

ARTICLES

HOW STATE COURTS CAN HELP AMERICA RECOVER THE RULE OF LAW: THE PENNSYLVANIA EXPERIENCE

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I. INTRODUCTION

Just before Thanksgiving, a jurisprudentially revealing and widely publicized debate about whether America has a rule of law took place between the President of the United States and the Chief Justice of the Supreme Court.¹ President Donald Trump criticized a judicial decision that went against his Administration as having been rendered by an “Obama judge.”² Chief Justice John Roberts responded that “we do not have Obama judges or Trump judges.”³ The Chief Justice was defending judicial independence as a necessary aspect of the rule of law.⁴

But, instead of coming to his defense, most observers, on both sides of the political aisle, seemed to agree with President Trump.⁵ Senate Minority Leader Chuck Schumer referred to the Chief Justice as a “Republican[],” thus illustrating President Trump’s point about partisan judging.⁶ Randy Barnett, probably the leading conservative legal theorist in America, tweeted, “If you don’t think presidents of each party (try to) select judges with differing judicial philosophies,

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¹ See, e.g., Adam Liptak, *John Roberts, Leader of Supreme Court’s Conservative Majority, Fights Perception That It Is Partisan*, N.Y. TIMES (Dec. 23, 2018), <https://www.nytimes.com/2018/12/23/us/politics/chief-justice-john-roberts-supreme-court.html>.

² *Id.*

³ *Id.*

⁴ See Bruce Ledewitz, *The Obama Judge and the Foundations of the Rule of Law*, JURIST (Dec. 2, 2018), <https://www.jurist.org/commentary/2018/12/the-obama-judge-and-the-foundations-of-the-rule-of-law/>.

⁵ See, e.g., Liptak, *supra* note 1.

⁶ See Chuck Schumer (@SenSchumer), TWITTER (Nov. 23, 2018, 6:51 AM), <https://twitter.com/SenSchumer/status/1065981195148804096>.

you haven't been paying attention. Roosevelt surely did. And he wasn't the first nor the last. The argumentation on this one is truly bizarre."⁷

Somehow, without most of us noticing, the idea of a rule of law has become intellectually implausible and politically indefensible. Most of us now seem to believe that the ideology of the judge is all important.⁸ The implications of this change are dire.

There is a great deal of philosophically oriented literature about objectivity and the rule of law in this post-modern age, including Steve Smith's classic work, *Law's Quandry*.⁹ It is not my intention here to repeat in any detail arguments that nihilism, by which I mean in this context, skepticism about the objectivity of values, has undermined the rule of law. Suffice it to say that for a classically oriented jurist like Justice John Harlan, legal decisions were understood to reflect a "rational continuum."¹⁰ If rationality, instead, is just a front for power and political commitment, law as it was understood in our tradition is not possible.

Rather, my purpose is to begin to answer a question about how to go forward—"can a commitment to Truth be reintroduced in American law schools, and how, and when?"¹¹ The answer I propose is that truth can be reintroduced in law by attending to the healthy values discourse that still goes on in at least some state constitutional decision-making. I will illustrate that proposal by contrasting U.S. Supreme Court value skepticism with reasoned values engagement by the Pennsylvania Supreme Court. Of course, I will only highlight a very few instances of what I call the absence of the fear of subjectivity in the Pennsylvania tradition, but they are contexts in

⁷ See Ledewitz, *supra* note 4. I am in a sense here invoking Randy Barnett against himself. In his excellent book, *The Structure of Liberty: Justice and the Rule of Law* (1998), Barnett makes the point better than I that a rule of law depends on judgments about the nature of the universe and of human beings that are not a matter of human will. See RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 47 (1998). Barnett's book is absolutely an example of reasoning about values that refutes the value skepticism illustrated by Justice Scalia *infra*. That is why it was so disappointing that Barnett joined the chorus against the Chief Justice. In the earlier Barnett view, there are not judges with different philosophies. There are sound judges, and decisions, and unsound judges and opinions. "Sound" here meaning in accord with the kind of beings we are, the kind of society that promotes happiness and the kind of universe we live in. Partisan appointment has nothing to do with it.

⁸ See, e.g., Liptak, *supra* note 1.

⁹ See STEVEN D. SMITH, *LAW'S QUANDRY* 2 (2004).

¹⁰ This phrase originated in Justice Harlan's dissent from the dismissal of appeals in *Poe v. Ullman*. See *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) ("[L]iberty [guaranteed by the due process clause] is not a series of isolated points . . . [but] a rational continuum.").

¹¹ See Ledewitz, *supra* note 4.

which similar judgments on the U.S. Supreme Court probably would bring forth such concerns.

I have not done the research to establish that Pennsylvania is representative of the nation in regard to values engagement, but my impression is that this is the case. State constitutional law seems simply healthier today than is the federal tradition.

