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New Judicial Federalism and the Pennsylvania Experience: Reflections on the *Edmunds* Decisions

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New Judicial Federalism and the Pennsylvania Experience: Reflections on the *Edmunds* Decision

Hon. Thomas M. Hardiman[*]

I. INTRODUCTION[**]

It is fitting and proper that *Duquesne Law Review* should honor Chief Justice Ralph J. Cappy upon his retirement from public life after thirty years of devoted service. The Chief's sudden and untimely passing on May 1, 2009, renders this a bittersweet work indeed. Contributors to this volume undoubtedly will recount their experiences with the Chief during his tenure as Public Defender, Judge of the Court of Common Pleas of Allegheny County, or Justice of the Pennsylvania Supreme Court. I will comment briefly on the human side of the man.

Chief Justice Cappy possessed an indomitable spirit and made an unforgettable first impression. Always generous with his time and talent, the Chief was quick to help others from all walks of life. While holding the highest judicial office in the Common-

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wealth, he regularly took time from his busy schedule to meet with scores of lawyers across Pennsylvania, from the most powerful and renowned to the inexperienced and unknown. He served for years as a trustee of his alma mater, the University of Pittsburgh, and on the Board of the University of Pittsburgh Medical Center.

The Chief's humanity and capacious desire to help others was imbued in him at a very young age. He grew up in a consummately Pittsburgh ethnic family (Serbian on his mother's side and Italian on his father's), and the Brookline neighborhood where he was raised was steeped in family and community. His father, Joseph Cappy, spent his entire adult life as a public servant, working as a clerk to the Allegheny County Board of Viewers. Watching his father serve the people inspired the Chief to become educated and pursue a life of service in his own right. One can only imagine the pride Joseph Cappy felt when, in January 2003, he watched his son invested as Chief Justice of the Pennsylvania Supreme Court.

Notwithstanding his professional success, Ralph Cappy always remembered from whence he came, the first in his lineage to receive a college diploma. Refusing to succumb to the myth of the self-made man, he consistently honored his mentors by paying forward the favor to those who followed him. Innumerable people from all walks of life have benefitted from the Chief's counsel and generosity. His legacy will endure not only in law books, but also in the hearts and minds of the people he has helped and inspired.

II. NEW JUDICIAL FEDERALISM

Among Chief Justice Cappy's many contributions to the corpus of Pennsylvania law, his opinion in *Commonwealth v. Edmunds*[1] is perhaps preeminent. Written during Justice Cappy's second year on the Supreme Court, *Edmunds* was a watershed in state constitutional law because it articulated a standard for state courts to follow as they determined whether to interpret their state constitutions differently than federal courts interpreted the United States Constitution. This article traces Pennsylvania law since *Edmunds* and evaluates its impact nationwide.

Judges and academicians have long paid lip service to the principle that states can interpret and apply their constitutions inde-

1. 586 A.2d 887 (Pa. 1991).

pendent of the United States Supreme Court's interpretation of analogous provisions in the United States Constitution. As Justice Brandeis noted in 1932: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory[.]"[2] This principle saw little practical application, however, until it returned to the fore in the 1970s and 1980s.

Indeed, this so-called "new judicial federalism"[3] became one of the hallmarks of the Supreme Court during the tenure of Chief Justice Warren Burger. During this period in American legal history, Supreme Court justices began to remind the states of their power to interpret their constitutions more broadly than the Supreme Court interpreted the United States Constitution.[4] Despite these not-so-subtle hints, initially only a handful of states accepted the invitation. Those few "courageous" state supreme courts that exercised this power did so largely in the area of criminal law.[5] In time, state courts began experimenting with new federalism with increasing confidence; between 1970 and 1989, approximately 600 published opinions interpreted state constitutions more expansively than the United States Constitution.[6]

This substantial increase in cases dealing with new federalism was no accident, and it is best understood in its historical context. In what has been called a "criminal procedure revolution," the United States Supreme Court under the leadership of Chief Justice Earl Warren issued a series of decisions that expanded the scope of constitutional protections afforded to defendants, most notably in arrest and search and seizure cases.[7] Chief Justice Warren was subsequently replaced by Chief Justice Burger in 1969, during a time of rapidly increasing crime. In 1971, Presi-

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2. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

3. Justice William J. Brennan, Jr., reintroduced the principle of independent state constitutional interpretation as "new judicial federalism" at a lecture given at Harvard Law School in 1977. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

4. *Id.*; *see also* Johnson v. Louisiana, 406 U.S. 356, 375-76 (1972) (Powell, J., concurring); Crist v. Bretz, 437 U.S. 28 (1978) (Burger, C.J., dissenting); Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 5-6 (1984-1985).

5. For a thorough survey of state criminal case law that extended constitutional rights beyond the federal minimum, *see* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985).

6. Linda B. Matarese, *Other Voices: The Role of Justices Durham, Kaye and Abrahamson in Shaping the "New Judicial Federalism,"* 2 EMERGING ISSUES IN STATE CONST. L. 239, 246 (1989).

7. A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249 (1968).

dent Richard Nixon launched the "war on drugs," a national initiative that brought with it laws and policies intended to discourage the production, distribution, and consumption of illegal drugs.[8]

Federal jurisprudence under the leadership of Chief Justice Burger reflected the mood of the people nationally. As crime rates continued to increase and the national outcry for reform grew louder, the Burger Court transformed the criminal-procedure jurisprudence of the Warren Court by issuing decisions that facilitated criminal prosecutions. This tectonic shift in constitutional criminal procedure was vilified by civil libertarians.[9] Equally concerned, many state court judges and academicians responded by turning to state constitutional law, which ushered in the era of modern judicial federalism.

As the Burger Court began to retreat from some of the protections granted to criminal defendants by the Warren Court, some state supreme courts viewed this retreat as an opportunity to respond.[10] They did so by using state constitutional law to protect and enforce individual rights. As one commentator had noted: "[A] sustained, systemic reaction against the Court, in retrospect, look[ed] inevitable."[11]

Today, the power of the states to interpret their constitutions to offer broader protection of individual rights than that required by the United States Constitution is undisputed.[12] Last term, writing for a nearly unanimous Supreme Court, Justice Scalia wrote,

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8. *See generally* Steven B. Duke & Albert Gross, AMERICA'S LONGEST WAR (1982).

9. *See, e.g.*, Alpheus Thomas Mason, *Whence and Whither the Burger Court? Judicial Self-Restraint: A Beguiling Myth*, 41 *THE REVIEW OF POLITICS* 1, 3-37 (1979); Bernard Schwartz, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION (1990); Charles M. Lamb and Stephen C. Halpern, eds., THE BURGER COURT: POLITICAL AND SOCIAL PROFILES (1991).

10. Ronald F. Wright, *How the Supreme Court Delivers Fire and Ice to State Criminal Justice*, 59 WASH. & LEE L. REV. 1429, 1430 (2002).

11. Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1413 (2002).

12. *See, e.g.*, Robert F. Williams, *State Constitutional Law Process*, 24 WM. & MARY L. REV. 169, 190 (1983) (urging state courts "to develop truly independent state constitutional jurisprudence"); Peter J. Galie, *State Supreme Courts, Judicial Federalism and the Other Constitutions*, 71 JUDICATURE 100 (1987); Judith S. Kaye, *A Midpoint Perspective on Directions in State Constitutional Law*, 1 EMERGING ISSUES IN STATE CONST. L. 17 (1988); Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1050 (1985); Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L. REV. 233, 257 (1984) (championing the state court protection of individual rights); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1498 (1982); Martha Craig Daughtrey, *State Court Activism and Other Symptoms of the New Federalism*, 45 TENN. L. REV. 731, 736 (1978).

