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The Role of New Federalism in Pennsylvania: Does United States Supreme Court Precedent Have Any Weight?

I. INTRODUCTION

On July 20, 1991, the Pennsylvania Supreme Court handed down a decision which effectively overruled prior inverse condemnation law in Pennsylvania. The supreme court did so by significantly increasing the rights of individuals under the "takings" clause of the Pennsylvania Constitution and consequently circumscribing the scope of permissible state action. In *United Artists Theater Circuit, Inc. v City of Philadelphia*, the Pennsylvania Supreme Court held that portions of Philadelphia's Historic Preservation Act unconstitutionally deprived landowners of an ownership interest in their property without just compensation, in violation of Article I, section 10 of the Pennsylvania Constitution. The court's decision that day appeared to be directly in conflict with a prior decision of the United States Supreme Court, and yet, the city of Philadelphia, the losing party, had not a glimmer of hope for a reversal on appeal. The action of the Pennsylvania Supreme Court

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1. "Inverse condemnation" is defined in Black's Law Dictionary as: An action brought by a property owner seeking just compensation for land taken for a public use, against a government or private entity having the power of eminent domain. It is a remedy peculiar to the property owner and is exercisable by him where it appears that the taker of the property does not intend to bring eminent domain proceedings. Black's Law Dictionary 825 (West, 6th ed 1990).


3. The "takings" clause of the Pennsylvania Constitution reads: Nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured. Pa Const, Art I, § 10.


5. See note 89.


8. Under the doctrine established in *Michigan v Long*, 463 US 1032 (1983), discussed at note 23, the United States Supreme Court will not review a decision of a state court holding a state statute unconstitutional so long as that decision rests upon adequate and independent state grounds. *Long*, 463 US at 1041. Hope is not lost for the city of Phila-
in *United Artists* reflects a growing tendency of state courts to reach beyond the Bill of Rights of the federal constitution in protecting individual rights. This judicial activism, sometimes labelled "New Federalism," has been used increasingly by the Pennsylvania Supreme Court during the last two years. Indeed, it appears that the litigant making a constitutional challenge based on individual rights may well have greater chances of success under the state constitution than its federal counterpart.

Part One of this comment traces this increased "New Federalism" and its development in various states. In Part Two, the effect of this movement in Pennsylvania is examined with a focus on the recent supreme court cases of *United Artists* and *Commonwealth v Edmunds*. This examination helps reveal the role and benefits of New Federalism in Pennsylvania and other states. This comment concludes that New Federalism should continue to be used in state courts for three reasons. First, it operates as an effective check on the increasingly conservative federal judiciary. Second, states offer a less costly forum for constitutional experimentation. And third, state court judges are more likely to be in touch with public perception and preferences with regard to the scope of individual freedoms.

II. THE INCREASED USE OF FEDERALISM AND RELIANCE ON STATE CONSTITUTIONS

During the Warren Court era, the federal judiciary was the primary protector of individual rights. The armor that federal courts used to save individuals from the oppression of state governments was the Fourteenth Amendment. Although some members of the Supreme Court urged a complete application of the Bill of Rights to the states through the Fourteenth Amendment, incor-
poration was instead done on a piecemeal basis. By the end of the Warren Court era, most of the protections afforded to individuals in the first eight amendments had been made applicable to the states by various Supreme Court decisions.

For the past several years, however, the Supreme Court of the United States has favored a more restrictive reading of the individual liberties afforded by the Bill of Rights. Beginning with the 1976 decision of Fischer v United States, in which the Court determined that private diaries may be seized and used to help convict a defendant, the high court has gradually eroded or limited the protections afforded during the Warren Court era. With the recent appointments of Justices Souter and Thomas to the United States Supreme Court and the "conservatization" of the federal judiciary, one would expect this trend to continue for the next several years.

