been retained unchanged in the Constitutions of 1838, 1874, and 1968. It currently comprises Article I, Section 1.

claim, and are entitled to complain when they are hurt . . . to remonstrate the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority."[15] Shortly before the framing of the Declaration of Rights, the Continental Congress wrote in Philadelphia in 1774,

"[t]he importance of [freedom of the press] consists . . . in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs."[16] So, too, the framers of the 1874 Constitution, though they ultimately limited their work to a relatively minor expansion of the protections against criminal libel prosecutions, articulated a high regard for the political functions of the press when they reenacted the Declaration of Rights.[17]

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15. ANDREW HAMILTON, DEFENSE OF JOHN PETER ZENGER ON CHARGES OF SEDITIOUS LIBEL (1735), at *http://www.uark.edu:80/depts/comminfo/cambridge/zenger.html. See id.* ("that to which nature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power (in these parts of the world, at least) by speaking and writing truth").

Hamilton's address in the Zenger trial in New York has long been cited by Pennsylvania's Supreme Court as a part of Pennsylvania's constitutional heritage. Kane v. Commonwealth, 89 Pa. 522, 526-27 (1879). *See also* Bodack v. Law Enforcement Alliance of America, 790 A.2d 277 (Pa. 2001) (Castille, J., dissenting); Mack Appeal, 126 A.2d 679, 683 (Pa. 1956) (Bell, concurring and dissenting); O'Donnell v. Philadelphia Record Co., 51 A.2d 775, 790 n.3 (Pa. 1947) (Maxey, J., dissenting) Commonwealth v. McManus, 21 A. 1018, 1020 (Pa. 1891) (Mitchell, J., concurring).

16. ADDRESS TO THE INHABITANTS OF QUEBEC, 1774, IN THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 222 (Bernard Schwartz ed. 1971). *See also* Vincent Blasi, *The Checking Value in First Amendment Theory,* 1977 AM. B. FOUND. RES. J. 521 (1977); THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF THE STATE OF PENNSYLVANIA TO THEIR CONSTITUENTS IN THE BILL OF RIGHTS: A DOCUMENTARY HISTORY, *supra* at 665-68 (objecting to the "omission" of "the stipulations heretofore made" by state Constitutions "in favour of" "the liberty of the press, that scourge of tyrants and the grand bulwark of every other liberty").

17. *E.g.,* IV DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 716-717 (1873) (Mr. Smith) ("Give me but liberty of the press . . . and I will shake down from its height corruption and bury it under the ruins of the abuses it was meant to shelter"); 726 (Mr. Sharpe) ("It is the duty of the press to educate the public mind upon the affairs of State, to drag from its concealment the malfeasance of public officials, to watch and denounce all arbitrary acts of government . . . the newspaper ought to be the wide awake sentinel and guardian which stands upon the watch towers of the State to protect the liberties of the people"); V DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 586 (1873) (Mr. Dallas) (". . . but for that single paper, the man Tweed and his subordinates. . . . would still revolve in the heaven of po-

The Pennsylvania Supreme Court has repeatedly recognized the constitutional importance of expression that brings to light the potential or actual wrongdoing of government officials, and the constitutionally problematic quality of efforts by officials to stifle criticism. Thus, in the 1835 *Case of Austin,*[18] the Court reversed the disbarment of attorneys who had criticized a common pleas court judge, commenting that "[t]he conduct of a judge, like that of every other functionary, is a legitimate subject of scrutiny, and where the public good is the aim, such scrutiny is as open to an attorney of his court as to any other citizen. . . . [An attorney] is not professionally answerable for a scrutiny into the official conduct of the judges, which would not expose him to legal animadversion as a citizen." So, too, in 1963 *In Re Taylor and Selby Appeals*[19] interpreted Pennsylvania's Newspaper Shield Law broadly in light of the observation that "independent newspapers are today the principal watch-dogs and protectors of honest, as well as good, Government." Again, in *Commonwealth v. Contakos,*[20] the prevailing

litical power"); 596-7 (Mr. Landis) ("Does any one doubt that it is the duty of the press to keep the people fully posted upon matters of pubic interest, and to discuss fully and freely the character and conduct of public men? If so he lives too late. . . . No people could exercise the elective franchise intelligently unless the newspapers kept them informed on such subjects"); *id.* at 598-99 (The press are "public instructors, the pointers-out of that which requires redress, the advocates of that which ought to be introduced"); VII DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 266 (1873) (Mr. M'Camant) ("As faithful sentinels upon the watchtowers of liberty, they could more effectually warn us of danger, and being forewarned we could be forearmed").

18. Case of Austin, 5 Rawle 191, 205-206 (Pa. 1835).

19. In Re Taylor and Selby Appeals, 193 A.2d 181, 185 (Pa. 1963). *See id.* at 185 (Shield Law's "spiritual father is the revered constitutionally ordained freedom of the press."). *See also* Magazine Publishers of America v. Department of Revenue 654 A.2d 519, 524 (Pa. 1995) ("The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion." (quoting Leathers v. Medlock, 499 U.S. 439, 447 (1991)); *id* at 579 (Flaherty, J., dissenting) ("The tax restrains the crucial function of the press as government watchdog").

20. Commonwealth v. Contakos, 453 A.2d 578, 581 (Pa. 1982). The *Contakos* plurality was accepted as controlling in Commonwealth v. Fenstermaker, 530 A.2d 414 (Pa. 1987). For other accounts of the importance and value of public discourse as a means of checking the possible abuse of power by courts, see Commonwealth v. Hayes, 414 A.2d 318, 321 (Pa. 1980) (opinion of Nix, J.) ("It was thought the presence of the public generally would constrain a court, otherwise predisposed, to accord the witness a fair trial.") (quoting Commonwealth v. Trinkle, 124 A.191, 192 (Pa. 1924)); *id.* at 331 (opinion of Kaufman, J.) (praising publicity as "check on judicial power"; "evidence is to be publicly allowed or disallowed, in the face of the country; which must curb any secret bias or partiality that might arise in his own breast . . . Wigmore noted that public proceedings serve a vital societal function in that they move the court, the parties and the witnesses more strongly . . . to a strict con-

opinion observed, in sustaining constitutionally mandated access to trials, "the public and the media together counterbalance the possible emergence of a corrupt or biased judiciary."

The election of public officials ceases to be democratic if criticism of their actions or their candidacy is legally sanctionable. Thus, in construing the 1874 revision of Article I, Section 7, the Court reversed a judgment disbarring attorneys for publishing criticism of a sitting judge in light of the newly established status of judges as elected officials. The Court observed, "it is now the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship. No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar. . . . To say that an attorney can act or speak on this subject only under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system."[21] Shortly thereafter, notwithstanding Pennsylvania's constitutional protection of reputation, the Court in *Briggs v. Garrett*[22] recognized a privilege to criticize candidates for public office with probable cause, even if the criticism was in fact a falsehood: "[H]ave the voters whose suffrages [a candidate] solicits, the right to canvass and discuss his qualifications, openly and freely, without subjecting themselves to fine or imprisonment, or a ruinous suit for damages? If the voters may not speak, write or print anything but such facts as they can establish with judicial certainty, the right does not exist, unless in such form that a prudent man would hesitate to exercise it. . . . If not, we have indeed fallen upon evil times, and our boasted freedom is but a delusion. The principle contended for here, if sustained by this court, would put a padlock upon the mouth of every voter, and intelligent free discussion of the fitness of public men for office would cease." The sum of the matter, for the Pennsylvania Supreme Court is that "[t]here is practically universal agreement that free discussion of candidates for political office is essential to the functioning of a democratic society."[23]

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scientiousness in the performance of duty.) (citations omitted); In re Johnson, 359 A.2d 739, 747 (Pa. 1976) (Pomeroy, J. dissenting) ("Criticism by the press is in the nature of public debate: it protects the integrity of the court by exposing its processes to robust public review.").

21. Ex parte Steinman, 95 Pa. 220, 238-39 (1880).

22. Briggs v. Garrett, 2 A. 513, 523-24 (Pa. 1886).

23. Commonwealth v. Wadzinski, 422 A.2d 124, 129 (Pa. 1980).

§ 10.2[b]. SELF GOVERNMENT, DELIBERATION AND POLITICAL TRUTH

The protection of free expression under Pennsylvania's Constitution is not limited to a right to remonstrate with and criticize officials and candidates for office. It undergirds a broader right of self government: the right of the citizens of Pennsylvania to inform themselves in order to deliberate on the issues of the day. The text of the Constitution protects not only criticism of public officials, but all publications "proper for public information" (Article I, Section 7 [c]) as well as the right of citizens to assemble "for the common good" (Article I, Section 20) and to seek responses to their concerns from the holders of political power.[24]

The Pennsylvania Supreme Court has recognized that, under Pennsylvania's structure of government, citizens have both the right and the "solemn duty" to consult with each other "to work out the public weal," as well as to address their conclusions to the constituted authorities.[25] Thus, in *Kirmse v. Adler*,[26] the Court held that the right of labor unions "to present their cause to the public by circulars calculated to induce others to stand with them" found protection under the Pennsylvania Constitution. Again, in *Boettger v. Loverro*,[27] in the course of holding that Pennsylvania's

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24. At least one commentator viewed the original protection of free expression in Pennsylvania as a part of the "the determination to establish participatory politics" that characterized the Constitution of 1776. JOHN K. ALEXANDER, *Pennsylvania, Pioneer in Safeguarding Personal Rights in The Bill of Rights and the States* 323 (Patrick T. Conley & John P. Kaminski eds.) (1992). *See* Wells v. Bain, 75 Pa. 39, 47 (1873):

> The people, having reserved the right to alter or abolish their form of government, have, in the same declaration of their rights, reserved the means of procuring a law as the instrumental process of so doing. The twentieth section is as follows [quoting current Article I, section 20].... If the legislature, possessing these powers of government, be unwilling to pass a law to take the sense of the people, or to delegate to a convention all the powers the people desire to confer upon their delegates, the remedy is still in their own hands; they can elect new representatives that will.

25. Spayd v. Ringing Rock Lodge, 113 A. 70, 72 (Pa.1921). *See also* Parker v. Commonwealth, 6 Pa. 507, 513 (1847) (By vesting power in the General Assembly, "the people of Pennsylvania ... solemnly and emphatically divested themselves of all right, directly, to make or declare the law, or to interfere with the ordinary legislation of the state, otherwise than in the manner pointed out in art. ix., sect. 20"); Commonwealth v. Tate, 432 A.2d 1382, 1388 (Pa. 1981) ("protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people" (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

26. Kirmse v. Adler, 166 A. 566, 569 (Pa. 1933).

27. Boettger v. Loverro, 587 A.2d 712, 720 (Pa. 1991). Boettger construed the First Amendment, but the Court has

wiretap law could not be applied to punish newspaper publication of lawfully obtained material, the Court observed, "[i]t is the freedom of dissemination of information and ideas of public importance that is the bonding agent in a democracy." And in *Commonwealth v. Tate*,[28] in affirming the independent Pennsylvania protection of free speech and assembly, the Court announced, "[t]he profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open has special meaning for this Commonwealth, whose founder, William Penn, was prosecuted in England for the crime of preaching to an unlawful assembly and persecuted by the court for daring to proclaim his right to a trial by an uncoerced jury."

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been equally emphatic when directly addressing the Pennsylvania Constitution that Pennsylvania's free expression guaranties protect discourse which "disseminates political knowledge, and by adding to the common stock of freedom, gives a just confidence to every individual." Respublica v. Dennie, 4 Yeates 267, 270 (1805). *See* Clark v. Allen 204 A.2d 42 (Pa. 1964) (holding accusation of "communistic tendencies" was not libelous and if considered so "would realistically and practically put an effective stop to searching and illuminating public debate").

28. Commonwealth v. Tate, 432 A.2d 1382, 1388 (Pa. 1981) (citations omitted). *See also* Bodack v. Law Enforcement Alliance, 790 A.2d 277 (Pa. 2001) (Castille, J., dissenting) (quoting at 1388). As the Court recounted in Commonwealth v. Contakos, 453 A.2d 578, 580 (Pa. 1982) (citations omitted):

In 1670 William Penn and William Mead were tried before a jury at the Old Bailey in London on an indictment of unlawful assembly, disturbing the peace, and causing a great concourse and tumult. Penn had addressed a group of three hundred Quakers in Grace Church Street, London, after the Quakers had found their meeting house locked by order of the crown. . . . He considered the charges against him to be in violation of the Great Charter of 1225 and the earlier version, the Magna Carta.

Penn himself and the Quakers of Pennsylvania were less than unwavering in their commitment to freedom of speech and press.

LIVINGSTON ROWE SCHUYLER, THE LIBERTY OF THE PRESS IN THE AMERICAN COLONIES BEFORE THE REVOLUTIONARY WAR 23-28 (1905) gives an account of experience of William Bradford, the first printer in Pennsylvania. In 1687 the Friend's Meeting ordered Bradford to obtain prior approval from them of any material that "Concerns Friends or Truth."

In 1689 Bradford printed Penn's charter, and was summoned before Pennsylvania's Governor and Council, bound on L500 security not to print anything without Governor's permission. The Governor invoked both the interest and orders of William Penn. In 1692 Bradford was arrested for seditious libel; although the jury "could not agree" on his conviction Bradford was held over until next term and his tools and letters were released only when Penn was deprived of the colony in 1693. For discussion of the 1692 prosecution, *see* The Proprietor v. George Keith (1692) reported in PENNSYLVANIA COLONIAL CASES 117 (Samuel W. Pennypacker, ed. 1892); William Goldman Theatres v. Dana, 173 A.2d 59, 67 n.1 (Pa. 1961). *See* Alexander, *supra* note 24, at 19. (Patrick T. Con-

§ 10.3. FREE EXPRESSION AND THE SEARCH FOR KNOWLEDGE

When the Continental Congress praised the virtues of a free press in Philadelphia in 1774, it highlighted the importance of a free press to the "advancement of truth, science, morality."[29] So, too, in 1824, *Updegraph v. Commonwealth*[30] acknowledged the protected status of communications which sought to "prove any supposed truths" or "detect supposed error." The constitutional heritage of Pennsylvania acknowledges that governmental censorship is a bar to the advancement of knowledge. As Justice Oliver Wendell Holmes Jr. maintained on the federal level, "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[31]

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ley & John P. Kaminski eds.) 317-19 (1992).

In 1721 Andrew Bradford (son of William) was interrogated by Governor Sir William Keith, warned not to publish comments on his conduct without official consent but Bradford continued to publish. ALEXANDER, *supra.* During the period 1756-9 the Pennsylvania Assembly sought to silence critics by arresting and trying them for libel; English Privy Council ordered discharge on procedural grounds. *Id.*, SCHUYLER 27-28 (same).

In construing Pennsylvania's "great heritage of freedom," Tate, 432 A.2d. at 1389, one must take account, as Justice Harlan put it with regard to federal Constitutional traditions, of "what history teaches are the traditions from which it developed as well as the traditions from which it broke." Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan J. dissenting). By the time of the revolution, the press in Pennsylvania was typified by robust and indeed vituperative public debate. *See supra* note 4. The Pennsylvania Supreme Court has viewed the earlier colonial excursions into the suppression of free expression as vices against which Pennsylvania's Constitution sought to guard. *See* William Goldman Theatres 173 A.2d at 67 ("The members of the Convention which drafted that Constitution were undoubtedly fully cognizant of the vicissitudes and outright suppressions to which printing had theretofore been subjected in this very Colony.").

29. 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (W. Ford ed. 1904) (1774).

30. Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 409 (1824). *See id.* at 405 ("Upon the whole, it may not be going too far to infer, from the decisions, that no author or printer, who fairly and conscientiously promulgates the opinions with whose truths he is impressed, for the benefit of others, is answerable as a criminal."). Updegraph stated that an indictment for blasphemy against statements which it regarded as directed toward ridiculing religion rather than "proving truth" or "defeating error" was permitted, notwithstanding constitutional protections, but dismissed the indictment because it was improperly drawn.

31. Abrams v. United States, 250 U.S. 616, 629 (1919) (Holmes, J. dissenting). *See* Chalk Appeal, 272 A.2d 457 (Pa. 1971) (sustaining a challenge under Article I, Section 7 to dismissal of welfare case-worker because "[w]hether his statements were true, or false, need not concern us, for this is a question which could not meaningfully be answered by either the York County Board, or the Civil Ser-

§ 10.4. FREE EXPRESSION AND FREEDOM OF THOUGHT

The political and epistemic roles of free expression are essentially consequentialist; they rest on the utility of free expression as a means of attaining other goals. Yet Pennsylvania amended its Constitution in 1790 specifically to announce that "the free communication of thoughts and opinions is one of the invaluable rights of man," a right guaranteed as a part of inherent human dignity. It has retained this declaration unchanged through three constitutional revisions over the last two hundred years. This commitment points to a third and complementary grounding for freedom of expression in Pennsylvania's constitutional heritage: free expression is an element of personal autonomy of thought that underpins the freedoms guaranteed by the rest of the Constitution.

Pennsylvania's heritage of liberty of conscience found its most prominent recognition in the sphere of religious freedom.[32] But in this respect the regard for religious conscience is congruent with a regard for freedom of thought, belief, and inquiry more generally.[33] The root of Blackstone's

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vice Commission. Appellant was addressing himself to matters of public policy, where, the best test of truth is the power of the thought to get itself accepted in the competition of the market." quoting Abrams, 250 U.S. at 630); Schlesinger Appeal, 172 A.2d 835, 843 (Pa. 1961) (invoking "Jefferson's classic admonition in his First Inaugural Address that 'If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.'"); Kreamer Hosiery Co. v. American Fed'n of Full Fashioned Hosiery Workers, 157 A. 588, 603 (Pa. 1931) (Maxey, J., dissenting) ("[I]deas are not subject to injunction. Ideas have far reaching effects. Some of these effects may be good and some may be evil, but it is opposed to progress and contrary to the spirit of our institutions to entrust any official with the arbitrary power to say what ideas shall be liberated and what ideas shall be suppressed.")

32. *See, e.g.,* Judicial Inquiry and Review Bd. v. Fink, 532 A.2d 358, 369 (Pa.1987) ("Pennsylvania, more than any other sovereignty in history, traces its origins directly to the principle that the fundamental right of conscience is inviolate . . . A citizen of this Commonwealth is free, of longstanding right, to practice a religion or not, as he sees fit, and whether he practices a religion is strictly and exclusively a private matter, not a matter for inquiry by the state." (quoting Commonwealth v. Eubanks, 512 A.2d 619 (Pa. 1986)) (citations omitted); Updegraph v. Commonwealth, 11 Serg. & Rawle 394, 408 (1824) ("When our ancestors emigrated from England, they took with them such of the English principles as were convenient for the situation in which they were about to be placed. It required time and experience to ascertain how much of the English law would be suitable to this country. The minds of William Penn and his followers, would have revolted at the idea of an established church. Liberty to all, preference to none; equal privilege is extended to the mitred Bishop and the unadorned Friend.") (emphasis omitted).

33. *See* Duffy v. Cooke, 86 A. 1076 (Pa. 1913) ("The Constitution of 1790 provided against discrimination on account

special disapprobation of prior restraints, invoked by the Pennsylvania Supreme Court in *William Goldman Theaters, Inc. v. Dana*,[34] is that if prior restraints are prohibited, "the will of individuals is still left free. . . . Neither is any restraint hereby laid upon freedom of thought or inquiry: liberty of private sentiment is still left." So, too, the Court has observed that, "direct restraints upon expression impose restrictions on human thought and strike at the core of liberty in a way which limitations on access to information do not."[35]

Pennsylvania's right to free communication of thoughts and opinions is grounded in intellectual autonomy; it thus entails the reciprocal right to decline to communicate.[36] Thus, in 1967, *Dudek v. Pittsburgh City Fire Fighters, Local No. 1*,[37] held that the guarantees of the Pennsylvania Constitution barred an effort to compel the plaintiff to engage in speech to which he objected. The Court observed, "[i]t is just as illegal to compel one to speak when he prefers to remain silent as it is to gag one when he wishes to talk. The liberty to write or speak includes the corresponding right to be silent and also the liberty to decline to write. . . ."[38]

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of religious sentiments. . . . The opinion was widely disseminated that routine offices and employments were conferred because the appointee held certain political sentiments. Such a state of facts if it existed would have . . . amounted not to a legal, but to an actual disqualification on account of political sentiments. There is everything in the spirit of the Constitution to prohibit such proscription. . . .").

34. Wm. Goldman Theatres, Inc. v. Dana, 173 A.2d 59, 62 (Pa. 1961).

35. Philadelphia Newspapers, Inc. v. Jerome, 387 A.2d 425, 433 n.16 (Pa. 1978).

36. So long as the citizen remains free to disavow statements she is forced to adopt, the arguments from a "marketplace of ideas" or a "right to remonstrate" against compelled communications are difficult to maintain.

37. Dudek v. Potts Fire Fighters, Local No. 1, 228 A.2d 752 (Pa. 1967).

38. *Id.* 228 A.2d at 755. *See id.* at 758 (Roberts, J., concurring) ("[T]he principle of free speech is deeply rooted in our law and in our vision of a free society. That principle is as much violated by requiring a man to speak what he does not believe, as it is by prohibiting him from expressing what he does believe.").

The parallel case in First Amendment jurisprudence makes even clearer the link to Pennsylvania's heritage. In West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 n.13 (1943), the Court observed that a mandatory flag salute "requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights." The Court recalls that "[t]he Quakers, William Penn included, suffered punishment rather than uncover their heads in deference to any civil authority." *Id.* at 632 n.13. *See* 6 HOWELL'S STATE TRIALS 951, 956 (1661–1678) (account by William Penn and William Mead of their trial at the Old Bailey in 1670 in which Penn was fined for refusing to remove his hat).

More recently, in *Commonwealth v. Bricker,*[39] the Pennsylvania Supreme Court held that, even absent an effort to participate in political dialogue, the use of a flag for interior decoration was constitutionally protected expression. It declared:

> [t]here are few forms of self-expression as personal and important as the manner in which we decorate our homes. We have long recognized the sanctity of the home in this Commonwealth as we have repeatedly stated that "upon closing the door to one's home to the outside world, a person may legitimately expect the highest degree of privacy known to our society". . . . Clearly, there is no precise constitutional calculus as to what constitutes constitutionally protected expression. However, we believe that the government must satisfy constitutional scrutiny before it can tell the citizens of this Commonwealth what pictures they may hang on their walls or what symbols they may display in the sanctity of their homes."[40]

It is this intellectual and spiritual autonomy which the Pennsylvania Constitution recognizes as the precondition for a free society. As the Court commented in *Commonwealth v. Tate,*[41] "The observation of the Supreme Court of the United States with regard to the First Amendment to the United States Constitution applies equally to the Pennsylvania Constitution: 'freedom of speech . . . [is] protected against censorship or punishment. . . . For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.'"

§ 10.5. THE STRUCTURE OF PROTECTION

§ 10.5[a]. PRIOR RESTRAINT

Unlike the federal Constitution, where the structures on prior restraint are a matter of inference from a relatively opaque provision,[42] the clearest

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39. Commonwealth v. Bricker, 666 A.2d 257 (Pa. 1995).

40. Commonwealth v. Bricker, 666 A.2d 257, 261 (Pa. 1995) (quoting Commonwealth v. Brian 656 A.2d 287, 289 (Pa. 1994)).

41. Commonwealth v. Tate, 432 A.2d 1382, 1388 (Pa. 1981) (citations omitted). *See also* Duggan v. 807 Liberty Ave., 288 A.2d 750, 754 (Pa. 1972) (quoting Palko v. Connecticut, 302 U.S. 319, 326, 327 (1937)) ("freedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.").

42. *See* New York Times Co. v. United States, 403 U.S. 713 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Near v. Minnesota, 283 U.S. 697, 712-21 (1931); Patterson v. Colorado, 205 U.S. 454, 461 (1907) (relying on Respublica).

principle to emerge from Pennsylvania's constitutional text is that, as the Court put it in *Respublica v. Dennie* in 1805, a citizen is free to "[p]ublish as you please in the first instance without control. . . ."[43]

Pennsylvania's original protections of free expression adjured, "freedom of the press ought not be restrained."[44] As noted above, in *Respublica v. Oswald*, Justice McKean equated the "restraint" prohibited by the 1776 Constitution with the licensing schemes of prior restraint which had been overturned in the British struggle for freedom of the press during the seventeenth century. According to Justice McKean, the protections 1776 gave "to every citizen a right of investigating the conduct of those who are entrusted with the public business; and they effectually preclude any attempt to fetter the press by the institution of a licenser. . . . The true liberty of the press is amply secured by permitting every man to publish his opinions; but [once published] it is due to the peace and dignity of society to enquire into the motives of such publications, and to distinguish between those which are meant for use and reformation, and with an eye solely to the public good, and those which are intended merely to delude and defame."[45]

In amending the provisions to their current form in 1790, the Pennsylvania Convention retained the proviso that, "no law shall ever be made to restrain the right" of examining any branch of government in the press, and added that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."[46] The text of the Constitution thus establishes a right to "write speak and print" without prior restraint, leaving harms caused by free expression to subsequent "responsibility for abuse."[47]

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43. Respublica v. Dennie, 4 Yeates 267, 269 (1805). *See* William Goldman Theatres, Inc. v. Dana, 173 A.2d 59, 62 (Pa. 1961) ("It is clear enough that what [the provision of Article I, § 7] was designed to do was to prohibit the imposition of prior restraints upon the communication of thoughts and opinions, leaving the utterer liable only for an abuse of the privilege. History supports this view."), quoted with approval in Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1335 (Pa. 1986) and Commonwealth v. Tate, 432 A.2d 1382, 1388 (Pa. 1981).

44. Pa. Const. of 1776, Declaration of Rights, art. XII.

45. Respublica v. Oswald, 1 U.S. (1 Dall.) 319, 325 (1788). *See id.* at 329 (addressing the General Assembly, one of its members, Mr. Lewis, supported McKean's opinion through the following statement: "[h]ere then, is to be discerned the genuine meaning of this section in the bill of rights . . . Every man may publish what he pleases; but, it is at his peril, if he publishes any thing which violates the rights of another, or interrupts the peace and order of society . . .").

46. Pa. Const. of 1790, art. IX, § 7. This wording was retained unaltered to the present Constitution. *See* PA. CONST. art. 1, § 7.

47. *See* Dennie, 4 Yeates at 267; Commonwealth v. Duane (1806), reported at

This clear commitment provided the basis for the Pennsylvania Supreme Court's 1961 decision in *William Goldman Theatres, Inc. v. Dana*[48] invalidating Pennsylvania's regime of motion picture regulation, which required that an exhibitor register with the Board of Motion Picture Control 48 hours in advance of any initial showing, and empowered the board to disapprove a film as "obscene" or "unsuitable for children" by majority vote. The Court held that procedure to be an invalid "pre-censorship" inconsistent with Article I, Section 7 notwithstanding the facts that obscenity was punishable at common law, and that the United States Supreme Court had upheld a film censorship regime under First Amendment analysis earlier the same year.[49]

There is some debate as to exactly which legal regimes or interferences transgress Pennsylvania's constitutional hostility to prior restraints. On one side of the spectrum, administrative regimes that give officials discretion to block entirely the publication of materials without their prior authorization are impermissible. They fall clearly afoul of Blackstone's admonition that "[t]o subject the press to the restrictive power of a licenser . . . is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government."[50]

On the other hand, not every reduction in the flow of information is a "prior restraint." If the prior restraint doctrine were rooted solely in the proposition that government should not be able to exercise discretion over the information available to the public, then any action which prevents the

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1 Binn. 97 (Tilghman, C.J.) ("this provision was intended to prevent men's writings from being subject to the previous examination and control of an officer appointed by the government, as is the practice in many parts of Europe, and was once the practice in England").

48. 173 A.2d 59 (Pa. 1961).

49. Times Film Corp. v. City of Chicago, 365 U.S. 43 (1961). The Pennsylvania Court commented "[t]hat case in no way involved the rights guaranteed the individual by the Pennsylvania Constitution." William Goldman Theatres, Inc. v. Dana, 173 A.2d at 65.