"Individual States may surely construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."[13] Although the power of the states to do so is indisputable, questions remain as to when and how state courts should exercise this power.[14] Whatever the future may bring for judicial federalism, one thing is clear: The emergence of "new judicial federalism" and the burgeoning case law and commentary on the subject has won for state constitutional law a rightful place next to the extensive body of scholarship regarding federal law.

III. NEW JUDICIAL FEDERALISM IN PENNSYLVANIA

A. *The Foundation for* Edmunds*:* Commonwealth v. Sell

Pennsylvania was one of the early states to exercise its power to expand individual rights beyond the minimum requirements of the United States Constitution.[15] Most significant in this regard is *Commonwealth v. Sell*,[16] which laid the foundation for *Edmunds*. In *Sell*, the Pennsylvania Supreme Court had to decide whether to follow the United States Supreme Court's decision in *United States v. Salvucci*,[17] which held that a defendant charged with a possessory crime no longer had "automatic standing" to challenge the lawfulness of a search and seizure, regardless of whether it affected him. The Pennsylvania Supreme Court chose

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13. Virginia v. Moore, 553 U.S. ___, ___, 128 S. Ct. 1598, 1604 (April 23, 2008) (citing California v. Greenwood, 486 U.S. 35, 43 (1988)). In *Moore*, the Supreme Court considered whether a police officer violated the Fourth Amendment by making an arrest based on probable cause but in violation of state law. The court concluded that the search was reasonable under the Fourth Amendment because litigants had brought the claim on federal grounds (not state constitutional grounds) and state law did not alter the Fourth Amendment.

14. The criticism often levied is that states will abuse the power by availing themselves of independent state constitutional interpretation whenever they wish to negate Supreme Court decisions with which they disagree or deem "unsatisfactory." Paul Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 606 n.1 (1981); *see also* Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting).

15. *See* Commonwealth v. Richman, 320 A.2d 351 (Pa. 1974); Commonwealth v. Campana, 304 A.2d 432 (Pa. 1973), *vacated*, 414 U.S. 808 (1973), *on remand*, 314 A.2d 854 (Pa. 1974), *cert. denied*, 417 U.S. 969 (1974); Commonwealth v. Triplett, 341 A.2d 62 (Pa. 1975); Commonwealth v. Bussey, 404 A.2d 1309 (Pa. 1979); Commonwealth v. DeJohn, 403 A.2d 1283 (Pa. 1979), *cert. denied*, 444 U.S. 1032 (1980); Commonwealth v. Sell, 470 A.2d 457 (Pa. 1983).

16. 470 A.2d 457 (Pa. 1983).

17. 448 U.S. 83 (1980).

not to apply the United States Supreme Court's analysis in *Salvucci* to the Pennsylvania Constitution.[18]

Writing for the majority, Justice Robert N. C. Nix, Jr., recognized that "[w]hile minimum federal constitutional guarantees are 'equally applicable to the [analogous] state constitutional provisions,' the state has the power to provide broader standards than those mandated by the federal Constitution."[19] He noted that "constitutional protection against unreasonable searches and seizures existed in Pennsylvania more than a decade before the adoption of the federal Constitution, and fifteen years prior to the promulgation of the Fourth Amendment[.]"[20] Justice Nix concluded that individuals charged with possessory offenses had automatic standing to bring a suppression motion under the Pennsylvania Constitution.[21] *Sell* also recognized that "Article I, [S]ection 8 of the Pennsylvania Constitution . . . mandates greater recognition of the need for protection from illegal governmental conduct offensive to the right of privacy."[22] Consequently, *Sell* made clear that the Pennsylvania Supreme Court would accord as much weight to Supreme Court interpretations of the United States Constitution as it accorded to the decisions of sister state courts or lower federal courts, depending upon the persuasiveness of the opinion.[23]

The *Sell* majority's departure from Fourth Amendment jurisprudence did not go uncriticized. Justice McDermott (joined by Justice Hutchinson) dissented sharply, claiming that this departure was unwarranted and dangerous.[24] According to the dissent, when there is no discernible textual distinction between the Pennsylvania and United States constitutions, the Pennsylvania Supreme Court should adopt the reasoning of the United States Supreme Court.[25] Justice McDermott opined that "absent compelling reason, textual or otherwise . . . the interests of this nation are best served by maintaining common standards of constitutional law throughout its separate jurisdictions."[26]

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18. *Sell*, 470 A.2d at 458.
19. *Id.* at 466-67.
20. *Id.*
21. *Id.* at 467-68.
22. *Id.* at 468-69.
23. *Sell*, 470 A.2d at 467 (relying on *DeJohn*, 403 A.2d at 1288).
24. *Id.* at 469.
25. *Id.* at 470.
26. *Id.*

The divergent opinions in *Sell* exemplify the contrasting positions in an ongoing national debate concerning new judicial federalism: Proponents champion the notion of the states as laboratories of justice and the need for independent interpretation of state constitutions to secure liberty, while critics believe that federal standards should be respected because disparate state standards will lead to unpredictable and chaotic results.

A survey of Pennsylvania cases involving new judicial federalism following *Sell* reveals a continuation of that same debate. Some Pennsylvania judges sided with the position taken by the *Sell* majority and extended state constitutional protections to individuals beyond the federal standard.[27] Others were more cautious in embracing Pennsylvania's foray into new judicial federalism and sided with the position taken by the dissenters in *Sell*—that judges should presume that state constitutional provisions should be interpreted like their federal counterparts unless a compelling reason existed to do otherwise.[28]

B. The Edmunds *Decision*

After years of relative quiet, the debate in *Sell* was rekindled eight years later in *Commonwealth v. Edmunds*.[29] In *Edmunds*, after just one year on the Pennsylvania Supreme Court, Justice Cappy effectuated a sea change in Pennsylvania constitutional law by abandoning the *Sell* presumption and replacing it with a four-part framework for courts to use in evaluating claims arising under the Pennsylvania Constitution.[30]

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27. *See, e.g.*, *DeJohn*, 403 A.2d 1283 (recognizing an expectation of privacy in bank records under Article I, Section 8 of the Pennsylvania Constitution, notwithstanding the Supreme Court's refusal to recognize any expectation of privacy in bank records under the Fourth Amendment); Commonwealth v. Tarbert, 535 A.2d 1035, 1043 (Pa. 1987); *Bussey*, 404 A.2d 1309; *Triplett*, 341 A.2d 62; *Richman*, 320 A.2d 351; *Campana*, 304 A.2d 432.

28. *See, e.g.*, *Commonwealth v. Gray*, 503 A.2d 921, 926 (Pa. 1985) (stating that an expansion of rights under the State Constitution over applicable federal rights will only be found where there is "a compelling reason to do so"); *Commonwealth v. Johnston*, 530 A.2d 74, 83 (Pa. 1987) (Hutchinson, J., dissenting) (majority held that a "canine sniff" constitutes a search under the Pennsylvania Constitution; Justice Hutchinson disagreed, finding that there was insufficient reason to depart from the federal standard); *Commonwealth v. Sam*, 952 A.2d 565 (Pa. 2008) (writing for the majority, Chief Justice Castille held that the Pennsylvania Constitution does not provide a greater right for a mentally incompetent inmate to refuse antipsychotic medication for the purpose of rendering the inmate competent to participate in post-sentencing proceedings than did the parallel federal right); *Commonwealth v. Harper*, 611 A.2d 1211 (Pa. Super. Ct. 1992); *Commonwealth v. Crouse*, 729 A.2d 588 (Pa. Super. Ct. 1999); *Commonwealth v. Grahame*, No. 3288 EDA 2006, 2008 WL 1759257 (Pa. Super. Ct. Apr. 18, 2008).