The retrenchment of individual liberties being conducted by the federal judiciary has not been entirely welcome at the state court level. The federal constitution creates a "floor" below which states may not go in restricting individual liberties. State courts may, however, go above this floor in expanding individual freedoms so long as there is no conflict with positive federal law. State courts have not been reluctant to use this power to hold that constitutional minimums of the United States Supreme Court decisions were not sufficient to meet more stringent requirements of state constitutional law. From 1970 to 1984, state courts handed down over 250 opinions holding that state constitutional protection of individual liberties was greater than that afforded by their federal

15. See Gitlow v New York, 268 US 652 (1925) (holding that the states are bound by the constraints of the First Amendment); Chicago B. & Q. R. Co. v Chicago, 166 US 226 (1897) (holding that the states are bound by the takings clause of the Fifth Amendment); Wolf v Colorado, 338 US 25 (1949) (holding the states bound by the search and seizure provisions of the Fourth Amendment); Mapp v Ohio, 367 US 643 (1961) (holding the states bound by the Fourth Amendment's exclusionary rule); Gideon v Wainwright, 372 US 335 (1963) (holding the states bound by the Sixth Amendment's requirement of a right to counsel).
20. Id.
21. Id at 548.
State court decisions expanding the protections of the federal constitution have covered a broad range of individual rights. Courts in California, Massachusetts, Washington and Pennsylvania, for instance, have held that clauses in their state constitutions go further in protecting freedom of expression than does the federal counterpart. Some of these attempts to expand individual liberties have met with cloaked hostility from the Supreme Court. Other members of the Court have encouraged states to develop their own constitutional law. It seems clear, however, that so long as state courts abide by the standard enunciated by the Supreme Court in Michigan v Long, and do not attempt to curtail those rights currently protected by the United States Constitution, the Supreme Court will not interfere with the state court decisions.

22. Id.

23. 463 US 1032 (1983). Under the Supreme Court's decision in Long, federal courts will not review a state court decision so long as the state court clearly states that its judgment rests solely on an interpretation and application of state law. In a later case the Supreme Court showed that it did indeed mean what it said in Long. The court vacated and remanded a decision of the Montana Supreme Court in which the state court had said, "clearly, to permit evidence of defendant's refusal to take the breathalyzer test would violate not only the United States Constitution, but also our own constitution." State v Jackson, 195 Mont 185, 637 P2d 1, 4 (1981), vacated sub nom, Montana v Jackson, 460 US 1030 (1983). For an in-depth discussion of the mistake committed by the Montana Supreme Court, see Ronald K.L. Collins, Reliance on State Constitutions—The Montana Disaster, 63 Tex L Rev 1095 (1985).


25. See Florida v Casal, 462 US 637 (1983), in which Chief Justice Burger encouraged the residents of Florida to "amend state law to insure rational law enforcement." Casal, 462 US at 639 (Burger concurring). Because the state court's decision in Casal was made solely on state constitutional grounds, the Chief Justice was unable to effect this change himself. Id at 638. See also Colorado v Nunez, 465 US 324, 327 (1984) (White concurring).

26. Justices Brennan and Stevens have actively counseled state courts to develop their own state constitutional law. See, for example, Michigan v Mosley, 423 US 96, 120 (1975) (Brennan dissenting), and South Dakota v Neville, 459 US 553, 566-71 (1983) (Stevens dissenting).

27. See note 23.
III. "NEW FEDERALISM" IN THE PENNSYLVANIA SUPREME COURT

The Pennsylvania Supreme Court has welcomed the challenge to develop strong and independent state constitutional law with respect to individual rights. Indeed, the state court was holding individual freedoms to a higher standard shortly after the close of the Warren Court in 1969.28 Cases which simply go farther than the United States Supreme Court in granting individual protections are numerous in Pennsylvania.29 As the federal judiciary becomes increasingly conservative, however, the Pennsylvania Supreme Court seems to be showing an increased willingness to grant rights in situations which directly conflict with the affirmative language of opinions of the United States Supreme Court. The following two cases illustrate this trend.

A. Commonwealth v Edmunds30

The exclusionary rule was first made applicable to state criminal actions in Mapp v Ohio.31 In Mapp, the Supreme Court held that evidence seized pursuant to a warrantless search of an accused's residence is inadmissible under the Fourth and Fourteenth Amendments to the United States Constitution.32 Mapp thus created the veritable floor below which state courts could not go in admitting evidence seized without a warrant.