The Pennsylvania Court had upheld an earlier film censorship statute against challenge under the Pennsylvania's free speech protections without substantial discussion in Buffalo Branch, Mutual Film Corp. v. Breitinger, 95 A. 433 (Pa.1915) (per curiam), relying on an opaque opinion by the common pleas court. The Court referred to the United States Supreme Court's opinion, in Mutual Film Corp. v. Industrial Commn. of Ohio, 236 U.S. 230, 244 (1915), that held that motion pictures were not " part of the press of the country or as organs of public opinion" protected by the Ohio Constitution. According to the Pennsylvania Supreme Court, Mutual Film Corp. was "in accord with that of the learned Common Pleas in these cases." 95 A. at 440.

50. 4 WILLIAM BLACKSTONE, COMMENTARIES 151-52, quoted with approval in William Goldman Theaters, Inc., 173 A.2d at 62. *See* Willing v. Mazzocone, 393 A.2d 1155, 1157 (Pa. 1978) (Mandarino, J.) (quoting with approval).

news media from obtaining information would constitute a prior restraint. Although the position has been advanced by news media seeking access to information,[51] this is not the law under Pennsylvania's free expression guarantees. The right to "freely speak, write and print" prevents the government from imposing prior censorship on the "communication" of "thoughts and opinions," but provides no untrammeled right to obtain information in order to form those opinions. Thus, the Court's 1978 decision in *Philadelphia Newspapers, Inc. v. Jerome*[52] rejected the proposition that orders limiting public access to pre-trial suppression hearings criminal proceedings were prior restraints: "[a] prior restraint prevents publication of information or material in the possession of the press and is presumed unconstitutional. These orders, however, issued in compliance with the Rules of Criminal Procedure, did not prevent petitioners from publishing any information in their possession or from writing whatever they pleased and therefore did not constitute a prior restraint upon publication."[53] And although every legal sanction has some deterrent effect, not every statute announcing an ex ante prohibition on speech is a prior restraint. The "responsibility for abuse" contemplated by Article I, Section 7 clearly encompassed criminal as well as civil liability.[54]

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51. Cf. McLaughlin v. Philadelphia Newspapers, Inc., 348 A.2d 376, 385 (Pa. 1975) (Roberts, J., dissenting) ("Silence imposed by refusing to inform is indistinguishable in effect from silence imposed by curtailing the speech of those already informed.").

52. Philadelphia Newspapers v. Jerome, 287 A.2d 425 (Pa. 1978).

53. *Id.* at 433-34 (citations omitted). *See* McLaughlin, 348 A.2d at 378 (rejecting newspaper's claim of right of access to attorney to records of a disciplinary proceeding against a public official, and denying relevance of prior restraint precedents through the assertion that "this is not a case which calls into question the right of the press to print, publish and distribute information which it has already acquired"); McMullan v. Wohlgemuth, 308 A.2d 888, 895 (Pa. 1973) (rejecting newspaper's claim of right of access to records of identity of welfare recipients under Article I, § 7 stating: "this is *not* a case involving the right of the press to print, publish and distribute information. If it were, the result we reach would be quite different. . . . Here, no impermissible prior restraint is involved."); In re Mack, 126 A.2d 679 (Pa. 1956) (upholding a court order barring photographing of criminal defendant against challenge under Article I, § 7).

54. While there are statements in Ins. Adjustment Bureau v. Ins. Comm'r, 542 A.2d 1317, 1323 (Pa. 1988) that appear to characterize the statutory prohibition of solicitations by insurance adjusters within 24 hours of an accident as "prior restraints," they are best understood as loose dicta. Such a characterization would be inconsistent with both the constitutional text, and prior restraint doctrine. The standard the Court actually used in Insurance Adjustment Bureau falls considerably short of the unyielding hostility to prior restraints that usually applies under Article I, § 7. And the rule the case announces applies impartially to any restriction of commercial speech. *See* 542 A.2d at 1324 ("Article I, Section 7 will not allow the prior restraint *or other restriction of commercial speech* . . . where the legitimate important interests of the government may be accomplished prac-

The two intermediate cases addressed by Pennsylvania's high court have involved the issuance of injunctions against communicative activities which are said to violate applicable law and situations in which administrative officials exercise discretion over some but not all opportunities to engage in free communications.

§ 10.5[a][1]. Injunctions

Injunctions, unlike prior licensing schemes, generally restrain speech only after notice and hearing, and are usually subject to immediate appeal. On the other hand, injunctions share with licensing schemes an orientation towards preventing rather than punishing allegedly illegal communications. Like a press license, injunctions turn on the determination of a single official; they can be granted with the stroke of a pen. Injunctions interfere with the dissemination of information on the basis of potentially exaggerated threats of possible future harm, rather than on the basis of the results of abuse proven before a jury.

Historically, the record on judicially imposed ex ante restraints on free expression has been mixed in Pennsylvania. In the first years after the adoption of the 1790 Constitution, it was not uncommon for courts to require authors and editors to post bonds or recognizances which were subject to forfeiture in the case of a published libel.[55] This practice was said to be consistent with the constitutional prohibition on prior restraints on the ground that before forfeiture, a jury was required to find that a libel had occurred, and "a man though bound to his good behavior, may still publish what he pleases, and if he publishes nothing unlawful, his recognizance will not be forfeited."[56] The rule after 1806 was that sùrety could not be demanded for good behavior before conviction.[57]

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ticably in another, less intrusive manner") (emphasis added).

55. *See* Respublica v. Askew, 1 Yeates, 186 (1792) (reporting a fine and security for good behavior for one year imposed in libel case); Respublica v. Cobbet, 2 Yeates 352 (1798) (refusing removal to federal court of forfeiture action on recognizance bond imposed by Justice McKean on publisher, William Cobbett); Respublica v. Cobbet, 3 Yeates 93 (1800) (affirming the right of the Supreme Court to require recognizance against libel and the right of a jury to determine the law and facts in libel suits); *id.* at 100 (stating counsel's argument that "to effect the purposes of preventive justice, a 'discretion' must necessarily be lodged with the magistrate" adducing right of President under the Alien Act to remove aliens); Respublica v. Davis, 3 Yeates 128 (1801) (reporting a verdict against guarantor for violation of Cobbet's recognizance).

56. Commonwealth v. Duane, reported at 1 Binn. 97 (1806) (Tilghman, J.) (granting writ of habeas corpus).

57. *Id.*

In the context of labor struggles during the end of the nineteenth and the first half of the twentieth century, the Pennsylvania Supreme Court regularly upheld injunctions issued against parades, pickets, boycotts, and efforts to persuade employees to withdraw their labor. Many of these labor injunctions were phrased as prohibitions against particular modes of expression that were regarded as coercive.[58] These instances accord with the constitutional text. A prohibition against the assembly of a violent mob might well be seen as no infringement of the proposition that "every citizen may freely speak, write or print on any subject." Mob violence is not "speaking writing or printing"; indeed the protection of the right to assembly in Article I, Section 20 was specifically limited in 1790 to "the right *in a peaceable manner* to assemble together." So long as the injunction leaves open ample opportunity to exercise the constitutional right of "free communication of thoughts and opinions" identified by Article I, Section 7, it might well be viewed as no prior restraint.

Other labor injunctions issued in the late nineteenth century and early twentieth, however, were directed not at the manner of speech but at its substance; the constitutionally protected "communication of thoughts and opinions" was interdicted because of its unlawful character or tendencies, an approach in substantial tension with the constitutional hostility to prior restraints.[59]

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58. Carnegie-Illinois Steel Corp. v. United Steelworkers, 45 A.2d 857 (Pa. 1946) (issuing an injunction against steelworkers forcibly interfering with maintenance employees entering struck plants stating that, "when a 'picket line' becomes a picket *fence* it is time for government to act"); Westinghouse Elec. Corp. v. United Elec. Radio Mach. Workers, 46 A.2d 16 (Pa. 1946) (issuing an injunction against forcible interference with access to struck plant); Wortex Mills Inc. v. Textile Workers, 85 A.2d 851 (Pa. 1952) (reversing an injunction issued against mass picketing through a prohibition on "loitering or being unnecessarily in the vicinity"); Westinghouse Elec. Corp. v. United Elec. Radio and Mach. Workers, 118 A.2d 180 (Pa. 1955) (enjoining mass picketing that prevented access to plant); Logan Valley Plaza v. Amalgamated Food Employees Union Local 950, 227 A.2d 874 (Pa. 1967) (upholding an injunction against labor picketing in shopping mall). *Cf.* Jefferson & Indiana Coal Co. v. Marks, 134 A.430 (Pa. 1926) (issuing an injunction against parades and picketing where "it was a demonstration aimed at the fears rather than the judgment of those who desired to work. . . . [T]he very fact of parading at the time and place constituted intimidation and was properly enjoined. . . . Persuasion too long and persistently continued, becomes a nuisance and an unlawful form of coercion.").

59. The early cases were the most extreme. *See* O'Neill v. Behanna, 37 A. 843 (Pa. 1897) (issuing an injunction based on "annoyance, intimidation, ridicule and coercion" which extended to denial of the "right to talk to new men" on their way to work); Flaccus v. Smith, 48 A. 894 (Pa. 1901) (issuing an injunction against "seeking to induce the apprentices of the employer to violate the terms of their indentures" by joining a union); Kraemer Hosiery Co. v. American Federation of

By the middle of the twentieth century the Pennsylvania Supreme Court had announced the proposition that no equitable jurisdiction existed to enjoin the communications of organized labor in the absence of disorder, intimidation, or threats.[60] In the last fifty years, the issuance of injunctions against speech has waned.

The Pennsylvania Supreme Court regularly invalidated the issuance of injunctions proscribing exercises of free expression where the issuing courts failed to comply with the procedural mandates of notice, hearing and prompt final judicial determination imposed as a matter of First Amendment doctrine by the United States Supreme Court.[61] As amended in 1973, in light of those cases, Pennsylvania Rule of Civil Procedure 1531(f)(1) now provides:

> (f)(1) When a preliminary or special injunction involving freedom of expression is issued, either without notice or after notice and hearing, the court shall hold a final hearing within three (3) days after demand by the defendant. A final decree shall be filed in the office of the prothonotary within twenty-four (24) hours after the close of the hearing.

Full Fashioned Hosiery Workers, 157 A 588 (Pa. 1931) (enjoining efforts to recruit employees who signed agreements not to join a union); Purvis v. Local 500, United Bhd. of Carpenters, 63 A. 585 (Pa. 1906) (upholding the issuance of an injunction against boycotting, encouraging a boycott and forbidding work on non-union material).

But even after the heyday of the labor injunction, the Pennsylvania Supreme Court occasionally upheld the issuance of injunctions against picketing for "unlawful" purposes. Wilbank v. Chester and Delaware County Bartenders, 60 A.2d 21 (Pa. 1948) (issuing an injunction against picketing where "[d]efendants' purpose in picketing was to require plaintiffs to force their employees to join the union . . . Such a purpose is clearly unlawful . . ."); Phillips v. United Bhd. of Carpenters, 66 A.2d 227 (Pa. 1949) (same); Baderak v. Bldg. and Constr. Trades Council, 112 A.2d 170 (Pa. 1955) (upholding an injunction against non-employees who stopped trucks making deliveries to a building site, convincing them not to fulfill their deliveries); Sansom House Enter. Inc. v. Waiters & Waitresses Union, Local 306, 115 A.2d 746 (Pa. 1955) (holding that the trial court should have issued injunction against picketing where object of picketing was to force employees to join a union); Grimaldi v. Local No. 9, 153 A.2d 214 (Pa. 1959) (enjoining a union from picketing a one-man barbershop).

60. Kirmse v. Adler, 166 A. 566 (Pa. 1933).

61. Duggan v. 807 Liberty Ave., Inc., 288 A.2d 750 (Pa. 1972) (citing Freedman v. Maryland, 380 U.S. 51 (1965)); Commonwealth v. Guild Theatre, Inc., 248 A.2d 45 (Pa. 1968) (same). *See also* Ranck v. Bonal Enterprises, Inc., 359 A.2d 748 (Pa. 1976) (condemning ex parte grant of a preliminary injunction against the exhibition or sale of allegedly obscene periodicals); Commonwealth ex rel. Davis v. Van Emberg, 347 A.2d 712, (Pa. 1975) (reversing an ex parte injunction closing a bookstore); Apple Storage Co., v. Consumers Educ. & Protective Assoc., 272 A.2d 496 (Pa. 1971) (reversing grant of ex parte injunction against consumer picketing).

> If the final hearing is not held within the three (3) day period, or if the final decree is not filed within twenty-four (24) hours after the close of the hearing, the injunction shall be deemed dissolved.[62]

These rules themselves suggest that viewed as a procedural matter, not all injunctions "involving freedom of expression" are impermissible.[63] On the other hand, neither the cases enunciating the procedural requirements nor the comments to Rule 1531(f) make reference to the words and history of Article I, Section 7 or the holding of *Dana* that Pennsylvania's hostility to prior restraints is more severe than that of the Federal Constitution.

Willing v. Mazzocone[64] provides the most recent discussion of the constraints of Article I, Section 7 on the issuance of injunctions, treating in-

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62. In Sch. Dist. of Pittsburgh v. Pittsburgh Fed'n of Teachers, 406 A.2d 324 (Pa. 1979), the Court held that since part of a preliminary injunction prohibiting a teachers' strike "prohibits certain communications by and between appellants and prohibits certain picketing," the entire injunction was dissolved on refusal to grant a final hearing, although parts of the injunction "arguably did not involve freedom of expression."

63. The current state of parallel federal law is set forth in Madsen v. Women's Health Center, Inc., 512 U.S. 753, 764 n.2 (1994):

> Prior restraints do often take the form of injunctions. *See, e.g.,* New York Times Co. v. United States, 403 U.S. 713 (1971) (refusing to enjoin publications of the "Pentagon Papers"); Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam) (holding that Texas public nuisance statute which authorized state judges, on the basis of a showing that a theater had exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene was unconstitutional as authorizing an invalid prior restraint). Not all injunctions that may incidentally affect expression, however, are "prior restraints" in the sense that that term was used in New York Times Co. or Vance. Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone. Moreover, the injunction was issued not because of the content of petitioners' expression, as was the case in New York Times Co. and Vance, but because of their prior unlawful conduct. (citations omitted).

Cf. Justice Henry O'Brien's dictum in Commonwealth v. Guild Theatres, Inc., 248 A.2d 45, 46 (Pa. 1968) (discussing First Amendment precedents, Justice O'Brien states that "[a]lthough we cannot agree with appellants contention that no prior restraint on the exhibition of a motion picture is permissible, it is clear that any such restraint must be very carefully circumscribed.").

64. Willing v. Mazzocone, 393 A.2d 1155 (Pa. 1978). Justice Louis Mandarino's reliance on the strictures against prior restraints was joined by Justices Samuel Roberts and O'Brien, both concurring in the result, *id.* at 1158 (holding that Pennsylvania's constitutional protection of free expression is "based on abhorrence of prior restraints"), and Justice Thomas Pomeroy, also concurring, *id.* at 1160 (incorporating dissenting opinion of Justice Jacobs dissenting

junctions as prior restraints. The prevailing opinion of Justice Louis Mandarino relied on the prohibition of prior restraints in Article I, Section 7 to reverse an injunction entered against the picketing of a law firm by a disgruntled former client, despite a showing that the client's allegations were false and that her indigent status made her judgment proof in a defamation action. Since *Willing*, the Pennsylvania Supreme Court has not upheld an injunction prohibiting an exercise of free expression in the face of a prior restraint challenge under Article I, Section 7.[65]

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in the Superior Court, 369 A.2d 829, which was premised on the proposition that "Article I Section 7 . . . was designed to . . . prohibit the imposition of prior restraints"). *See* Commonwealth v. Pittsburgh Press Co., 396 A.2d 1187, 1191 (Pa. 1979) (Roberts, J., concurring) (arguing that statutory authorization of the Human Relations Commission to direct newspaper to cease and desist publication of "situation wanted" advertisements identifying the advertiser by sex, race, religion, or age is an unconstitutional prior restraint under Article I, § 7); Vogel v. W.T. Grant Co., 327 A.2d 133, 138 (Pa. 1974) (Mandarino, J., concurring) (arguing that an injunction against contacting employers and family of credit card purchasers in effort to collect debt was an impermissible prior restraint); Kramer v. Thompson, 947 F.2d 666 (3d Cir. 1991) (reviewing Pennsylvania cases and concluding that injunction against defamation is improper, even after a jury verdict awarding damages); Terminix Int'l Co. v. Kay, 150 F.R.D. 532 (E.D. Pa. 1993) (granting Rule 11 sanctions against plaintiff's counsel who sought an injunction against critical speech).

65. In Giant Eagle Mkts. Co. v. United Food & Commercial Workers Union, Local Union No. 23, 652 A.2d 1286 (Pa. 1995), the Court sustained an injunction "ordering the pickets to be peaceful and lawful in nature, restricting the number of pickets at the entrances of all appellants stores, mandating the proper spacing and location of those pickets, and enjoining appellees from preventing persons having business with appellant from entering or leaving the premises" after a showing mass picketing, violence, and intimidation. *Id.* at 1291. The order in question did not prevent the communication of any thoughts or opinions, and the issue of prior restraint under Article I, Section 7 was not raised.

During the last quarter century, the Pennsylvania Supreme Court has three times explicitly declined to address Article I, Section 7 prior restraint issues:

In Adler Barish, Daniels, Levin & Crescoff v. Epstein, 393 A.2d 1175 (Pa. 1978), the Court upheld an injunction against solicitation by former employees of a law firm of the firm's clients, but engaged in no prior restraint analysis, observing that the employees "have not disputed the constitutionality of an injunction as a form of sanction." *Id.* at 1149 n.9. This seems a sensible approach.

In Masloff v. Port Auth. of Allegheny County, 613 A.2d 1186 (Pa. 1992) the court declined to address the propriety of a lower court order directing the participants in court-supervised labor negotiations not to make public statements without prior court authorization because "neither of the parties has asserted that the [court] has denied it authorization to make any public statements." *Id.* at 1187 n.1. This seems to be in some tension with the usual rule that the mere requirement of obtaining authorization is an impermissible prior restraint.

Finally, in Bodack v. Law Enforcement Alliance of America, 790 A.2d 277 (Pa. 2001), a majority of the Supreme Court

§ 10.5[a][2]. Permit Requirements

It is not uncommon for municipal governments to require permits for parades, demonstrations, or public meetings. While denial of such permits may not entirely foreclose the possibility of conveying the communications at issue, neither did denial of the classic press license prevent the dissemination of the information at issue by word of mouth. Article I, Section 20 declares that citizens have the right to peaceably assemble, and permit requirements, like the prior restraints against which Blackstone inveighed, place the opportunity to exercise unilateral discretion over the exercise of a constitutional right in the hands of the administrative officer who issues the permit. On the other hand, public meetings, and sometimes other forms of communication, carry with them the possibility of physical disruption of traffic flow or other content-neutral interests that are not adequately addressed by the possible assessment of damages.

In an initial encounter with the issue, in 1920, *Duquesne City v. Fincke*[66] reviewed a conviction of labor organizers for holding a parade in violation of a local ordinance which forbade the holding of public meetings on city streets without a permit issued by the mayor. Notwithstanding the fact that the organizers had filed three successive requests for permits upon which the mayor had taken no action,[67] the Court held that the conviction was consistent with the constraints of Pennsylvania's guarantees of free expression. The streets, according to the opinion "are intended for passage, not assemblage" and "unless regulation is vested somewhere we may renew in our large cities the disorders which have recently appeared in those of the old world."[68] A city, being the owner of the streets, was said to be entitled to regulate their use "under such restrictions and limitations, as in her opin-

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without opinion declined to grant extraordinary jurisdiction to review an injunction entered against the airing of advertisements by political advocacy groups who had not complied with campaign disclosure laws. Justice Castille's dissent from the denial of jurisdiction argued, with some plausibility, that the orders constituted impermissible prior restraints.

66. Duquesne City v. Fincke, 112 A. 130 (Pa. 1920).

67. Mayor Crawford is quoted as saying "Jesus Christ himself could not speak in Duquesne on behalf of the A.F.L." JOHN P. HOERR, AND THE WOLF FINALLY CAME 172 (1988) DAVID BRODY, LABOR IN CRISIS; THE STEEL STRIKE OF 1919, 94 (1965). *See* INTERCHURCH WORLD MOVEMENT OF NORTH AMERICA, PUBIC OPINION AND THE STEEL STRIKE 188 (1921) (quoting Crawford as announcing "Jesus Christ himself could not hold a meeting in Duquesne"). Labor organizers were not favorites of local officials during this period in Pennsylvania's history. *See, e.g.*, Elizabeth Ricketts, *The Struggle for Civil Liberties and Unionization in the Coal Fields: The Free Speech Case of Vintondale, Pennsylvania*, 1922, 122 PA. MAG. OF HIST. AND BIOGRAPHY 319 (1998).

68. Duquesne City, 112 A. at 132-33.

ion, would best conserve 'the peace good government and welfare of the city.' "[69] If the mayor's refusal to act on the permit was unconstitutionally arbitrary or discriminatory, according to the court, a mandamus petition would provide the appropriate remedy. No mention was made of the constitutional strictures against prior restraints.

Modern cases have been more skeptical of administrative licensing. They have, in general, applied the federal free speech doctrine that a permit a regime "which establishes a 'previous restraint' on free speech with no standards prescribed for the exercise of the discretion of the officer issuing the permit is invalid."[70] Under Pennsylvania's independent free expression guarantees, the court in *Commonwealth v. Tate*[71] held impermissible the exclusion of leafletters from a public forum on the basis of "a vague requirement of permission, governed by no articulated standards."

§ 10.5[b]. "EVERY CITIZEN MAY FREELY SPEAK, WRITE AND PRINT"

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69. *Id.* at 134.

70. Commonwealth ex rel. Hines v. Winfree, 182 A.2d 698, 702 (Pa. 1962) (quoting Saia v. New York, 334 U.S. 558 (1948)) (upholding a truck ordinance which provided for automatic issuance of license on showing of technical compliance and payment of license fee). *See* Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151 (1969) (expounding "the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional"). *Cf.* Commonwealth v. Wadzinski, 422 A.2d 124 (Pa. 1980) (invalidating a statute which required prior notification of an opponent before a candidate can make statements within last 48 hours of campaign utilizing solely First Amendment analysis); Brush v. Pennsylvania State Univ., 414 A.2d 48 (Pa. 1980) (upholding a college rule that allowed canvassing in dormitories only if majority of residents voted to allow canvassing where Article I, Section 7 was raised but citing only federal cases in response); Commonwealth v. Sterlace, 391 A.2d 1066 (Pa. 1978) (upholding a prohibition on the placing of advertising materials such as flyers on residential property without prior consent of the resident using entirely federal analysis).

71. Commonwealth v. Tate, 432 A.2d 1382, 1390-91 (Pa. 1981). *See id.* ("the college could not, consistent with the invaluable rights to freedom of speech, assembly, and petition constitutionally guaranteed by this Commonwealth to its citizens exercise its right of property to invoke a standardless permit requirement . . . to prevent appellants from peacefully presenting their point of view"). The analysis in Tate applied Article I, Sections 7 and 20 to the exercise of authority by a private college, and there is some debate as to the vitality of its holding in that regard. For public actors, however, Tate seems clearly to preclude the exercise of "standardless" discretion in the administration of a public forum. *See id.* at 1391 ("Nor may they be based simply upon an undifferentiated fear or apprehension of disturbance. . . ." (citation omitted)).

§ 10.5[b][1]. The Scope of Protection: "Free Communication of Thoughts, Opinions and Ideas"

Pennsylvania's free expression protections are broadly phrased. Although particular modes of communication are mentioned—"the printing presses" in Article I, Section 7[a], "speech printing and writing" in Article I, Section 7[b], the "publication of papers" in Article I, Section [c], and "assembly" and "petition address or remonstrance" in Article I, Section 20—the underlying protection is accorded to the right of citizens to "free communication of thoughts opinions and ideas."

A citizen need use no particular means of communication to invoke her right to free expression. Pennsylvania's courts have recognized that constitutional protection extends to display of the flag as a decoration within the privacy of a citizen's home,[72] as well as to erection of a liberty pole in the public square.[73] The effort to peacefully persuade employees to withdraw from employment or join a union,[74] to picket the premises of employers involved in a labor dispute,[75] to picket landlords accused of dis-

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72. Commonwealth v. Bricker, 666 A.2d 257 (Pa.1995) ("Clearly, there is no precise constitutional calculus as to what constitutes constitutionally protected expression. However, we believe that the government must satisfy constitutional scrutiny before it can tell the citizens of this Commonwealth what pictures they may hang on their walls or what symbols they may display in the sanctity of their homes. We recognize that Ms. Bricker's display of the flag is not 'high art' such as a display of decorative arts found in a fine art museum. However, we believe that the Constitution applies to 'low art' as well as 'high art.'"). Bricker undertakes the analysis primarily in First Amendment terms, but the conclusion regarding the protected nature of home decoration is grounded on an exposition of Pennsylvania's Constitutional right to privacy in the home.

73. Respublica v. Montgomery, 1 Yeates 419 (1795) (rejecting the claim that erection of a liberty pole was an exercise of the right to "free communication of thoughts and opinions" because it constituted an "abuse of liberty" "when the army were known to have been on the march in support of the constitution and law could only be attributed to an avowed design of giving aid to the insurgents"); *cf.* Pennsylvania v. Morrison, 1 Add. 274 (1795) (prosecuting for a liberty pole "in defiance of the laws of the state, of Pennsylvania.").

Liberty poles originated as large, wooden columns often fashioned out ships masts erected in public squares as part of the rites of resistance to British authority during the American Revolution. SIMON P. NEWMAN, PARADES AND THE POLITICS OF THE STREET 25-29 (1997). After the revolution, they were used as symbols of resistance during the Whiskey Rebellion, *id.* at 172-73, and adopted by Jeffersonian republicans as prominent and easily recognizable symbols of liberty, equality and republicanism, and as symbols of opposition to the Federalists government, as well as to the Sedition Act. *Id.* at 80-81, 97, 170-79.

74. Kirmse v. Adler, 166 A. 566 (Pa. 1933); Kraemer Hosiery Co. v. American Fed'n of Full Fashioned Hosiery Workers, 157 A. 588 (Pa. 1931).

75. Locust Club v. Hotel & Club Employees' Union 155 A.2d 27 (Pa. 1959); Warren v. Motion Picture Mach. Operators,118 A.2d 168 (Pa. 1955); American

reputable practices,[76] to seek to persuade others to join a boycott for legitimate purposes,[77] to distribute or sell printed materials on a public street (though not to establish a stationary newsstand),[78] to engage in nude dancing,[79] have all been regarded as protected exercises of the rights of free expression under the Pennsylvania Constitution.[80] Likewise, the right to free communication of thoughts and opinions is infringed by a compulsion to engage in undesired communication.[81]

Although the Pennsylvania Court formerly excluded commercial speech from the protected "communication of thoughts and opinions,"[82] the current rule considers commercial speech to be within the sphere of constitutional safeguards when it is neither false nor misleading.[83]

Brake Shoe Co. v. District Lodge 9 of the Int'l Ass'n of Machinists, 94 A.2d 884 (Pa. 1953); Wortex Mills Inc. v. Textile Workers Union, 85 A.2d 851 (Pa. 1952); Alliance Auto Service Inc. v. Cohen, 19 A.2d 152 (Pa. 1941).

76. Hibbs v. Neighborhood Org. to Rejuvenate Tenant Housing, 252 A.2d 622 (Pa. 1969).

77. 1621 Inc. v. Wilson, 166 A.2d 471 (Pa. 1960) (neighborhood organization picketing local taproom viewed as nuisance); Watch Tower Bible & Tract Soc'y v. Dougherty, 11 A.2d 147 (Pa. 1940) (Catholic threat to boycott department store whose radio station broadcast anti-Catholic programming).

78. 46 S. 52nd St. v. Manlin, 157 A.2d 381 (Pa. 1960).