29. 586 A.2d 887 (Pa. 1991).

30. *Edmunds*, 586 A.2d at 895.

1. Factual Summary

On August 4, 1985, Pennsylvania State Trooper Michael Deise received a phone call from two men who had been hunting in a remote, wooded area.[31] Asking to remain anonymous, the hunters told Trooper Deise that they had come upon a white corrugated building where marijuana plants were growing.[32] During a subsequent meeting,[33] the hunters described the building in detail and said that it was owned by Louis Edmunds.[34] Trooper Deise then questioned the hunters about their ability to recognize marijuana plants.[35] Satisfied that the men could identify marijuana, Trooper Deise investigated the area the next day by helicopter and located a building that matched the hunters' description.[36] He later drove past the property and found a mailbox that identified it as the Edmunds residence.[37]

After investigating the property by air and by foot, Trooper Deise applied to the local district judge for a search warrant based upon his affidavit that disclosed the substance of the hunters' discovery and the actions he had taken to confirm their story.[38] Trooper Deise's affidavit inadvertently omitted the specific date and time that the hunters came upon the marijuana, however.[39] Despite this material omission, the district judge issued a warrant to search the Edmunds residence, as well as the white corrugated building described by the hunters.[40]

Trooper Deise and several other state police officers executed the warrant at the Edmunds residence.[41] Trooper Deise entered the house while Louis Edmunds searched for the written lease to the white corrugated building.[42] At the top of the stairs, Trooper Deise saw four bags containing what he believed to be marijuana.[43] The police officers then searched the white corrugated

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31. *Id.* at 888-89.
32. *Id.* at 889.
33. Commonwealth v. Edmunds, 541 A.2d 368, 369 (Pa. Super. Ct. 1988), *overruled by Edmunds*, 586 A.2d 887.
34. *Edmunds*, 586 A.2d at 889. *See also* Commonwealth v. Edmunds, 541 A.2d 368, 369 (Pa. Super. Ct. 1988), *overruled by Edmunds*, 586 A.2d 887.
35. *Edmunds*, 586 A.2d at 889.
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 890.
40. *Edmunds*, 586 A.2d at 889.
41. *Id.*
42. *Id.*
43. *Id.*

building and, consistent with the hunters' story, found a substantial amount of marijuana within and around the premises.[44] Edmunds was arrested, charged, and found guilty of possession of marijuana and other related offenses.[45]

2. *Procedural History*

Edmunds filed a pretrial motion to suppress the marijuana, arguing that it was discovered and seized in violation of Article I, Section 8 of the Pennsylvania Constitution because Trooper Deise's affidavit was insufficient to establish probable cause to support a search warrant.[46] Edmunds claimed that the affidavit was fatally flawed because it failed to specify the date and time that the hunters first discovered the marijuana plants, and because the facts on which Trooper Deise relied were insufficient to show that the hunters' testimony was reliable.[47] The trial court agreed that the affidavit was defective under Pennsylvania law, but it applied the "good faith" exception to the exclusionary rule established by the United States Supreme Court in *United States v. Leon*[48] and concluded that the defective affidavit did not compel the suppression of evidence.[49]

On appeal, the Pennsylvania Superior Court affirmed the judgment of the trial court.[50] It noted that Article I, Section 8 of the Pennsylvania Constitution contained language that was "the same as that of the Fourth Amendment" and concluded there was no compelling reason to deviate from the federal standard.[51] Accordingly, the Superior Court also relied on *Leon* to conclude that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[52]

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44. *Id.*
45. *Edmunds*, 586 A.2d at 889-90.
46. *Id.*
47. A warrant issued without reference to the time when an informant had obtained his information is defective under Article I, Section 8 of the Pennsylvania Constitution. Commonwealth v. Conner, 305 A.2d 341 (Pa. 1973).
48. 468 U.S. 897, 922-23 (1984) (holding that where an officer seizes evidence in good faith reliance on a warrant that is later invalidated, that evidence is not subject to the exclusionary rule).
49. *Edmunds*, 586 A.2d at 890.
50. *Id.*
51. *Id.*
52. *Id.* at 895 (citing *Leon*, 468 U.S. at 922-23).

3. Edmunds *and the Four-Part Interpretive Framework*

The Pennsylvania Supreme Court reversed the judgment of the Superior Court, holding that the "good faith" exception to the exclusionary rule established in *Leon* does not apply to Article I, Section 8 of the Pennsylvania Constitution.[53] Therefore, evidence seized in reliance on the deficient warrant was suppressed.[54]

Although it signaled a clear departure from *Leon*, the *Edmunds* holding was not as jurisprudentially significant as the four-part test it established for reviewing claims brought under the Pennsylvania Constitution. In light of the United States Supreme Court's requirement that state courts make a "plain statement" of any adequate and independent state grounds upon which their decisions rest,[55] Justice Cappy wrote:

> . . . as a general rule it is important that litigants brief and analyze at least the following four factors:
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> 1) text of the Pennsylvania constitutional provision;
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> 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.[56]

Consistent with this four-pronged framework, the Court turned first to the text of Article I, Section 8 of the Pennsylvania Constitution[57] and noted its similarity to the Fourth Amendment of the United States Constitution.[58] The Court then stated that neither identical language nor similarity between the federal and state

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53. *Id.* at 894.
54. *Edmunds*, 586 A.2d at 906.
55. Michigan v. Long, 463 U.S. 1032, 1038 (1983).
56. *Edmunds*, 586 A.2d at 895.
57. Article I, Section 8 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 person 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.
58. *Edmunds*, 586 A.2d at 895-96.

constitutions requires the Pennsylvania courts to follow federal precedent.[59]

The Court then considered the history of Article I, Section 8 and Pennsylvania's approach to search and seizure cases.[60] Noting that the Pennsylvania Constitution was adopted ten years prior to the ratification of the United States Constitution, the Court refuted the "misconception that state constitutions are somehow patterned after the United States Constitution."[61] The Court also explained that the probable cause and warrant requirements of Article I, Section 8 were rooted in Pennsylvania's Constitution of 1776 and were intended to embody a strong notion of privacy and protection against unreasonable searches and seizures.[62]

Finally, the Court reasoned that the historical record "indicates that the purpose underlying the exclusionary rule in this Commonwealth is quite distinct from the purpose underlying the exclusionary rule under the Fourth Amendment" and thus warranted independent analysis and judgment.[63]

In light of the history of Article I, Section 8, the Court declined to adopt the "good faith" exception to the exclusionary rule, explaining:

> [The Pennsylvania] Constitution has historically been interpreted to incorporate a strong right of privacy, and an equally strong adherence to the requirement of probable cause under Article I, Section 8. Citizens in this Commonwealth possess such rights, even where a police officer in "good faith" carrying out his or her duties inadvertently invades the privacy or circumvents the strictures of probable cause. To adopt a "good faith" exception to the exclusionary rule, we believe, would virtually emasculate those clear safeguards which have been carefully developed under the Pennsylvania Constitution over the past 200 years.[64]

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59. *Id.* (citing *Tarbert*, 535 A.2d at 1043).