Twenty-three years after Mapp was decided, the United States Supreme Court, responding in part to criticism of the harsh effects of the exclusionary rule, lowered the floor created by the Fourteenth Amendment. In Leon v United States,33 the high court was presented with evidence seized pursuant to a valid search warrant.34 The warrant, however, was later found to be lacking in

28. One of the earliest Pennsylvania cases granting more rights under the state than federal Constitution was Commonwealth v Hamilton, 449 Pa 297, 297 A2d 127 (1972) (speedy trial).
34. Leon, 468 US at 902.
probable cause and therefore defective. At trial, the defendants' motion to suppress the seized evidence was granted over the government's objection that the officers were acting in good faith. The Court of Appeals for the Ninth Circuit affirmed, and the United States Supreme Court granted certiorari to consider whether a "good faith" exception should be read into the exclusionary rule of Mapp.

In a majority opinion written by Justice White, the Court held that the good faith exception was an appropriate modification of the exclusionary rule. Evidence seized pursuant to a search warrant issued by a neutral and detached magistrate which the officers believed at the time to be valid was therefore admissible, despite the language of the Fourth and Fourteenth Amendments. To hold otherwise, claimed the majority in Leon, would be to punish judges and magistrates rather than deter police misconduct, and would therefore not further the purposes of the exclusionary rule.

Seven years after the United States Supreme Court's decision in Leon, the Pennsylvania Supreme Court was presented with a similar factual scenario. As in Leon, the defendant in Commonwealth v Edmunds sought to exclude evidence seized pursuant to a defective search warrant. The warrant in question was alleged to be defective due to failure of the supporting affidavit to state the time frame in which the police informants had observed illegal activ-

35. Id at 903.
36. Id at 904.
37. Id at 905.
38. Justice White's opinion was joined by Justices Blackmun, Powell, Rehnquist, O'Conner and Chief Justice Burger. Id at 899.
39. Id at 925.
40. Id.
41. Id at 921. This rationale was one of the main justifications the Pennsylvania Supreme Court used to deviate from Leon in Commonwealth v Edmunds. See note 64.
43. The warrant was alleged defective under Pennsylvania Rule of Criminal Procedure 2003. Edmunds, 586 A2d at 890. Rule 2003 provides in part:

(a) No search warrant shall issue but upon probable cause supported by one or more affidavits sworn before the issuing authority. The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits.

(b) At any hearing on a motion for the return or suppression of evidence, or for suppression of the fruits of evidence, obtained pursuant to a search warrant, no evidence shall be admissible to establish probable cause other than the affidavits provided for in paragraph (a).

ity. The trial court judge ruled that although the warrant was defective under Rule 2003 of the Pennsylvania Rules of Criminal Procedure, the officers had acted in good faith in seizing the evidence. The trial judge therefore held that the evidence was admissible under the good faith exception of Leon.

Based in part upon the contested evidence, the defendant was found guilty by the trial court. The defendant appealed to the superior court, contending that the evidence seized under the search warrant should have been excluded under both the Fourth Amendment of the United States Constitution and its state counterpart, Article I, section 8 of the Pennsylvania Constitution. The superior court affirmed the decision of the trial court, finding that there was "no compelling reason to deviate from the decision of the Court in Leon."

On appeal to the Pennsylvania Supreme Court, the issue presented was whether the Pennsylvania Constitution contained a "good faith" exception similar to the one found in the Fourth Amendment by the Leon Court. In the process of determining this issue, the Pennsylvania Supreme Court in Edmunds delineated a four-part method for comparing similar provisions of the Pennsylvania and federal Constitutions. This four-part analysis was expressly sanctioned by the Pennsylvania Supreme Court in Edmunds for use by future litigants espousing different applications of state constitutional issues with their federal constitutional