79. Pap's A.M. v. City of Erie, 812 A.2d 591, 602 (Pa. 2002). In construing the federal protection of free expression, however, the Pennsylvania Supreme Court determined that "sexual contact between correctional staff and inmates cannot plausibly be categorized as expressive conduct warranting First Amendment protection." Commonwealth v. Mayfield, 832 A.2d 418, 424 (Pa. 2003).

80. The Court's conclusions that "fighting words" are outside of free speech protections have used First Amendment analysis exclusively. *Compare* Commonwealth v. Mastrangelo, 414 A.2d 54 (Pa. 1980) (upholding a conviction for disorderly conduct, defined as "making unreasonable noise with intent to annoy or alarm," where defendant followed and frightened a meter maid, calling her "nigger lover" and "****sucker") *with* Commonwealth v. Hock, 728 A.2d 943 (Pa. 1999) (addressing the words "[f]*** you, a**" [*sic*] to a police officer did not constitute disorderly conduct). *Cf.* J.S. v. Bethlehem Area School District, 807 A.2d 847 (Pa. 2002); Commonwealth v. Hendrickson, 724 A.2d 315 (Pa. 1999) (upholding a "harassment by communication" statute requiring specific intent to harass by repeated communications against first amendment challenge—Article I, Section 7 challenge waived because not raised below).

81. Dudek v. Pittsburgh City Fire Fighters, 228 A.2d 752 (Pa. 1967).

82. Ullom v. Boehm, 142 A.2d 19 (Pa. 1958) (holding that a prohibition of price advertising by sellers of eyeglasses does not violate Article I, Section 7, but rather, is a valid exercise of police power).

83. *See* Bureau of Prof'l & Occupational Affairs v. State Bd. of Physical Therapy, 728 A.2d 340, 343 (Pa. 1999) ("Insofar as false or misleading commercial speech is concerned we have followed the federal view that such speech is not constitutionally protected."); Ins. Adjustment Bureau v. Ins. Comm'r for Pennsylvania, 542 A.2d 1317, 1324 (Pa. 1988) (invalidating a statute prohibiting

§ 10.5[b][2]. The Scope of Prohibited Interference: Overview

Article I section 7[a] announces that the freedom of the press is protected against "laws. . . . made to restrain the right thereof." Article I, Section 7[c] places constraints on "prosecutions" and "indictments" for publications of papers. It is clear, therefore, that official actions that impose criminal punishment for the exercise of rights of free expression are subject to the limits imposed by the Pennsylvania Constitution.

But the potential for interference with free expression extends beyond the threat of criminal prosecution and Article I, section 7[b] and Article I, section 20 are phrased in broader terms. They announce that "every citizen may freely speak, write and print on any subject" and that "citizens have the right" to freedom of assembly, petition or remonstrance. Under these provisions the question arises as to what actions other than criminal prosecution constitute derogations of the right to "freely speak, write, or print" and the right to freedom of assembly, petition and remonstrance that call forth scrutiny under the Pennsylvania Constitution. The following subjects have generated case-law worthy of discussion.

§ 10.5[b][3]. Civil Sanctions

Although the protections of Article I, Section 7[c] are limited by their terms to "indictments" or "prosecutions," it has long been clear that civil sanctions levied by state courts are also constrained by the general guaranties of Article I, Section 7[a] and 7[b].[84]

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solicitation of business by claims adjusters during first 24 hours of a catastrophe stating "[o]ur perspective is that in the commercial speech area, we should tread carefully where restraints are imposed on speech if there are less intrusive, practicable methods available to effect legitimate, important government interests."); Commonwealth v. Pittsburgh Press Co., 396 A.2d 1187, 1191 (Pa. 1979) (holding that an order forbidding newspapers from printing requests for employment identifying the sex, race, age, and religion of the advertiser was unconstitutional on the ground that there was "no showing" the limitation was "the necessary to promote . . . legitimate state interest[s]" and further, holding that "unsubstantiated belief" was insufficient).

84. *See* Briggs v. Garrett, 2 A. 513 (Pa. 1886) (observing tension between liberty of press and protection of reputation in a libel action presenting the constitutional question of whether defendant "abused the right" of free speech); Runkle v. Meyer, 3 Yeates 518 (1803) (justifying a civil action for libel against printer under Article I, Section 7 as an imposition of "responsibility" for "abuse of liberty"). *Cf.* Boettger v. Loverro, 587 A.2d 712 (Pa. 1991) (construing a state statute to avoid imposition of liability for publication of wiretap transcripts lawfully obtained).

§ 10.5[b][4]. Deprivation of Licenses and Government Employment

Under the Constitution of 1790, the Supreme Court of Pennsylvania determined that despite the fact that attorneys are admitted to the bar on good behavior, the disbarment of an attorney for publication of measured criticism of a sitting judge would be an impermissible limitation of free expression.[85] Similarly, in construing the Constitution of 1874, Pennsylvania's Supreme Court treated disbarment as a punishment that would deprive an attorney of "his profession and livelihood," holding that "it would be a clear infraction of the spirit if not the letter of [the free speech protections] to hold that an attorney can be summarily disbarred for the publication of a libel on a man in a public capacity or where the matter was proper for public investigation or information . . . he certainly does not forfeit his constitutional rights as a freeman by becoming an attorney."[86]

In the case of public employment, the Pennsylvania Supreme Court was initially less willing to recognize denial of employment as a "deprivation of livelihood" that impinged on constitutional rights to free expression. During the first half of the twentieth century the Court regularly held that discharge from public employment because of particular expressions of political sentiment did not interfere unconstitutionally with the right to "free communication of thoughts and ideas" because no constitutional provision guaranteed public employment. Objections were dismissed on the ground that "[i]f such restriction is distasteful to [an employee], he has the alternative of seeking other employment."[87] So, too, the Pennsylvania Court

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85. Case of Austin, 5 Rawle 191, 205-06 (1835) (stating an attorney is "not professionally answerable for a scrutiny into the official conduct of the judges, which would not expose him to legal animadversion as a citizen").

86. Ex parte Steinman, 95 Pa. 220, 238-39 (1880) (reversing a disbarment for criticism of a judge). *Compare* Margolis' Case, 112 A. 478, 480 (Pa.1921) (disbarment upheld where in addition to anarchist affiliations, attorney "encouraged others, by his addresses, to violate the laws of the land. Such conduct in the case of an attorney, whose duty it is to uphold the law, and not encourage a breach thereof it constitutes a positive disregard of the official obligation which he solemnly entered into when he took his oath of office," (citation omitted)) *with* Schlesinger Appeal, 172 A.2d 835, 842 (Pa. 1961) (reversing disbarment of a member of the communist party, because "[c]ulpability does not attach merely from membership in the Communist Party; under our traditions beliefs are personal and not a matter of mere association," (citation omitted) relying on federal precedents). *See also* Schlesinger v. Musmanno, 81 A.2d 316 (Pa. 1951) (reversing on due process grounds summary disbarment by a trial judge who concluded the attorney was a communist).

87. Duffy v. Cooke, 86 A. 1076, 1081 (Pa. 1913) (upholding statute discharging municipal employees who serve as members of, attends meeting of any political party). *See* Bd. of Pub. Educ. v. August, 177 A.2d 809 (Pa. 1962) (upholding discharge of teacher for refusal to answer questions about communist affil-

concluded that conditions on the grant of licenses could not infringe on guarantees of free expression because there was no right to obtain such licenses.[88]

In the aftermath of the McCarthy era, however, the Pennsylvania Court began to recognize the scope of the potential impact of denials of "privileges" on opportunities for free expression.[89] In 1971 the Court sustained a challenge under both federal and state free speech protections to the dismissal of a public employee for statements critical of government welfare policy. It announced that in light of "the tremendous increase in government activity and employment . . . it is today a well established principle that constitutional rights are no longer forfeited simply because one is a policeman, or a lawyer, or a teacher, or even a lifeguard. These public occupations 'are not relegated to a watered-down version of constitutional rights' . . . 'It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.' "[90]

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iations); Bd. of Educ. v. Soler, 176 A.2d 653 (Pa. 1961) (same); Bd. of Pub. Educ. v. Beilan, 125 A.2d 327 (Pa. 1956) (same); Fitzgerald v. Philadelphia, 102 A.2d 887 (Pa. 1954) (upholding loyalty oath required of hospital nurse); Albert Appeal, 92 A.2d 663 (Pa. 1952) (upholding discharge of high school English teacher for "advocation of or participating in un-American or subversive doctrines"); McCrory v. Philadelphia, 27 A.2d 55 (Pa. 1942) (upholding dismissal of fire fighter because he wore a political badge and solicited votes); Hutchinson v. Magee, 122 A. 234 (Pa. 1923) (upholding order barring members of fireman's association from employment in fire department).

88. In re Tahiti Bar, Inc., 150 A.2d 112, 114, 116 (Pa. 1959) (upholding suspension of liquor licenses suspended for "lewd, immoral and/or improper entertainment"; "[a]n individual has no constitutional right to engage in the business of selling alcoholic beverages. . . . [the statute] merely provides that, if a certain type of entertainment is presented, the privilege of dispensing alcoholic beverages, to which an individual has no constitutional right, will be withdrawn . . . the right of the individual to freedom of speech is not involved.")

89. *See* Bd. of Pub. Educ. v. Watson, 163 A.2d 60 (Pa. 1960) (reversing dismissal of teacher dismissed for failing to answer HUAC questions on 1st Amendment grounds); Ault v. Unemployment Comp. Bd. of Review, 157 A.2d 375 (Pa. 1960) (reversing denial of unemployment compensation to claimant discharged from private employment for invoking 5th Amendment before U.S. Senate investigating committee, and noting the tendency to "become[s] myopic upon the mere mention of Communism"). This recognition had been foreshadowed in Wilmerding Borough Sch. Dist. Bd. of Dir. v. Gillies, 23 A.2d 447, 448 (Pa. 1942) (reversing dismissal of teacher who was alleged to have "chosen as his companions and associates, communists and persons of radical political belief"; evidence did not meet statutory standard for dismissal on the basis of immorality or incompetence).

90. In re Chalk, 272 A.2d 457, 459-60 (Pa. 1971) (citations omitted). *See also* Redevelopment Auth. of Philadelphia v. Lieberman, 336 A.2d 249 (Pa. 1975) (reversing dismissal of employee who had

§ 10.5[b][5]. Private Interference with Free Expression

Unlike the First and Fourteenth Amendments of the Federal Constitution, which are by their terms directed respectively against actions by "Congress" and "states," the words of Pennsylvania's free expression guaranties do not confine their protection to particular modes of "state action." Article I, Section 7 [b] announces, as its predecessors have since 1790, that, "The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for abuse of that liberty." Article I, Section 20 declares, in similar fashion, that "[t]he citizens have a right" to assembly, petition and remonstrance. The constitutional text gives no reason to believe that private and public assaults may not equally violate these rights.[91]

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publicly criticized employer, relying on federal First Amendment precedents); Commonwealth ex rel. Specter v. Moak, 307 A.2d 884 (Pa. 1973) (Stating "it is now beyond cavil that public employees may not be denied constitutional rights on the theory that public employment is a privilege, not a right," but holding under First Amendment precedents that prohibition on political candidacy is a constitutionally permissible restriction on the political activity of municipal employees).

In Pennsylvania State Police v. Hospitality Inv. of Philadelphia, Inc., 650 A.2d 854 (Pa. 1994), a majority of the court relied on Tahiti Bar to hold that liquor licensees waived their free speech objections to prohibitions on price advertising. This case was reversed and remanded for reconsideration by the United States Supreme Court, and on remand, the statute was struck down on First Amendment grounds without addressing Article I, Section 7. Pennsylvania State Police v. Hospitality Inv. of Philadelphia, Inc., 689 A.2d 213 (Pa. 1997).

91. For a fuller discussion, see Chapter 34, *infra,* dealing with "State Action." To be sure, the concluding paragraph of the Declaration of Rights has provided since 1790 that "everything in this article is excepted out of the general powers of government and shall forever remain inviolate." PA. CONST. art. I, §25. But the limitation of the "powers of government" does not appear to exhaust the effect of the Article. In Spayd v. Ringing Rock Lodge, 113 A. 70, 72 (Pa. 1921), the Court gave weight to the separate proposition that the rights of the Declaration should "forever remain inviolate" to preclude retaliation by a labor union against one of its members. Moreover, the Declaration's wording since 1790 has been introduced by an intent that the "essential principles of liberty and free government may be recognized and unalterably established." PA. CONST. art. I, Introduction.

By the terms of the Constitution, the "invaluable right[s]" of "free communication of thoughts and opinions" is one such "principle[s] of liberty and free government." To take the extreme case, a polity in which one political group is at liberty to suppress its competitors by private force would be characterized by neither "liberty" nor "free government," even if the form of elections remained. Given the importance of free speech in underpinning Pennsylvania's democratic self governance (*see supra*), the Constitution cannot be indifferent to private attempts to stifle political expression.

A line of twentieth century cases confirms this perception. In *Spayd v. Ringing Rock Lodge,*[92] the Pennsylvania Supreme Court reviewed a petition from a member of the Brotherhood of Railroad Trainmen who had been expelled for signing a petition asking the Pennsylvania legislature to reconsider a "full crew law" supported by the union. The court issued an injunction grounded on the free expression provisions of the Pennsylvania Constitution, compelling the plaintiff's reinstatment. It declared:

> When plaintiff signed the petition to the legislature to repeal the Full Crew Law, he was communicating his "thoughts and opinions" to that body, and seeking at its hands redress of what he considered a public "grievance"—relief which the lawmakers alone could grant. Since plaintiff viewed the statute petitioned against as such a grievance, the course of conduct pursued by him was not merely within his legal rights, but accorded with his solemn duty as a citizen, for the exercise of which he can under no circumstances be penalized.[93]

The court adduced as well a narrower ground for decision:

> We have often said that the by-laws, rules and regulations of these artificial bodies will be enforced only when they are reasonable. . . . and they never can be adjudged reasonable when, as here, they would compel the citizen to lose his property rights in accumulated assets, or forego the exercise of other rights which are constitutionally inviolable.[94]

Similarly, in *Dudek v. Pittsburgh City Fire Fighters, Local No. 1,*[95] the Court, relying on *Spayd,* enjoined the imposition of fines by a public employees union on eighteen members who refused to picket Democratic ward meetings as the union directed. The court reasoned:

> It is just as illegal to compel one to speak when he prefers to remain silent as it is to gag one when he wishes to talk. . . . The regulations and by-laws of organizations such as the one under consideration, will be enforced only when they are reasonable. . . . [P]laintiffs would be compelled to oppose by signs, and by picketing, candidates for whom they might well have a decided preference. Such a regulation imposes

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92. 113 A. 70 (Pa. 1921).

93. *Id.* at 72 ("[t]he rights above noted cannot lawfully be infringed, even momentarily, by individuals any more than by the State itself"); *id.* at 72 ("[t]he Constitution does not confer the right, but guarantees its free exercise—without let or hindrance from those in authority, at all times, under any and all circumstances; and, when this is kept in view, it is apparent that such a prerogative can neither be denied by others nor surrendered by the citizen himself.").

94. *Id.*

95. Dudek v. Pittsburgh Fire Fighters, Local No. 1, 228 A.2d 752 (Pa. 1967).

> a blanket opposition which is so contrary to the fundamental rules of fairness that it cannot possibly pass muster under the criterion of reasonableness.[96]

Commonwealth v. Tate[97] reversed the defiant trespass conviction of demonstrators who sought to distribute peacefully leaflets on a private college campus opposing the policies of the FBI director who had been invited to a public meeting on campus. The court began by reviewing the wording and heritage of Pennsylvania's constitutional guaranties of free speech, concluding that "the rights of freedom of speech, assembly, and petition have been guaranteed since the first Pennsylvania Constitution, not simply as restrictions on the powers of government, as found in the Federal Constitution, but as inherent and "invaluable" rights of man.[98] Construing the Pennsylvania statute's affirmative defense to prosecution for defiant trespass when property is "open to members of the public" and an alleged trespasser has complied with all "lawful conditions" for access, the Court concluded that the prohibition of defendants' leafletting was not a "lawful" condition. "[T]he college could not, consistent with the invaluable rights to freedom of speech, assembly, and petition constitutionally guaranteed by this Commonwealth to its citizens, exercise its right of property to invoke a standardless permit requirement and the state's defiant trespass law to prevent appellants from peacefully presenting their point of view to this indisputably relevant audience in an area of the college normally open to the public."[99]

Some federal courts have viewed the Pennsylvania Supreme Court's subsequent decision in *Western Pennsylvania Socialist Workers v. Connecticut*

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96. *Id.* at 755. *See id.* at 757 (Cohen, J., concurring in the result) ("the legality of the objective sought by the union did not overcome its unlawful attempt at coerced expression by individual union members contrary to their constitutional rights of free speech and political belief"); *id.* at 758 (Roberts, J. concurring) ("it should be noted that the language of our Constitution prohibits not only state interference with free expression but also coercion of speech from sources other than the state."). *See also* Collins v. Main Line Bd. of Realtors, 304 A.2d 493, 497-98 (Pa. 1973) (enjoining exclusion of real estate broker from trade organization as common law restraint of trade, and reasoning: "One of the reasons, for example, given by the appellee corporation for denying membership to the appellants centered around charges brought by appellants on behalf of a client against the appellee, charging it with discrimination before the Pennsylvania State Human Relations Commission. Although the charge was dismissed by the Commission, the Board felt that Collins had maligned its reputation by bringing the charge. We think it sufficient to say that Collins and Suburban should not now be permitted to be penalized for assisting a client in an attempt to assert his constitutional right to petition the government for a redress of grievances.")

97. Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981).

98. *Id.* at 1388.

99. *Id.* at 1391.

General Life Insurance Co.,[100] as repudiating the *Spayd-Dudek-Tate* line of cases and rejecting the possibility that private actions can constitute an unconstitutional interference with Pennsylvania free expression rights.[101] The Court in *Socialist Workers* refused to enjoin the owner of a shopping center from enforcing a policy uniformly banning all political leafletting, but to view it as overruling the prior construction of Pennsylvania's free expression guarantees misreads the five opinions delivered by the fractured court in the case.

The concurring opinions of Justices Rolf Larsen and James McDermott explicitly rejected *Tate*, and Justice Stephen Zappala expressed "serious doubts" regarding its conclusions.[102] Justice Robert Nix, however, explicitly reaffirmed *Tate* and joined in what he regarded as the lead opinion's conclusion that "the limitation in Federal constitutional decisions to matters involving 'state action' is not applicable in an analysis where it is alleged that one of these rights conferred under our Constitution has been violated."[103] The lead opinion by Justice William Hutchinson, joined by Justice John Flaherty, offered a very narrow analysis in support of its conclusion that "the Pennsylvania Constitution does not guarantee access to private property for the exercise of such rights where, as here, the owner uniformly and effectively prohibits all political activities and similarly precludes the use of its property as a forum for discussion of matters of public controversy."[104]

On one hand, the lead opinion affirms that the Pennsylvania Constitution "is a limitation on the power of state government . . . [which] prohibits the government from interfering with [inherent natural rights] and

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100. Western Pennsylvania Socialist Workers v. Connecticut General Life Insurance Co. 515 A.2d 1331 (Pa. 1986).

101. *E.g.*, Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623 (E.D. Pa. 2001); Constitutional Def. Fund v. Humphrey, 1992 U.S. Dist. LEXIS 9306 (E.D. Pa. 1992); Tinneny v. Frasse-Basset, Inc., 1990 U.S. Dist. LEXIS 6152 (E.D. Pa. 1990); *Cf.* Sabatini v. Reinstein, 1999 U.S. Dist. LEXIS 12820 (E.D. Pa. 1999) (holding that no private cause of action existed under Article I, section 7). *But see, e.g.* Cable Inv., Inc., v. Woolley, 867 F.2d 151 (3d Cir. 1989) (treating Western Pennsylvania Socialists as clarifying Tate; crucial question was whether defendant established a public forum); Radich v. Goode, 886 F.2d 1391 (3d Cir. 1989) (same); Cyber Promotions v. America Online, 948 F. Supp. 436 (E.D. Pa. 1996) (same). *See* Coatesville Dev. Co. v. United Food & Commercial Workers, 542 A.2d 1380 (Pa. Super. 1988) (reversing grant of injunction against picketing on private property, declining to reach Article I, Section 7).

102. W. Pennsylvania Socialist Workers, 515 A.2d at 1340 (opinion of Larsen, J., concurring); *id.* at 1340 (opinion of Zappala, J., concurring); *id.* at 1341 (opinion of McDermott, J., concurring in the result).

103. *Id.* at 1341 (Nix, J., concurring in part and dissenting in part).

104. *Id.* at 1333 (the court distinguished the one-sided college policy in Tate which allowed speech by the FBI director, but banned his critics).

leaves adjustment of the inevitable conflicts among them to private interaction, so long as that interaction is peaceable and non-violent."[105] On the other hand, the opinion immediately cautions "[w]e are not suggesting that the rights enumerated in the Declaration of Rights exist only against the state"; "[t]hey are not created by the Constitution, but preserved by it," citing *Spayd*.[106] It concludes that shopping malls are not "require[d] . . . to provide a political forum for persons or groups with views on public issues, so long as the owner does not grant unfair advantage to particular interests or groups by making his premises arbitrarily available to those he favors while excluding all others," citing *Commonwealth v. Tate*.[107] Thus, the opinion apparently reaffirms both *Tate* and *Spayd* without mentioning *Dudek*.[108]

The current state of doctrine is hardly pellucid. None of the Pennsylvania cases go so far as to declare that every action by a private party which deters the exercise of free expression is a violation of the Pennsylvania Constitution. But the constitutional commitment to free expression clearly exercises a "gravitational" pull in interpreting both statutory and common law requirements. Where either statutory or common law doctrines constrain the exercise of a legal right or privilege to "reasonable" dimensions, this line of cases at a minimum mandates that a "reasonable" application of those rights or privileges cannot be one that derogates Pennsylvania's Constitutional commitment to free expression.[109]

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105. *Id.* at 1335. The opinion exhibits some confusion in failing to note that the key language regarding the "free communication of ideas and opinions" was adopted in the 1790 Constitution rather than the natural rights Constitution of 1776, ignoring the clear salience to the framers of the political function of the rights of free communication (*see supra*), and overlooking the insertion by the 1790 convention of the clarification that the Declaration of Rights is promulgated in order that "essential principles of liberty and free government may be recognized and unalterably established."

106. *Id.* at 1335.

107. *Id.* at 1336. *See id.* at 1338 (affirming that Tate "implictly recognized" Pennsylvania's Constitution provides greater protection than the Federal Constitution).

108. In Pap's A.M. v. City of Erie, 812 A.2d 591, 605-6 (Pa. 2002), the Court cites with approval both Spayd and Tate as exemplifying the "broader" protections provided by the "independent constitutional path forged under Article I, Section 7."

109. They suggest, as well, that Judge Arlin M. Adams was on solid ground in Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983), in holding that the Pennsylvania free expression guarantees provide a basis for concluding that public policy prohibits the discharge of a private employee for refusing to sign letters to legislators in support of his employer's political agenda. The possibility of a wrongful discharge action based on the Declaration of Rights has occasioned a long-running debate as Pennsylvania's law has evolved over the last twenty years. *See* James G. Fannon, *The Public Policy Exception to the Employment at Will Doctrine: Searching for Clear Mandates in the Pennsylvania Constitution*, 27 RUTGERS L.J. 927 (1996). The most recent opinions from the Pennsylvania Supreme Court suggest that an employer's efforts to interfere with an employee's activities as a citizen, exer-

§ 10.5[b][6]. Other Regulations

In the usual case, the "free communication of thoughts and opinions" is not infringed by generally applicable regulations simply because they impose some collateral burden on communication. Thus, the elimination of a sales tax exemption for magazines, while the tax was retained for newspapers was held to be consistent with Article I, Section 7 because the tax was identical to that imposed on other items of commerce and incidence of the tax was based on format and frequency of the publication rather than its contents.[110]

In *Philadelphia Fraternal Order of Correctional Officers v. Rendell*, the court held that a statute which limited collective bargaining rights of public employees to a single designated union even when a rival union had been chosen by employees did not impinge on rights guaranteed by Pennsylvania's free expression protections. The Court reasoned: "Appellants have not been prohibited from forming PFOCO nor have they suffered any retaliation from the City or the Commonwealth for forming a rival union and expressing dissatisfaction with AFSCME . . . freedom of speech does not include the right to force another to listen."[111]

On the other hand, while an order denying access to government information is not a prior restraint, interferences with the opportunity to gather news are subject to review under the Pennsylvania Court's free ex-

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cising constitutional right to participate in political discourse or petition or remonstrate would be actionable. *See* Shick v. Shirey, 716 A.2d 1231 (Pa. 1998) (discharge in retaliation for filing worker's compensation claim was actionable); McLaughlin v. Gastrointestinal Specialists, Inc., 750 A.2d 283, 289 (Pa. 2000) (rejecting wrongful discharge claim based on a possible violation of a federal statute distinguishing case where "if we allowed an employer to discharge an employee for filing a complaint with a Commonwealth agency such as the Workers' Compensation Appeal Board, we impact the rights of that employee and the public by undermining the very purposes of a statute of this Commonwealth"); Shick v. Shirey, 691 A.2d 511, 518 (Pa. Super. 1997), *rev'd and remanded*, 716 A.2d 1231 (Pa. 1998) (opinion of Saylor, J., dissenting) (quoting Novosel: wrongful discharge action is available on the basis of "a violation of a clearly mandated public policy which 'strikes at the heart of a citizen's social right, duties, and responsibilities' ").

110. Magazine Publishers of America v. Commonwealth, 654 A.2d 519 (Pa. 1995). So, too, the Pennsylvania Constitution does not protect the press from the general obligation to comply with grand jury subpoenas. In re Taylor, 193 A.2d 181, 184 (Pa. 1963) ("[b]y no stretch of language can it protect or include under 'freedom of the press' the non-disclosure of sources of information"). *See also* Commonwealth v. Abu-Jamal, 555 A.2d 846, 859 (Pa. 1989) ("[p]unishing a person for expressing his views or for associating with certain people is substantially different from allowing his statements to be used for impeachment or to be considered as evidence of his character where that character is a relevant inquiry").

111. Philadelphia Fraternal Order of Correctional Officers v. Rendell, 736 A.2d 573, 577 (Pa. 1999).

pression jurisprudence, to guard against gratuitous government interference with the flow of information to the public.[112]

§ 10.5[b][7]. "Responsible for Abuse"

The protections offered by Pennsylvania's free speech provisions are qualified. The core constitutional text contemplates the possibility of sanc-

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112. McMullan v. Wohlgemuth, 308 A.2d 888, 896-97 (Pa. 1973) ("it is perhaps logical to assume that . . . a right to gather news 'of some dimension must exist' if the First Amendment is to have realistic vitality . . . we agree that such a right, emanating from the First Amendment, does exist, this right, as all other First Amendment rights, is not absolute. . . . [h]ere appellees have no right to compel the disclosure of names explicitly restricted by statute. . . . [t]he Commonwealth's interest in protecting the privacy of those it aids through public assistance is paramount and compelling. . . . The statutory limitation imposed on appellees' asserted First Amendment right to compel the disclosure . . . is no greater than necessary to protect the substantial governmental and individual interests involved"); In re McLaughlin, 348 A.2d 376, 382 (Pa. 1975) ("[w]e need not here intimate any view as to whether such a right of access exists in this case, for even assuming [it does] . . . we would conclude that the right is overborne by the paramount interest of the state in protecting the grant of confidentiality"); In re Mack, 126 A.2d 679, 681 (Pa. 1956) (order prohibiting taking pictures of criminal defendant within the courthouse upheld because freedom of the press is "subject to reasonable rules seeking maintenance of the court's dignity and the orderly administration of justice").