In order for state courts to serve as an antidote to nihilism, it is also necessary to address the question of *why* state constitutional discourse is better able to engage in reasoned discourse about values.¹² Ironically, the suggestion raised in the final section of this Article is that it is the more political nature of state courts that permits state judges to be open about their values. That is to say, the problem of nihilism is not that there are Obama judges and Trump judges and is not that judges have different judicial philosophies. The problem of nihilism is the fatalism that describes this situation as fixed.¹³ Since under skepticism there is no truth to discover, there is no possibility of persuasion and change.¹⁴ We simply remain forever locked in our contrary positions.

What is needed, instead, is for judges to have an open conversation about values among themselves and with the people, so that democratic judgments can be rendered and law can advance.¹⁵ That is how a rule of law works in a democratic society.¹⁶ That process is being choked by a nihilism that paralyzes national debate.¹⁷ But that engagement still goes on at the state level.¹⁸

¹² See *infra* Part IV.

¹³ See Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 4 (1984).

¹⁴ See Bruce Ledewitz, *The Five Days in June When Values Died in American Law*, 49 AKRON L. REV. 115, 146 (2016) [hereinafter Ledewitz, *When Values Died in American Law*]; Peter S. Smith, Note, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 508 (1997).

¹⁵ This is the image of the Supreme Court as conducting a "national seminar" in Eugene Rostow's memorable image, now absolutely out of fashion, since there is nothing to learn under nihilism. See Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952). Barry Friedman would later use the term dialogue to describe the actual practice of judicial review. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 580–81, 653–54 (1993). These images require the possibility of emerging consensus about constitutional meaning among all constitutional actors. Obviously, frozen opposing blocs on the Supreme Court rooted on by frozen opposing blocs in the nation is a very different context.

¹⁶ See Friedman, *supra* note 15, at 653–54.

¹⁷ Cf. Robert S. Pritchard & Vincent F. Filak, *Confronting Media Nihilism: How Transparency Builds Meaning During Crises*, PUB. REL. J., Winter 2010, at 1, 4 ("Nihilism creates a distortion of both reality and society's awareness of the critical issues relevant to a crisis.").

¹⁸ See *infra* Part IV.

II. THE NIHILISM OF FEDERAL CONSTITUTIONAL LAW

One illustration will suffice to demonstrate the value skepticism of U.S. Supreme Court decisions—though the reader is free to consult a series of articles in which I have endeavored to make this case more generally.¹⁹ In *McDonald v. City of Chicago*,²⁰ in a five to four decision, the U.S. Supreme Court held that the Second Amendment’s protection of the right to bear arms is fully applicable to the states.²¹ In the course of that decision, the five Justice majority held that the right to bear arms is “fundamental.”²²

In dissent, Justice Stevens disputed this conclusion:

I do not doubt for a moment that many Americans feel deeply passionate about firearms, and see them as critical to their way of life as well as to their security. Nevertheless, it does not appear to be the case that the ability to own a handgun, or any particular type of firearm, is critical to leading a life of autonomy, dignity, or political equality²³

Justice Scalia responded to this assertion with what can only be called, in a reference to the famous and despairing statement by Arthur Leff, as “the Grand Sez Who.”²⁴ “Who says? Deciding what

¹⁹ See generally Bruce Ledewitz, *Has Nihilism Politicized the Supreme Court Nomination Process?*, 32 B.Y.U. J. PUB. L. 1, 42–43 (2017) [hereinafter Ledewitz, *Supreme Court Nomination Process*] (discussing value judgments in U.S. Supreme Court decisions); Ledewitz, *When Values Died in American Law*, *supra* note 14, at 115–16 (arguing that Justice Kennedy’s majority opinion in *Lee v. Weisman* and Justice Scalia’s dissent in *Planned Parenthood v. Casey* are emblematic of the nihilism that currently pervades America’s legal culture). This piece can be understood as a companion to *The Role of Religiously Affiliated Law Schools in the Renewal of American Democracy*. See Bruce Ledewitz, *The Role of Religiously Affiliated Law Schools in the Renewal of American Democracy*, 12 U. MASS. L. REV. 230 (2017) [hereinafter Ledewitz, *Religiously Affiliated Law Schools*]. In that article, I suggest that values discourse in the legal academy might be renewed through emulation of religiously affiliated law schools. *Id.* at 259. Here I suggest that values discourse in judicial opinions might be renewed through attention to state constitutional law jurisprudence.

²⁰ *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

²¹ See *id.* at 748–49, 791, 806 (concluding, in an opinion by Justice Alito and joined by Chief Justice Roberts and Justices Kennedy and Scalia, that the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment. Justice Thomas, concurring in the judgment, concluded that the right is a privilege of American citizenship recognized by the Privileges or Immunities Clause of the Fourteenth Amendment).

²² See *id.* at 778, 791.

²³ *Id.* at 893 (Stevens, J., dissenting).