44. Edmunds, 586 A2d at 890. The Pennsylvania Supreme Court had previously held that a search warrant lacking this information was inadmissible. Commonwealth v Conner, 452 Pa 333, 305 A2d 341 (1973).
46. Edmunds, 586 A2d at 890.
47. Id at 888.
48. The Fourth Amendment to the United States Constitution provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.
US Const, Amend IV.
49. Edmunds, 586 A2d at 890. This portion of the Pennsylvania Constitution provides:
The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any persons or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.
Pa Const, Art I, § 8.
51. Edmunds, 586 A2d at 888.
The purpose of the four-part analysis is to provide the court with the adequate and independent state grounds necessary to overcome the Michigan v Long threshold. These four factors, as set forth in Edmunds, are:

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.

After noting that the similarity between the wording of the Fourth Amendment and Article I, section 8 was not dispositive of the state constitutional issue, the Pennsylvania Supreme Court in Edmunds examined the history of the state constitutional provision. The court began by noting that Pennsylvania had not recognized an exclusionary rule until the Supreme Court's decision in Mapp, and that early Pennsylvania cases paralleled those of the United States Supreme Court during that period. The court emphasized, however, that Pennsylvania and federal law parted ways in 1973. It was at that time, according to the majority in Edmunds, that the United States Supreme Court developed "a more metamorphosed view, suggesting that the purpose of the exclusionary rule 'is not to redress the injury to the privacy of the search victim (but, rather) to deter future unlawful police conduct.'" The Pennsylvania Supreme Court, meanwhile, was increasingly holding that Article I, section 8 of the Pennsylvania Constitution was designed to ensure individual privacy. The United States Su-

52. Id at 895.
53. Id. See note 23 for a discussion of the test of Michigan v Long.
54. Edmunds, 586 A2d at 895. The court in Edmunds also stated that in some circumstances it may be helpful to set forth related federal precedent as a form of guidance rather than as binding authority. Id. The court stressed, however, that it is imperative for Pennsylvania courts to make an "independent analysis under the Pennsylvania constitution." Id. This may have been a veiled jab at the trial court in Edmunds, which, according to the supreme court, conducted a supplemental suppression hearing solely to establish the good faith of the police officers under Leon. Id at 891.
55. Id. The court stated that even if the provisions were identically worded, the state constitutional provision could be held to be more protective of individual rights. Id at 896, citing Commonwealth v Tarbert, 517 Pa 277, 535 A2d 1035, 1038 (1987).
56. Edmunds, 586 A2d at 895. It was apparently central to the court's analysis that Pennsylvania's search and seizure protections were adopted more than ten years prior to those contained in the Bill of Rights. Id.
57. Id at 897.
59. Edmunds, 586 A2d at 898, citing Commonwealth v Platou, 455 Pa 258, 312 A2d
Supreme Court's "reinterpretation" of the judicial philosophy surrounding the exclusionary rule continued up to and included the Leon decision, according to the majority in Edmunds, which looked with clear disfavor upon the Leon Court's rationale.60

After examining the related caselaw from other states,61 the supreme court in Edmunds proceeded to examine the policy considerations behind the exclusionary rule, both as developed in Pennsylvania and as outlined by the United States Supreme Court in Leon. The majority in Edmunds determined that the good faith exception to the exclusionary rule would nullify the requirements of Rules 2003, 2005 and 2006 of the Pennsylvania Rules of Criminal Procedure.62 In declining to adopt a rule which would have this