60. *Id.* at 895-99.

61. *Id.*

62. *Id.* at 896-97 (citing *Sell*, 470 A.2d at 467, for the proposition that "the survival of the language now employed in Article 1, Section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth").

63. *Edmunds*, 586 A.2d at 897.

64. *Id.* at 899.

After reaching its conclusion based on the history of the Pennsylvania Constitution, the Court then reviewed cases from other states.[65] The Court recognized that some states chose to adopt the federal standard articulated in *Leon*[66] insofar as it was consistent with a long history of federal exclusionary rule jurisprudence dating back to *Weeks v. United States*[67] and *Mapp v. Ohio*.[68] Notwithstanding the fact that Pennsylvania adopted the exclusionary rule articulated in *Mapp*,[69] the Court disagreed with *Leon* on the grounds that it was inconsistent with Pennsylvania's constitutional history and jurisprudence.[70]

Thus, the Pennsylvania Supreme Court joined those states that rejected the "good faith" exception to the exclusionary rule.[71] In doing so, the Court made clear that "[a] mere scorecard of those states which have accepted and rejected *Leon* is certainly not dispositive of the issue in Pennsylvania. However, the logic of certain of those opinions bears upon our analysis under the Pennsylvania Constitution, particularly given the unique history of Article I, Section 8."[72]

Finally, the Court turned to policy considerations in support of its decision to reject *Leon*.[73] To adopt a "good faith" exception to the exclusionary rule would contravene Rules 2003, 2005, and

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65. *Id.* at 899-901.

66. *Id.* at 899-900 (citing Jackson v. State, 722 S.W.2d 831 (Ark. 1987); State v. Brown, 708 S.W.2d 140 (Mo. 1986); Myers v. State, 482 N.E.2d. 778 (Ind. Ct. App. 1985); State v. Huber, 704 P.2d 1004 (Kan. Ct. App. 1985); Howell v. State, 483 A.2d 780 (Md. Ct. Special App. 1984); State v. Martin, 487 So.2d 1295 (La. Ct. App.), *writ denied* 491 So.2d 25 (La. 1986)).

67. 232 U.S. 383 (1914).

68. 367 U.S. 643 (1961).

69. Commonwealth v. Bosurgi, 190 A.2d 304 (Pa. 1963).

70. *Edmunds*, 586 A.2d at 891 ("In *Leon*, the Supreme Court in 1984 departed from a long history of exclusionary rule jurisprudence dating back to *Weeks v. United States* and *Mapp v. Ohio*." (citations omitted)).

71. *Id.* at 900 ("[T]he highest courts of at least four states—New Jersey, New York, North Carolina and Connecticut—have chosen to reject the "good-faith" exception under their own constitutions, with more detailed analysis of state constitutional principles.") (citing State v. Marsala, 579 A.2d 58 (Conn. 1990); State v. Novembrino, 519 A.2d 820 (N.J. 1987); People v. Bigelow, 488 N.E.2d 451 (N.Y. 1985); State v. Carter, 370 S.E.2d 553 (N.C. 1988). *See also* Mason v. State, 534 A.2d 242 (Del. 1987) (rejecting good faith exception as statutory matter); Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985) (same); Stringer v. State, 491 So.2d 837 (Miss. 1986); State v. Taylor, 763 S.W.2d 756 (Tenn. Crim. App. 1987); State v. Grawein, 367 N.W.2d 816 (Wis. 1985); People v. Sundling, 395 N.W.2d 308 (Mich. Ct. App. 1986); State v. Herbst, 395 N.W.2d 399, 404 (Minn. Ct. App. 1986) (rejecting "good faith" exception under respective state constitutions).

72. *Id.* at 900.

73. *See id.* at 901-05.

2006 of the Pennsylvania Rules of Criminal Procedure.[74] For instance, the Court noted that Rule 2003, which sets forth the prerequisites for the issuance of a warrant,[75] "adopts a 'four corners' requirement, and provides that only evidence contained within the four corners of the affidavit may be considered to establish probable cause."[76] Under this approach, one cannot look beyond the written warrant to consider statements made by police officers, even if made in good faith, to determine whether probable cause existed to support a search and seizure.[77] Therefore, a "good faith" exception would contradict Pennsylvania's criminal procedure rules by destroying the contractual approach to the warrant and probable cause requirements.

In sum, Justice Cappy's opinion for the Court in *Edmunds* is a classic example of judicial federalism that, in addition to joining eight other states in eschewing *Leon*'s "good faith" exception to the exclusionary rule, broke new ground with its four-part framework for state courts to apply in interpreting their respective constitutions independent of the Supreme Court's decisions interpreting the United States Constitution.[78]

4. *The* Edmunds *Dissent*

Justice Cappy's opinion for the Court in *Edmunds* was not unanimous.[79] As he did in *Sell*, Justice McDermott offered a vig-

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74. *Id.* (stating that "such a rule would effectively negate the judicially created mandate reflected in the Pennsylvania Rules of Criminal Procedure, in Rules 2003, 2005, and 2006.").

75. Pa. R. Crim. P. 2003 states, in pertinent part:

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

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

PA. R. CRIM. P. 2003.

76. *Edmunds*, 586 A.2d at 901 (citing Commonwealth v. Milliken, 300 A.2d 78 (Pa. 1973)).

77. *Id.* at 901 n.12 ("When Rules 2005 and 2006 are read in conjunction with Rule 2003, there is absolutely no question that oral statements of the police officer not in writing—of the sort made in the instant case by Trooper Deise—may not be considered in determining whether probable cause has been established.").

78. *See id.* at 900.

79. *Id.* at 906.

orous dissent in *Edmunds*.[80] Justice McDermott began by conceding the *power* of Pennsylvania courts "to give more than that allowed under Federal Constitutional interpretation."[81] As a prudential matter, however, Justice McDermott saw no reason to depart from the rationale of the United States Supreme Court.[82] Indeed, he argued that the "good faith" exception of *Leon* was firmly grounded in Pennsylvania jurisprudence.[83]

Justice McDermott also criticized the *Edmunds* majority for departing from the Court's consistent adherence to federal applications of the exclusionary rule, which, in his view, had been expanded well beyond instances where law enforcement authorities were guilty of misconduct.[84] He argued that *Leon* did not, as the majority suggested, "open the gates to unauthorized search" or "dissolve the need for probable cause."[85] Rather, the case merely shifted the responsibility for determining probable cause to a neutral magistrate, absolving the police of technical mistakes.[86] Applying this view to the facts of *Edmunds*, exclusion of evidence obtained in a reasonable search solely because a date or time was not specified with exactitude in a warrant was "practiced absurdity."[87] To Justice McDermott, *Leon* reiterated, and Pennsylvania jurisprudence supported, the well-established principle that the exclusionary rule was adopted to deter police misconduct.[88]

Underlying the dissent is the presumption that Pennsylvania has some obligation to strongly consider—if not follow without question—the Fourth Amendment jurisprudence of the United

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80. *See id.* at 906-09 (McDermott, J., dissenting). Justice Papadakos endorsed Justice McDermott's dissenting opinion but was constrained to concur in the result because of the clear mandate of Pa. R. Crim. P. 2003(a), which he interpreted to compel the "absurd" result that evidence must be excluded despite the absence of police misconduct. *Id.* at 906 (Papadakos, J., concurring in result).

81. *Edmunds*, 586 A.2d at 908 (citing *Sell*, 470 A.2d at 467).