²⁴ This was how Leff ended his article, *Unspeakable Ethics, Unnatural Law*:

All I can say is this: it looks as if we are all we have. Given what we know about ourselves and each other, this is an extraordinarily unappetizing prospect; looking around

is essential to an enlightened, liberty-filled life is an inherently political, moral judgment—the antithesis of an objective approach that reaches conclusions by applying neutral rules to verifiable evidence.”²⁵ Just to make it clear that he is not objecting to the particular grounds that Justice Stevens raises to support his claim, Justice Scalia goes on to contrast “vague ethico-political First Principles” with “historical methodology,” which, because it does not reason from first principles, but relies on verifiable evidence, “is much less subjective.”²⁶

I believe it is a fair summary of Justice Scalia’s position to say that there can be no reasoning about politics or morality because judgments in these fields are inherently subjective. Despite his application of this conclusion against Justice Stevens in *McDonald*, Justice Stevens himself had earlier joined an opinion in which values were described as mere human constructs.²⁷ So, I am not here highlighting or criticizing this position as in any way unique to Justice Scalia. As was usually the case in his lifetime, Justice Scalia is simply sharper and clearer in his enunciation of his position than is any other Justice.²⁸ All the Justices are subject to value skepticism.

It is easy to show that value skepticism like this is illogical and self-refuting. After all, the claim that judicial subjectivity is a threat to democracy, which Justice Scalia makes repeatedly, is itself nothing more than a “political, moral judgment” founded on First Principles

the world, it appears that if all men are brothers, the ruling model is Cain and Abel. Neither reason, nor love, nor even terror, seems to have worked to make us “good,” and worse than that, there is no reason why anything should. Only if ethics were something unspeakable by us, could law be unnatural, and therefore unchallengeable. As things now stand, everything is up for grabs.

Nevertheless:

Napalming babies is bad.

Starving the poor is wicked.

Buying and selling each other is depraved.

Those who stood up to and died resisting Hitler, Stalin, Amin, and

Pol Pot—and General Custer too—have earned salvation.

Those who acquiesced deserve to be damned.

There is in the world such a thing as evil.

[All together now:] Sez who?

God help us.

Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249.

²⁵ *McDonald*, 561 U.S. at 800 (Scalia, J., concurring).

²⁶ *Id.* at 803–04.

²⁷ See Ledewitz, *When Values Died in American Law*, *supra* note 14, at 117–19.

²⁸ See, e.g., *McDonald*, 561 U.S. at 804 (Scalia, J., concurring); Ledewitz, *When Values Died in American Law*, *supra* note 14, at 119–21.

as is the further claim that judges *should* be faithful to the Constitution.²⁹ Who says?

Justice Scalia held to these positions because he believed them to be in some sense true.³⁰ He undoubtedly had reasons for believing these things that he thought were rational and based on First Principles.³¹ Presumably, he did not consider those commitments to be merely subjective.

Unfortunately, the rule of law itself is another one of those “political, moral judgments” that are merely subjective under the reign of skepticism. The rule of law cannot be protected by resort to history or tradition because in Justice Scalia’s skeptical formulation, those limits are merely prudential posits—mere mechanisms to restrain judicial subjectivity.³² There can be no reason given to want to limit judicial subjectivity. Since reason is said to play no role, *cannot*, in fact, play a role in political or moral judgment,³³ these limits themselves cannot be defended rationally.

Believing this, as unfortunately we do, of course we just have Obama judges and Trump judges. We just have judges who come to different decisions—what Barnett calls having different judicial philosophies.³⁴ However, the word philosophy is misplaced in this skeptical context. One cannot give good reasons for having one philosophy or another because reason has nothing to do with it. We just believe what we believe. Further, politicians should expect continuing loyalty to these judicial positions by the judges they confirm to the federal courts. There should never be any change or growth or new understanding. That is why there is such a current mania to confirm as many conservative judges as possible to create lasting conservative control of the federal courts.³⁵ That is why Democrats are so anxious to “take back” the Supreme Court.³⁶ Under

²⁹ See *McDonald*, 561 U.S. at 803–04 (Scalia, J., concurring); *id.* at 908 (Stevens, J., dissenting); Ledewitz, *Supreme Court Nomination Process*, *supra* note 19, at 17.

³⁰ See *McDonald*, 561 U.S. at 804 (Scalia, J., concurring).

³¹ See *id.*

³² See *id.* at 803–04.

³³ See Ledewitz, *Supreme Court Nomination Process*, *supra* note 19, at 1–2.

³⁴ See Randy E. Barnett, *Judicial Conservatism v. A Principled Judicial Activism: Foreword to the “Symposium on Law and Philosophy,”* 10 HARV. J. L. & PUB. POL’Y 273, 275–76 (1987).

³⁵ See Ledewitz, *Supreme Court Nomination Process*, *supra* note 19, at 1–2. See also Ledewitz, *supra* note 4 (“Consider the words of, and the response to, Senate Majority Leader Mitch McConnell at the 2018 Federalist Society National Lawyers Convention on November 15: The closest thing we can do to have a permanent impact is to confirm judges and transform the judiciary. [A]nd we are going to keep on doing it for as long as we can.”).