60. Edmunds, 586 A2d at 897 (emphasis in original).
61. The Pennsylvania Supreme Court cited the following cases from other states as having adopted the good-faith exception of Leon: Jackson v State, 291 Ark 98, 722 SW2d 831 (1987); State v Brown, 708 SW2d 140 (Mo 1986) (en banc); Mers v State, 482 NE2d 778 (Ind Ct App 1985); State v Huber, 10 Kan App 2d 560, 704 P2d 1004 (1985); Howell v State, 60 Md App 463, 483 A2d 780 (1984); State v Martin, 487 S2d 1295 (La Ct App 3d Cir 1988). The Edmunds court noted that in many of these opinions the state court had merely affirmed on the basis of Leon without making any further state constitutional analysis. Edmunds, 586 A2d at 900.
The Edmunds majority cited the following state cases as rejecting the good faith exception to the exclusionary rule: State v Marsala, 216 Conn 150, 579 A2d 58 (1990); State v Novembrino, 105 NJ 95, 519 A2d 820 (1987); People v Bigelow, 497 NYS2d 630, 488 NE2d 451 (1985); State v Carter, 322 NC 709, 370 SE2d 553 (1985); State v Taylor, 763 SW2d 756 (Tenn Ct App 1987); State v Grawein, 123 Wis 2d 428, 387 NW2d 816 (Ct App 1985); People v Sundling, 153 Mich App 277, 395 NW2d 308 (1986); State v Herbst, 395 NW2d 399, 404 (Minn Ct App 1986); Mason v State, 534 A2d 242 (Del 1987) (rejecting good faith exception as a statutory matter); Commonwealth v Upton, 394 Mass 363, 476 NE2d 548 (1985) (rejecting good faith exception as a statutory matter).

Rule 2005 provides:
Contents of Search Warrant
Each search warrant shall be signed and sealed by the issuing authority and shall:
(a) Specify the date and time of issuance;
(b) Identify specifically the property to be seized;
(c) Name and describe with particularity the person or place to be searched;
(d) Direct that the search be executed within a specified period of time, not to exceed two (20 days from the time of issuance;
(e) Direct that the warrant be served in the daytime unless otherwise authorized on the warrant, PROVIDED THAT, for the purpose of the Rules of Chapter 2000, the term "daytime" shall be used to mean the hours of 6 a.m. to 10 p.m.;
(f) Designate by title the judicial officer to whom the warrant shall be returned; and
(g) Certify that the issuing authority has found probable cause based upon the facts sworn to or affirmed before the issuing authority by written affidavit(s) attached to the warrant.

Rule 2006 provides:
effect, the majority in *Edmunds* gave indications of what it thought of the *Leon* opinion and the opponents of New Federalism, stating:

We decline to undermine the clear mandate of these provisions by *slavishly adhering* to federal precedent where it diverges from two hundred years of our own constitutional jurisprudence.\(^{63}\)

The Pennsylvania Supreme Court in *Edmunds* then went on to attack the philosophical underpinnings of the *Leon* opinion, specifically that the purpose of the exclusionary rule is to deter police corruption.\(^{64}\) Having rejected the main justification of the majority in *Leon* for the “good faith” exception, the Pennsylvania Supreme Court went on to hold that the exception was not a part of the Pennsylvania Constitution, notwithstanding the holding of *Leon*.\(^{65}\)

Contents of Application for Search Warrant

Each application for a search warrant shall be by written affidavit(s) signed and sworn to or affirmed before the issuing authority, which affidavit(s) shall:

(a) State the name and department, agency, or address of the affiant;
(b) Identify specifically the items or property to be searched for and seized;
(c) Name or describe with particularity the person or place to be searched;
(d) Identify the owner, occupant, or possessor of the place to be searched;
(e) Specify or describe the crime which has been or is being committed;
(f) Set forth specifically the facts and circumstances which form the basis for the affiant’s conclusion that there is probable cause to believe that the items or property identified are evidence or the fruit of a crime, or are contraband, or are otherwise unlawfully possessed or subject to seizure, and that these items or property are located on the particular person or at the particular place described;
(g) If a “nighttime” search is requested (i.e. 10 p.m. to 6 a.m.), state additional reasonable cause for seeking permission to search in nighttime.


63. *Edmunds*, 586 A2d at 903 (emphasis added) (footnote omitted).
64. Id at 904. In an earlier portion of its opinion, the Pennsylvania Supreme Court in *Edmunds* employed fairly strong language in referring to the rationale of the *Leon* majority:

Indeed, we disagree with that Court’s suggestion in *Leon* that we in Pennsylvania have been employing the exclusionary rule all these years to deter police corruption. We flatly reject this notion. We have no reason to believe that police officers or district justices in the Commonwealth of Pennsylvania do not engage in “good faith” in carrying out their duties.