82. *Id.*

83. *Id.*

84. *See id.* at 907 (McDermott, J., dissenting) (citing *Bosurgi*, 190 A.2d 304, in support of his claim that "[u]ntil this day we have dutifully followed the canons of the Fourth Amendment prescribed by the Supreme Court of the United States through hundreds of cases. We accepted, *as we must*, their rationale that police procedures had overstepped constitutional bounds and we imposed the sanction of suppression to dissuade illegal search.") (emphasis added).

85. *Id.*

86. *Edmunds*, 586 A.2d at 907.

87. *Id.* at 907.

88. *Id.* at 907-08. Justice McDermott stated, "[l]ikewise, we have approved the suppression of evidence only where it will have the benefit of deterring similar police misconduct in the future." *Id.* at 907-08 (citing, *inter alia*, Commonwealth v. Corley, 491 A.2d 829, 835 (Pa. 1985); *DeJohn*, 403 A.2d 1283; and Commonwealth v. Brown, 368 A.2d 626 (Pa. 1976)).

States Supreme Court.[89] Although Justice McDermott dissented in *Sell*, his dissent in *Edmunds* echoed the *Sell* majority's "compelling interest" argument. In neither *Sell* nor *Edmunds* could Justice McDermott find any justifiable reason to reject, on state constitutional grounds, the United States Supreme Court's search and seizure jurisprudence. In his view, not only should federal jurisprudence serve as a benchmark for interpreting corresponding provisions of the Pennsylvania Constitution, but in practice, Pennsylvania had historically followed the federal case law in developing its state constitutional law, particularly with respect to the exclusionary rule.[90]

C. *The Effect of* Edmunds *on Pennsylvania Jurisprudence*

It is worth noting at the outset that Pennsylvania's foray into new judicial federalism has prompted legitimate criticism.[91] Some commentators have noted that Pennsylvania has been most active in departing from Supreme Court precedent in search and seizure cases arising under Article I, Section 8, while adhering to federal interpretations in most other areas of state constitutional law, including the Pennsylvania Constitution's analogues to the Fifth and Sixth Amendments.[92] This inconsistency raises the question of whether Pennsylvania is committed to a rigorous body of independent state constitutional law.[93] The critics posited that the episodic use of the *Edmunds* framework indicated that "development of state constitutional law in this area has continued to be

89. *See id.* at 908. Justice McDermott stated, "[t]he Supreme Court of the United States is a world landmark for the protection of constitutional rights. What they require we enforce; what they allow we ought not deter except upon clear evidence of positive need." *Id.* at 909.

90. *See id.* at 907-09.

91. *See* Robert F. Williams, *Methodological Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143, 169 (1986-87) (cautioning against overly rigid application by states of criteria in performing state constitutional interpretation); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); Francis Barry McCarthy, *Counterfeit Interpretations of State Constitutions in Criminal Procedure*, 58 SYRACUSE L. REV. 79 (2007).

92. Robert Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343 (1993); Ken Gormley, *The Pennsylvania Constitution after* Edmunds, 3 WIDENER J. PUB. L. 55 (1993); Robert Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*. 46 WM. & MARY L. REV. 1499 (20050.

93. Other critics have pointed to the fact that the state constitutional search and seizure doctrine is "intermittent" and that new judicial federalism is but a "selective revolt against certain portions of search and seizure law." Barry Latzer, STATE CONST. CRIM. LAW 73-74 (1995); *see also* Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41 (2006).

little more than a series of reactions to decisions of the United States Supreme Court."[94] Indeed, even the cases that ostensibly depart from federal law do so in "pale imitation[] of the decisions and of the values and the methods of analysis of the [Supreme Court]."[95] Justice McDermott's dissenting opinions in *Sell* and *Edmunds* echoed this perspective.

However apt these criticisms may be, Justice Cappy anticipated them and endeavored to bring more uniformity to Pennsylvania state constitutional law by designing and implementing the four-part framework in *Edmunds*.[96] The four-part framework remains the interpretive standard by which to decide Pennsylvania cases involving rights based on independent state grounds.[97] Interestingly, however, *Edmunds* has not been applied uniformly to every case triggering issues of state constitutional interpretation, as discussed below.

For example, a few years after *Edmunds*, the Pennsylvania Supreme Court stated in *Commonwealth v. White*[98] that the *Edmunds* analysis is not mandatory, and that a party's claim should not be dismissed for failing to follow the precise format set forth in *Edmunds*.[99] That is to say, the *White* majority read *Edmunds* to be a command to *litigants*, not to courts, requiring them to include an *Edmunds* analysis when bringing claims under the Pennsylvania Constitution.[100] As a result, cases such as *White* have clari-

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94. *Id.* at 90; *see also* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 388-89 (1984).

95. *Id.*

96. Commonwealth v. Rekasie, 778 A.2d 624 (Pa. 2001) (acknowledging that "[t]he analytical framework, which this court has applied in considering privacy expectations recognized [by] the Pennsylvania Constitution, has been less than clear."); *see also* Ken Gormley, *The Pennsylvania Constitution After* Edmunds, 3 WIDENER J. PUB. L. 55, 66 (1993).

97. Blum v. Merrell Dow Pharm., Inc., 626 A.2d 537, 541 (Pa. 1993); United Artists Theater Cir., Inc. v. City of Phila., 635 A.2d 612, 615 (Pa. 1993); Montayne v. Wissahickon School Dist., 327 F. Supp. 2d 510 (E.D. Pa. 2004).

98. 669 A.2d 896 (Pa. 1995).

99. *White*, 669 A.2d at 899; *see also* Commonwealth v. Strader, 931 A.2d 630, 633 (Pa. 2007) (analyzing under the Fourth Amendment of the United States Constitution and declining to perform *Edmunds* analysis where appellant failed to cite the *Edmunds* factors).

100. *Id.* Justices Castille and Montemuro did not share this view. They read *Edmunds* to require that courts independently perform an *Edmunds* analysis in ruling on state constitutional claims. *See, e.g.*, Jubilerer v. Rendell, 953 A.2d 514, 524 n.10 (Pa. 2008); Commonwealth v. Russo, 934 A.2d 1199, 1205-10 (Pa. 2007); Pap's A.M. v. City of Erie, 812 A.2d 591, 603 (Pa. 2002); Commonwealth v. Glass, 754 A.2d 655, 661 & n.8 (Pa. 2000); Commonwealth v. Williams, 692 A.2d 1031, 1038 (Pa. 1997); Commonwealth v. Rogers, 849 A.2d 1185, 1197 & nn.6-7 (Pa. 2004) (Castille, J., concurring); *White*, 669 A.2d at 910 (Pa. 1995) (Castille, J., dissenting); Commonwealth v. Perry, 798 A.2d 697, 714 n.6 (Pa. 2002)

fied the *Edmunds* analysis. It is not a mandatory test; rather, it is a rule for litigants to follow and a guidepost for courts in interpreting state constitutional provisions.[101] Pennsylvania courts may, of course, choose to decide a case without engaging in an *Edmunds* analysis where a state constitutional issue was raised but not briefed.[102]

The lack of a clear mandate to apply the *Edmunds* analysis to cases arising under the Pennsylvania Constitution has resulted in somewhat inconsistent approaches by Pennsylvania courts. A survey of cases decided after *Edmunds* in which the Pennsylvania courts confronted matters of state constitutional interpretation revealed the following six categories:

1. Cases that do not apply *Edmunds* but cite to it generally for the unremarkable notion that Pennsylvania may depart from federal standards in applying the Pennsylvania Constitution[103]

2. Cases that cite *Edmunds* merely for its holding that Pennsylvania does not recognize a "good-faith" exception to the exclusionary rule[104]

3. Cases that apply the *Edmunds* analysis and reach a result consistent with the corresponding federal standard[105]

(Castille, J., concurring); Commonwealth v. Shaw, 770 A.2d 295, 305 (Pa. 2001) (Castille, J., dissenting).