³⁶ See Ledewitz, *Supreme Court Nomination Process*, *supra* note 19, at 1; Emily Jashinsky, *Democrats Don’t Want to Confirm Anyone to the Supreme Court Until After 2020 Election*, WASH. EXAMINER (Sept. 19, 2018), <https://www.washingtonexaminer.com/opinion/democrats->

value skepticism, changing one's mind is always betrayal because there could, by definition, be no good reason to do so.³⁷

III. VALUES IN PENNSYLVANIA CONSTITUTIONAL LAW

Value skepticism of the type illustrated by Justice Scalia above is not wholly absent in Pennsylvania constitutional law, as I will elaborate below. After all, nihilism is a culture-wide phenomenon.³⁸ The point of the contrast between federal and state constitutional law is simply that at the federal level, skepticism is all-consuming.³⁹ It is a potential rejoinder to any invocation of values. That is not merely a possibility. The criticism of a judgment as merely subjective is often actually raised at the federal level.⁴⁰ That is not so in the Pennsylvania state courts.⁴¹

A case that illustrates very well the confidence of the Pennsylvania Supreme Court in making what might be called common sense, value laden judgments is the unanimous opinion in *Commonwealth v. Eisenberg*, in which the court struck down a mandatory \$75,000 fine as excessive under the State Excessive Fines provision.⁴²

Chief Justice Castille's opinion for the court demonstrates awareness of the vicissitudes and judicial reluctance of federal Eighth Amendment proportionality analysis.⁴³ As Barry Johnson has noted, the U.S. Supreme Court has feared resting proportionality analysis on "inherently subjective comparisons of sentence severity with offense seriousness."⁴⁴ But the *Eisenberg* opinion demonstrates no such hesitancy.⁴⁵

dont-want-to-confirm-anyone-to-the-supreme-court-until-after-2020-election.

³⁷ See, e.g., Ledewitz, *When Values Died in American Law*, supra note 14, at 146; Smith, supra note 14, at 508.

³⁸ See Ledewitz, *When Values Died in American Law*, supra note 14, at 116, 124, 127; Ledewitz, *Supreme Court Nomination Process*, supra note 19, at 1–2.

³⁹ See Ledewitz, *When Values Died in American Law*, supra note 14, at 116–20.

⁴⁰ See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 804 (Scalia, J., concurring); *id.* at 908–09 (Stevens, J., dissenting).

⁴¹ See, e.g., *Commonwealth v. Eisenberg*, 98 A.3d 1268, 1285 (Pa. 2014); *Commonwealth v. Miller*, 819 A.2d 504, 515 (Pa. 2002) (quoting *Commonwealth v. Bricker*, 581 A.2d 147, 155 (Pa. 1990)); *Miller*, 819 A.2d at 521 (Nigro, J., dissenting) (quoting *Bricker*, 581 A.2d at 155).

⁴² PA CONST. art. I, § 13 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted."); *Eisenberg*, 98 A.3d at 1270.

⁴³ See *Eisenberg*, 98 A.3d at 1282 n.18 (noting the rejection by Justice Scalia of any proportionality principle and the controlling view of Justice Kennedy that any such analysis should be limited to the rare case).

⁴⁴ See Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After United States v. Bajakajian*, 2000 U. ILL. L. REV. 461, 504 (2000).

⁴⁵ See *Eisenberg*, 98 A.3d at 1285, 1287.

Partly, the reason for this could be said to be the sheer absurdity of the statute given the circumstances of the case, in which a low level employee of a casino had stolen \$200, a misdemeanor theft, for which probation was imposed as the sentence, apart from the mandatory fine.⁴⁶ Further, the General Assembly had originally attached this level of mandatory fine to acts closely connected to the integrity of the gaming industry.⁴⁷ In a latter amendment, four additional criminal acts were added to the mandatory fine section, three of which were subject to fines of \$200-\$1,000 for first time offenders.⁴⁸ Only the theft provision at issue in *Eisenberg* was subject to the \$75,000 mandatory fine and no legislative findings or purpose accompanied the addition.⁴⁹

The court's reasoning was certainly straightforward:

In our view, the fine here, when measured against the conduct triggering the punishment, and the lack of discretion afforded the trial court, is constitutionally excessive. Simply put, appellant, who had no prior record, stole \$200 from his employer, which happened to be a casino. There was no violence involved; there was apparently no grand scheme involved to defraud either the casino or its patrons. Employee thefts are unfortunately common; as noted, appellant's conduct, if charged under the Crimes Code, exposed him to a maximum possible fine of \$10,000. Instead, because appellant's theft occurred at a casino, the trial court had no discretion, under the Gaming Act, but to impose a minimum fine of \$75,000—an amount that was 375 times the amount of the theft.⁵⁰

What is noteworthy about this language is the absence of hand-wringing about the subjectivity of these factors. Chief Justice Castille seems to be saying that anyone should be able to see that this punishment is unjust not only in terms of common sense, but in terms of what is usually imposed for conduct of this kind—in the non-casino context.⁵¹ Nor was there any dissent criticizing, or concurrence attempting to justify, this second-guessing of the

⁴⁶ See *id.* at 1271, 1285.

⁴⁷ See *id.* at 1286.

⁴⁸ See *id.* at 1284.

⁴⁹ See *id.* at 1284, 1286.

⁵⁰ *Id.* at 1285.