Id at 899.

65. Justice McDermott, who is properly characterized as the Pennsylvania Supreme Court’s resident opponent of New Federalism, filed a dissent in Edmunds in which he charged that the court abandoned a twenty-seven year history of a restrictive reading of the exclusionary rule. Id at 906.

Justice Papadakos filed a concurring opinion in *Edmunds*, indicating that he would have joined Justice McDermott’s dissent but for the clear language of Rule 2003. Id.
C. *United Artists Theater Circuit, Inc. v City of Philadelphia* \(^{66}\)

To properly understand the impact of the Pennsylvania Supreme Court’s decision in *United Artists*, one must start with a review of historic preservation law in the United States up to the time of the *United Artists* decision. Zoning itself was held constitutional by the United States Supreme Court in *Village of Euclid v Amber Realty Co.* \(^{67}\) The validity of historic preservation statutes was not determined until much later, however, in the Supreme Court’s 1978 decision in *Penn Central Transportation Co. v New York City.* \(^{68}\)

The plaintiff in *Penn Central*, the transportation company, planned to build a high-rise office building above plaintiff’s Grand Central terminal in New York City. \(^{69}\) Under New York City’s Landmarks Preservations Law, Grand Central terminal had been designated a landmark and the block which it occupied a landmark site. \(^{70}\) The Landmarks Preservations Commission, which had designated Grand Central terminal as a landmark, refused to give approval to Penn Central’s plans for the building due to the fact that they would be destructive of the terminal’s historic and aesthetic features. \(^{71}\) Penn Central did not appeal the Commission’s decision, but brought a separate action in state court challenging the validity of the Landmarks Law. \(^{72}\) Penn Central argued that the Landmarks Preservation Law was unconstitutional in that it had operated to deprive them of their property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. \(^{73}\)

The United States Supreme Court, in a majority opinion \(^{74}\) written by Justice Brennan, held that the application of the

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70. Id at 115.
71. Id at 117.
72. Id at 119.
73. Id at 118-19. Penn Central also claimed that the law operated to deprive them of their property without due process of law in violation of the Fourteenth Amendment. Id at 119.
74. Justice Brennan’s opinion was joined by Justices Stewart, White, Marshall, Blackmun and Powell. Chief Justice Burger and Justice Stevens joined a dissenting opinion by Justice Renquist.

It is at least somewhat ironic that Justice Brennan, the champion of state constitutional independence, wrote the majority opinion in the United States Supreme Court case that was blatantly ignored by the Pennsylvania Supreme Court in *United Artists*. 
Landmarks Law to Grand Central terminal did not rise to the level of a taking of Penn Central's property within the meaning of the Fifth and Fourteenth Amendments. Although the *Euclid* decision had only validated zoning type regulations which promoted health, safety, morals or general welfare, the majority in *Penn Central* apparently extended the permissible scope of regulation to preservation of aesthetic qualities and values. The New York law was therefore valid despite the fact that it restricted Penn Central's future use of the property and in fact forced Penn Central to continue, ad infinitum, to operate Grand Central at a loss.

The facts before the Pennsylvania Supreme Court in *United Artists* were strikingly similar to those of *Penn Central*. In 1986, the Philadelphia Historical Commission (hereinafter "the Commission") notified the then owner of the Boyd Theater, Smeric Corporation of Chestnut St., Inc., that the Commission would consider at a public meeting the proposed designation of the Boyd Theater as "historic." After Smeric twice attempted to obtain injunctions preventing the Commission from holding the hearing, a hearing was held on March 25, 1987. The Commission voted on that date to designate the building as historic, but the order was vacated and the hearing was rescheduled for April 2, 1987. At the Commission's rescheduled meeting, three reasons were offered for historic designation of the Boyd Theater: (1) the theater was an important example of art deco architecture, (2) the theater was the work of an important Philadelphia architectural firm, and (3) the building as a movie palace represented an important part of both America's and Philadelphia's cultural history. Testimony in op-