101. *Id.* at 910 (Castille, J., dissenting). *But see Sam*, 952 A.2d at 585 (Pa. 2008) ("As appellee's counsel notes, *Edmunds* directs advocates to brief and analyze the following four factors when litigating a claim that state constitutional doctrine should depart from the applicable federal standard . . .").

102. *See generally* Ken Gormley et al., THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES (Ken Gormley ed., 2004); *see also* Commonwealth v. Swinehart, 664 A.2d 957, 969 (Pa. 1995) (applying *Edmunds* factors but finding that use and derivative use immunity provided in 42 PA. CONS. STAT. § 5947 is consistent with the Pennsylvania constitutional privilege against compelled self-incrimination found in Article I, Section 9); Commonwealth v. Crouse, 729 A.2d 588, 594 (Pa. Super. Ct. 1999) (applying *Edmunds* factors but adopting federal standard to hold that the Pennsylvania Constitution permits a "protective sweep" of a private home pursuant to a valid arrest warrant).

103. *See, e.g.*, Commonwealth v. Snyder, 953 A.2d 396 (Pa. 2009); Smolow v. Hafer, 959 A.2d 298, 300 n.6 (Pa. 2008).

104. *See, e.g.*, Commonwealth v. Arnold, 932 A.2d 143, 148 (Pa. Super. Ct. 2007); Commonwealth v. Pratt, 930 A.2d 561 (Pa. Super. Ct. 2007); Jones v. City of Phila., 890 A.2d 1188, 1194-99 (Pa. Commw. Ct. 2006).

105. *See, e.g.*, Commonwealth v. Gray, 896 A.2d 601, 606 (Pa. Super. Ct. 2006) (interpreting the Pennsylvania Constitution to require the same standard for *Terry* stops as applied under federal law); *Russo*, 934 A.2d 1199 (undertaking an independent *Edmunds* analysis to conclude that the Fourth Amendment's open fields doctrine, as enunciated by the Supreme Court, applies equally under search and seizure provision of the Pennsylvania Constitution. Notably, Justice Cappy dissented, performing a separate *Edmunds* analysis

4. Cases that apply *Edmunds* to find broader protections under the Pennsylvania Constitution than those available under the United States Constitution[106]

5. Cases that do not apply *Edmunds* but nonetheless depart from the corresponding federal standard to find broader protections under the Pennsylvania Constitution than those pursuant to the United States Constitution[107]

6. Cases that apply the corresponding federal standard to a matter of state constitutional law as a default, with little or no mention of the *Edmunds* factors[108]

Among these six categories of cases, the first four represent the predictable outgrowth of a landmark decision such as *Edmunds*. The latter two categories of cases, which do not apply *Edmunds*, make it difficult to predict the extent to which *Edmunds* will stand the test of time. In the meantime, these two categories are likely to present difficulties for counsel and the Pennsylvania courts.

The cases that depart from *Edmunds*' methodology and revert to an analysis that relies on the federal standard as the baseline call

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to argue that the Pennsylvania Constitution affords more protection than the federal Constitution). Although the Pennsylvania Supreme Court has made progress in developing its own body of state constitutional law, particularly in the context of search and seizure and criminal procedure, it has been reluctant to stray from federal standards in other contexts. For example, in *United Artists' Theater Circuit, Inc., v. City of Philadelphia*, 635 A.2d 612, 616 (Pa. 1993), the Court upheld a Philadelphia historic landmark ordinance, holding that the takings clause in the Pennsylvania Constitution did not provide more extensive protections than those offered by the United States Constitution. Notably, however, the Court applied the *Edmunds* factors to uphold the federal standard. *United Artists*, 635 A.2d at 615-16.

106. *See, e.g.*, Hughes v. State Farm Fire & Cas. Co., 2007 WL 2874849 (W.D. Pa. 2007) (involving an insurance contract dispute under Pennsylvania law, in which federal court recognized and applied the *Edmunds* methodology).

107. *See, e.g.*, *Shaw*, 770 A.2d 295 (holding that the Pennsylvania Constitution precluded police from obtaining, for purposes of possible prosecution, results of a blood alcohol test performed by emergency room personnel for independent medical purposes, where police lacked search warrant and where no exigent circumstances existed); Commonwealth v. Luv, 735 A.2d 87 (Pa. 1999) (relying on *Labron* and *White*); *see also* Commonwealth v. McCree, 924 A.2d 621, 629 (Pa. 2007); Commonwealth v. Hernandez, 935 A.2d 1275 (Pa. 2007).

108. *See, e.g.*, *Perry*, 798 A.2d 697; *Rogers*, 849 A.2d 1185. Neither of these cases utilizes the *Edmunds* analysis, but they illustrate the disagreement that developed between Justices Cappy and Castille over new judicial federalism in Pennsylvania. Justice Cappy consistently applied an independent analysis of the Pennsylvania Constitution, sometimes without regard to the federal analysis of the United States Constitution. Chief Justice Castille, by contrast, tied his analyses to the federal jurisprudence absent a compelling reason to reach a different result under the Pennsylvania Constitution.

into question Pennsylvania's commitment to new judicial federalism, notwithstanding Justice Cappy's opinion in *Edmunds*. Similarly, cases that do not apply *Edmunds*, but nonetheless depart from the corresponding federal standard to find broader protections under the Pennsylvania Constitution than those offered by the United States Constitution, create some doctrinal confusion to the extent that these decisions ignore *Edmunds* in favor of the "compelling interest" test of *Sell*.

For example, Pennsylvania has departed from the federal standard in the context of the automobile exception to the warrant requirement. The United States Supreme Court has long held that warrantless vehicle searches are permissible where probable cause exists.[109] Under Article I, Section 8 of the Pennsylvania Constitution, however, warrantless vehicle searches "must be accompanied not only by probable cause, but also by exigent circumstances beyond mere mobility; one without the other is insufficient."[110]

Despite their clear departure from the federal standard, none of the Pennsylvania cases involving the automobile exception decisions relied on *Edmunds*. Accordingly, these decisions have raised eyebrows among judges and legal scholars. Even Chief Justice Castille critcized these decisions for not following some coherent "*Edmunds*-style state constitutional analysis or explanation for that departure from perfectly reasonable federal authority."[111]

Indeed, in a case that was remanded to the Pennsylvania Supreme Court by the United States Supreme Court after it disagreed with Pennsylvania's federal constitutional analysis, Justice Castille used an *Edmunds* analysis to hold that Article I, Section 7 of the Pennsylvania Constitution offered greater protection than the First Amendment to the United States Constitution.[112] In *Pap's A.M. v. City of Erie (Pap's II)*,[113] Chief Justice Castille held

109. Chambers v. Maroney, 399 U.S. 42, 51 (1970); Carroll v. United States, 267 U.S. 132, 149 (1925).

110. *Luv*, 735 A.2d at 93 (relying on *Labron* and *White*, 669 A.2d at 899); *see also McCree*, 924 A.2d at 629; *Hernandez*, 935 A.2d at 1280.