⁵¹ See *id.*

legislature.⁵²

I am not suggesting that the U.S. Supreme Court could not have reached this same conclusion under the Eighth Amendment or that the outcome in *Eisenberg* is necessarily correct—though I certainly believe that to be so. I am highlighting here only a difference in tone. The fear of subjectivity is simply absent in *Eisenberg*.

A similar absence of concern about subjectivity of values can be seen in formulations expressing due process concerns, whether of the procedural or substantive variety.⁵³ At the federal level, in 1952, Justice Frankfurter famously stated in *Rochin v. California*, that “[t]his is conduct that shocks the conscience” in condemning the use by police of forcible stomach pumping to seize drugs.⁵⁴ Even at that time, Justice Black, in the midst of the ongoing dispute at that time over incorporation, condemned this formulation as “nebulous.”⁵⁵

The *Rochin* formulation did not have much impact on later case outcomes in the search context.⁵⁶ But, beyond that, the formulation itself was subtly altered in later years so as to minimize its subjective potential.⁵⁷ In *Rochin*, the formulation suggested universal application—Justice Frankfurter described due process as protecting the “decencies of civilized conduct.”⁵⁸ In contrast, in *Collins v. City of Harker Heights*, Justice Stevens, for a unanimous Court, held that a city’s failure to warn its employees about known hazards in the workplace did not violate the Due Process Clause by referring to “conscience shocking, in a constitutional sense.”⁵⁹ And in *Sacramento v. Lewis*, Justice Souter further limited the universal sense of conscience to shocking the “contemporary conscience.”⁶⁰

In contrast, in *Commonwealth v. Bricker*, in 1990, Justice Cappy wrote for a closely-divided majority of the Pennsylvania Supreme

⁵² See *id.* at 1288.

⁵³ See, e.g., *Rochin v. California*, 342 U.S. 165, 172 (1952).

⁵⁴ *Id.*

⁵⁵ See *id.* at 175 (Black, J., concurring) (“I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards stated by the majority.”).

⁵⁶ See *Winston v. Lee*, 470 U.S. 753, 758 (1985) (avoiding the Due Process Clause altogether, resting condemnation of the search in that case on an incorporated Fourth Amendment); *Schumber v. California*, 384 U.S. 757, 760 (1966) (distinguishing from *Rochin*); *Breithaupt v. Abram*, 352 U.S. 432, 435 (1957) (stating that this case is not comparable to the facts in *Rochin*).

⁵⁷ See *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998); *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992).

⁵⁸ See *Rochin*, 342 U.S. at 173.

⁵⁹ *Collins*, 503 U.S. at 128.

⁶⁰ See *Lewis*, 523 U.S. at 847 n.8. Nor was this concern really new. Even in *Rochin* itself, Justice Frankfurter had been at pains to deny that he was engaging in “a revival of ‘natural law.’” *Rochin*, 342 U.S. at 171.

Court that the decision of a trial judge to send plea agreements with prosecution witnesses out with the jury represented “impermissible vouching” for the witnesses that “offends our sense of decency and our notion of the fundamental fairness inherent in our judicial system.”⁶¹ Unlike the *Rochin* line of cases, Justice Cappy did not feel the need to justify this formulation or ward off charges of abusive subjectivity.⁶² Justice Flaherty wrote a vociferous dissent, calling the conclusion about the documents “absurd,” but did not suggest that the very idea of offending a sense of decency was an impermissibly subjective formulation.⁶³

Nor has that concern with subjectivity been raised since. In 2002, in *Commonwealth v. Miller*, in a case that rejected another impermissible-bolstering claim, both the majority opinion and the dissent referred to the *Bricker* “offends our sense of decency” language without any suggestion that this kind of formulation is in any way troubling.⁶⁴ The constant concern about the impermissible potential for subjective judgment is simply not a part of Pennsylvania constitutional jurisprudence.

This point can be extended to the nature of rights themselves. At one time, in *Skinner v. Oklahoma*,⁶⁵ Justice Douglas for the U.S. Supreme Court could unselfconsciously refer to procreation as “one of the basic civil rights of man.”⁶⁶ Given the decline in the rhetoric of “inherent rights” on the U.S. Supreme Court in recent years,⁶⁷ however, it seems unlikely that any Justice would have the confidence to utilize such a formulation today.

Again, that is not the case with the Pennsylvania Supreme Court. In a special concurrence to his own majority opinion in *Commonwealth v. Ball*,⁶⁸ Justice Wecht referred to the rights of criminal defendants as “preexisting inherent rights that Americans enjoy, and that our constitutions obligate us to protect.”⁶⁹ Not one justice presumed to criticize this formulation as a mere subjective

⁶¹ *Commonwealth v. Bricker*, 581 A.2d 147, 155 (Pa. 1990).

⁶² *See id.*

⁶³ *See id.* at 161 (Flaherty, J., dissenting).

⁶⁴ *See Commonwealth v. Miller*, 819 A.2d 504, 515, 521 (Pa. 2002) (Zappala, C.J., dissenting) (quoting *Bricker*, 581 A.2d at 154–55).

⁶⁵ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁶⁶ *See id.* at 541.