Orders closing courtrooms have been held to be subject to a balancing process which gives substantial weight to the right to public access under Pennsylvania's Constitutional mandate of "speedy public trials" (Article I, Section 9) and "open courts" (Article I, Section 11). In re Seegrist, 539 A.2d 799 (Pa. 1988); Commonwealth v. Berrigan, 501 A.2d 226, 234 n.10 (Pa. 1985); Commonwealth v. Contakos, 453 A.2d 578, 580-81 (Pa. 1982); Commonwealth v. Hayes, 414 A.2d 318, 328 (Pa. 1980) (Justices Flaherty and Larsen would have held that no exclusions from the courtroom were ever appropriate); *see* Philadelphia Newspapers, Inc., v. Jerome, 287 A.2d 425,434 (Pa. 1978) (under Pennsylvania free expression provisions, "any limitation on access should be carefully drawn . . . [and] should not be limited for any reason less than the compelling state obligation to protect constitutional rights of criminal defendants . . . and . . . the threat posed to the protected interest is serious . . . and no more than is necessary to accomplish the end sought").

Likewise, records of public trials have been held to be subject to a mandate of public accessibility under Article I, Section 7 and Article I, Section 11. Commonwealth v. French, 611 A.2d 175, 180 n.12 (Pa. 1992) ("strongly condemning" sealing of record and stating "public trials involve public records"). A separate common law rule, established under the "same considerations" mandates access to material filed in courts. *See* P.G. Publ'g Co. v. Commonwealth, 614 A.2d 1106 (Pa. 1992) (recognizing common law right of access to search warrants in the absence of good cause for sealing); Commonwealth v. Fenstermaker, 530 A.2d 414 (Pa. 1987) (common law right of access to arrest warrants, absent substantial threats to legitimate state interests). Relying on Fenstermaker and McMullan, the Court in Uniontown Newspapers, Inc. v. Roberts, 839 A.2d

tions for "abuse" of constitutional liberties, and the prime interpretative challenge is to identify the substance of these "abuses."

The clearest constitutional provision, the substantive and procedural protections against criminal prosecution for publications involving public officials or issues provided by Article I, Section 7 [c], has been largely superseded by more protective federal constitutional standards in the area of libel.[113] The Pennsylvania Supreme Court has taken the position that in light of the constitutional protection for personal reputation provided by Article I, Section1 of the Declaration of Rights, federal rules establish the outer limits of constitutional protection against defamation actions. It wrote: "[t]o gratuitously embellish upon the stringent requirements of current federal constitutional law [regarding libel] would be in conflict with the recognition given by our state constitution to a citizen's right to protect his or her reputation."[114]

Outside of the context of reputation, a separate analysis under the Pennsylvania Constitution is necessary. The fulcrum of analysis is the proposition under Article I, Section 7[b] that "every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty."[115]

Beginning with the Constitution of 1790, eighteenth and nineteenth century courts held that the definition of "abuse" of free expression for

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185 (Pa. 2003) held that Article I Section 7 provided no right of access to legislative records beyond the proceedings of the legislature.

113. *See* Commonwealth v. Armao, 286 A.2d 626, 632 (Pa. 1972).

114. Sprague v. Walter, 543 A.2d 1078, 1084-5 (Pa. 1988); See Hatchard v. Westinghouse Broad. Co., 532 A.2d 346 (Pa. 1987) (interpreting Pennsylvania Shield Law to allow discovery of "outtakes" in libel actions to the extent that the documentary information does not reveal the identity of a personal source of information or may be redacted to eliminate the revelation of a personal source of information); Moyer v. Phillips, 341 A.2d 441 (Pa. 1975) (exception in survival action for cause of action for libel and slander is arbitrary and thus violative of equal protection rights afforded under the state Constitution for the protection of a fundamental right of reputation); Barr v. Moore, 87 Pa. 385, 393 (1878) ("The high esteem in which reputation is held, and the protecting care which the organic law has thrown around it, are clearly expressed in first section of the Declaration of Rights. . . . The general liberty of the press must be construed in subordination to the right of any person calumniated thereby, to hold it responsible for an abuse of that liberty").

115. As a textual matter, one might argue that the different phrasing in Article I, Section 20, protecting without qualification the right to assembly, petition and redress "in a peaceable manner" provides unqualified protection to political interchange and petition so long as it is peaceable. The Pennsylvania courts have, however, interpreted Article I, Section 20 and Article I, Section 7 *in pari materia*. *See* Philadelphia Fraternal Order of Correctional Officers v. Rendell, 736 A.2d 573, 576 (Pa. 1999); Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co. 515 A.2d 1331 (Pa. 1986); Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981); Duquesne City v. Fincke, 112 A. 130 (Pa. 1920).

which punishment could be imposed was tied to the common law: a common law criminal offense or tort was by definition an abuse of free expression. Thus, notwithstanding the constitutional protection of free communication, the early Pennsylvania courts had no difficulty in sanctioning criminal prosecutions for communicative actions that today would be recognized as obvious "abuses" such as riots, conspiracies and solicitations to engage in criminal acts,[116] and obstructions of the public highways.[117] But

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116. In the aftermath of the Whiskey Rebellion of 1794, the Pennsylvania Supreme Court upheld prosecutions for erecting "liberty poles" as standards of rebellion. Pennsylvania v. Morrison, 1 Addison 274 (1795) (prosecution for erecting a liberty pole "in defiance of the laws of the state of Pennsylvania"). *See* Respublica v. Montgomery, 1 Yeates 419, 422 (1795) (duty of magistrate was to prevent erection of liberty pole; "setting up [of] a pole at any time, in a tumultuous manner, with arms, is a riot" notwithstanding right of "free communication").

Likewise, courts regularly upheld indictments for conspiracy and solicitation to illegal actions. *E.g.,* Commonwealth v. Gillespie, 7 Serg. & Rawle 469, 474 (1822) (conspiracy to sell illegal lottery tickets); *see also, e.g.,* In re Northern Liberty Hose Co., 13 Pa. 193, 196 (1850) (upholding statutory proceedings to require fire company to close its doors because of rioting "by the [hose] company, or [its] adherents"); Commonwealth v. Franklin, 4 U.S. 255 (4 Dall.) (Pa. 1802) (upholding indictment under statute that defendants "unlawfully did combine and conspire, for the purpose of conveying, possessing, and settling, on certain lands within the limits of the county aforesaid, under a certain pretended title not derived from the authority of this commonwealth," on grounds that such conspiracies were violations of common law); Commonwealth v. Randolph, 23 A. 388 (Pa. 1892) (solicitation to commit murder is a common law crime although solicitation to commit fornication and adultery is not).

Pennsylvania's early conspiracy law extended to communications we would today regard as protected. *E.g.,* Mifflin v. Commonwealth, 5 Watts & Serg. 461 (1843) (upholding indictment for conspiring "to effect the escape of Jane M. Nevin, an infant . . . with a view to her marriage"); Commonwealth v. Eberle, 3 Serg. & Rawle 9 (1817) (upholding indictment for conspiracy for colorful language committing members of German Evangelical Lutheran Congregation to oppose the use of English in services; "the defendants complain of the hardship of charging them with all the rash and violent speeches of a few individuals. Such however is the law"); Commonwealth v. Wood, 3 Binn. 414 (1811) (conspiracy prosecution against journeyman hatters).

117. The Supreme Court of Pennsylvania rejected free speech claims and upheld a nuisance prosecution against a defendant who "by means of violent, loud, and indecent langauge" "caus[ed] to assemble and remain [in the public highway] for a long space of time great members of men and boys, so that the streets were obstructed." Barker v. Commonwealth, 19 Pa. 412 (1852).

The Court subsequently emphasized in Fairbanks v. Kerr & Smith, 70 Pa. 86, 92 (1872), that "it does not follow that every one who speaks or preaches in the street, or who happens to collect a crowd therein by other means, is therefore guilty of the indictable offence of nuisance. His act may become a nuisance by his obstruction of the public highway, but it will not do to say it is a nuisance per se. Such a stringent interpretation of

the courts equally approved common law prosecutions for seditious libel,[118] personal libel,[119] obscenity,[120] blasphemy,[121] public profane swearing,[122]

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the case of Barker is scarcely suited to the genius of our people or to the character of their institutions." *See also* County of Allegheny v. Zimmerman, 95 Pa. 287, 294 (1880) (plaintiff cannot claim that erection of a 40-foot liberty pole in public street prior to election was a nuisance per se; "It is a custom sanctioned by a hundred years and interwoven with the traditions, memories and conceded rights of a free people. . . . It did not occupy the street to such an extent or in such a manner that any person complained of its interfering with the public travel")

118. Respublica v. Dennie 4 Yeates 267 (1805) (prosecution for statement that "A democracy is scarcely tolerable at any period of national history"'). The Dennie court charged the jury that a conviction required a finding that the statement was "seditiously, maliciously and wilfully aimed at the Constitution" and that a privilege was available on a showing of "good motives, and for justifiable ends." The jury acquitted.

119. Commonwealth v. Place, 26 A.620, 621 (Pa. 1893) (criminal libel prosecution for newspaper story that "sets forth in a sensational manner the details of a disgusting private scandal concerning parties residing in Pottsville"); Commonwealth v. Duane, 1 Binn. 601 (1809) (prosecution for libeling Governor held Constitutional, but suspended by 1809 statute barring indictments for libel of public officials); *see also* Wood v. Boyle, 35 A. 853 (Pa. 1896) (upholding civil libel verdict in case brought after defendant had been acquitted on criminal libel charge). On remand from the United States Supreme Court's denial of protection under the First Amendment, the Pennsylvania Supreme Court invalidated the ban on nude dancing for failure to meet Article I, Section 7's least restrictive alternative requirement. Pap's A.M. v. City of Erie, 812 A.2d 591 (Pa. 2002).

120. Barker v. Commonwealth, 19 Pa. 412, 413 (1852) (prosecution also for "openly and publicly speaking with a loud voice . . . . representing men and women in obscene and indecent positions and attitudes" is justified where statements are public and have a "tendency . . . to debauch and corrupt the public morals"); Commonwealth v. Sharpless, 2 Serg. & Rawle 91, 102-103 (1815) (showing "painting, representing a man in obscene, impudent, and indecent posture with a woman," despite the absence of public display was indictable at common law, like "an indecent book," "[w]hat tended to corrupt society, was held to be a breach of the peace and punishable"). The Pennsylvania Court continued to take the position that Sharpless was good law through the middle of the twentieth century. *See* William Goldman Theatres, Inc. v. Dana, 173 A.2d 59, 64 (Pa. 1961); Commonwealth v. Blumenstein, 153 A.2d 227, 228 (Pa. 1959).

The *Sharpless/Barker* rule has been supplanted by more protective First Amendment rules. In evaluating the protection of sexualized communication during the last part of the twentieth century the Pennsylvania Court has taken protection to be governed by federal standards. *See* Zimmerman v. Philjon, Inc. 368 A.2d 694 (Pa. 1977); Commonwealth v. MacDonald, 347 A.2d 290 (Pa. 1975) (Pennsylvania obscenity statute unconstitutional under federal standards); Commonwealth v. Rogers, 327 A.2d 118 (Pa. 1974) (contrary United States Supreme Court decision required reversal of Commonwealth v. Lalonde, 288 A.2d 782 (Pa. 1972), which had unanimously adopted a mandate that contemporary community standards in obscenity cases be established by expert testimony), Duggan v. Guild Theatre, Inc., 258 A.2d 858 (Pa. 1969); Commonwealth v. Dell Publ'n, 233 A.2d 840 (Pa.

and the offense of being a "common scold."[123] So, too, the common law's bar against interference with contractual and business relations were held to sanction the issuance of injunctions against strikes, labor organizing, and picketing as "abuses" of Pennsylvania's guarantees of free communication and assembly.[124]

Privileges were accorded in civil libel actions on the basis of "good motives" and "probable cause."[125] This privilege and the broader constitutional

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1967) (describing federal obscenity law as a conceptual "disaster area" but applying it); Commonwealth v. Robin, 218 A.2d 546 (Pa. 1966).

Justices Castille and Zappala have recently taken the position that a more protective state rule shielded federally unprotected erotic dancing on the ground that "[l]awmakers may not categorically proscribe any form of protected expression simply because they are not at ease with its content." Pap's A.M. v. City of Erie, 719 A.2d 273, 284 (Pa. 1998) (Castille, J., concurring in the result), *rev'd on other grounds*, 529 U.S. 277 (2000) *on remand* 812 A.2d 591 (Pa. 2002).

121. Updegraph v. Commonweallth, 11 Serg. & Rawle 394 (1824) (blasphemy may be punished, like cursing, swearing in public).

122. Commonwealth v. Linn, 27 A. 843, 844 (Pa. 1893) ("[i]t cannot be doubted that profane swearing and cursing, in aloud and boisterous tone of voice, and in the presence and hearing of citizens of the commonwealth passing and repassing on the public streets . . . is an indictable offense," prosecution dismissed because no sufficient allegation that swearing was heard by the public).

123. In James v. Commonwealth, 12 Serg. & Rawle 220, 225 (1825) the court declared unconstitutional as cruel and unusual punishment "revolting to humanity" the punishment of subjecting women convicted of being common scolds to being "plunged three times in the water" on a "cucking stool." The court, however, despite some "hesitations" declared that "the offence of communis vexatrix" remained "punishable as a common nuisance, by fine, or by fine and imprisonment." *Id.* at 236. *See* Commonwealth v. Mohn, 52 Pa. 243, 246 (1866) (upholding prosecution of "common scold" as a nuisance; "[a]s to the unreasonableness of holding women liable to punishment for a too free use of their tongue, it is enough to say that the common law, which is the expressed wisdom of ages, adjudges that it is not unreasonable").

124. Kraemer Hosiery Co. v. American Fed'n of Full Fashioned Hosiery Workers, 157 A. 588 (Pa. 1931) (enjoining union efforts to recruit employees who had signed contracts forbidding union membership); Jefferson & Indiana Coal Co. v. Marks, 134 A. 430, 432 (Pa. 1926) (injunction against parades and demonstrations "aimed at the fears rather than the judgment of those who desired to work"); Purvis v. Local 500 United Brotherhood of Carpenters, 63 A. 585 (Pa.1906) (injunction issued against boycott, encouraging boycott, forbidding work on non-union material); Erdman v. Mitchell, 56 A. 327 (Pa. 1903) (injunction against "coercive" strike); Flaccus v. Smith, 48 A. 894 (Pa. 1901) (injunction against "enticing" apprentices to break their indentures); O'Neill v. Behanna, 37 A. 843 (Pa. 1897) (injunction against strikers who used "annoyance, intimidation, [and] ridicule").

125. Conroy v. Pittsburgh Times, 21 A. 154 (Pa. 1891) (burden on libel defendant to come forward with evidence of probable cause where privilege is claimed); Neeb v. Hope, 2 A. 568 (Pa.

mandate extended their protection primarily to sober addresses to the public on political topics,[126] though more extreme statements could prevail before juries.[127]

In the early twentieth century, Pennsylvania courts began to evaluate limitations on free expression that diverged from the common law. In general, in the early years of the twentieth century, the Pennsylvania Supreme Court was as deferential to legislative constraints as to common law limitations. Legislative exercises of the police power were held consistent with the guarantees of free expression so long as the legislative determinations were "reasonable."[128]

1886) (in libel action for comments about actions of public officer, defendant can prevail either by showing probable cause for accusation or lack of "ill will" or "reckless disregard" of reputation); Chapman v. Calder, 14 Pa. 365 (1850) (in slander action for privileged communication (here: charges to ecclesiastical tribunal) probable cause is a defense even if not given as part of claim of truth); M'Millan v. Birch, 1 Binn. 178, 186-87 (1806) ("freedom of speech in what is called a course of justice" presumptively privileges accusations before ecclesiastical tribunal; if accusations are made "in a decent manner" law will not "imply malice"); Gray v. Pentland, 4 Serg. & Rawle 420 (1819) (if charge is false, in order to prevail defendant must show he acted from mistake and with good faith); Gray v. Pentland, 2 Serg. & Rawle 23, 30 (1815) (defendant deposes before justice of the peace that prothonotary was drunk and unfit to perform duties; statement is actionable only if made "in malice" and "without probable cause"); Runkle v. Meyer, 3 Yeates 518 (1803).

126. Briggs v. Garrett, 2 A. 513 (Pa. 1886) (defendant protected from libel judgment for reading letter attacking political candidate to good government group, where he acted with probable cause, despite the fact that the letter was inaccurate); Ex parte Steinman, 95 Pa. 220, 236, 239 (1880) (attorneys protected from disbarment for publishing statement that acquittal of defendant was "secured by a prostitution of the machinery of justice to serve the exigencies of the Republican party," where the attorneys were "acting in good faith, without malice, and for the public good"); Case of Austin, 5 Rawle 191, 205 (1835) (critics of sitting judge protected against disbarment; "liberty of the press" protects "legitimate . . . scrutiny . . . where the public good is the aim").

127. *E.g.*, Respublica v. Dennie, 4 Yeates 402 (1805) (jury acquitted printer indicted for seditious libel on the basis of the statement, "A democracy is scarcely tolerable at any period of national history"); *cf.* Rowand v. DeCamp, 96 Pa. 493, 502 (1880) ("no statute or rule was cited which obligates a citizen when discussing the conduct of pubic servants in their official capacity, who speaks the truth as he designs to be understood and as he is understood by his hearers, to employ any prescribed form of expression or language. So long as he speaks the truth . . . he is not liable in damages, whether his language be chaste or vulgar, refined or scurrilous").

128. Commonwealth v. Widovich, 145 A. 295, 299 (Pa. 1929) (upholding prosecution under sedition statute; "[t]he body that determines in the first instance what utterances of speech shall constitute abuse, is the legislature. . . . [w]hether the regulation of speech or print goes beyond the 'abuse of liberty' as contemplated by the Constitution is for the courts. They may review the rea-

Pennsylvania's courts began to develop a more assertive approach to the protection of rights of free expression during the 1930s, in the shadow of the United States Supreme Court's application of federal free speech principles to the states. In *Kirmse v. Adler*,[129] the Pennsylvania Supreme Court unanimously affirmed that the right of labor unions to peacefully urge employees to withdraw from employment or to induce customers of hostile employers to withdraw their patronage was "secured to the citizen[s]" by Pennsylvania's free expression protections. Characterizing the guarantees of free speech as "absolute rights," the Court held that "[h]aving this unquestioned right to present their case to the public in newspapers or circulars in a peaceful way, if the employer suffers loss from this peaceable assertion of rights, it is a damage without a remedy."[130] The constitutional guarantees were largely superseded in the labor area by statutory protection,[131] and much subsequent litigation in the labor field turned on the construction of Pennsylvania's statutory protections in light of federal free-speech jurisprudence.[132] Pennsylvania's courts, however, continued to rec-

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sonableness of the enactments"); Commonwealth v. Foley, 141 A. 50, 51 (Pa. 1928) (upholding prosecution for circulation of anonymous defamatory pamphlet regarding district attorney, under statute which prohibits anonymous "opprobrious" material; notwithstanding constitutional requirement of "malice" or "negligence" in Article I, Section 7[c]; "[t]here is nothing in the Constitution to prohibit the legislature or the court from further defining negligence or malice"; legislature determined that an anonymous publication "is of itself malice and negligence"); Buffalo Branch, Mutual Film Corp. v. Breitinger, 95 A. 433 (Pa. 1915) (upholding film censorship statute; the police power " is more despotic and broader than the right of eminent domain . . . it is the application of the . . . principle of self preservation of the body politic"). *But cf.* Spayd v. Ringing Rock Lodge, 113 A. 70, 72 (Pa. 1921) (stating that a petition addressed to the legislature could "under no circumstances be penalized"). This approach left traces as late as mid-century. In re Mack, 126 A.2d 679 (Pa. 1956) (freedom of the press is "subject to reasonable rules seeking maintenance of the court's dignity and the orderly administration of justice").

Widovich was perhaps the high-water mark of deference. Relying on the statement in Article XVI of the 1874 Constitution that "the police power shall never be abridged," the Widovich court concluded, "[i]f the exercise of the police power should be in irreconcilable opposition to a constitutional provision or right, the police power would prevail." 145 A. at 298. This police power provision was deleted by the Constitution of 1968.

129. Kirmse v. Adler, 166 A. 566, 569 (Pa. 1933).

130. *Id.* at 569.

131. *See, e.g.,* Labor Anti-Injunction Act June 2, 1937 P.L. 1198.

132. *E.g.,* Phillips v. United Bhd. of Carpenters, 66 A.2d 227 (Pa. 1949) (picketing to coerce employer into requiring union membership (itself an unlawful act) can be enjoined; using federal free speech analysis); PLRB v. Chester & Delaware County Bartenders, 64 A.2d 834 (Pa. 1949) (holding Pennsylvania statute outlawing picketing by non-employees unconstitutional under First Amendment); Wilbank v. Chester & Delaware County Bartenders, 60 A.2d 21 (Pa. 1948) (picketing to induce employer to require union membership can be enjoined; re-

ognize that "[p]eaceful picketing has been recognized as a form of assembly and of speech, and has been afforded the protection of . . . Article I, Section 7 of the Constitution of Pennsylvania," and that "[a] state cannot because of its own notions of the wise limits of industrial dispute, either by legislative enactment or judicial determination, unduly limit the right of free speech."[133] Outside the labor context the Pennsylvania Supreme Court continued to hold that efforts to persuade customers to withdraw their patronage were protected.[134]

The free speech analysis of Pennsylvania's high court in the mid-twentieth century in large measure tracked federal doctrine. Thus, in the area of film censorship, the invalidation of vague and overbroad censorship schemes followed exclusively from federal precedents.[135] So, too, in responding to the anti-communist fervor of the 1950s, the Pennsylvania Supreme Court did not intepret Pennsylvania's free expression provisions to provide greater protection than their federal counterparts.[136] While Pennsylvania's high court periodically decried the excesses of red-hunting

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quirement would itself be illegal); Westinghouse Elec. Corp. v. United Elec., Radio, & Machine Workers Local 601, 46 A.2d 16 (Pa. 1946) (upholding injunction against plant seizure); Carnegie-Illinois Steel Corp. v. United Steelworkers, 45 A.2d 857 (Pa. 1946) (same). *See also supra* note 64.

133. American Brake Shoe Co. v. Dist. Lodge 9 Int'l Ass'n of Machinists, 94 A.2d 884, 887-88 (Pa. 1953) (citations omitted). *See* Warren v. Motion Picture Mach. Operators, 118 A.2d 168, 170 (Pa. 1955) ("[i]n a democracy, so long as the communication in a labor controversy—or in any other type of quarrel due to differences in view—advocates persuasion and not coercion, thus appealing to reason and not to force, there attends the message-bearer the invisible sentinel of the law protecting the right of freedom of communication").

134. Watch Tower Bible & Tract Soc'y v. Dougherty, 11 A.2d 147, 148 (Pa. 1940) ("defendants . . . cannot be mulcted in damages for protesting against the utterances of one who they believe attacks their church"); 1621, Inc. v. Wilson, 166 A.2d 271, 275 (Pa. 1960) (refusing to issue injunction against picketing of taproom by neighborhood organizations; right to "air grievances" is constitutionally protected).

135. Commonwealth v. Blumenstein, 153 A.2d 227 (Pa. 1959); Hallmark Prod., Inc. v. Carroll, 121 A.2d 584 (Pa. 1956). Subsequent obscenity analysis has also tracked the evolution of federal doctrine. *See supra* note 120.

136. The trend began with Albert Appeal, 92 A.2d 663 (Pa. 1952) (upholding the discharge of a high school English teacher for "advocation of or participating in un-American or subversive doctrines"), and Fitzgerald v. Philadelphia, 102 A.2d 887 (Pa. 1954) (upholding loyalty oath required of hospital nurse; analysis based entirely on federal precedents). *See* Bd. of Pub. Educ. v. Beilan, 125 A.2d 327 (Pa. 1956) (upholding discharge of teacher discharged for failure to answer questions by principal regarding communist affiliations); Kaplan v. Philadelphia Sch. Dist., 130 A.2d 672 (Pa. 1957) (denying pay to teacher discharged for failing to reply to questions regarding communist affiliation); Bd. of Pub. Educ. v. Soler, 176 A.2d 653 (Pa. 1961) (refusal to answer questions about

repression,[137] where it provided relief, the court relied on requirements of due process and fair procedure rather than the rights of free expression.[138]

As the McCarthy era receded, the Pennsylvania's courts began to approach free expression cases with a somewhat greater degree of independence.[139] In recent decades, the Pennsylvania cases have regularly articu-

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communist connections by superior grounds for discharge); Bd. of Pub. Educ. v. August, 177 A.2d 809 (Pa. 1962) (upholding discharge of teacher for refusal to answer superior's questions about communist connections).

137. In re Schlesinger, 172 A.2d 835, 837 (Pa. 1961) ("It is a lamentable commentary, but none the less true, that, in the existing frame of the public mind, a lawyer who undertakes voluntarily the legal representation of a person charged with being, or even pointed at (in J'accuse fashion) as, a Communist runs the risk of a disruption of his law practice and the impairment of his own professional reputation"); Ault v. Unemployment Comp. Bd. of Review, 157 A.2d 375, 378 (Pa. 1960) (noting tendency of officials to "become[s] myopic upon the mere mention of Communism"); Matson v. Margiotti, 88 A.2d 892, 899 (Pa. 1952) ("[t]he recent practice of some high public officials to slander and vilify innocent people who have little or no chance to defend themselves or their reputation has shocked our nation and nearly every respectable citizen would like to see mud-slinging and unjustifiable character assassination by public officials and candidates for public office stopped or abolished").

138. In re Schlesinger, 172 A.2d 835 (Pa. 1961) (reversing disbarment of former member of communist party because of multiple failures in process by which disbarment was imposed); Bd. of Pub. Educ. v. Intille, 163 A.2d 420 (Pa. 1960) (reversing dismissal of teacher for invocation of 5th amendment before HUAC; relying on federal precedents); Ault v. Unemployment Comp. Bd. of Review, 157 A.2d 375 (Pa. 1960) (reversing denial of unemployment compensation to worker discharged for invoking Fifth Amendment before congressional investigating committee); Commonwealth v. Truitt, 85 A.2d 425, 428 (Pa. 1951) (reversing conviction for assault in labor affray where prosecution "injected" irrelevant testimony as to defendant's "communistic connections and activities"); Matson v. Jackson, 83 A.2d 134, 135, 137 (Pa. 1951) (enjoining hearing by attorney general into "alleged communistic leanings, sympathies and utterances" of attorney on grounds that the attorney general lacked authority to conduct such hearings, "an authority that would be contrary to the spirit of all our laws which so jealously guard the rights of the individual"); Schlesinger v. Musmanno, 81 A.2d 316 (Pa. 1951) (reversing contempt citation and disbarment of attorney that trial judge concluded was a communist); Commonwealth ex rel. Roth v. Musmanno, 72 A.2d 263 (Pa. 1950) (reversing order dismissing grand juror because trial judge concluded she was a communist); Communist Party Petition, 75 A.2d 583 (Pa. 1950) (issuing writ of prohibition against order mandating the padlocking of communist party offices as "without warrant in law"). *See also* Commonwealth v. Nelson, 104 A.2d 133 (Pa. 1954), *aff'd*, 350 U.S. 497 (1956) (sedition conviction reversed because of federal preemption); *cf.* Bd. of Pub. Educ. v. Watson, 163 A.2d 60 (Pa. 1960) (reversing dismissal of teacher for failing to answer HUAC on First Amendment ground; First Amendment privilege may not be well founded but refusal to answer Congressional committee is not statutory "incompetency").

139. *E.g.*, William Goldman Theatres

lated a doctrine that allows the state to burden free expression only to the extent necessary to remedy demonstrated evils.[140] In *Insurance Adjustment Bureau v. Insurance Commissioner*,[141] the court announced that "Article I, Section 7, will not allow the prior restraint or other restriction of commercial speech by any governmental agency where the legitimate, important interests of government may be accomplished practicably in another, less intrusive manner." Reviewing a prohibition on solicitation by claims adjusters within 24 hours of a loss, the Court concluded that the legitimate governmental goal of preventing overreaching by insurance adjusters "could be accomplished by enforcement of civil, criminal and administrative remedies already in place." In regard to commercial speech, this "least restric-

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v. Dana, 173 A.2d 59 (Pa. 1961) (holding that film censorship statute was unlawful prior restraint under Article I, Section 7 despite recent United States Supreme Court case upholding film censorship under First Amendment); Locust Club v. Hotel & Club Employees' Union, 155 A.2d 27 (Pa. 1959) (holding that peaceful picketing of social club seeking to organize workers was protected by Article I, Section 7, even though federal precedents might hold it unprotected under the First Amendment).