75. *Id* at 138.
77. *Penn Central*, 438 US at 129. This holding is directly contrasted by the *United Artists* decision. See *United Artists* 595 A2d at 13.
78. *Penn Central*, 438 US at 140 (Rehnquist dissenting).
80. *Id*.
81. *Id*.
82. *Id* at 8. These reasons were advanced by one of the members of the Commission. Another member of the Commission offered slide testimony in favor of the designation. These two members of the Commission presented all evidence in favor of the designation and apparently did so on the Commission's behalf to the other members of the Commission. The supreme court indicated its skepticism of the constitutionality of this procedure in a footnote, saying:

We are troubled by a procedure where the Commission, apparently through a designation committee, recommends properties for historic designation, provides the testi-
position to the designation was offered by a representative of Sameric and a member of an award-winning architectural firm. Following the testimony of both sides, the Commission voted to designate Boyd Theater as historic.

Sameric appealed the Commission's designation to the Court of Common Pleas of Philadelphia County, which dismissed the appeal. The commonwealth court affirmed the dismissal, and the Supreme Court of Pennsylvania granted an allowance of appeal.

The Pennsylvania Supreme Court, in a majority opinion written by Justice Larsen, framed the United Artists issue as whether the cost of the "laudable" goals of the Philadelphia ordinance should be borne by all taxpayers or could lawfully be imposed on the owner of the property in question. Justice Larsen's opinion

mony and evidence in support of its designation, argues the case for historical designation through one or more of its commission members, and then decides whether the property it recommended should be so designated. There is an obvious lack of due process in such a procedure. The property owner, whose property rights are put in jeopardy by the Commission's proposal of historical designation, is entitled to a neutral and detached arbitrator in the first instance.

Id at 8 n 1, citing Ward v Village of Monroeville, 409 US 57 (1972). Had the Pennsylvania Supreme Court decided the case on the above grounds it would have been subject to review by the United States Supreme Court under Michigan v Long. See note 23.

83. United Artists, 595 A2d at 8. The architect, Emanuel Reider, testified that the Theater had few of the distinguishing characteristics of an art deco building, was not known for its art deco style, and was in fact a mediocre building. Id at 8 n 2.

84. Id at 8.

85. Id. Sameric in fact filed a suit in equity against the Commission. The common pleas court treated the suit as an appeal of the Commission's decision under the Local Agency Law, 2 Pa Cons Stat § 752. United Artists, 595 A2d at 8.

86. United Artists, 595 A2d at 8.

87. Justice Larsen's opinion was joined by Justices Flaherty, Zappala and Papadakos. Justice Cappy filed a concurring opinion in which he was joined by Justice McDermott and Chief Justice Nix.

88. Id at 10. These goals were to:
(1) preserve buildings, structures, sites and objects which are important to the education, culture, traditions and economic values of the city;
(2) establish historic districts to assure that the character of such districts is retained and enhanced;
(3) encourage the restoration and rehabilitation of buildings, structures, sites and objects which are designated as historic or which are located within and contribute to the character of districts designated as historic without displacing elderly, long-term, and other residents living within those districts;
(4) afford the City, interested persons, historical societies and organizations the opportunity to acquire or to arrange for the preservation of historic buildings, structures, sites and objects which are designated individually or which contribute to the character of historic districts;
(5) strengthen the economy of the City by enhancing the City's attractiveness to tourists and by stabilizing and improving property values; and,
(6) foster civic pride in the architectural, historical, cultural and educational accom-
first reviewed the relevant Pennsylvania constitutional provision that, like its counterpart in the Fifth Amendment to the United States Constitution, requires compensation for a taking of private property for public purposes. 89 Interestingly, however, the majority opinion in United Artists did not cite the recently promulgated Edmunds test90 or conduct the analysis recommended by the majority in that case.