⁶⁷ The references tend now to be only in quotations from other sources. *See* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1472 (2018) (quoting *Nat’l Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208, 232 (3d Cir. 2013); *Duro v. Reina*, 495 U.S. 676, 691 (1990) (quoting 1 Op. Sol. 699, 699 (Dep’t of Interior 1936)).

⁶⁸ *Commonwealth v. Ball*, 146 A.3d 755 (Pa. 2016).

⁶⁹ *See id.* at 771 (Wecht, J., concurring).

political, moral judgment.⁷⁰

It might be said that Justice Wecht was, after all, merely echoing the text of the Pennsylvania Constitution, which describes the rights it includes as “inherent and inalienable.”⁷¹ But this is basically true of the U.S. Constitution as well, as the Ninth Amendment shows.⁷² The Framers of the Revolutionary Period and the subsequent constitutional period were not value skeptics.⁷³ It is no more appropriate for a Justice of the U.S. Supreme Court to disparage rights as merely subjective than it is for a justice on the Pennsylvania Supreme Court to do so. Value skepticism is not faithful to the original public meaning of either Constitution.⁷⁴ Nor is it consistent with our traditions.⁷⁵

It might also be said that all of the examples I have adverted to are just rhetorical differences—that I am merely pointing to the differing ways that the two constitutional traditions talk about law. I have not shown that case outcomes differ between the two courts.

That is so. However, law is in large part a rhetorical exercise. A court that insists that political and moral judgments are inherently subjective and that values cannot be reasoned about is enunciating a different kind of law than is a court that expresses values openly and endeavors to defend its judgments as rationally compelling.⁷⁶

Nevertheless, there is one substantive area in which value engagement seems to have led to a different result in the Pennsylvania Supreme Court compared to the U.S. Supreme Court: voter ID legislation. In *Crawford v. Marion County Election Board*,⁷⁷ the U.S. Supreme Court upheld Indiana’s voter ID law.⁷⁸ There was

⁷⁰ See *id.* (Baer, J., dissenting).

⁷¹ See PA. CONST. art. I, §1.

⁷² “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

⁷³ See Ledewitz, *When Values Died in American Law*, *supra* note 14, at 136.

⁷⁴ See Ledewitz, *Supreme Court Nomination Process*, *supra* note 19, at 15–17.

⁷⁵ See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 872 (2010) (Stevens, J., dissenting) (quoting *Palko v. State of Connecticut*, 302 U.S. 319, 325 (1937)).

⁷⁶ Compare *McDonald*, 561 U.S. at 804 (Scalia, J., concurring) (“[A historically focused method] is less subjective because it depends upon a body of evidence susceptible of reasoned analysis rather than a variety of vague ethico-political First Principles whose combined conclusion can be found to point in any direction the judges favor. In the most controversial matters brought before this Court—for example, the constitutionality of prohibiting abortion, assisted suicide, or homosexual sodomy, or the constitutionality of the death penalty—any historical methodology, under any plausible standard of proof, would lead to the same conclusion.”), with *Commonwealth v. Bricker*, 581 A.2d 147, 155 (Pa. 1990) (“This impermissible vouching for witnesses—especially witnesses of this caliber—offends our sense of decency and our notion of the fundamental fairness inherent in our judicial system.”).

⁷⁷ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

⁷⁸ *Id.* at 188–89, 204 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

no majority opinion, but neither Justice Stevens' lead opinion, nor Justice Scalia's concurrence, evinced much, if any, sympathy or concern for voters who might be disenfranchised by such a law.⁷⁹

In contrast to this indifference, the Pennsylvania Supreme Court in *Applewhite v. Commonwealth*,⁸⁰ although remanding the case for further consideration of injunctive relief, noted that the "population [affected] includes members of some of the most vulnerable segments of our society (the elderly, disabled members of our community, and the financially disadvantaged.)"⁸¹ The court then "obliged" the lower court to enter the injunction on remand unless "there will be no voter disenfranchisement."⁸² Not surprisingly, given that exacting standard, a preliminary injunction against the law was granted two weeks later.⁸³

A different context of values expression—a substantive one in which there is no parallel to U.S. Supreme Court holdings—is the enforcement of environmental rights.⁸⁴ The Pennsylvania Supreme Court's recent decisions interpreting and applying the Environmental Rights Provision in the Pennsylvania Constitution⁸⁵ have demonstrated strong and confident value commitments.⁸⁶

The text of the Environmental Rights Provision, adopted by the voters in 1971, under the influence of the original Earth Day⁸⁷ is remarkable in its sweeping breadth:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including

⁷⁹ See Bruce Ledewitz, *Beyond Edmunds: The State Constitutional Legacy of Chief Justice Ronald D. Castille*, 53 DUQ. L. REV. 371, 398–99 (2015) [hereinafter Ledewitz, *Beyond Edmunds*].

⁸⁰ *Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012).

⁸¹ *Id.* at 4, 5.

⁸² See *id.* at 5.

⁸³ See *Applewhite v. Commonwealth*, No. 330 M.D.2012, 2012 WL 4497211, at *8 (Pa. Commw. Ct. Oct. 2, 2012).