Under the Pennsylvania Constitution, the Court began to review the actual probability of disruption invoked to justify limitations on expression. *See, e.g.*, Commonwealth v. Pittsburgh Press Co., 396 A.2d 1187, 1189, 1191 (Pa. 1979) (invalidating limit on advertising because of the absence of any showing that the limitation was "necessary to promote [emploment discrimination] legitimate state interest"; the state's "unsubstantiated belief" that the prohibition would limit employment discrimination was insufficient); Conversion Center Charter Case, 130 A.2d 107, 111 (Pa. 1957) (trial court may not deny approval of charter of "Conversion Center" aimed at converting Catholics; conclusion that group "might" create "unrest" is not sufficient reason; "an interdiction based on nothing more than the possibility of some future transgression of the law is a violation of the applicable constitutional guarantees"); American Brake Shoe Co. v. District Lodge 9 Int'l Ass'n Machinists, 94 A.2d 884 (Pa. 1953) ("[a] state cannot because of its own notions of the wise limits of industrial dispute, either by legislative enactment or judicial determination, unduly limit the right of free speech"; holding that peaceful labor picketing of non-struck plant of multi-plant employer cannot be enjoined).

140. Philadelphia Newspapers, Inc. v. Jerome, 387 A.2d 425, 435 (Pa. 1978) (closure of trial is permissible where "the threat posed to the protected interest is serious" and the closure is "no more than is necessary to accomplish the end sought"); Pirillo v. Takiff, 341 A.2d 896, 901 (Pa. 1975) (upholding order preventing joint representation of 12 subpoenaed witnesses by attorneys employed by police union because intrusion is "no greater than necessary to eliminate the substantive evil"); McMullan v. Wohlgemuth, 308 A.2d 888, 897 (Pa. 1973) (upholding refusal to allow access to names of welfare recipients because of interest in privacy: "[t]he statutory limitation imposed on appellees' asserted First Amendment right to compel the disclosure . . . is no greater than necessary to protect the substantial governmental and individual interests involved").

141. Insurance Adjustment Bureau v. Insurance Commissioner, 542 A.2d 1317, 1324 (Pa. 1988).

tive alternative" requirement has been subsequently held to be limited to speech that is neither false nor misleading.[142] In Pap's A.M. v. city of Erie,[143] the Court invalidated a ban on public nudity that was "aimed at barring nude dancing." Although the ordinance had previously been upheld by the United States Supreme Court, the Pap's Court adopted an independent analysis under Article I, Section 7 relying on Insurance Adjustment Bureau's least intrusive alternative test. Simple hostility to "the erotic message of the dance," the Court held, was not a legitimate interest in light of Article I, Section 7's protection of "the free communication of thoughts and ideas," and the important and legitimate interest in avoiding sex crimes could be accomplished by "narrower, less intrusive methods than the total ban on expression."[144]

This approach is congruent with the constitutional language which makes a citizen subject to "responsibility for abuse of liberty"; a requirement that the burden on free communication be no greater than necessary to avoid a demonstrated harm follows the linkage of "responsibility" to a particular "abuse." There is no reason to believe this least restrictive alternative analysis, which is some times more protective than First Amendment standards, is limited to commercial speech or expressive conduct cases, since it seems clear that in terms of the concern for political and expressive liberty that underpin Pennsylvania's free expression jurisprudence, commercial speech and nude dancing are far from the core of protected expression.[145]

§ 10.6. OTHER STATE CONSTITUTIONS

Since each of the 50 states' Constitutions contains free expression provisions, many of which track the "responsible for abuse" wording of Article

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142. Commonwealth v. State Bd. of Physical Therapy, 728 A.2d 340, 343 (Pa. 1999) ("[o]nly where speech is not misleading have we engaged in an analysis of whether, for purposes of the Pennsylvania Constitution, there were available less restrictive means by which the government could have accomplished its objective"; holding that allowing chiropractors to advertise as "physical therapists" is misleading).

143. Pap's A.M. v. City of Erie, 812 A.2d 591, 612-13 (Pa. 2002).

144. *Id.*

145. The analysis of the Court in Boettger v. Loverro, 587 A.2d 712, 718 (Pa. 1991), construing Pennsylvania's wiretap statute not to impose liability for publication of intercepted communications obtained from court records after a motion to suppress had been denied, proceeded largely in terms of First Amendment values. But the court's conclusion that "it cannot be said that the information . . . [was] protected by a state interest of the highest order" because "our citizens' right to privacy does not extend to protecting a 'right to privacy' in illegal endeavors" is consistent with the notion that infringement on freedom of the press is acceptable no further than is truly necessary to protect important state interests.

I, section 7, a large volume of litigation and commentary has emerged regarding state free-expression protections.[146] The opinions of the Pennsylvania Supreme Court on occasion make mention of parallel discussion in other courts,[147] but for the most part analysis of Pennsylvania free-expression issues has proceeded unencumbered by reference to the jurisprudence of sister states.

§ 10.7. CONCLUSION

The free-expression clauses of the Pennsylvania Constitution have a rich heritage. The clauses' tripartite commitments—political, epistemic, and libertarian—serve crucial functions in protecting the utility of speech as well as free expression itself and promise to continue to do so in the future.

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146. A useful overview can be found in 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES 5-1 TO 5-96 (3d ed. 2000). *See also* FRIESEN at 9-1 to 9-37 (discussing application of state free expression guarantees to non-public actors); ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW, CASES AND MATERIALS 270-84 (3d ed. 1999) (same); Susan King, *State Constitutional Law Bibliography: 1989-1999*, 31 RUTGERS L. J. 1623, 1691 (2000) (collecting recent articles on state free-speech jurisprudence).

147. Pap's A.M. v. City of Erie, 812 A.2d 591, 610-11 n. 10 (Pa. 2002) (declining to follow constitutional analysis of nude dancing by other state courts where either "no separate state constitutional analysis was undertaken" or the cases rest on "unexplained decisions" to follow a prevailing United States Supreme Court plurality). W. Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co., 515 A.2d 1331, 1338 (Pa. 1986) (distinguishing California cases on shopping center access, noting "[t]he highest courts of other jurisdictions are divided on this issue"); Commonwealth v. Tate, 432 A.2d 1382, 1389 (Pa. 1981) (making reference to New Jersey and California cases regarding access to shopping centers by protestors); Commonwealth v. Nelson, 104 A.2d 133, 135 (Pa. 1954), *aff'd*, Pennsylvania v. Nelson, 350 U.S. 497 (1956) (dicta citing New Jersey case regarding vagueness of "incitement to hatred" statutes); Commonwealth v. Geuss, 76 A.2d 500 (Pa. Super. 1950), adopted by Pennsylvania Supreme Court, 81 A.2d 553 (Pa. 1951) (making reference to New Jersey case regarding loudspeakers).

EXHIBIT B

Chapter 8

ELECTIONS

Article I, Section 5

AMY ELIZABETH MCCALL*

§ 8.1. INTRODUCTION

Article I, Section 5 of the Pennsylvania Constitution, relating to "Elections" provides as follows:

> "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."[1]

"Free and equal" elections were considered, by those leaders of the Revolutionary era responsible for the creation of the first Pennsylvania Constitution, to be a cornerstone of the democratic republic created by the severance of the colonies from England.[2] Although some of the more radical ideas instituted in that first Constitution for the Commonwealth have been eliminated through later Constitutional overhauls, "free and equal" elec-

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1. PA. CONST. art. I, §5.

2. Free and equal elections had long been the law of the territory, but the definition of free and equal had been amorphous. THOMAS RAEBURN WHITE, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA 349 (1907). CHARLES R. BUCKALEW, AN EXAMINATION OF THE CONSTITUTION OF PENNSYLVANIA 9 (1883).

tions are still considered to be a cornerstone of the democratic republic. The right to such elections is explicitly protected in Pennsylvania's Constitution by Article I, § 5 of the Declaration of Rights.

This chapter will provide guidance to a litigant wishing to perform an *Edmunds* analysis[3] of the free elections clause in Article I, § 5 of the Pennsylvania Constitution. Thus, Part I will cover the text and history of Article I, § 5. Part II will discuss Pennsylvania case law regarding the elections provision. Part III will introduce related case law from sister states. Because there is no federal equivalent of the elections clause, there will be no analysis of federal precedent regarding the elections clause. Finally, Part IV will offer a summary and discuss any policy considerations that may be considered when a court is determining the effect of Article I, § 5 of the Pennsylvania Constitution on a specific issue.

§ 8.2. TEXT AND HISTORY

Pennsylvania's 1776 constitution was a victory for those seeking a radical democratic government.[4] One of the changes that early Pennsylvania leaders agreed was necessary to give citizens a more democratic system was greater popular participation in government than had existed previously. Under the Frame of Government of Pennsylvania of 1696,[5] for a person to vote in an election, that person was required to be a free male of at least 21 years of age, have fifty acres of land with at least ten being cleared, or "be otherwise worth fifty pounds" and have been a resident of the province for at least two years.[6] During the revolutionary era, a religious and geographic schism in politics allowed those who had previously been denied the franchise to come into power.[7] To ensure that broader participation in

3. Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991).

4. Robert F. Williams, *"The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism,"* 62 TEMP. L. REV. 541 (1989). The radical changes included a unicameral legislature and an executive committee. These were changes that did not last and the 1790 Pennsylvania Constitution instituted a more traditional two-house legislature and single executive. ROSALIND L. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 18 (1960).

5. The Frame of Government of the Province of Pennsylvania, and the territories thereunto belonging, passed by Governor Markham, November 1, 1696, available at: http://www.yale.edu/lawweb/avalon/states/pa05.htm.

6. *Id.* "That no inhabitant of this province or territories, shall have right of electing, or being elected as aforesaid [Council and Assembly], unless they be free denizens of this government, and are of the age of twenty-one years, or upwards, and have fifty acres of land, ten acres whereof being seated and cleared, or be otherwise worth fifty pounds, lawful money of this government, clear estate, and have been resident within this government for the space of two years next before such election." *Id.*

7. BRANNING, *supra* § note 4, at 11-13.

government was possible, and that those who had gained power could maintain that power, the Declaration of Rights, which occupied a separate section of the 1776 Pennsylvania Constitution, included the following language in section VII: "That all elections ought to be free; and that all free men having a sufficient evident common interest with, and attachment to the community, have a right to elect officers, or to be elected into office."[8] This sweeping language, based on the Virginia Bill of Rights, left certain questions ambiguous regarding exactly which citizens could exercise the franchise.[9] For example, how exactly could it be determined whether a citizen had an "attachment to the community" or a "sufficient evident common interest with" the community?

This weak language was drastically strengthened in the 1790 Pennsylvania Constitution, when much of the modifying language was removed and the present equality language was added as a requirement for elections. When combined with the preamble to the Declaration of Rights, the new provision in Article IX of the revised constitution read: "That the general, great and essential principles of liberty and free government may be recognised and unalterably established, WE DECLARE . . . That elections shall be free and equal."[10] The minutes of the 1789-1790 proceedings give no insight into the reasons the convention chose to remove the modifying language, but clearly, this new wording granted broader rights to Pennsylvania citizens.[11]

When another convention to amend the Constitution was held in 1837-38, section five of the ninth article, dealing with elections, sparked lively debate.[12] Earlier in that same convention, the same issues were raised and argued for several days. Over 50 pages of the record dealt with a discussion of Article III, § I.[13] The issue that caused such dissension was the inclusion of

8. Pa. Const. of 1776, Ch. I, VII.

9. ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 569 (1985). The Virginia Bill of Rights, adopted on June 12, 1776, included property issues in the same section as the elections clause. Section 6 of the Virginia Bill of Rights said, "That elections of members to serve as representatives of the people, in assembly, ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage, and cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assembled, for the public good." Va. Const. of 1776.

10. Pa. Const. of 1790, Art. IX, § V.

11. Matthew C. Jones, *"Fraud and the Franchise: The Pennsylvania Constitution's 'Free and Equal Election' Clause as an Independent Basis for State and Local Election Challenges,"* 68 TEMP. L. REV. 1473, 1477 (1995).

12. PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION COMMENCED AT HARRISBURG, MAY 2, 1838, Volume XI, pg. 249.

13. *Id.* at Volume III, pp. 29–81.

language such as that proposed to be inserted in Article IX, § V of the Declaration of Rights: "The election laws shall be uniform throughout the state and no greater or other restrictions shall be imposed on the electors in any city, country or district than are imposed on the electors of every other city, county or district."[14] This addition was defeated and the language of Article IX, § V remained unchanged, i.e. "Elections shall be free and equal."[15]

In 1872, a convention to once again amend the Pennsylvania Constitution was convened in Harrisburg.[16] Section five of the proposed new Declaration of Rights read: "That the elections shall be free and equal, and no power, civil or military, shall, at any time, interfere with the free exercise of the right of suffrage" reflecting additional language proposed by the committee.[17] There was a fractious debate regarding events in a Philadelphia election several years before the convention, with some sides claiming that the federal military was properly called in to preserve order and others claiming the federal military prevented a fair election.[18] A motion to have the elections clause remain exactly as it had been (i.e. "That elections shall

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14. *Id.* at Volume XI, pg. 249. Similar language was proposed to be inserted into Article III, § I, "... The election laws shall be equal throughout the State, and no greater or other restrictions shall be imposed on the electors in any city, county, or district, than are imposed on the electors of every other city, county, or district." *Id.* note 16, pg. 29. These proposals were a response to the Registry Law which provided for separate rules for Philadelphia voters to exercise their franchise rights than those rules provided for the remainder of the state. This is further discussed *infra* in the discussion of Patterson et al. v. Barlow et al., 60 Pa. 54 (1869).

15. PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION COMMENCED AT HARRISBURG, MAY 2, 1838, Volume XI, pg. 251. However, note that virtually identical language was inserted into Article VIII, § 7 in the 1901 Constitution:

> All laws regulating the holding of elections by the citizens or for the registration of electors shall be uniform throughout the state; but laws regulating and requiring the registration of electors may be enacted to apply to cities only, provided that such laws be uniform for cites in the same class.

Thomas White notes that:

> This is the only express provision in the constitution recognizing the power of the Legislature to classify cities for purposes of legislation. Laws relating to elections, other than registration laws, must apply to the whole state, and not merely to a class of cities; this is because of the usual rule of interpretation, that the exception marks the limit of the power.

THOMAS RAEBURN WHITE, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA 357 (1907). The language of the 1901 Constitution has been added to and the provision has been moved to Article VII, § 6, but the provision remains the constitutional law of Pennsylvania.

16. DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA CONVENED AT HARRISBURG, NOVEMBER 12, 1872 (1873).

17. *Id.* at 670.

18. *Id.* at 670-6.

be free and equal") was defeated by a vote of thirty-six to thirty-eight.[19] Mr. Ainey, from Lehigh County, suggested changing the proposed wording so that the word "with" after the word "interfere" would be changed to "to prevent."[20] Ainey urged that this would better address those abuses that concerned the delegates to the convention.[21] This proposed change was accepted, and since the 1874 addition of that language—"and no power civil or military, shall, at any time, interfere to prevent the free exercise of the right of suffrage"—the wording of the elections section of the Declaration of Rights has remained unchanged. The 1874 Constitution also moved the Declaration of Rights back to Article I to underscore its importance.

A wide range of issues has been discussed under the Elections Clause of the Declaration of Rights over the past two centuries. New cases still arise under this constitutional clause with regularity. The framers of Pennsylvania's original 1776 Constitution were correct in anticipating that a citizens' right to "free and equal" elections would remain a cornerstone of a healthy democratic state.

§ 8.3. PENNSYLVANIA CASE LAW

One of the earliest cases decided under the Article I, § 5 of the Pennsylvania Constitution gave meaning to the words in that clause. In 1874, the Pennsylvania Supreme Court decided a case regarding the 1873 constitutional convention, *Wood's Appeal*.[22] In that case, a portion of the delegates to the convention was elected by the majority of the voters, and a lesser portion of those delegates was reserved to represent the minority of the voters in the election.[23] This minority representation was challenged as a violation of the standards of republican government and a violation of the "free and equal" elections clause.[24] The court rejected this argument stating that the "free and equal" elections clause was "nothing more than a declaration, that elections shall be public, and open to all duly qualified alike, without discrimination as to individuals or classes."[25] Charles Buckalew, in his seminal 1883 work on the Pennsylvania Constitution,[26] found this statement to be far too narrow an interpretation of the elections clause.[27] In general, as the

19. *Id.* at 676.
20. *Id.* at 672.
21. *Id.*
22. Wood's Appeal, 75 Pa. 59 (1874).
23. *Id.* at 60.
24. *Id.*
25. *Id.* at 67.
26. CHARLES R. BUCKALEW, AN EXAMINATION OF THE CONSTITUTION OF PENNSYLVANIA (1883).
27. *Id.* at 10. Buckalew wrote,
> The words "free and equal" ... strike not only at privacy and partiality in popular elections, but also at corruption, compulsion, and other undue influences by which elections may be assailed; at all regulations of law which shall impair the right of suffrage rather than facilitate or reasonably direct the manner of its exercise, and at all

cases that follow demonstrate, modern courts have tended to agree with him.

§ 8.3[a]. UNIFORMITY OF ELECTION LAWS

The earliest case decided under Article I, § 5 of the Pennsylvania Constitution listed in Buckalew's treatise was *Patterson v. Barlow.*[28] In *Patterson,* the Pennsylvania Supreme Court, with extensive discussion, determined that free and equal elections did not require that laws be uniform across the state.[29]

At issue in *Patterson* was an act passed April 17, 1869, entitled "An act further supplementary to the act relative to the elections of this Commonwealth" which created two separate systems for elections in the state: one for Philadelphia and the other for the remainder of the state.[30] The trial judge ruled that the act was unconstitutional because it violated the constitutional requirement of free and equal elections.[31] On appeal before the full Supreme Court, Justice Daniel Agnew, writing for the majority, noted that since the requirement for uniformity had been raised at the Constitutional Convention of 1838 and had been rejected by that body, it would make no sense for the court to read uniformity into the current provision.[32] The court decided that "free and equal" elections did not require absolutely uniform regulations, merely reasonably equal opportunities to vote.[33] It should be noted that this case was decided before the enactment of the 1901 constitutional amendment requiring uniformity of election laws (see note 19). That amended clause, now located in Article VII, § 6, takes uniformity of election laws out of the domain of the "free and equal" elections provision in Article I, § 5.

§ 8.3[b]. BALLOTS

The majority of the earliest cases brought under Article I, § 5 of the Pennsylvania Constitution concerned ballots and nominations. In 1884, the Chester County Reports published a Philadelphia case, *In re Clothier's Application,*[34] regarding whether the ballot could be denied to an otherwise

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limitations, unproclaimed by the Constitution upon the eligibility of the electors for office.

28. Patterson v. Barlow, 60 Pa. 54 (1869).

29. *Id.* at 84-5. The opinions in Patterson span over 50 pages. But *see supra* note 15.

30. *Id.* at 74. Section 18 of the Act states that "None of the foregoing provisions of this act shall apply to the City of Philadelphia, excepting sections 12 and 13." Sections 12 and 13 related to naturalization of citizens. The remainder of the act applies almost exclusively to the City of Philadelphia.

31. *Id.* at 42-43.

32. *Id.* at 84-85.

33. *Id.*

34. In re Clothier's Application, 2 Chest. Co. 355 (1884).

qualified voter who had made a wager as to the result of the election. The court declared that additional qualifications could not be placed on voters in a "free and equal" election. Moreover, a rule against wagering on the result of the election would constitute such an unconstitutional additional qualification.[35]

At issue before the Pennsylvania Supreme Court in *Dewalt et al. v. Bartley et al.*[36] was whether new ballots, that included a box to check in order to cast a vote for all the candidates proposed by one of the majority parties, were unconstitutional. In this 1892 case, plaintiffs contended that such an electoral device resulted in an unequal election, where electors voting for minority parties were required to write in their candidates' names within a limited time, while those voting for all the candidates of a single major party could simply check a box.[37] Plaintiffs argued that the constitutional provision prohibited the legislature from passing "any law which shall give, directly or indirectly, an advantage to some voters which will not equally apply to all voters."[38] The court disagreed, however, stating that the nomination process was part of the elections process and that no voter was inhibited from freely voting for the candidate of his choice.[39] The challenged provisions, the court concluded, did not impede "free and equal" elections.[40]

Oughton v. Black[41] was brought under similar circumstances. That challenge involved the request for an injunction to restrain the city commissioners from printing ballots that incorporated a box to check to vote for all of the members of a specific party represented on the ballot.[42] Plaintiff-Appellants claimed that "these provisions giving to voters who wish to vote for all the candidates of one political party the special privilege of doing so by a single cross . . . are also unconstitutional, as authorizing a method of voting for political parties, not for men."[43] The court therefore considered the issue: "[D]oes the manner in which an elector is permitted by the statute to designate the ticket for which he wishes to vote interfere with the freedom and equality of elections?"[44] The court determined that inequality did not result when a voter was required to expend a small amount of extra time in the voting process.[45] The *Oughton* court also recognized that the ability to cast write-in votes was necessary to promote equal elections for those electors unsatisfied with their chosen candidates.[46]

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35. *Id.*
36. DeWalt v. Bartley, 24 A. 185 (Pa. 1892).
37. *Id.* at 187.
38. *Id.*
39. *Id.*
40. *Id.*
41. Oughton v. Black, 61 A. 346 (Pa. 1905).
42. *Id.*
43. *Id.* at 347.
44. *Id.*
45. *Id.*
46. *Id.* at 348.

In *Commonwealth ex rel. v. Martin*,[47] presiding officers of the Philadelphia Democratic convention challenged a statute that forbade ballots which contained the same name in more than one place. Both the Democratic and the Republican nominating conventions for Philadelphia nominated the same slate of judges, and the Secretary of State placed the names only in the Republican portion of the ballot per the challenged statute.[48] The Democratic officers asserted that this violated the guarantee of free and equal elections.[49] The court agreed, granting a peremptory mandamus action ordering the names to appear on both sections of the ballot.[50]

The Court of Common Pleas of Lancaster County in *In re Certificate of Nomination of Jeremiah Rife*,[51] declared regarding Article I, § 5: "Any tampering by election officers with the purity of the ballot . . . affects society in a most serious and destructive manner. Its tendency is to prevent the expression of the voice and will of the people in the choice of their officers and rulers. . . ."[52] In this case, the court waded through allegations of severe election board misconduct, permitting both sides to call most of the voters in the district as witnesses, and found that the misconduct did not affect the outcome of the election.[53] The court commended the petitioner for his efforts to maintain the constitutional ideal of free and equal elections, while denying petitioner's request to set aside the election.[54]

In 1928, the Borough of New Britain was created from parts of the townships of Doylestown and New Britain.[55] At the time, the school code provided that each newly created division of this sort should constitute its own school district unless the district formed would be of the fourth class, in which case no new school district would be created without state Board of Education approval.[56] A new fourth-class district was formed without such approval, and the constitutionality of the act requiring state approval was at issue in this case.[57] The central concern in *New Britain Borough School District* was citizens' ability to vote for school directors.[58] Without a new school district, students in the new borough would attend the school that they had previously attended.[59] However, the new borough was made up of pieces of two separate school districts but only one voting district.[60] The voting district could have only one ballot, but voters located in the different school

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47. Commonwealth ex rel. v. Martin, 20 C.C.R. 117 (1897).
48. *Id.* at 118-19.
49. *Id.* at 119.
50. *Id.* at 122-23. *See* Wilson v. Philadelphia County, *infra* note 64.
51. In re Certificate of Jeremiah Rife, XVI Lanc. L. Rev. 185 (C.P. of Lanc. County 1899).
52. *Id.* at 190.
53. *Id.* at 188-90.
54. *Id.* at 191.
55. New Britain Borough School District, 145 A. 597 (Pa. 1929).
56. *Id.*
57. *Id.* at 598.
58. *Id.* at 598-99.
59. *Id.* at 599.
60. *Id.*

districts should be voting for separate school board directors. Thus, the single voting district precluded the placement of the appropriate candidates' names on the correct ballots.[61] The court noted that although there existed no constitutional mandate that citizens be able to vote for school board members, Article I, § 5 required that if citizens in fourth class school districts were generally allowed to vote for the board of directors for their school (as they were), then all citizens in fourth class districts had to be able to do so.[62] Therefore, the court declared that the portion of the act giving veto power in the creation of new districts to the state was void and unconstitutional.[63]

Generally, Pennsylvania courts have found that ballot innovations are constitutional as long as ease of voting, not inequality, is the result of the innovation. Ballots that encourage clarity and ease of voting have been found to promote free elections.

§ 8.3[c]. NOMINATIONS

Statutes and regulations regarding the method that candidates are required to use to have their names placed on the ballots is another question that courts have considered with regularity. *Wilson v. Philadelphia County*[64] challenged the Act of June 14, 1935, commonly known as the Party Raiding Act. That Act prohibited candidates from being listed on multiple parties' primary ballots, unless the candidate was running for judge of a court of record.[65] The Pennsylvania Supreme Court found that this provision did *not* deprive voters from electing their candidate of choice, since citizens could vote for a candidate of the other party at the general election.[66]

Rowe ex rel. Schwartz v. Lloyd[67] challenged a requirement that every candidate who was nominated in the primary election by write-in votes (as op-

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61. *Id.*
62. *Id.*
63. *Id.*
64. Wilson v. Philadelphia County, 179 A. 553 (Pa. 1935). *See* Krull et al. v. City and County of Philadelphia et al., 2 Pa. D. & C. 2d 181 (1955)(action in County Court with similar facts to Wilson).
65. Wilson, 179 A. at 554. *See* discussion of Commonwealth ex rel. v. Martin, *supra* note 47.
66. *Id.* On a similar note, in Urik Election, where the petitioner wished to cumulate the votes cast for him under two different versions of his name listed under both the Democratic and the Republican parties, the Allegheny County court ruled that "The right to vote is the very cornerstone of democracy, and this right should be jealously protected by the courts by uniformly administering the laws passed to protect this right . . . we must strictly construe the Election Code of 1937, *supra*, and deny petitioner the right to cumulate the votes in an issue." Urik Election, 80 D. & C. 200 (1952).
67. Rowe ex rel. Schwartz v. Lloyd, 36 A.2d 317 (Pa. 1944).

posed to nominated by a party) had to pay the fee that was required for candidates to be placed on the primary ballot. The court found that after accepting the nomination of the voters, the candidate was simply required to put himself on equal footing with the other candidates who had already paid the fee.[68] Thus, this regulation was found to promote equality of elections, and was upheld.[69]

In 1969, the issue of the constitutionality of a nomination provision under Article I, § 5 of the Pennsylvania Constitution arose again in *Shanky v. Staisey.*[70] *Shanky* challenged a requirement that, for a candidate to appear on the general election ballot, that candidate had to demonstrate the support of a set number of eligible voters, either by primary election or by petition.[71] The Pennsylvania Supreme Court, in upholding the law, quoted the rule for determining whether elections were free and equal that was originally stated in 1914 in *Winston v. Moore,*[72] as follows:

> In a general way it may be said that elections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him.[73]

Applying that rule, the court found that equality was preserved because all candidates were required to meet the same conditions and therefore the statute did not violate the Elections Clause of the Pennsylvania Declaration of Rights.[74]

Requirements placed on nominations have thus been found constitutional where those requirements promote, or at least do not truly hinder, equality. The courts have suggested that a candidate's access to the ballot is not as strictly protected under constitutional jurisprudence as citizens' access to voting.[75]

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68. *Id.* at 318-19.

69. *Id.*

70. Shankey v. Staisey, 257 A.2d 897 (Pa. 1969).

71. *Id.* at 898.

72. Winston v. Moore, 91 A. 520 (Pa. 1914).

73. *Id.* at 523; *see also* Shankey v. Staisey, 257 A.2d at 899. This rule, first stated in Winston v. Moore, is repeated throughout the caselaw arising on this issue.

74. Shankey, 257 A.2d at 899.

75. *See* Sweeney v. Tucker, 375 A.2d 698 (Pa. 1977), in which the court declared that an incumbent candidate's interest in a particular office was "highly circumscribed." *Id.* at 524.