111. *Hernandez*, 935 A.2d at 1286-87 (Castille, J., concurring in result).

112. *See* Pap's A.M. v. City of Erie, 812 A.2d 591 (Pa. 2002) (*Pap's II*). Chief Justice Cappy wrote *Pap's I*, in which the Pennsylvania Supreme Court held that a local ordinance that banned nude dancing violated the First Amendment. Pap's A.M. v. City of Erie, 719 A.2d 273 (Pa. 1998) (*Pap's I*). While Justice Cappy noted that the Court was not bound by federal precedent, it found the precedent persuasive in the absence of controlling federal and Pennsylvania precedent. *Pap's I*, 719 A.2d at 278-80. *Pap's I* went up to the Supreme Court (City of Erie v. Pap's A. M., 529 U.S. 277 (2000)), which overturned the decision and remanded.

113. 812 A.2d 591 (Pa. 2002).

that a city ordinance prohibiting nude dancing violated Article I, Section 7 of the Pennsylvania Constitution because it intended to prohibit a protected expressive and communicative activity.[114]

In doing so, Chief Justice Castille noted Pennsylvania's history and experience protecting speech and expression.[115] Neither party disagreed that Pennsylvania afforded more protection for speech than the federal courts, nor that an *Edmunds* analysis was appropriate.[116] The argument turned on how far such protection would extend, and both litigants used the *Edmunds* factors to craft their arguments.[117] Chief Justice Castille emphasized the importance of the *Edmunds* model to the creation of a coherent and ascertainable standard to govern future analysis under Article I, Section 7.[118]

Thus, Chief Justice Castille acknowledged the potential for departure from federal law, especially in light of *Edmunds*.[119] For him, such a departure must be justified by more than a court's mere disagreement with federal authority.[120] At the same time, Chief Justice Castille noted recently that the *Edmunds* factors would not be applied to state constitutional claims that have no federal analogue.[121]

In light of the varying treatment of the *Edmunds* decision, one cannot say unequivocally that Pennsylvania always will evaluate the state constitutional claim first and then proceed to evaluate the federal constitutional claim only in the absence of a state constitutional right (i.e., the *primacy* approach). Nor can one say that Pennsylvania will look to the United States Constitution first and only engage in state constitutional analysis when there is no federal right (i.e., the *interstitial* approach). Nor will Pennsylvania categorically engage in both a state constitutional analysis and an evaluation of the claim under federal law (i.e., the *dual sovereignty* approach). Finally, Pennsylvania obviously has eschewed a categorical lockstep approach, which, as the name suggests, means that the state constitutional interpretation mirrors federal consti-

114. *Id.* at 608.
115. *Id.* at 601.
116. *Id.* at 602.
117. *Id.*
118. *Pap's II*, 812 A.2d at 603.
119. *Id.* at 603-04.
120. *Id.* at 604.
121. *Jubelirer*, 953 A.2d at 524.

tutional interpretation.[122] Unable to place Pennsylvania state constitutional jurisprudence neatly into one of these categories, Professor and Interim Dean Ken Gormley of Duquesne Law School has called Pennsylvania's approach to state constitutional interpretation "selective primacy."[123] According to Gormley, Pennsylvania has engaged in a "mish-mash" of the three non-lockstep approaches.[124]

Although the application of the *Edmunds* framework has been inconsistent at times and the result it yields varies from jurist to jurist, it has been critical to the development of new judicial federalism in Pennsylvania. Notwithstanding the internal inconsistencies, Pennsylvania appears to remain committed to the development of independent state constitutional jurisprudence.

It may be too soon to comment with any certainty on patterns emerging in the post-*Edmunds* case law, given that Pennsylvania courts are still developing their approaches to state constitutional interpretation. Nevertheless, it is already clear that *Edmunds* profoundly affected Pennsylvania jurisprudence by establishing a framework for lawyers and courts to demonstrate that they have engaged in an independent state constitutional analysis pursuant to *Michigan v. Long*.

Indeed, the *Edmunds* opinion was Pennsylvania's first attempt to establish a formulaic approach to interpreting the Pennsylvania Constitution. Despite its less-than-uniform treatment, the fact remains that, regardless of whether one is a proponent or critic of new judicial federalism, *Edmunds* established a method of state constitutional interpretation that remains the focal point as Pennsylvania continues to develop its state constitutional jurisprudence.

D. The Effect of Edmunds *on the Jurisprudence of Other States*

The significance of Justice Cappy's opinion in *Edmunds* extends well beyond the borders of Pennsylvania. Unsurprisingly, *Edmunds* figures prominently in state cases considering whether to adopt the "good faith" exception to the exclusionary rule. Most of the post-1991 cases that rejected the "good faith" exception cited to

122. *See* Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L. J. 225, 250 (2007).

123. Gormley, *The Pennsylvania Constitution After* Edmunds, 3 WIDENER J. PUB. L. at 70-75.

124. *Id.* at 73.

Edmunds as persuasive authority.[125] Even among those courts that chose to follow the federal standard and adopt the "good faith" exception, many addressed Justice Cappy's opinion in *Edmunds*.

Perhaps more noteworthy is *Edmunds*' contribution to "new federalism" generally. Virtually all scholarship published on the subject after 1991 has either discussed or at least mentioned *Edmunds*.[126] Moreover, as noted previously, state courts are increasingly relying on their own constitutions to provide broader protection for individual rights, independent of those afforded by the United States Constitution. *Edmunds* is often discussed by state courts in this context.

Various state supreme courts—most notably Delaware, Kentucky, Michigan, and Wyoming—found *Edmunds* particularly influential and have relied on it to craft virtually identical methodologies for interpreting their respective state constitutions.[127] Likewise, the Minnesota Supreme Court established similar factors for litigants to consider when bringing claims under the Minnesota Constitution.[128] In doing so, the Minnesota Supreme Court

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125. *See, e.g.*, People v. Camarella, 818 P.2d 63 (Cal. 1991); State v. Gutierrez, 863 P.2d 1052 (N.M. 1993); State v. Carter, 370 S.E.2d 553 (N.C. 1988); State v. Canelo, 653 A.2d 1097 (N.H. 1995) (adopting the reasoning of the *Edmunds* majority opinion); State v. Lopez, 896 P.2d 889, 902 (Haw. 1995); State v. Matsunaga, 920 P.2d 376 (Haw. Ct. App. 1996); State v. Hill, 690 So.2d 1201 (Ala. 1996); People v. Krueger, 675 N.E.2d 604 (Ill. 1996); State v. Guzman, 842 P.2d 660 (Idaho 1992).

126. *See, e.g.*, Davenport v. Garcia, 834 S.W.2d 4 (Tex. 1992) (discussing emerging new federalism jurisprudence nationwide).

127. *See* Jones v. State, 745 A.2d 856, 864-65 (Del. 1999) (looking to *Edmunds* to establish a nonexclusive list of factors that includes textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes); *see also* Ortiz v. State, 869 A.2d 285, 291 n.4 (Del. 2005) (citing to *Edmunds* and *Jones* and stating that "[t]he proper presentation of an alleged violation of the Delaware Constitution should include a discussion and analysis of one or more of the criteria set forth in *Jones* or other applicable criteria."); Dorsey v. State, 761 A.2d 807 (Del. 2000); People v. Bullock, 485 N.W.2d 866 (Mich. 1992) (applying *Edmunds* to hold that under Michigan's Constitution: (1) search of luggage placed in automobile by passenger was valid pursuant to the automobile exception to the warrant requirement; but (2) mandatory penalty of life imprisonment without possibility of parole violated "cruel or unusual" punishment prohibition; and (3) proper remedy was to strike down the prohibition on parole); Saldana v. State, 846 P.2d 604 (Wyo. 1993) (looking to other states, including Pennsylvania, for guidance in shaping its own interpretive methodology).