⁸⁴ See John C. Dernbach & Marc Prokopchak, *Recognition of Environmental Rights for Pennsylvania Citizens: A Tribute to Chief Justice Castille*, 53 DUQ. L. REV. 335, 337 (2015); Caleb Hall, *A Right Most Dear: The Case for A Constitutional Environmental Right*, 30 TUL. ENVTL. L.J. 85, 101 (2016).

⁸⁵ PA. CONST. art. I, § 27.

⁸⁶ See, e.g., *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 966–67 (Pa. 2013).

⁸⁷ See Donna Morelli, *PA's Environmental Rights Amendment Grows Some Teeth*, BAY J. (Feb. 18, 2018), https://www.bayjournal.com/article/pa_activists_using_environmental_rights_amendment_with_success. For background on the adoption, see Dernbach & Prokopchak, *supra* note 84, at 335–36.

generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.⁸⁸

Yet, perhaps for the very reason that the text is so broad, the Pennsylvania courts failed to enforce the Amendment meaningfully for almost forty-five years.⁸⁹ Two decisions in particular essentially precluded successful lawsuits under Section 27: *Commonwealth v. National Gettysburg Battlefield Tower, Inc.*,⁹⁰ and *Payne v. Kassab*.⁹¹

In *Gettysburg*, the Attorney General brought suit to enjoin construction of a tower on private land overlooking the Gettysburg National Military Park.⁹² The Attorney General argued that construction of the tower would conflict with the right of the people to the natural, scenic, historic, and esthetic values of the environment.⁹³ The court affirmed the denial of the injunction below.⁹⁴

Although there was no majority opinion, the prospect of an unlimited power in the executive branch to enforce undefined environmental limits on private parties plainly concerned some of the justices.⁹⁵ *Gettysburg* has had the effect of precluding enforcement of Section 27 against private parties.⁹⁶

Conversely, *Payne* concerned not the reach of the first sentence in Section 27, but the meaning of the State's duty as trustee toward Pennsylvania's "public natural resources."⁹⁷ The case involved the loss of park land to a street widening project.⁹⁸ In permitting the project to go forward, the Commonwealth Court adopted a three-part test of compliance with Section 27 that would generally be satisfied if the government followed existing statutory provisions:

- (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
- (2) Does the record demonstrate a

⁸⁸ Dernbach & Prokopchak, *supra* note 84, at 336–37.

⁸⁹ *See id.* at 338–39, 344.

⁹⁰ *Commonwealth v. Nat'l Gettysburg Battlefield Tower*, 311 A.2d 588 (Pa. 1973).

⁹¹ *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976).

⁹² *See Gettysburg*, 311 A.2d at 589–90.

⁹³ *See id.* at 590.

⁹⁴ *See id.* at 595.

⁹⁵ *See* Dernbach & Prokopchak, *supra* note 84, at 340.

⁹⁶ *See id.* at 341.

⁹⁷ *See Payne*, 312 A.2d at 272–73; Dernbach & Prokopchak, *supra* note 84, at 341.

⁹⁸ *See Payne*, 312 A.2d at 264, 266.

reasonable effort to reduce the environmental incursion to a minimum? (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?⁹⁹

The Pennsylvania Supreme Court affirmed the denial of injunctive relief, holding that compliance with the existing statutory framework was sufficient in the context of the street widening without adopting the Commonwealth Court test.¹⁰⁰ Nevertheless, over the next forty-five years, the *Payne* test enunciated in the lower court became the standard by which all Section 27 challenges were evaluated, resulting in an “almost non-existent” chance of success in enforcing Section 27.¹⁰¹

This entire edifice was overturned, first in a plurality opinion, *Robinson Township v. Commonwealth*, in 2013,¹⁰² and then in a majority opinion in *Pennsylvania Environmental Defense Foundation v. Commonwealth*, (“*PEDF*”) which adopted the *Robinson* framework for analysis¹⁰³ and formally rejected the *Payne* test.¹⁰⁴ In *Robinson*, the court struck down important portions of Pennsylvania’s newly enacted gas drilling legislation, Act 13.¹⁰⁵ In *PEDF*, the court applied the principles of trust doctrine in holding that proceeds from public leases of oil and gas interests have to remain within the corpus of the public trust created by Section 27.¹⁰⁶

These two decisions are massive in size¹⁰⁷ and significance¹⁰⁸ and

⁹⁹ See *id.* at 273 n.23 (quoting *Payne v. Kassab*, 312 A.2d 86, 94 (Pa. Commw. Ct. 1973), *aff’d*, 361 A.2d 263 (Pa. 1976)).

¹⁰⁰ See Dernbach & Prokopchak, *supra* note 84, at 342–43.

¹⁰¹ See *id.* at 344–45. Ironically, one exception to this observation was *Pennsylvania Environmental Management Services v. Commonwealth*, in which the court concluded that there had been too much concern for environmental protection by the government agency. *Pa. Env’tl. Mgmt. Servs. v. Commonwealth*, 503 A.2d 477, 480 (Pa. Commw. Ct. 1986).