§ 8.3[d]. CANDIDATES

In addition to nominations, Pennsylvania courts have addressed several other issues affecting candidates for elected office. In *Winston v. Moore*, the court refused to pass on whether a primary election falls within Article I, § 5, but instead operated under a broad assumption that such constitutional provisions would apply.[76] The court found that the legislature had broad powers to dictate the mode and method by which citizens would be able to exercise their constitutional right to free elections.[77] Provisions placing requirements on candidates before those candidates could be placed on the ballot were not violative of the free and equal elections clause, the court concluded, as long as those requirements are administered equally.[78]

In 1979, in *Snider v. Shapp*,[79] the Commonwealth Court of Pennsylvania held that the guaranty of "free and equal" elections encompassed suffrage, and ethical requirements, placed on individual candidates, did not impede suffrage in a manner that would violate that guaranty.

In 1986, the Pennsylvania Supreme Court found that term limits were merely a restriction on the candidate, and did not inhibit the right of the people to vote freely.[80]

Once again, the legislature may place reasonable requirements on candidates without violating the "free and equal" elections clause. Thus, reasonable restrictions on which candidates' names are placed on the ballot, as well as ethical requirements and term limits, have all been found to be constitutional restrictions on candidates.

§ 8.3[e]. APPORTIONMENT

Adjudication of reapportionment plans has been a troublesome issue in the history of the Article I, § 5 elections clause in the courts of the Commonwealth. Almost two centuries before reapportionment became an important national issue in the midst of the civil rights movement, Pennsylvania included regular reapportionment in the 1776 Constitution as a means of ensuring equal weight of voters' ballots, protecting those citizens in the rapidly growing western portions of the state.[81]

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76. Winston v. Moore, 91 A. 520 (Pa. 1914).

77. *Id. See* Burdick v. Takushi, 504 U.S. 428 (1992) ("... as a practical matter, and if elections are to be fair and honest, there must be regulation to bring order to the democratic process.").

78. *Id.* at 523.

79. Snider v. Shapp, 405 A.2d 602 (Pa. Cmwlth. 1979).

80. City Council of the City of Bethlehem v. Marcincin, 515 A.2d 1320 (Pa. 1986).

81. Constitution of Pennsylvania, September 28, 1776, Section 17. In pertinent part, this provided:

In 1938, Pennsylvania's senatorial and representative apportionment plans were challenged in the courts. *Lyme v. Lawrence*[82] challenged the senatorial apportionment and *Shoemaker v. Lawrence*[83] challenged the apportionment of the Commonwealth into representative districts. In both cases, it was found that districts were formed of noncontiguous or highly irregularly shaped areas.[84] There were even areas that were not included in any voting district.[85] Both cases quoted *Patterson v. Barlow*, which stated that elections shall be made equal "by laws which shall arrange all the qualified electors into suitable districts, and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the Commonwealth."[86] The court went on to find that the challenged apportionment schemes were invalid as violative of the "free and equal" elections clause.[87]

In the 1959 decision of *Butcher v. Rice*,[88] the Pennsylvania Supreme Court changed its practice, for the time, of reviewing apportionment schemes. In *Butcher*, the senatorial apportionment was challenged as violating the requirement of equality as well as the requirement stated in Article II, § 16 of the Pennsylvania Constitution, which required that senatorial districts be "as nearly equal in population as may be."[89] The court concluded that it lacked jurisdiction to issue an injunction to restrain an election.[90] There was a strong dissent by Justice John Bell indicating that although the majority ostensibly relied on United States Supreme Court precedent, that precedent merely indicated an unwillingness to involve the federal courts in state issues.[91] Therefore, Justice Bell argued, the states were perfectly free to review, examine, and implement election schemes.

. . . But as representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty, and make the voice of a majority of the people the law of the land; therefore the general assembly shall [have lists of taxable inhabitants made] . . . [and use such lists to] appoint a representation . . . in proportion to the number of taxables in such returns; which representation shall continue for the next seven years afterwards at the end of which [new lists shall be made and new apportionment accomplished].

82. Lyme v. Lawrence, 45 Dauph. 322 (1938).

83. Shoemaker v. Lawrence, 31 D. & C. 681 (1938).

84. Lyme, 45 Dauph. 322; and Shoemaker, 31 D. & C. 681.

85. Lyme, 45 Dauph. at 324; Shoemaker, 31 D. & C. at 684.

86. Shoemaker, 31 D. & C. 681, 686, (*quoting* Patterson v. Barlow, 60 Pa. 54, 75).

87. Lyme v. Lawrence, 45 Dauph. 322, 328-9; Shoemaker v. Lawrence, 31 D. & C. 681, 691-2.

88. Butcher v. Rice, 153 A.2d 869 (Pa. 1959).

89. *Id.* at 870.

90. *Id.* at 873.

91. *Id.* at 886. This dissent also relied heavily on Pennsylvania's mandate of free and equal elections, although the majority decision ignored that issue.

The United States Supreme Court's decision in *Reynolds v. Sims*,[92] changed the court's practice regarding apportionment proceedings. Thus, in 1964, when the Pennsylvania court decided *Butcher v. Bloom*[93] on facts similar to the previous *Butcher* case, although regarding a newly implemented apportionment plan, it had a mandate from the United States Supreme Court to decide this apportionment case. *Butcher v. Bloom* did not reach any free and equal elections issues, but the Pennsylvania Supreme Court did maintain jurisdiction over a reapportionment matter, demonstrating the mandated change in policy.

In *In re 1991 Pennsylvania Legislative Reapportionment Commission*,[94] twenty-five appellants challenged the 1991 apportionment scheme on various grounds. The challenge under Article I, § 5 raised issues about a candidate's interest in a specific office when that candidate's residence was no longer within the district in which he intended to run for office.[95] The court concluded that a candidate had a right to run only for an office for which he was qualified.[96] The legislature was not required to "tailor its plan around the residences of political aspirants who seek to challenge a specific incumbent."[97] Therefore, the court found that the apportionment was valid as to this issue.[98]

In 2002, voters challenged the Commonwealth's post-2000 congressional redistricting plan as Republican gerrymandering under three separate sections of Pennsylvania's Declaration of Rights, including Article I, § 5.[99] In *Erfer v. Commonwealth*,[100] petitioner-voters filed suit in the Commonwealth Court, which initially scheduled the hearing of the case for a date after nomination petitions were due for the 2002 elections.[101] The voters directly petitioned the Pennsylvania Supreme Court for redress.[102] The Pennsylvania Supreme Court granted plenary jurisdiction and required the

92. Reynolds v. Sims, 377 U.S. 533 (1964).

93. Butcher v. Bloom, 203 A.2d 556 (Pa. 1964).

94. In re 1991 Pennsylvania Legislative Reapportionment Commission, 609 A.2d 132 (Pa. 1992); *see also* KEN GORMLEY, THE PENNSYLVANIA LEGISLATIVE REAPPORTIONMENT OF 1991 (1994).

95. In re 1999 Pennsylvania Legislative Reapportionment Commission, 609 A.2d 132 (Pa. 1992). Appellants claimed that they had planned to run for specific offices against specific incumbent candidates prior to the reapportionment. After the reapportionment, their residences were no longer in those districts. The court found that because these appellants lacked "any evidence of their being part of an identifiable group suffering a history of disenfranchisement or lack of political power" and because a candidates interest in a particular political office is not a strong interest, Article I, § 5 was not violated. *Id.* at 142.

96. *Id.*

97. *Id.*

98. *Id.* The entire plan of the Reapportionment Commission was found to be valid and all challenges failed. *Id.* at 147.

99. Erfer v. Commonwealth, 794 A.2d 325 (2002). The additional sections were PA. CONST. art. I, §§ 1 and 26.

100. *Id.*

101. *Id.* at 328.

102. *Id.*

Commonwealth Court to issue findings of fact on an expedited schedule.[103] The findings of fact from Judge Pellegrini of the Commonwealth Court pointed out that this was the first case to address whether Article I, § 5 of the Pennsylvania Constitution applies to the congressional redistricting process.[104] The Supreme Court, ruling upon the findings of fact from the Commonwealth Court, denied both respondent-Commonwealth's suggestion that because the U.S. Constitution provided for reapportionment, it precluded the Pennsylvania Constitution from applying as well,[105] and petitioners' request that the Court find that the "free and equal elections clause provides further protections to the right to vote than does the Equal Protections Clause" of the Federal Constitution.[106] The defendants also attempted to have the Court limit the application of the elections clause to offices of the Commonwealth, but the Court summarily rejected this argument.[107] The petitioners constitutional claims, including their Article I, § 5 claim, were thus denied.

Thus, after a brief time when Pennsylvania courts refused to enter the fray surrounding reapportionment, courts now routinely decide apportionment issues. Although many of the controversies arise under other sections of the Pennsylvania Constitution, Article I, § 5 provides constitutional support to a litigant's claim that reapportionment plans must serve to maintain free and equal elections.[108]

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103. *Id.*

104. *Id.* at 354.

105. *Id.* at 321. The Court stated:

> It is true that the U.S. Constitution has granted our legislature the power to craft congressional reapportionment plans. Yet, we see no indication that such a grant of power simultaneously suspended the Constitution of our Commonwealth *vis-à-vis* congressional reapportionment. Without clear support for the radical conclusion that our Commonwealth's Constitution is nullified in challenges to congressional reapportionment plans, it would be highly inappropriate for us to so circumscribe the operation of the organic legal document of our Commonwealth.

106. *Id.* at 332.

107. *Id.* at 331.

108. Cases challenging reapportionment plans are often brought under Article II, § 16, which mandates equal senatorial and representative districts:

> The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. Each senatorial district shall elect one Senator, and each representative district one Representative. Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.

PA. CONST. art. II, § 16. *See, e.g.*, Butcher v. Bloom, *supra* note 93; In re 1991 Pennsylvania Reapportionment Commission, *supra* note 99. Additional claims are sometimes brought under Article I §§ 1 and 26, the equal protection guarantee. See, e.g., Erfer v. Commonwealth, *supra* note 99.

§ 8.3[f]. VOTER QUALIFICATIONS

Courts have concluded that the legislature has the power to define the term "qualified elector" within constitutional limitations. In 1890, the Pennsylvania Supreme Court found that the identification and registration of qualified voters did not impede free and equal elections.[109] This was reiterated in 1971 in *Ray v. Commonwealth*,[110] where plaintiff claimed that the fact that he was prohibited from voting because he was confined to a penal institution violated the Article I, § 5 requirement of "free and equal" elections. The court found that Article VII, § 14's mention of "qualified electors" mandated that the legislature must have the ability to determine the meaning of "qualified elector" without violating Article I, § 5.[111]

In 2000, the Commonwealth Court, in *Mixon v. Commonwealth*,[112] considered the question of felons' voting rights once again. Here the plaintiffs were divided into four groups: (1) two men who were incarcerated and registered to vote; (2) two men who were incarcerated and had not previously been registered to vote; (3) two men who had been previously convicted and were now released but not registered to vote; and (4) a single female who was registered to vote and claimed the lack of ability of the other groups to vote hampered her ability to vote.[113] The court found, first, that the female lacked standing on this issue, because any injury she may have received was "too remote and speculative to afford her standing."[114] The court then conducted its own *Edmunds* analysis, and based on *Patterson v. Barlow*, found that the opportunity to vote in free and equal elections was one possessed only by "qualified" voters.[115] Moreover, the legislature had the power to determine which electors were "qualified."[116]

The *Mixon* court therefore concluded that the legislature had the right to proscribe voting by incarcerated felons as part of its ability to define "qualified electors."[117] However, because the voter registration system prevented convicted felons from *registering to vote* for five years after their release, but not from *voting* after their release if they had previously been registered, the Commonwealth Court found that portion of the voter registration act lacked a rational basis and therefore was unconstitutional.[118]

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109. Cusick's Election, 20 A. 574 (Pa. 1890).

110. Ray v. Commonwealth, 276 A.2d 509 (Pa. 1971).

111. *Id.* at 510.

112. Mixon v. Commonwealth, 759 A.2d 442 (Pa. 2000).

113. *Id.* at 444.

114. *Id.* at 443.

115. *Id.* at 450.

116. *Id. See* Ray v. Commonwealth, 276 A.2d 509 (Pa. 1971).

117. Mixon, 759 A.2d at 450.

118. *Id.* The Court based this decision on the Supreme Court's pronouncement in Gray v. Sanders, which said "that while minors, felons, and other classes of citizens may be excluded from voting, once the body of voters is determined, and their qualifications specified, there is 'no constitutional way by which equality of

Pennsylvania's "free and equal" elections clause has been used as the basis for a considerable number of complaints against legislative action that citizens contend violates their access to those "free and equal elections." In general, the results of these challenges have been to find that the legislature must have the ability to "facilitate" and "reasonably direct the manner of" elections as well as to determine the status of a qualified elector.[119] However, the legislature must be careful to maintain strict equality and freedom of elections in this process.

§ 8.4. RELATED CASE LAW FROM OTHER STATES

When determining the constitutionality of a statute under the Pennsylvania Constitution, in addition to the Commonwealth's caselaw, courts may also consider the caselaw of other states. There are at least twenty-four other states in the United States with elections clauses similar to Pennsylvania's "free and equal" elections provision in their constitutions.[120] Of those states, five have no cases recorded as brought under the state constitution elections clause,[121] while many of the other states have had only a limited number of challenges brought under their elections provisions.[122] Still others have witnessed extensive court challenges under these provisions, as has Pennsylvania.[123] These elections clauses, which are very similar to that of Pennsylvania, have been the subject of widely disparate interpretations and have had varying impacts upon the maintenance of freedom of elections in other states.[124]

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voting power may be evaded.' " Mixon v. Commonwealth, 759 A.2d 442, 451 (quoting Gray v. Sanders, 372 U.S. 368, 380-1 (1963)).

119. BUCKALEW, *supra* note 2 at 10.

120. ARK. CONST. art. 3, § 2 ("free and equal"); ARIZ. CONST. art. 2, § 21 ("free and equal"); COLO. CONST. art. II, § 5 ("free and open"); DEL. CONST. art. I, § 3 ("free and equal); ILLINOIS CONST., art. 3, § 3 ("free and equal"); IND. CONST. art. 2, § 1 ("free and equal"); KY. CONST. § 6 ("free and equal"); MD. DEC. OF R. art. 7 ("free and frequent"); MASS. CONST. ANN. Pt. 1, art. IX ("free"); MO. CONST. art. 1, § 25 ("free and open"); MONT. CONST., art. II § 13 ("free and open"); NEB. CONST. art. 1, § 22 ("free"); N.H. CONST. Pt. 1, art. 11 ("free"); N.M. CONST. art. II, § 8 ("free and open"); N.C. CONST. art. I, § 10 ("free"); OK. CONST. art. IIII, § 5 ("free and equal"); S.C. CONST. art. I, § 5 ("free and open"); S.D. CONST. art. VI, § 19 ("free and equal"); TENN. CONST. art. I, § 5 ("free and equal"); UTAH CONST. art. I, § 17 ("free"); VERMONT CONST. art. 8 ("free and without corruption"); VA. CONST. art. I, § 6 ("free"); WASH. CONST. art. I, § 19 ("free and equal"); WYO. CONST. art. 1, § 27 ("open, free and equal").

121. Arizona, Delaware, Nebraska, Oklahoma, and Virginia.

122. States with limited caselaw regarding their elections provisions include Missouri, Montana, New Mexico, North Carolina, South Carolina, Utah, and Wyoming.

123. States with relatively extensive caselaw regarding their elections provisions include Illinois, Kentucky, Massachusetts, and New Hampshire.

124. For a discussion of the use of states' election clauses as a basis for a challenge to an election based on fraud, *see* Jones, *supra* note 11.

For instance, in the area of ballots and nominations, a Colorado court has held that reasonable, nondiscriminatory restrictions on the rights of voters are justified by the state's need to encourage voting and democracy.[125] The Colorado Supreme Court has stated that the constitutionality of ballot access restrictions will be decided with a balancing test, balancing the injury to the voter against the precise interest of the state.[126] The Federal District Court for the Eastern District of North Carolina has ruled that a requirement that candidates have the signatures of ten percent of the registered voters before having their names placed on the ballot was over burdensome and therefore an unconstitutional restriction on access to the ballot required by the North Carolina Constitution.[127]

Likewise, in the area of apportionment, the Seventh Circuit found in 1992 that the use of a voting plan that would temporarily delay implementation of the new census every 20 years did not violate Illinois' "free and equal" elections clause.[128] The Indiana Supreme Court in 1982 ruled that its "free and equal" elections clause required redistricting to maintain the "equality of the force of each vote."[129] Similarly, the Kentucky Supreme Court found in 1962 that the duty of courts to maintain "free and equal" elections outweighed the courts' "traditional reluctance to enter the political thicket."[130]

The area of voter qualification has generated quite a bit of controversy. In 1950, the Tennessee Supreme Court held that the "legislature generally has the right to determine the qualifications of the voters and regulate the conduct of the election. . . ." [131] While this is generally true in most states, the qualification of convicted felons to vote has been a regularly contested issue in many states. In the 1980's, the District Court for the Western District of Tennessee found that there was no constitutional mandate prohibiting the exclusion of some or all felons from the voter rolls.[132] In 2000, the New Hampshire Supreme Court ruled that felon disenfranchisement statutes were a valid exercise of the legislature's ability to define qualified voters.[133] However, in 1983, the Massachusetts Supreme Judicial Court held that "prisoners domiciled in Massachusetts who are unable to register to

125. Bruce v. City of Colo. Springs, 971 P.2d 679 (Colo. App. 1998).

126. Libertarian Party v. Secretary of State, 817 P.2d 998 (Colo. 1991).

127. Obie v. North Carolina State Board of Elections, 762 F.Supp. 119 (E.D.N.C. 1991).

128. Political Action Conference v. Daley, 976 F.2d 335 (7th Cir. 1992).

129. State Election Bd. v. Bartolomei, 434 N.E. 2d 74 (Ind. 1982).

130. Watts v. Carter, 355 S.W. 2d 657, 658 (Ky. 1962).

131. Trotter et al. v. City of Maryville et al., 235 S.W.2d 13 (Tenn. 1950), citing Cook v. State, 90 Tenn. 407 (1891).

132. Tate v. Collins, 496 F. Supp. 205 (W.D. Tenn. 1980), Tate v. Collins, 622 F.Supp. 1409 (W.D. Tenn. 1985).

133. Fischer v. Governor, 145 N.H. 28 (2000).

vote in person due to incarceration must be provided an opportunity to register to vote by absentee ballot."[134]

Some states have stated that the right to vote is a fundamental one. The New Mexico Supreme Court, when discussing the elections clause in its state constitution, declared that "the supreme right guaranteed by the state constitution is the right of a citizen to vote at public elections."[135]

§ 8.5. POLICY CONSIDERATIONS AND CONCLUSION

As initially stated, Pennsylvania has a long tradition of placing an emphasis on free and equal elections. Long before apportionment was considered a necessary part of maintaining equality of voter impact nationally, reapportionment was written into the original state constitution.[136] Although this priority on "free and equal" elections has not always been maintained, each time the legislature has ignored these important provisions, the courts have eventually brought statutes back in line with the constitutional mandates. Thus, Article I, § 5 continues to provide fertile ground for state constitutional decisions, as Pennsylvania Constitutional jurisprudence enters a new century.

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134. Cepulonis v. Secretary of Commonwealth, 452 N.E.2d 1137 (Mass. 1983).

135. State ex rel. Walker v. Bridges, 27 N.M. 169 (1921). The United States Supreme Court has even declared that the right to vote is fundamental because exercising that right preserves all other rights in Harmon v. Forssenius, 380 U.S. 528, 537 (1965).

136. *See supra* note 81.

EXHIBIT C

Chapter 4

INHERENT RIGHTS OF MANKIND

Article I, Section 1

ELIZABETH WACHSMAN* AND KEN GORMLEY**

§ 4.1. INTRODUCTION AND HISTORY

Article I, Section 1 of the Pennsylvania Constitution ("Section 1"), relating to "Inherent Rights of Mankind," provides as follows:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Section 1 has no precise counterpart in the United States Constitution. It bears a remote resemblance to the due process language contained in the federal 5th and 14th Amendments. More closely, however, it resembles the sweeping language of the preface of the Declaration of Independence, a resemblance that should come as no surprise: A number of statesmen who participated in drafting the Declaration of Independence in July of 1776 also helped fashion the Pennsylvania Constitution that was completed three months later in September of the same year.[1] (See Chapter 3 *supra*).

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1. The Convention that drafted the Pennsylvania Constitution of 1776, chaired by Benjamin Franklin, convened on July 15, 1776 and completed its work on September 28th of that year. *See*

The "Inherent Rights of Mankind" provision has spawned a wide, but at times disjointed, array of case law. The principal areas that have been swept within the ambit of Section 1 include the protection of property, liberty, freedom of contract, reputation, happiness, privacy, equal protection, and due process. Over the course of two centuries, the courts' interest in specific areas under this provision has ebbed and flowed depending upon the historical context. Ironically, one of the rights most consistently afforded broad protection under Section 1 (besides property rights) relates to the area of privacy, a subject not even explicitly mentioned in the "Inherent Rights of Mankind" provision.

It is fair to say—as a general rule—that the Pennsylvania courts have not utilized Section 1 with any consistency to protect fundamental liberties of citizens of the Commonwealth. However, there exists a sturdy foundation of case law which leaves sufficient room for future judicial activity, making it possible that this provision will assume a more prominent role as state constitutional jurisprudence continues to undergo a transformation in Pennsylvania.

Article I, Section 1 of the existing Pennsylvania Constitution differs only slightly from the original "Inherent Rights of Mankind" provision contained in the Pennsylvania Constitution of 1776.[2] The 1776 version did not include the words "and reputation," which were inserted later in 1790. Furthermore, in place of the words "inherent and indefeasible," the original text spoke of "natural, inherent and unalienable" rights.[3] When the Pennsylvania Constitution was overhauled in 1790, however, Section 1 was revised. The current clause is thus identical to that set forth in Article IX, Section 1 of the 1790 charter.

Section 1 of the Declaration of Rights can be traced to similar language in Article I, Section 1 of the Virginia Constitution (adopted on June 12, 1776 and primarily drafted by George Mason).[4] It can also be traced back to the writings of the English political-philosopher Jeremy Bentham.[5]

CHARLES R. BUCKALEW, AN EXAMINATION OF THE CONSTITUTION OF PENNSYLVANIA 2 (1883). Consequently, the Declaration was "fresh in men's minds." *Id. See also,* LOUIS S. SHIMMELL, THE GOVERNMENT OF PENNSYLVANIA AND OF THE UNITED STATES (1911).

2. Chapter I, Section 1 of the original Pennsylvania Constitution of 1776 provided: "That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety."

3. *See* Buckalew, *supra* at 2. *See also* J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY 177-78 (1936) (1971).

4. Mason is generally credited with authoring the Declaration of Rights of the Virginia Constitution. Buckalew, *supra,* at 3. Article I, Section 1 of the Virginia Constitution, adopted in Convention on June 12, 1776, provided: "That all men are by nature equally free and in-

Early cases (during the 19th century) interpreting this provision gave a fairly generous reading to Section 1, particularly in defining the concepts of "liberty" and "property" subsumed by the provision. Charles Buckalew's treatise on the Pennsylvania Constitution, published in 1883, reported few opinions relating to this section during the first century of the Constitution's existence.[6] Yet, Thomas Raeburn White's equally important treatise, published in 1907,[7] began to report a number of cases that touched upon this right, particularly in conjunction with the guaranty contained in Section 9 of the Declaration of Rights that a citizen cannot "be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land."[8] As well, Stewart Purdon's *"A Digest of the Statute Law of the State of Pennsylvania From the Year 1700 to 1903,"* published in 1905, contains dozens of citations to decisions that specifically make mention of the safeguards of Section 1. From these and other sources, a significant body of jurisprudence under the "inherent rights of mankind" provision can be assembled.

§ 4.2. PENNSYLVANIA CASE LAW

§ 4.2[a]. LIFE & LIBERTY

Early Pennsylvania decisions interpreting the words "life" and "liberty" in Section 1 were couched in fairly broad terms. Thus, in *Brace Bros. v. Evans,*[9] the Court of Common Pleas of Allegheny County declared that the rights to life and liberty were "fundamental rights" under the Pennsylvania Constitution "of which (a person) cannot be deprived by law and which he cannot relinquish voluntarily. . . ."[10] In *Brace Bros.*, the court found that the Knights of Labor and the Trades Assembly, which led a boycott against Brace Bros. laundry business because it had discharged eleven girls, had interfered with plaintiff's right to conduct its business. This right to conduct one's business, emphasized the Court, was among those "liberties" protected by the Pennsylvania Constitution. The court concluded that "the rights of life and liberty . . . include the right to provide a living for one's self and family by any lawful means. . . ."[11] Thus, the defendant labor union was answerable at law and equity for interfering with those basic rights.

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dependent, and have certain inherent rights which, when they enter into a state of society, they cannot, by any compact deprive or divest their posterity, namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." VA. CONST., Art. I, Sec. 1 (1776).

5. *See* JEREMY BENTHAM, BENTHAM'S WORKS, i, 154, cited in BUCKALEW, *supra* at note 1.

6. BUCKALEW, *supra,* at note 1.

7. THOMAS RAEBURN WHITE, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA (1907).

8. WHITE, *supra,* Ch. VII.

9. Brace Bros. v. Evans, 5 Pa. C.C. 163 (1888).

10. *Id.* at 166.

11. *Id.* at 167.

A number of early cases under Section 1 follow this template, extolling the importance of the liberty to engage in one's livelihood, while occasionally recognizing its limits. In *Powell v. Commonwealth,*[12] the Pennsylvania Supreme Court recognized the importance of liberty and property rights, but found that the legislature was permitted to exercise its legitimate police powers to limit such rights. In that case, the Court upheld a statute which prohibited the manufacture and sale of oleo margarine with the intent to defraud consumers into believing it was butter. The state's interest in health, safety, and welfare established limitations upon defendant's putative Section 1 rights.

In some cases, the notion of liberty under Section 1 has spilled into a recognition of the right to contract. For example, in the 1894 decision of *Waters v. Wolf,*[13] the Supreme Court of Pennsylvania stated that the "privilege of contracting is both a liberty and a property right." The Court went on to declare that "if A is denied the right to contract and acquire property in the manner which he has hitherto enjoyed under the law, and which B, C, and D are still allowed by the law to enjoy, it is clear that he is thus denied the right to contract."[14]

For the most part, however, the number of early Pennsylvania cases declaring a broad liberty interest in one's livelihood and ability to engage in contracts declined as the notion of "economic liberty" came into disfavor under the U.S. Constitution. This corresponded with the repudiation of *Lochner v. New York*[15] during President Franklin D. Roosevelt's New Deal, a period in which Congress aggressively sought to regulate the economy in order to pull the country out of the Great Depression.[16]

Only a scattering of early Pennsylvania cases invoked the safeguards relating to "life" and "liberty" in contexts other than the "right to engage in business" or contractual rights. Thus, *Mays Case,*[17] decided by the Lackawanna Court of Common Pleas in 1891, suggested that the right to personal liberty under Section 1 was broad enough to invalidate a statute that allowed a husband to have his wife declared a lunatic without notice.[18] Over

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12. Powell v. Commonwealth, 7 A. 913 (Pa. 1887).

13. Waters v. Wolf, 29 A. 646 (Pa. 1894).

14. *Id.* at 651, quoting Cooley on Constitutional Limitations, §§ 391 and 393. Yet these contractual rights are subject to the same police power limitations as other Section 1 rights. *See, e.g.,* Equitable Credit and Discount Co. v. Geier, 21 A.2d 53 (Pa. 1941).

15. Lochner v. New York, 198 U.S. 45 (1905).

16. *See, e.g.,* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). For a useful discussion of the demise of Lochner, *see* NOWAK & ROTUNDA, CONSTITUTIONAL LAW SEC. 11.4 (5th ed. 1995).