128. Kahn v. Griffin, 701 N.W.2d 815, 829 (Minn. 2005) ("Thus, we suggest that, as a general rule, there are certain factors that litigants should consider when addressing an issue that may implicate a separate independent analysis under the Minnesota Constitution. The following nonexclusive list of factors should prove useful: (1) the text of the state Constitution, (2) the history of the state constitutional provision, (3) relevant state case law, (4) the text of any counterpart in the U.S. Constitution, (5) related federal precedent and relevant case law from other states that have addressed identical or substantially similar constitutional language, (6) policy considerations, including unique, distinct, or

expressly noted the importance of *Edmunds* and acknowledged Justice Cappy's contribution.[129]

Of course, not all states have followed *Edmunds*. The New Mexico Supreme Court, for example, adopted its own version of an interstitial approach to state constitutional interpretation.[130] While not entirely deferential to federal precedent, New Mexico's approach is more deferential to federal precedent than the *Edmunds* approach.[131] Under New Mexico's approach, if a litigant asserts a constitutional right that state courts have analyzed using federal precedent, federal precedent will be applied.[132] If, on the other hand, no precedent exists with regard to a particular constitutional claim, the litigant must bring the claim as a state constitutional claim, and the court will perform an independent analysis.[133]

The New Mexico Supreme Court expressly noted *Edmunds* and the fact that the Pennsylvania Supreme Court was one of several state courts to have "outlined a number of criteria that trial counsel in New Mexico might profitably consult in framing state constitutional arguments."[134] However, it ultimately concluded that litigants were not required to raise, in the trial court, specific criteria for departing from federal interpretation of the United States Constitution.[135]

Other states have, at times, opted for the lockstep approach. Using this approach, state courts apply the federal standard as the default rule in interpreting corresponding state provisions and acknowledge the potential for departure from the federal standard, but only in exceptional circumstances when some compelling reason warrants it.[136]

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peculiar issues of state and local concern, and (7) the applicability of the foregoing factors within the context of the modern scheme of state jurisprudence.").

129. *Id.* at 829 n.12.

130. State v. Gomez, 932 P.2d 1, 7-8 (N.M. 1997).

131. *Id.* For a thorough discussion of the interstitial approach to state constitutional interpretation, see the New Jersey Supreme Court's analysis in *State v. Hunt*, 450 A.2d 952, 964 (N.J. 1982). *See also* Gormley, *The Pennsylvania Constitution After* Edmunds, 3 WIDENER J. PUB. L. at 70-75, for a discussion of the interstitial approach, as distinguished from the primacy approach, and Pennsylvania's selective primacy approach.

132. *Gomez*, 932 P.2d at 8.

133. *Id.*

134. *Id.* at 8 n.3.

135. *Id.*

136. Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1506-09 (2005) (discussing the lockstep approach and advocating that states perform a "reflective adoption" of federal law—deciding to follow Fourth Amendment holdings, without indicating that in the future, in other cases, the same approach will be followed).

For example, the North Dakota Supreme Court applied the federal standard to search and seizure cases, but did so by engaging in an *Edmunds* analysis and by distinguishing the North Dakota Constitution from the Pennsylvania Constitution.[137] The Ohio Supreme Court—after citing *Edmunds* and recognizing that it had the power to interpret the Ohio Constitution more expansively than the United States Constitution—concluded "that protections afforded by the Ohio Constitution are coextensive with those provided by the United States Constitution."[138] As seen with Pennsylvania's application of *Edmunds*, the states that purportedly follow a lockstep approach also do so inconsistently at times.

Whatever approach the states have adopted in evaluating their respective constitutions, one thing is abundantly clear: During and after the Burger Era, numerous states recognized their power to depart from federal interpretations of the United States Constitution.[139] Of the many cases where the courts have exercised that power, *Edmunds* played a seminal role in the development of new judicial federalism.

Not only did *Edmunds* set a standard for interpretation and analysis of the Pennsylvania Constitution, but it also offered a

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137. State v. Herrick, 588 N.W.2d 847, 853 (N.D. 1999) ("[T]he independent history of Pennsylvania's declared right to be free from unreasonable searches and seizures was an important factor in the *Edmunds* reasoning . . . North Dakota precedent does not contain such clear guidance.").

138. State v. Robinette, 685 N.E.2d 762, 766 (Ohio 1997); *see also* State v. Gustafson, 668 N.E.2d 435, 441 (Ohio 1996) (Double Jeopardy Clauses coextensive in their protections); Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59, 65 (Ohio 1994) (First Amendment Free Speech Clauses coextensive in their protections).

139. Carreras v. City of Anaheim, 768 F.2d 1039, 1042-43 (9th Cir. 1985) (finding a restraining order overbroad under the California Constitution), *overruled by* L.A. Alliance for Survival v. City of L.A., 993 P.2d 334 (Cal. 2000); Farmers New World Life Ins. Co. v. Bountiful City, 803 P.2d 1241 (Utah 1990) (looking to federal law only after finding no inverse condemnation under the state constitution); Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n, 773 P.2d 455, 461 (Ariz. 1989); *In re* T.W., 551 So.2d 1186, 1190 (Fla. 1989); O'Neill v. Oakgrove Constr., 523 N.E.2d 277, 282 (N.Y. 1988); State v. Jewett, 500 A.2d 233, 238 (Vt. 1985) (federal law considered but required briefing of the state constitutional issue before the case could be decided); State v. Koppel, 499 A.2d 977, 979 (N.H. 1985); State v. Beno, 341 N.W.2d 668 (Wis. 1984) (following the state constitution although recognizing the existence of a closely corresponding federal Speech and Debate Clause found in U.S. CONST. art. 1, § 6, cl. 1); People v. Rolfingsmeyer, 461 N.E.2d 410, 413-15 (Ill. 1984); State v. Hunt, 450 A.2d 952, 959 (N.J. 1982); Ravin v. State, 537 P.2d 494, 513-15 (Alaska 1975); Burrows v. Superior Court of San Bernardino County, 529 P.2d 590 (Cal. 1975); State v. Larocco, 794 P.2d 460 (Utah 1990) (federal law was examined but rejected as inadequate); City of Hillsboro v. Purcell, 761 P.2d 510 (Or. 1988) (discussing federal law but then deciding the case under the state constitution), *overruled by* State v. Anderson, 910 P.2d 1229 (Utah 1996); Colo. Civil Rights Comm'n v. Traveler's Ins. Co., 759 P.2d 1358, 1362-63 (Colo. 1988) (reversing the lower court for relying on federal law when the state constitution contained unique provisions).

methodology for other state courts to emulate and build upon as they experiment with new judicial federalism. By articulating a clear methodology, *Edmunds* has opened the door to further development of state constitutional law.

IV. CONCLUSION

During his seventeen years of service on the Pennsylvania Supreme Court, Justice Ralph Cappy authored many opinions of significance. Although his leadership and influence grew during his tenure, especially after he became Chief Justice, the passage of time may confirm that his most influential opinion was issued after only one year on the Court. *Edmunds* remains to this day an important decision that is likely to be the subject of debate and discussion in Pennsylvania and the nation for years to come.