The United Artists court instead proceeded to determine whether the Philadelphia ordinance operated as a “taking” within the meaning of Article I, section 10 of the Pennsylvania Constitution. 91 In performing this analysis, the majority not only disregarded the recent Edmunds standards, but almost totally ignored the fact that a similar provision was contained in the federal Constitution. 92 The only reference to the Penn Central case made by the majority was to Justice, now Chief Justice, Rehnquist’s dissent. 93 The majority in United Artists determined that the ordinance did constitute a taking under the Pennsylvania Constitution and that the Board’s designation was, therefore, unconstitutional. 94 Interestingly, perhaps the two strongest proponents of New Federalism on the Pennsylvania Supreme Court, Chief Justice Nix and Justice Cappy, filed a concurring opinion in United Artists indicating that Penn Central deserved more attention and that Pennsylvania’s constitutional provision did not necessarily mandate a different result on the takings issue. 95 This concurring opinion was joined by Justice McDermott, probably the court’s staunchest opponent to New Federalism. 96

89. Pennsylvania’s constitutional provision reads in part: Nor shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured.

Pa Const, Art I, § 10.

The Fifth Amendment to the United States Constitution provides in part:

Nor shall private property be taken for public use without just compensation.

US Const, Amend V. This portion of the Fifth Amendment has been made applicable to the states through the Fourteenth Amendment. Chicago B & Q R. Co. v Chicago, 166 US 226 (1897).

90. See note 54 and accompanying text.

91. See note 89 for a partial text of Pa Const, Art I, § 10.

92. The majority’s lone citation to the Fifth Amendment was in footnote eight of the court’s opinion. United Artists, 595 A2d at 11 n 8.

93. Id at 13.

94. Id at 14.

95. Id at 14 n 1.

96. Id.
IV. Conclusion

As long as the federal judiciary continues to taper the freedoms afforded during the Warren Court, New Federalism is apt to continue in various state courts in this country. As espoused by Justice Brennan and Chief Justice Nix, this continued expansion and experimentation with state-based constitutional rights should be encouraged for several reasons.

First, New Federalism offers a foil for the well-documented conservatization of the federal judiciary. Twelve years of Republican administration have created a judiciary which is not at all protective of the individual rights developed by the Warren Court. The erosion of these protections is likely to continue for some time, no matter which party controls the White House. New Federalism operates as a check on this erosion, although concededly only at the state government level.

Second, state court judges are more likely to be in tune to public perception and opinion, and their opinions may therefore be more reflective of current social values. Whereas members of the federal judiciary receive lifetime appointments, most state court judges are either appointed for limited terms or elected. Hence, they are more apt to be conscious of public attitudes. To the extent that these attitudes are in favor of greater protection of individual rights, state court judges can continue to put these attitudes into effect through New Federalism.

Third, experimentation with individual rights is less costly at the state level than at the federal level. The United Artists case is an excellent example of this. On the federal level, a holding that historic designation in some cases may require compensation to the owner of the affected property would likely immobilize the historic movement throughout the country. State and local governments do not have the funds necessary to effectuate such a requirement, and the number of historic designations would be likely to significantly dissipate. In the event that such a decision were perceived erroneous, the movement might well be crippled nationwide before the decision was reversed or a constitutional amendment passed. A state court decision, in contrast, has a much lesser impact. Any negative repercussions are much less widespread or catastrophic.

and many state constitutions can be amended much more quickly and easily than the United States Constitution.

Finally, allowing state courts to pursue the development of their own constitutional law encourages legal thought along various differing philosophical fronts. As Chief Justice Nix has written in his article on the subject:

A state court is thus free from federal constraints when addressing a state constitutional issue, and may approach such an issue as a strict constructionist, a liberal-contextual interpreter, a legal realist, a critical legal studies thinker, or a judicial activist.99

When such differing readings can be made under the relatively consequence-free experimentation of New Federalism, they should be encouraged as expanding the scope and intensity of legal discourse.

Whether one agrees or disagrees with the propriety of New Federalism, it is clear that the advocate is wise to consult his or her state constitution in making an argument for protection of individual rights. It is possible, even likely, that Pennsylvania courts will be more sympathetic to these arguments than those based on the federal Constitution. What was once an appeal "throw in" now becomes the most compelling argument, that state action in some way violated a client's state constitutional rights.

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