17. Mays Case, 10 Pa. C.C. 283 (1891).

18. *But see* Hinchman v. Richie, Brightly's Rep. 143 (1849) (allowing re-

a hundred years later, in *Commonwealth v. Luczak*,[19] the Snyder County Court of Common Pleas cited Section 1's protection of the "right to enjoy and defend life" for the purpose of rejecting the notion that there is an "all-encompassing right to die," thereby upholding the constitutionality of criminal statutes which prohibited the causing or aiding of suicide.[20]

For the most part, the early string of cases that embraced a sweeping protection of "life" and "liberty," under Section 1, have fizzled out over time. At the same time, a new group of cases dealing with "due process" rights under Section 1 (discussed *infra*) in effect have supplanted the older "liberty" cases.

§ 4.2[b]. PROPERTY

By far, the most commonly invoked judicial basis for invoking Article I, Section 1 has been to protect the property interests of Pennsylvania citizens.[21] Yet, most of the judicial rulings dealing with property under this section, at least in recent years, have served to *limit* the potential right to acquire, possess, and protect property.[22]

Early decisions involving property rights under Section 1 consistently spoke of those rights in broad terms. These were often declarations in the context of the right to work. In *Erdman v. Mitchell*[23] decided in 1903, the Pennsylvania Supreme Court stated:

> The right to the free use of his hands is the workman's property as much as the rich man's right to the undisturbed income from his factory, houses and lands; by his work he earns present subsistence for himself and family. . . . This right of acquiring property is an inherent indefeasible right of the workman; to exercise it he must have the unrestricted privilege of working for such employer as he chooses at such wages as he chooses to accept. This is one of the rights guaranteed him by our 'Declaration of Rights;' it is a right of which the legislature cannot deprive him, one which the law of no trades union can take

straint of an insane person's liberty without oath or affirmation).

19. Commonwealth v. Luczak, 29 Pa. D. & C.4th 401 (1995).

20. *Id.* at 403-04.

21. *See, e.g.*, Pennsylvania N. W. Distribs., Inc. v. Zoning Hearing Bd. of Township of Moon, 584 A.2d 1372 (Pa. 1991); Equitable Credit and Discount Co. v. Geier, 21 A.2d 53 (Pa. 1941); Rohrer v. Milk Control Board, 186 A. 336 (Pa. 1936); Sharpless v. Mayor of Philadelphia, 21 Pa. 147 (1853).

22. *E.g.*, Equitable Credit and Discount Co. v. Geier, 21 A.2d 53 (Pa. 1941); Rohrer v. Milk Control Board, 186 A. 336 (Pa. 1936); *see also* Professional Insurance Agents Ass'n of PA., et al. v. Chronister, 625 A.2d 1314 (Pa. Cmwlth. 1992) (there must be "state action" in order to establish a violation of Section 1).

23. Erdman v. Mitchell, 56 A. 327 (Pa. 1903).

from him, and one which it is the bounden duty of the courts to protect. The one most concerned in jealously maintaining this freedom is the workman himself.[24]

Other decisions straddled the line between "liberty" and "property" interests in the realm of the individual's right to work finding that these two provisions, working in tandem, created a zone of constitutional protection.[25] Still other early cases acknowledged the importance of property rights under Section 1, but went on to permit limitations by the government.[26] Thus, one can find ample decisions both endorsing and circumscribing property rights under this provision in the early case law.

In modern times, the protection of property rights under Section 1 has survived nicely, albeit with obvious limitations. In *Northwestern Distributors v. Zoning Hearing Board,*[27] decided in 1991, the Moon Township Board of Supervisors attempted to force an owner of a pre-existing adult bookstore to change the nature of his business gradually through an amortization scheme. The Pennsylvania Supreme Court held this governmental action invalid under the "inherent rights" provision. The Court wrote: "[T]he amortization and discontinuance of a lawful pre-existing nonconforming use [without compensation] is per se confiscatory and violative of the Pennsylvania Constitution, Pa. Const. art. I, Section 1." The Court went on to state that if "municipalities were free to amortize nonconforming uses out of existence, future economic development could be seriously compromised." Thus, in takings cases such as *Northwestern,* the Pennsylvania Supreme Court has been swift to find violations of Section 1 property rights, particularly where there has been no just compensation offered by the government.

In other contexts, the courts have not hesitated to invalidate laws that unreasonably infringe upon property rights, as evidenced by the 1997 ruling by the Commonwealth Court in *Herrit v. Code Management Appeal Board.*[28] In *Herrit,* that Court struck down as unconstitutional a BOCA National Property Maintenance Code that did not allow a property owner "to repair an

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24. *Id.* at 332.

25. *See, e.g.,* Waters v. Wolf, *supra* 29 A. at 651-652; Commonwealth v. Brown, 8 Pa. Super. 339, 357 (1898) (invalidating an act requiring the weighing of bituminous coal before screening, and providing a penalty for the violation thereof); Durkin v. Kingston Coal Co., 33 A. 237 (Pa. 1895) (partially invalidating a statute to the extent it imposes on the owner of a bituminous coal mine liability for the failure of a mine foreman to comply with the provisions of the statute).

26. *See, e.g.,* Commonwealth v. Baxter, 23 Pa. C.C. 270 (1899) (upholding a statute that made it a misdemeanor to buy junk from minors and unknown persons).

27. Pennsylvania N.W. Distribs., Inc. v. Zoning Hearing Board of Township of Moon, 584 A.2d 1372 (Pa. 1991).

28. Herrit v. Code Management Appeal Board, 704 A.2d 186 (Pa. Cmwlth. 1997); *see also* Commonwealth v. Hagan, 44 Pa. D. & C.4th 516 (2000).

unsafe structure where the costs of repair would exceed 100 percent of the property's current value."[29] In invalidating the Code provision, the Court held that if a property owner "wants to spend unreasonable amounts of money to bring his Property [sic] into compliance, that is only his concern."[30] In addition, in *Smith v. Coyne,*[31] the Supreme Court held that the right of a landlord to possess and control the landlord's property "has greater constitutional weight than the tenant's right to a jury trial."[32] Thus, the Court found valid the requirement that all tenants, including low-income tenants, post a supersedeas when appealing from a judgment granting possession of the leased property to the landlord. Most recently, in *Nixon v. Commonwealth,*[33] the Pennsylvania Supreme Court found that the right to engage in lawful employment was among those "undeniably important" rights protected by Section 1, in striking down portions of a law that sought to prohibit healthcare providers from hiring individuals with criminal convictions for certain offenses, however remote.[34]

Yet for every case recognizing a broad property right under Section 1, there is a case acknowledging an implicit limitation with respect to that provision. As early as the 1853 case of *Sharpless v. City of Philadelphia,*[35] Chief Justice Black of the Pennsylvania Supreme Court, writing in reference to Section 1, stated that while "[o]ur constitution makes property as sacred as life . . . no man's right to his property can be so absolute as to exempt it from a fair share of the public burdens lawfully and constitutionally imposed."[36] Therefore, the court held, property was subject to taxation by the government.

In addition to the ability to tax property, the courts have permitted the government to regulate the uses of property in a great number of instances. The courts have held that a person may use his or her property in any way desired, provided that the person does not (1) violate any provision of the

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29. *Id.* at 188.

30. *Id.* at 189.

31. Smith et al. v. Coyne et al., 722 A.2d 1022 (Pa. 1999).

32. *Id.* at 1025.

33. *See* Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003) (Section 1 is similar to due process guaranty of the U.S. Constitution and protects certain "inalienable rights"; right to lawful employment, while not a fundamental right, is "undeniably important" and cannot be arbitrarily interfered with); *but see* Hull v. Rose, Schmidt, Hasley & DiSalle, P.C., et al., 700 A.2d 996 (Pa. Super. 1997) (right to employment is not fundamental).

34. The Older Adults Protective Services Act sought to require that healthcare facilities servicing older adults could not hire individuals convicted of various felonies and misdemeanors, involving moral turpitude, regardless of how old such offenses were, presumably to protect older patients from abuse. The Pennsylvania Supreme Court found this provision violative of Section 1, concluding that it did not bear a "real and substantial" relationship to the Commonwealth's interest in protecting elderly individuals from victimization. Id. at 290.

35. Sharpless v. City of Philadelphia, 21 Pa. 147 (1853).

36. *Id.* at 166.

federal or state constitutions; or (2) create a nuisance; or (3) violate any covenant, restriction, or easement; or (4) violate any laws or zoning or police regulations that are constitutional.[37] Therefore, such regulations are constitutional so long as they are not arbitrary and are reasonably related to "the preservation of public health, safety, morals or general welfare."[38] The police power of the government is given great deference; it may be invoked to regulate vast areas of property usage despite Section 1's emphasis on the importance of a property owner's rights.

The potency of these regulatory powers of the government, even when coming into collision with Section 1, can be seen in *Rohrer v. Milk Control Board.*[39] In that 1936 case, the Supreme Court of Pennsylvania held that a law was not violative of Section 1 even though it required milk dealers to be licensed and required the dealers to charge customers between a certain range of prices established by the state.[40] The court found that, within two years of the promulgation of Section 1, laws were enacted controlling the prices of certain items in the market. Thus, the court reasoned, such action demonstrated "that the fixing by the legislature of the prices of staple commodities, generally used by the inhabitants, was not deemed a violation of [Section 1] of the Declaration of Rights."[41] Therefore, a business person does not have total control over his or her property. In *Rohrer*, for instance, a milk dealer could not protect his business by charging higher prices for milk during hard times even if the dealer stood to lose the business altogether. In this and similar ways, the government has been able to whittle away at the property protections of Section 1.

Property rights may also be curbed when other competing fundamental rights are at stake. In *Commonwealth v. Tate,*[42] when a private college attempted to ban citizens from handing out protest leaflets at an event open to the public, Justice Samuel Roberts, writing for the court, began by acknowledging that the property protections of Section 1 were implicated owing to the private status of the school.[43] However, the Court concluded that Section 1 did not govern because, "in certain circumstances, the state may reasonably restrict the right to possess and use property in the interests of freedom of speech, assembly, and petition."[44]

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37. Appeal of Kit-Mar Builders, 268 A.2d 765, 771 (Pa. 1970) (Bell, C.J., concurring); *see also* BAC, Inc. v. Board of Supervisors of Millcreek Township, 633 A.2d 144 (Pa. 1993); Farley v. Zoning Hearing Board of Lower Merion Township, et al., 636 A.2d 1232 (Pa. Cmwlth. 1994); Pennsylvania Med. Soc'y v. Foster, 608 A.2d 633, 637 (Pa. Cmwlth. 1992).

38. Exton Quarries, 228 A.2d 169, 178 (Pa. 1967).

39. Rohrer v. Milk Control Bd., 186 A. 336 (Pa. 1936).

40. *Id.* at 338.

41. *Id.*

42. Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981).

43. *Id.* at 1388-1389.

44. *Id.* at 1390.

Hence, when it comes into collision with other constitutional rights, the right of a citizen to fully control his or her property may be severely curtailed.

Thus, despite the strong wording of Section 1, which recognizes the indefeasibility of the right to acquire, possess, and protect property, the Pennsylvania case law interpreting this section does not support use of such property in unfettered fashion. Instead, property owners are subject to many different regulations and competing interests that may control, and at times defeat, the property owner's preferred use of the privately owned property.

§ 4.2[c]. DUE PROCESS AND EQUAL PROTECTION

Another major area of Section 1 application relates to due process and equal protection. This is true even though neither of these rights is specifically mentioned in the text of that provision. As discussed earlier, the "due process" strand of cases grew up as a replacement to the "liberty" cases as the notion of economic liberty interests fell into disfavor under the federal Constitution. Although modern Pennsylvania case law has regularly acknowledged the existence of implied due process and equal protection safeguards under Section 1, the courts have remained cautious in this area.[45] Several cases have struck down laws as violative of due process and equal protection under Section 1. Yet the trend is one of restraint as appellate judges generally have not expanded these protections beyond the United States Supreme Court decisions interpreting the 14th Amendment to the United States Constitution.[46]

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45. *E.g.*, A.Y. v. Commonwealth, 641 A.2d 1148 (Pa. 1994); Fischer v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985); Gambone v. Commonwealth, 101 A.2d 634 (Pa. 1954); Girard Trust Co., Trustee's Appeal, 3 A.2d 252 (Pa. 1938); Commonwealth ex rel. Woodruff v. Humphrey, 136 A. 213 (Pa. 1927); Hull v. Rose, Schmidt, Hasley & DiSalle, P.C., et al., 700 A.2d 996 (Pa. Super. 1997); Dansby v. Thomas Jefferson University Hosp., 623 A.2d 816 (Pa. Super. 1993); Commonwealth v. Gonzalez, 588 A.2d 528 (Pa. Super. 1991); In re Adoption of T.M.F., 573 A.2d 1035 (Pa. Super. 1990); Lawson v. Pennsylvania Dep't of Pub. Welfare, 744 A.2d 804 (Pa. Cmwlth. 2000); Commonwealth v. Price, 705 A.2d 933 (Pa. Cmwlth. 1997); Gombach v. Department of State, 692 A.2d 1127 (Pa. Cmwlth. 1997); Pennsylvania Institutional Health Services, Inc., et al. v. Commonwealth, 649 A.2d 190 (Pa. Cmwlth. 1994).

46. Section 1 of the 14th Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Thus, in the 1995 case *Fischer v. Department of Public Welfare,*[47] the Pennsylvania Supreme Court stated that while it was "free to interpret [the Pennsylvania] Constitution in a more generous manner than the federal courts," it was nonetheless true that "we had often turned to federal constitutional analysis as an interpretational aid."[48] The Court went on to state that, when it came to equal protection claims, the court should be "guided by the same principles in interpreting our (Pennsylvania) Constitution" as the United States Supreme Court has utilized in interpreting the federal constitution.[49]

The Pennsylvania courts' propensity to follow United States Supreme Court interpretation in this area can be illustrated in a number of cases. For example, in *Gambone v. Commonwealth,* a law that required signs posting prices for gasoline to be within certain size limitations was struck down as violative of due process requirements found in Sections 1 and 9 of the Declaration of Rights, as well as the 14th Amendment of the United States Constitution.[50] The Court found that "the prohibition of the posting on the gasoline dealers' premises . . . of price signs in excess of a certain prescribed size is wholly unreasonable and arbitrary and bears no rational relation to public health, safety, morals, or welfare."[51] The Court apparently adhered to a traditional, federal due process approach without undertaking an independent analysis of the Pennsylvania Constitution.

In the *Fischer* case discussed above, the Pennsylvania Supreme Court refused to hold under Section 1 that the Commonwealth was required to provide funds for indigent women to obtain abortions, even though it had provided funds to aid indigent women in the delivery of their babies.[52] In doing so, the Pennsylvania Supreme Court followed the United States Supreme Court's holding under the 14th Amendment in *Harris v. McRae.*[53]

At least one Pennsylvania jurist has attempted to diverge from such a heavy reliance on the United States Supreme Court's analysis in the area of due process and equal protection. Judge Phyllis Beck of the Superior Court, in a concurring opinion relating to the termination of parental rights in *In Re Adoption of T.M.F.,*[54] pointed out that "the provisions of the state constitution may provide greater protection than their federal counterparts."[55] Judge Beck attempted to underscore the independence of due

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47. Fischer v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985).

48. *Id.* at 121.

49. *Id.*

50. Gambone v. Commonwealth, 101 A.2d 634, 639 (Pa. 1954).

51. *Id.* at 637, quoting Kroger v. O'Hara Township, 329 A.2d 266, 276 (Pa. 1978).

52. Fischer, 502 A.2d at 123.

53. Harris v. McRae, 448 U.S. 297 (1980).

54. In re Adoption of T.M.F., 573 A.2d 1035 (Pa. Super. 1990).

55. *Id.* at 1052. (Beck, J., concurring).

process and of equal protection provisions by stating that "it has been recognized that Article I, sections 1, 9, and 26 combine to provide the counterpart of the federal due process and equal protection provisions."[56] This is so, wrote Judge Beck, because Section 1 deals with "fundamental fairness in the context of civil proceedings;" Section 9 "concerns the rights of the accused in criminal prosecutions"[57] and Section 26 "concerns the right of the people to be free from discrimination in the exercise of their civil rights."[58,59]

After noting the possible independence of equal protection and due process guarantees under the Pennsylvania Constitution, Judge Beck intimated that these protections should be expanded in the Commonwealth, stating that "among these inherent rights [in Section 1] is the right of a parent to enjoy the companionship of her child" and that one "must therefore determine under what circumstances the state may deprive the parent of her article 1, section 1 right to the child."[60]

Further, in the 1999 case *Commonwealth v. Martin*,[61] the Superior Court indicated that due process rights under the Pennsylvania Constitution, while "substantially co-extensive" with those guaranteed under the Fourteenth Amendment of the federal constitution, "are more expansive in that a violation of due process occurs, even if no prejudice is shown, when the same entity or individual participates in both the prosecutorial and adjudicatory aspects of a proceeding."[62]

Thus, if the language in Martin and Judge Beck's statements in *In Re Adoption of T.M.F.* are any indication, Section 1 may produce increased activity with respect to implied due process and equal protection guarantees.

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56. *Id.* at 1051. (Beck, J., concurring).

57. 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 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."

58. Article 1, Section 26 provides: "Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right."

59. In re Adoption of T.M.F., 573 A.2d at 1051 (Beck, J., concurring).

60. *Id.* (Beck, J., concurring).

61. Commonwealth v. Martin, 727 A.2d 1136 (Pa. Super. 1999).

62. *Id.* at 1141.

§ 4.2[d]. PURSUIT OF HAPPINESS

The "pursuit of happiness" clause in Section 1 has been invoked, on occasion, by the Pennsylvania courts. However, it has not generated extensive commentary by the courts.

In the 1994 case *Bishop v. Piller*,[63] the Supreme Court of Pennsylvania invoked the "pursuit of happiness" clause in determining that the Grandparents' Visitation Act[64] did not intend to favor a grandparent whose child became a parent in a lengthy, strong, and significant relationship as opposed to a grandparent whose child became a grandparent through a brief encounter. The Supreme Court held:

> Nothing is more central to the happiness of many people than to look after the well being, and enjoy the society of, their grandchildren. . . . [G]randparents look forward to the opportunity of spending time with their grandchildren, of spoiling them, and of passing on to them family history and the wisdom of ages. . . . It must be remembered that grandchildren, too, have the natural right to know their grandparents and that they benefit greatly from that relationship.[65]

Almost one hundred years earlier, in the 1895 case of *Commonwealth v. Isenberg*[66] the Court of Quarter Sessions of Clearfield County had held that an act requiring employers to pay wages twice a month between fixed days was unconstitutional because it sought "to prevent [the citizen] from doing as he pleases with that which is his own even though he respects the rights of others, and is, in all respects, a law-abiding citizen," thus implicitly interfering with the citizens' rights of "enjoying liberty, acquiring property and pursuing happiness."[67]

Aside from *Bishop* and *Isenberg*, however, the Pennsylvania courts have worried little about the pursuit of happiness language of Section 1.

§ 4.2[e]. REPUTATION

The protection of reputation in Section 1 has likewise been recognized only sporadically by the Pennsylvania courts. The Supreme Court of Pennsylvania recently stated that "a person's interest in his or her reputation has been placed in the same category with life, liberty and property."[68] Along

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63. Bishop v. Piller, 637 A.2d 976 (Pa. 1994).

64. 22 P.S. §§ 1511-1514.

65. Bishop, 637 A.2d at 978.

66. Commonwealth v. Isenberg, (Quart. Sess.) 8 Kulp 116 (1895).

67. *Id.* at 117.

68. Sprague v. Walter, 543 A.2d 1078, 1084 (Pa. 1988); *see also* Pennsylvania Bar Ass'n v. Pennsylvania Ins. Dep't, 607 A.2d 850, 855-57 (Pa. Cmwlth. 1992); Moyer v. Phillips, 341 A.2d 441, 443 (Pa. 1975); Meas v. Johnson, 39 A. 562, 563 (Pa. 1898).

with Article I, Section 11, which provides that every citizen shall have a remedy at law for unjust injuries to reputation,[69] Section 1 occasionally has been utilized to help ensure that the right to protect one's reputation is given force.

Thus, in the early case of *Commonwealth v. Swallow,*[70] the Superior Court of Pennsylvania in 1898 invoked Section 1 to permit indictment of the editor of the *Pennsylvania Methodist* newspaper for printing a story that indicated dereliction of duty by certain state officials (including the superintendent of public grounds and buildings). The story accused these officials of corrupt receipt of funds from the State Treasury as they had allegedly performed no services in order to earn such funds. In permitting the indictment to stand, but in ordering a new trial to comport with evidentiary rulings, the court noted: "The case thus involves questions of the highest importance: on the one hand, the right of a public officer to protection of his reputation, and, on the other, the right of the citizen to investigate the official conduct of men acting in a public capacity, and to publish his conclusions. These rights are alike secured by constitutional guarantee."[71]

Further, in *Hatchard v. Westinghouse Broad. Co.,*[72] the Supreme Court of Pennsylvania held that despite the Pennsylvania Shield Law,[73] unpublished documentary information gathered by a television station was discoverable in a libel action to the extent that the documentary information did not reveal the identity of the personal source of information or could be redacted to eliminate revelation of the personal source of information. Thus, the Shield Law must be limited at least to the extent of the protection of the "special value placed on an individual's reputation in the Pennsylvania Constitution."[74]

In 1995, the Commonwealth Court of Pennsylvania found a violation of the constitutional right to protect one's reputation in *Simon et al. v. Commonwealth.*[75] In that case, the court granted injunctive relief and halted the Pennsylvania Crime Commission from publishing a report entitled "Racketeering and Organized Crime in the Bingo Industry." The injunctive relief was granted because the petitioners were denied the due process pro-

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69. *Id.* Article I, Section 11 provides: "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."

70. 8 Pa. Super. 539 (1898).

71. *Id.* at 601.

72. 532 A.2d 346 (Pa. 1987).

73. 42 Pa.C.S. § 5942(a).

74. Hatchard, 532 A.2d at 351.

75. Simon et al. v. Commonwealth, 659 A.2d 631 (Pa. Cmwlth. 1995).

tections of: "(1) notice that their reputations were at issue; (2) an opportunity to be heard; (3) an opportunity to confront and cross-examine any witnesses whose statements or testimony was used to produced the published statements; and (4) an opportunity to subpoena witnessed on their own behalf. . . ."[76] The Commonwealth Court further held that "the fact that the Commission is investigatory [in nature] does not justify the abrogation of petitioners' right to possess and protect their reputations without due process of law."[77]

One area that has become significant in modern Pennsylvania reputation cases relates to medical and psychological records. In *Wolfe v. Beal*,[78] decided in 1978, a mental patient was illegally committed to Danville State Hospital. Relying on Article 1, Section 1, the Supreme Court of Pennsylvania noted that "many people view mental illness with disdain and apprehension," and thus concluded it was the court's duty to "order the destruction of medical records to protect the reputation of those who had been unlawfully committed to a state mental hospital."[79]

For its support in *Wolfe*, the Supreme Court cited *Commonwealth ex rel. Magaziner v. Magaziner*.[80] The *Wolfe* court concluded that, because Magaziner had "approved of the concept of protecting the reputation of a person who was unlawfully thrust into the criminal process by sanctioning the expungement of his criminal record," mental hospital records pertaining to the patient's commitment should also be destroyed when illegalities were unearthed.[81]

However, the foundation for the Supreme Court's reasoning in *Wolfe* is questionable. First, the court in *Magaziner* never specifically mentioned Article I, Section 1's reputation protections. Furthermore, that court did not order the expungement of Magaziner's contempt of court arrest, in order to protect such reputational interests. Rather, it found the issue moot, because the petition to cite Magaziner for contempt had been dismissed. The Court indicated that Magaziner could avail himself of "a simple [expungement] proceeding" in order to eliminate any arguable harm.[82] Thus, while the *Wolfe* court relied on *Magaziner* for its reasoning, it is unclear whether the *Magaziner* court really meant to endorse broad Section 1 protections at all.

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76. *Id.* at 634.

77. *Id.* at 639.

78. Wolfe v. Beal, 384 A.2d 1187 (Pa. 1978).

79. *Id.* at 1189.

80. Commonwealth ex rel. Magaziner v. Magaziner, 253 A.2d 263 (Pa. 1969). In that case, Petitioner husband challenged an order of the County Court of Philadelphia that had granted Respondent wife's petition to cite Petitioner for contempt, for failing to allow Respondent to enter their former marital home to retrieve personal items. The Respondent wife's petition was later dismissed by a different judge in the County Court.

81. Wolfe, 384 A.2d at 1189.

82. Magaziner, 253 A.2d at 268.

Furthermore, the Pennsylvania courts have found repeated limitations on this "indefeasible" right to protect one's reputation. For example, in the 1952 case of *Matson v. Margiotti*,[83] a woman was denied damages for enduring allegedly libelous statements made by the Attorney General concerning her purported anti-government/communistic activities. The Supreme Court of Pennsylvania rejected the argument that the plaintiff could bring a Section 1 reputation claim against a government official. The court stated that "neither freedom of speech nor freedom to protect one's property and reputation—each of which is guaranteed by the Constitution . . . is unlimited."[84] The court went on to comment that, even though an innocent person's reputation may suffer great damage, "to permit slander, or libel . . . suits . . . would be to deter all but the most courageous . . . public officials from performing their official duties and would thus often hinder or obstruct justice."[85]

In the 1994 case *Brozovich v. Dugo, et al.*,[86] the Commonwealth Court of Pennsylvania held that a discharge of an at-will employee (so long as it is not wrongful nor a violation of public policy) does not by itself constitute a deprivation of the fundamental right to reputation as in "an at-will employment relationship, an employer may terminate an employee for any reason or for no reason at all."[87]

Thus, the right to protect reputation is far from absolute under Section 1. Indeed, as a general rule, it has been narrowly construed, particularly in modern cases.

§ 4.2[f]. PRIVACY

It is somewhat ironic that "privacy"—a word not even mentioned in Section 1—is one of the most zealously protected rights under Section 1. Nevertheless, it is a concept taken seriously by the Pennsylvania courts in modern times. (For a fuller discussion of privacy rights under the Pennsylvania Constitution, *see* Chapter 33, *infra*). It is perhaps the most broadly protected of all of the rights safeguarded under Section 1, and it likely will be further expanded in future years.[88]

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83. Matson v. Margiotti, 88 A.2d 892 (Pa. 1952).

84. *Id.* at 899.

85. *Id.* at 899-900.

86. Brozovich v. Dugo et al., 651 A.2d 641 (Pa. Cmwlth. 1994).

87. *Id.* at 644.

88. *See* Hon. Vincent A. Cirillo, *Curtis v. Kline: The Pennsylvania Supreme Court Declares Act 62 Unconstitutional—A Triumph for Equal Protection Law*, 34 DUQ. L. REV. 471 (1996) for discussion of how Section 1 could have been utilized in declaring Act 62 unconstitutional.

In the telephone wire-tap case of *Commonwealth v. Murray*,[89] Justice Michael Musmanno cited Section 1 and stated that "[o]ne of the pursuits of happiness is privacy. The right of privacy is as much property of the individual as the land to which he holds title and the clothing he wears on his back."[90] Justice Musmanno went on to state that of "all the precious privileges and prerogatives in the crown of happiness . . . none shines with greater luster and impacts more innate satisfaction . . . to the wearer than the golden, diamond-studded right to be left alone."[91]

It is perhaps no surprise that the courts have recognized a strong privacy right inherent in Section 1, since the importance of privacy under the Pennsylvania Constitution—generally—has repeatedly been emphasized.[92] Thus, in the 1990 case of *Barasch v. Pennsylvania Public Utility Commission*,[93] the Pennsylvania Commonwealth Court referred to the telephone privacy protections identified in *Murray*, and expanded upon them.[94] In *Barasch*, the Commonwealth Court refused to allow a telephone company to offer Caller*ID to its customers. After restating that privacy was a right protected by Section 1, the court held that "an individual has a right to privacy in the use of his or her telephone and that unauthorized seizure or disclosure of one's number will not be permitted."[95]

On appeal, however, the Supreme Court of Pennsylvania refused to invoke the Pennsylvania Constitution in its decision, since the court found a statutory basis for continuing the ban on Caller*ID so long as the consent of the parties to the communication had not been obtained.[96] In doing so, the Supreme Court criticized the Commonwealth Court's invocation of the Pennsylvania Constitution within its decision, stating that "courts should not decide constitutional issues in cases which can properly be decided on non-constitutional grounds."[97]

In *Denoncourt v. Commonwealth, State Ethics Comm'n*,[98] the Pennsylvania Supreme Court in 1983 struck down as unconstitutional a requirement that

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89. Commonwealth v. Murray, 223 A.2d 102 (Pa. 1966) (plurality opinion), *aff'd on other grounds*, 605 A.2d 1198 (Pa. 1992).

90. *Id.* at 109.

91. *Id.* at 110.

92. *See, e.g.*, Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991), and cases cited therein; *see also* In re Pittsburgh Action Against Rape, 428 A.2d 126, 135 (Pa. 1981) (O'Brien, C.J., concurring); *Id.* at 149 (Larsen, J., dissenting).

93. Barasch v. Pennsylvania Public Utility Comm'n, 576 A.2d 79 (Pa. Cmwlth. 1990).

94. The Pennsylvania Supreme Court upheld the decision on non-constitutional grounds. *See* Barasch v. Bell Telephone Co. of Pennsylvania, 605 A.2d 1198 (Pa. 1992).

95. Barasch, 576 A.2d at 88.

96. Barasch v. Bell Telephone Co. of Pennsylvania, 605 A.2d at 1203.

97. *Id.*

98. Denoncourt v. Commonwealth, State Ethics Comm'n, 470 A.2d 945 (Pa. 1983).

the immediate family members of individuals holding public office disclose their financial interests.[99] Citing Section 1, the Court announced that it "was adopting a two-pronged analysis of privacy as involving (1) a freedom from disclosure of personal matters and (2) the freedom to make certain important decisions."[100] This case involved the freedom from disclosure of personal matters.[101] After weighing the facts, the court concluded that there had been an "infringement on the privacy rights of the public official's family."[102]

The courts have also invoked Section 1's "privacy" notions to (1) safeguard the addresses, phone numbers and social security numbers of government employees and individuals who have applied for firearms licenses;[103] (2) protect privacy-based parental rights, including "the right to assert [a] child's right to life";[104] and (3) protect an individual's right to refuse psychological testing and to refuse the disclosure of the results of a psychological examination.[105]

Like other areas safeguarded by Section 1, however, privacy protections are not absolute. Instead, the courts must balance "an individual's right to privacy against a countervailing state interest which may or may not justify, in the circumstances, an intrusion on privacy."[106] Thus, the courts will restrict privacy protections when the privacy interests are outweighed by the state interests.

In the case of *In re June 1979 Allegheny County Investigating Grand Jury v. Lanni,*[107] the Supreme Court of Pennsylvania held that a patient's right to privacy—in not having medical records on tissue reports revealed—was outweighed by a grand jury's need for evidence to aid an investigation of the Allegheny County Coroner's Office.[108] This was especially true since the grand jury was sworn to secrecy.[109] Thus, there was no significant privacy

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99. *Id.* at 950.

100. *Id.* at 948. *See also* Fischer v. Commonwealth, Dep't of Pub. Welfare, 543 A.2d 177 (Pa. Cmwlth. 1988); Fischer v. Commonwealth, Dep't of Pub. Welfare, 482 A.2d 1148 (Pa. Cmwlth. 1984) (en banc).

101. *Id.*

102. *Id.* at 947.

103. *See* Tribune-Review Publishing Co., et al. v. Allegheny County Housing Authority, 662 A.2d 677 (Pa. Cmwlth. 1995); Time Publishing Co., Inc., et al. v. Michel, et al., 633 A.2d 1233 (Pa. Cmwlth. 1993).

104. *See* Rideout v. Hershey Medical Center, 30 Pa. D. & C.4th 57 (1995).

105. *See* In the Matter of T.R., et al., 731 A.2d 1276 (Pa. 1999) (*reversing* In the Matter of T.R., et al., 665 A.2d 1260 (Pa. Super. 1995); In the Matter of: K.D., et al., 744 A.2d 760 (Pa. Super. 1999); In re "B.", 394 A.2d 419 (Pa. 1978).

106. *Id.* at 948.

107. In re June 1979 Allegheny County Investigating Grand Jury, 415 A.2d 73 (Pa. 1980).

108. *Id.* at 77.

109. *Id.* at 78.

interest at risk, particularly when weighed against the compelling state interest of gathering evidence.

Another case in which the privacy interest was outweighed by a societal interest was *Stenger v. Lehigh Valley Hospital Center.*[110] In *Stenger,* decided in 1989, the plaintiff, suing the hospital for negligence, sought to learn the identity of a blood donor whose blood may have caused her to contract the AIDS virus. Plaintiff also sought to learn the identities of fifty-one other individuals who had received this donor's blood. The Pennsylvania Superior Court, in a decision later upheld by the Pennsylvania Supreme Court,[111] refused to allow discovery of the fifty-one other blood recipients due to the low probability that this information would materially aid the plaintiff's case.[112] Thus, the infringement on the privacy interests of the fifty-one individuals could not be justified.[113]

However, the *Stenger* court did allow limited discovery with respect to the donor.[114] Because information regarding the hospital screening procedures was necessary to the plaintiff's negligence argument, this need outweighed the donor's privacy interest in not divulging his medical information, so long as his identity and confidentiality could be protected.[115] Thus, the need for evidence in a specific case can outweigh an individual's privacy interests. However, the courts have continued to protect this privacy interest vigorously through ensuring the confidentiality of the donors and safeguarding their records.

On the other hand, the courts do not automatically find that there is an infringement on privacy rights when certain aspects of an individual's life are required by law to be disclosed to a governmental agency. In the 1994 case of *McCusker v. Workmen's Compensation Appeal Board,*[116] the Supreme Court of Pennsylvania held that the right to privacy under Section 1 was not infringed when worker's compensation benefits were terminated as a result of the meretricious relationship of the individual receiving the benefits. In so holding, the Supreme Court stated: "The statute at issue in the instant case simply does not prohibit or criminalize the Appellant's choice of living or family arrangements, . . . [and] in no way prevents the Appellant from entering into a meretricious relationship; nor does it impose criminal sanctions for such a relationship. This statute merely sets forth an eligibility requirement for benefits under the worker's compensation program."[117]

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110. Stenger v. Lehigh Valley Hosp. Ctr., 563 A.2d 531 (Pa. Super. 1989).

111. Stenger v. Lehigh Valley Hosp. Ctr., 609 A.2d 796 (Pa. 1992).

112. Stenger, 563 A.2d at 538.

113. *Id.*

114. *Id.* at 537.

115. *Id.*

116. McCusker v. Workmen's Compensation Appeal Board, 639 A.2d 776 (Pa. 1994).

117. *Id.* at 779.

In conclusion, compared to other areas of Section 1 protection, the Pennsylvania courts have been particularly vigorous in protecting privacy interests stemming from Section 1. This is no doubt related to the courts' broad interpretation of privacy rights under the Declaration of Rights, generally, particularly under Section 8 ("Search and Seizure") and other provisions. (See, Section 4.8, *infra*). As a result, this area will likely continue to expand in future years.

§ 4.3. RELATED CASE LAW FROM OTHER STATES

The constitutions of numerous other states, besides Pennsylvania, contain provisions similar to Article I, Section 1.[118] Professor Jennifer Friesen's excellent treatise on modern state constitutional jurisprudence does not contain a specific section on this particular provision,[119] (presumably because it is somewhat general in nature and has no precise federal counterpart). However, there exists ample case law in those states whose constitutions contain similar language. As one might expect, each state has its own unique interpretational history. For instance, Nevada has an almost nonexistent body of case law relating to Article I, Section 1, a virtually identical provision.[120] On the other hand, California[121] and New Jersey[122] each have a sizable body of case law interpreting their like clauses, often more far-reaching than those found by the Pennsylvania courts.

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118. *See* especially the following state constitutions: Article I, Section 1 of the Constitutions of Alabama, California, Connecticut, Indiana, Iowa, Kansas, Maine, Nevada, New Jersey, Ohio, Vermont, Virginia and West Virginia; Article I, Section 2 of the Constitution of Florida; Part 1, Article 1 of the Constitution of Massachusetts; Article II, Section 3 of the Constitution of Colorado; Article II, Section 2 of the Constitution of Arkansas; and Part 1, Article 2 of the Constitution of New Hampshire.

119. *See* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (3rd ed. 2000).

120. Article 1, Section 1 of the Nevada Constitution reads: "All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness."

121. Article I, Section 1 of the California Constitution provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

122. Article 1, Section 1 of the New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness."

Among those states with provisions similar to Section 1, judicial deference to the state's police power in regulating property seems to be the norm. Thus, Pennsylvania courts are not alone in their propensity to interpret, in a narrow fashion, the freedoms granted by the property protections. Nor are Pennsylvania courts alone in giving limited effect to the "pursuit of happiness" clause.

At the same time, there are some interesting observations that can be made with respect to the cases nationwide. Some states have rich jurisprudence under such provisions; others have barren soil. For example, Nevada's case law is particularly sparse and disjointed, with less than a dozen judicial cites since 1864, when the Nevada Constitution was ratified.[123] Like the Pennsylvania decisions discussed above, most of Nevada's cases deal with property.[124] However, several cases address liberty and the pursuit of happiness,[125] and one case strikes down a statute as being violative of federal and state due process protections.[126] Although this case law is on the books, most of it dates back to distant decades and is therefore of questionable value.[127]

While Nevada has done very little with its "inherent rights" provision, both California and New Jersey have a sizable body of case law dealing with similar constitutional provisions.[128] More important, these two states have separated themselves from federal interpretations regarding privacy, due process, and equal protection. Unlike the Pennsylvania courts, the courts of both California and New Jersey have created a significant amount of latitude for their respective courts to provide more protection than their federal counterparts.

One area in which the California courts provide great protection, under the state's "inherent rights" clause, relates to the woman's right to privacy, specifically in the context of abortion. Unlike Pennsylvania, California declined in 1981 to follow the U.S. Supreme Court's decision in *Harris v. McRae.*[129] In *Committee to Defend Reproductive Rights v. Myers,*[130] the California Supreme Court held that the state must provide abortion funding to the

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123. *See supra* note 120.

124. *See, e.g.,* Kelly v. State, 532 P.2d 1029 (Nev. 1975); Urban Renewal Agency of City of Reno v. Iacometti, 379 P.2d 466 (Nev. 1963); Flick v. Nevada Fish and Game Commission, 335 P.2d 422 (Nev. 1959); and State ex rel. Roman Catholic Bishop of Reno v. Hill, 90 P.2d 217 (Nev. 1939).

125. *See* Atteberry v. State, 438 P.2d 789 (Nev. 1968) and Norman v. City of Las Vegas, 177 P.2d 422 (Nev. 1947).

126. *See* State ex rel. Roman Catholic Bishop of Reno v. Hill, 90 P.2d 217 (1939).

127. *E.g.,* Ex Parte Kair, 80 P. 463 (Nev. 1905); Worthington v. District Court of Second Judicial District, 142 P. 230 (Nev. 1914).

128. *See supra* note 121 and 122.

129. Harris v. McRae, 448 U.S. 297 (1980). *See* Section 4.5, *infra.*

130. Committee to Defend Reproductive Rights v. Myers, 625 P.2d 779 (Cal. 1981).

poor who are also eligible for state-funded medical care.[131] To do otherwise, the court held, would infringe on the privacy protections found in Article I, Section 1 of the California Constitution.[132] In distancing itself from the United States Supreme Court's decision in *Harris v. McRae*, the California Supreme Court stated that "the *McRae* case did not present any question under the California Constitution and consequently the justices of the high court neither addressed nor resolved the question of the compatibility of such a statutory scheme with our state constitutional guarantees."[133]

Furthermore, in *American Academy of Pediatrics v. Van de Kampf*,[134] the California Court of Appeal for the First District upheld a preliminary injunction preventing the implementation of a law requiring parental consent for minors seeking abortions. The California court, in issuing a strong statement warning against blindly following federal case law with respect to privacy, declared: "The state Constitution is a document of *independent* force and the rights defined therein are not mirror images of their federal counterparts," and that the California Constitution "is to be construed by our courts informed but untrammeled by the United States Supreme Court's reading of parallel provisions."[135] (Pennsylvania, on the other hand, while acknowledging its power to interpret its Constitution differently in this area, has generally maintained a policy of adopting the federal interpretation with respect to equal protection issues.)[136]

Another area of privacy in which California courts have diverged from their federal brethren is the "right to die" area. In *Bouvia v. Superior Court*,[137] the Court of Appeal for the Second District held that the right to privacy specifically included the right to refuse medical treatment. In addition, this included the right not to be inserted with a nutrition tube and force-fed.[138]

New Jersey, likewise, has aggressively developed its own jurisprudence in this area. In *Greenberg v. Kimmelman*,[139] a due process case involving the ban on hiring state employees and their families to work in casinos, the New Jersey Supreme Court clearly distanced itself from federal analysis in cases involving due process and equal protection.[140] Although it concluded that,

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131. *Id.* at 781.

132. *Id.* at 784.

133. *Id.* at 781.

134. American Academy of Pediatrics v. Van de Kampf, 263 Cal. Rptr. 46 (Cal. App. 1 Dist. 1989).

135. *Id.* at 49.

136. Fischer v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985).

137. Bouvia v. Superior Court, 225 Cal. Rptr. 297 (Cal. App. 2 Dist. 1986).

138. *See also* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990).

139. Greenberg v. Kimmelman, 494 A.2d 294 (N.J. 1985).

140. *Id.* at 302-03. *See, e.g.*, Hennessey v. Coastal Eagle Point Oil Co., 609 A.2d 11 (N.J. 1992); Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982); State v. Saunders, 381 A.2d 333 (N.J. 1977); In re Quinlan, 355 A.2d 647 (N.J. 1976); Mc-

in the case before it, analysis under both the federal and New Jersey constitutions led to the same result,[141] the New Jersey court explained: "By developing an interpretation of the New Jersey Constitution that is not irrevocably bound by federal analysis, we . . . avoid the necessity of adjusting our construction of the state constitution to accommodate every change in federal analysis of the United States Constitution."[142] Thus, the New Jersey Supreme Court has ensured that its analysis of its "inherent rights" clause did not depend strictly on federal interpretations. Indeed, it has scrupulously left room open for departures from federal court precedent in future cases.

§ 4.4. CONCLUSION

Article I, Section 1 of the Pennsylvania Constitution has been utilized, sporadically, by the Pennsylvania courts to define the rights of citizens in the areas of liberty, property, equal protection, due process, reputation, pursuit of happiness, and privacy. For the most part, the courts have been cautious in applying Section 1 and in expanding its protections. The extremely broad language of Section 1, in hindsight, may have actually hampered meaningful and cohesive interpretation of this provision. However, other states such as California and New Jersey have succeeded in interpreting similar "inherent rights" language contained in their own constitutions in more expansive ways.

With a greater activity under the Declaration of Rights, generally, the Pennsylvania courts may slowly begin to fashion a more meaningful jurisprudence under Section 1. There certainly exists a foundation upon which this provision might be further developed, making it a more vital source of fundamental rights for Pennsylvania citizens in decades to come.

Govern v. Van Riper, 43 A.2d 514 (N.J. Ch. 1945), *aff'd*, 45 A.2d 842 (N.J. 1946).

141. *Id.* at 303.

142. *Id.* at 302-03.

EXHIBIT D

§ 31.6. ARTICLE I, SECTION 26: THE 1967 ANTIDISCRIMINATION PROVISION

In 1967, the legislature proposed and the people of Pennsylvania adopted, via referendum, Article I, Section 26 as an addition to the Declaration of Rights. Section 26 provides: "Neither the Commonwealth nor any political subdivision thereof shall *deny* to any person the enjoyment of any civil right, *nor discriminate* against any person in the exercise of any civil right."[66]

Similar provisions in other states typically limit the proscription to discrimination on the basis of race, color, or national origin.[67] Pennsylvania's provision is, by contrast, more open-ended. The express ban on *discrimination* against persons in the exercise of their civil rights, in addition to prohibiting the *denial* of rights, provides a strong textual basis for extending such protection beyond the federal equal-protection doctrine.

The legislative history of the 1967 provision is sparse, but one conclusion clearly emerges: The protection of Section 26 was designed to reach beyond that provided by the Fourteenth Amendment and beyond the existing equality provisions (Article I, Section 1 and Article III, Section 32) in the state Constitution. The predecessor of Article I, Section 26 originated as a 1963 proposal by the Committee on the Bill of Rights of the Pennsylvania Bar Association's "Project Constitution."[68] The Committee proposed Article I, Section 26 at the same time it recommended redrafting Article I,

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Our Public Schools, 24 CONN. L. REV. 675 (1992) (considering recent and potential future directions in school finance litigation); *Symposium, Investing in Our Children's Future: School Finance Reform in the 90's*, 28 HARV. J. ON LEGIS. 293 (1991) (stating that interest in school financing reform has increased because of recent state constitutional cases).

66. PA. CONST. art. I, § 26 (emphasis added); *cf.* N.Y. CONST. art. I, § 11 (earlier version of this type of provision). For a discussion of similar provisions in other state constitutions, *see* Albert L. Sturm, *The Development of American State Constitutions, 12 Publius: The Journal of Federalism* 57, 87-88 (1982); ALBERT L. STURM & KAYE M. WRIGHT, CIVIL LIBERTIES IN REVISED STATE CONSTITUTIONS, IN CIVIL LIBERTIES: POLICY AND POLICY MAKING 179, 182-83 (S. Wasby ed., 1976). *See* Chapter 28, discussing Article I, Section 26 earlier in this volume.

67. *See, e.g.*, N.J. CONST. art. I, para. 5. The Pennsylvania legislature specifically eliminated such a limitation from its provision. *See* 149 Pa. Legis. J., House, 2771-72 (1965) (conference committee report on resolution leading to Article I, Section 26 of the Pennsylvania Constitution); *infra* notes 72-75 and accompanying text.

68. *See Constitutional Report, A Revised Constitution for Pennsylvania* ("*Project Constitution*"), 34 PA. BAR ASS'N Q. 147, 247, 249 (1963). The text accompanying notes is based on a section of the brief in Fischer v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985), written by Kathryn Kolbert and Seth Kreimer, with whom the author served as co-counsel. *See infra* text accompanying notes.

Section 10 to include a separate "clause the wording of which is copied, *with the addition of an 'equal protection' clause, from the Federal Constitution.*"[69]

The Governor's Commission on Constitutional Revision, however, did not include the proposed "equal protection" language, presumably because it duplicated the existing guarantees provided by Article I, Section 1 and by Article III, Section 32.[70] By contrast, it proposed the adoption of Article I, Section 26.[71] Thus, at its inception, Article I, Section 26 was regarded as distinct from, and supplementary to, the existing equality guarantees in the state and federal constitutions. The existing provisions must have been viewed as not reaching far enough.

As introduced in the state Senate, in the form of Senate Bill 530 of 1965, Article I, Section 26 prohibited discrimination on the ground of "race, color, or national origin."[72] The bill was amended in the House to prohibit discrimination on the basis of "race, creed, color, sex, or national origin,"[73] an amendment that provoked the nonconcurrence of the Senate.[74] The difference was resolved in conference committee by broader language that prohibited discrimination "against any person in the exercise of any civil right."[75]

Article I, Section 26 was approved in this form by the legislature in December 1965 and ratified by the people on May 16, 1967. This approval was secured one hundred years after the Fourteenth Amendment prohibited states from denying persons the "equal protection of the laws," almost two hundred years after the adoption of Article I, Section 1, and almost one hundred years after the adoption of the predecessor of Article III, Section 32, the other equality guarantee of the Pennsylvania Constitution.

Article I, Section 26, therefore, supplements the other equality guarantees of Article I, Section 1 and Article III, Section 32 by specifically pro-

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69. *Id.* at 247 (emphasis added).

70. *See, e.g.*, Baltimore & O.R.R. v. Commonwealth, Dep't of Labor & Indus., 334 A.2d 636, 643 (Pa. 1975) (holding that the contents of Article III, Section 32 and the Federal Equal Protection Clause are "not significantly different").

71. *See* Report of Governor's Commission on Constitutional Revision ix, 5 (1964).

72. S.B. 530, printer no. 551, at 2, 149th Gen. Ass. (1965).

73. S.B. 530, printer no. 1281, at 2, 149th Gen. Ass. (1965).

74. 149 Pa. Legis. J., Senate, 937-38 (1965).

75. 149 Pa. Legis. J., House, 2771-72 (1965); *see* Pennsylvania Bar Association, Pennsylvania Constitutional Revision: 1966 Handbook 17 ("The Governor's Commission on Constitutional Revision . . . felt that there should be added to the Declaration of Rights a section prohibiting discrimination by any governmental agency against any person in the exercise of his or her civil rights. Accordingly, it proposed a new Section 26 which the Legislature broadened in its scope." (emphasis added)). *See* note, *supra.*

hibiting *discrimination against*, as well as *denial of*, any civil right. In view of the legislative history of Section 26, clearly its language was not lightly chosen. Rather, as the Supreme Court of Pennsylvania noted in a similar situation concerning special laws: "[T]he language of the Pennsylvania Constitution is substantially different from the federal constitution. We are not free to treat that language as though it was not there. Because the Framers of the Pennsylvania Constitution employed these words, the specific language in our constitution cannot be readily dismissed as superfluous."[76]

Article I, Section 26 was a change of substance in the Declaration of Rights, and was voted on separately by the voters on May 16, 1967. It was not part of a broader package or revision of the state Constitution. By applying the previously mentioned interpretation approach, the concepts of "discriminate" and "civil rights," therefore, cannot be construed to carry some obscure limitation of meaning; rather, the approach to interpretation should include the normal understanding of such words or concepts when they were ratified by the people of Pennsylvania, which, here, reveal a clear mandate of neutrality and a prohibition of favoritism or partiality.

The potential reach of a modern, nondiscrimination provision such as Article I, Section 26 was tested in the Pennsylvania courts when the use of Medicaid funds for abortions for poor women was banned except to save the life of the mother. Challengers to this statute sought, and were granted, a preliminary injunction in an original action before the Pennsylvania Commonwealth Court in August of 1981. On interlocutory appeal, the Supreme Court of Pennsylvania upheld the preliminary injunction.[77] On remand to the Commonwealth Court, the Commonwealth filed preliminary objections in the nature of a demurrer. These were overruled by an evenly divided commonwealth court.[78] Eventually, Judge John A. MacPhail, sitting as a Chancellor, declared the statute unconstitutional and issued a permanent injunction against its enforcement."[79]

With respect to the Article I, Section 26 argument, however, Judge MacPhail stated:

> Although Petitioners have argued that Article I, Section 26 of the Pennsylvania Constitution provides greater equal protection guarantees than Article III, Section 32, our research has failed to disclose any significant or substantive difference in the treatment of these provisions by Pennsylvania courts. We also have not discovered any movement by

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76. Kroger Co. v. O'Hara Township, 392 A.2d 266, 274 (Pa. 1979).

77. Fischer v. Department of Pub. Welfare, 439 A.2d 1172 (Pa. 1982).

78. Fischer v. Commonwealth, Dep't of Pub. Welfare, 444 A.2d 774 (Pa. Cmwlth. 1982).

79. Fischer v. Commonwealth, Dep't of Pub. Welfare, 482 A.2d 1137 (Pa. Cmwlth. 1984).

> the courts to employ Article I, Section 26 as a vehicle to broaden equal protection guarantees under the Pennsylvania Constitution. . . . We, accordingly, will address all of the equal protection challenges as a unit.[80]

Under this view, all of the efforts described above to amend the Pennsylvania Constitution, stretching form 1963 to 1967, were a futile exercise.

The Commonwealth excepted to Judge MacPhail's decision, and the case was heard en banc by the Commonwealth Court, which reversed by a five-to-two vote.[81] President Judge James Crumlish's majority opinion did not even mention Article I, Section 26, but rather, referred only to Article III, Section 32 (special laws), which he referred to as "the Commonwealth's equal protection clause."[82]

The Supreme Court of Pennsylvania upheld the Commonwealth Court in a seven-to-zero decision. Justice James McDermott's unanimous opinion rejected the basic equal protection challenges to the ban on Medicaid funding for abortions.[83] He continued:

> Although we have not previously embraced a mode of analyzing claims under Article I § 26, we think that the most appropriate analysis is that utilized by the United States Supreme Court. . . . This has sometimes been referred to as the "penalty" analysis, whereby the focus is whether a person has been somehow penalized for the exercise of a constitutional freedom. However, as the Majority noted in *Maher v. Roe*, that analysis does not warrant relief in a situation such as here where a state merely seeks to encourage behavior by offering incentives, as distinct from where a state refuses to subsidize a person's exercise of a constitutional right.
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> . . .
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> Therefore, we hold that since the Commonwealth here has not otherwise penalized appellants for exercising their right to choose, but has merely decided not to fund that choice in favor or an alternative social policy, that the Commonwealth's actions are not

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80. *Id.* at 1143 n.12 (citations omitted).

81. Fischer v. Commonwealth, Dep't of Pub. Welfare, 482 A.2d 1148 (Pa. Cmwlth. 1984), *aff'd*, 502 A.2d 114 (Pa. 1985).

82. *Id.* at 1151; *see also id.* at 1156 n.23 (noting that although the language of the Federal Equal Protection Clause and Pennsylvania's Article III, Section 32 differ, the "substantive application is not significantly different insofar as traditional equal protection is concerned"). *See also* Small v. Horn, 722 A.2d 664, 772 n. 13 (Pa. 1998); Commonwealth v. Albert, 758 A.2d 1149, 1151-52 (Pa. 2000).

83. Fischer v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985).

offensive to the Constitutional guarantees protected under Article 1 § 26.[84]

Thus, the Supreme Court of Pennsylvania became the first and, until 1992,[85] the only state supreme court to *follow* the United States Supreme Court's 1980 decision in *Harris v. McRae*.[86] In doing so it essentially considered Article I, Section 26 simply to be another version of existing equality provisions.

§ 31.7. THE 1971 PENNSYLVANIA STATE EQUAL RIGHTS AMENDMENT

Adopted in 1971, the Pennsylvania Equal Rights Amendment (ERA), Article I, Section 28 of the Pennsylvania Constitution provides: "Equality of rights under the law shall not be abridged in the Commonwealth of Pennsylvania because of the sex of the individual."[87] Even though it was stricken from an early draft of Article I, Section 26 by the legislature in 1965,[88] the specific focus on sex discrimination was made part of the state constitution only a few years later.

In 1984, Chief Justice Robert Nix noted that the Equal Rights Amendment is "a state constitutional amendment adopted by the Commonwealth

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84. *Id.* at 123-24 (citations omitted). In a footnote, Justice McDermott stated:

> In Harris v. McRae . . . the Majority's comments on the breadth of the equal protection clause are analogous. "The guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classification and other government activity."

Id. at 123 n.15 (citations omitted) (quoting Harris v. McRae, 448 U.S. 297, 322 (1980)).

85. The Supreme Court of Michigan upheld a state ban on Medicaid funds for abortion. Doe v. Department of Social Serv., 487 N.W.2d 166 (Mich. 1992). The Doe opinion provided a much more searching and independent analysis of Michigan's equality provisions than the Supreme Court of Pennsylvania provided in Fischer v. Department of Pub. Welfare, 502 A.2d 114 (Pa. 1985). *See generally* Louis D. Bilionis, *Liberty, the "Law of the Land," and Abortion in North Carolina*, 71 N.C. L. REV. 1839 (1993) (contending that the Declaration of Rights of the North Carolina Constitution should provide the basis for a woman's right of choice); Kathryn Kolbert & David Gans, *Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151 (1993); Edward R. Alexander, Note, *The Right of Privacy and the New York State Constitution: An Analytical Framework*, 8 TOURO. L. REV. 725 (1992).

86. Harris v. McRae, 448 U.S. 297 (1980).

87. PA. CONST. art. I, § 28. *See* discussion of Article I, Section 28 earlier in this volume in Chapter 30.

88. *See supra* text accompanying notes 73-75.