¹⁰² See *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 966–67 (Pa. 2013).

¹⁰³ See *Pa. Env’tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 930 (Pa. 2017) (“[W]e rely here upon the statement of [general] principles thoughtfully developed in that plurality opinion.”).

¹⁰⁴ See *id.* (citing *Robinson Twp.*, 83 A.3d at 967).

¹⁰⁵ See *Robinson Twp.*, 83 A.3d at 913, 985.

¹⁰⁶ See *Pa. Env’tl. Def. Found.*, 161 A.3d at 916.

¹⁰⁷ The plurality opinion in *Robinson* is 162 pages in length, for example. See *Robinson*, 83 A.3d 901; Dernbach & Prokopchak, *supra* note 84, at 351.

¹⁰⁸ John Dernbach was not exaggerating when he wrote in the Widener Environmental Law Center blog that “[t]he implications of [the *Robinson* decision] will be felt for years, perhaps decades.” See John Dernbach, *The Pennsylvania Supreme Court’s Robinson Township Decision: A Step Back for Marcellus Shale, a Step Forward for Environmental Rights and the Public Trust*, WIDENER ENVTL. L. CTR. (Dec. 21, 2013), <http://blogs.law.widener.edu/envirolawcenter/2>

analyzing them is beyond my purpose here. The point here is to see these decisions as openly value laden. In one sense, that is obvious. These decisions are milestones in the history of environmental protection in the United States.¹⁰⁹ But in another sense, the matter is not clear at all. The *PEDF* court, for example, stated that “the proper standard of judicial review lies in the text of Article I, Section 27 itself.”¹¹⁰ In other words, the Justices would assert that the values being enforced in these decisions are simply those of the constitutional provision itself and any judge should be enforcing that provision as written, no matter how value skeptical.

There is some merit to this understanding, and I will return below to the role of amendments like Section 27 in the development of Pennsylvania constitutional jurisprudence. But this judicial modesty would also be disingenuous. The mere fact that the revolutionary implications of Section 27 were held dormant for over forty years¹¹¹ shows that a judicial decision was made to break with that line of precedent and to read the Amendment afresh.

The decision by the Pennsylvania Supreme Court over these two opinions to give a fuller effect to the text and implications of Section 27 cannot be considered a mechanical application of a text. This decision by the justices is reminiscent of the 19th century decision by Chancellor George Wythe in Virginia and the earlier decision by Chief Judge William Cushing in Massachusetts, to interpret “free and equal” clauses in their state constitutions as abolishing slavery.¹¹² Yes, it could be said that these jurists were “just” applying a constitutional text—if all men are born free and equal, then chattel slavery is obviously unconstitutional—but most judges did not interpret these constitutional texts to overturn the settled social/economic arrangements of slavery and it required strong personal commitments for these two jurists to do so.¹¹³ The same is true for the justices who wrote and joined the *Robinson* and *PEDF* opinions. The value of protecting the environment in ways heretofore

013/12/21/the-pennsylvania-supreme-courts-robinson-township-decision-a-step-back-for-marcellus-shale-a-step-forward-for-article-i-section-27/. Now that the *Robinson* plurality opinion has essentially been adopted by the whole court, that significance is only magnified. See *Pa. Envtl. Def. Found.*, 161 A.3d at 930; Dernbach & Prokopchak, *supra* note 84, at 338, 352, 358–59.

¹⁰⁹ See *Pa. Envtl. Def. Found.*, 161 A.3d at 930; Dernbach & Prokopchak, *supra* note 84, at 358–59; Dernbach, *supra* note 108.

¹¹⁰ *Pa. Envtl. Def. Found.*, 161 A.3d at 930.

¹¹¹ See Dernbach & Prokopchak, *supra* note 84, at 338–39, 344.

¹¹² See BERNARD SCHWARTZ, MAIN CURRENTS IN AMERICAN LEGAL THOUGHT 81, 81 n.584 (1993).

¹¹³ See *id.* at 81.

unexpressed was clearly present.

The final instance of Pennsylvania constitutional values engagement that I will show is perhaps the most explicit, but also the most fraught. In *Commonwealth v. Edmunds*,¹¹⁴ the Pennsylvania Supreme Court expressly adopted a four-factor test to be used “each time a provision of [the Pennsylvania Constitution] is implicated.”¹¹⁵ The four factors were described as:

- 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.¹¹⁶

There has been some question as to whether the *Edmunds* framework is really applicable “each time” the Pennsylvania Constitution is invoked, or only when considering provisions parallel to those of the U.S. Constitution, whether the framework is binding on the courts, or only on litigants, and whether the decision of the U.S. Supreme Court in *Michigan v. Long*¹¹⁷ “requires” anything of a state court in the context referenced in *Edmunds*, despite the statement in the opinion that it does.¹¹⁸ All of these considerations are beyond my purpose here. Here, the point is that the court could, without comment or criticism, invoke “policy considerations” as something the courts need to be concerned about when interpreting constitutional provisions.¹¹⁹ What would Justice Scalia have said about that?

Justice Cappy’s majority opinion did in fact broadly consider policy in refusing to follow the recognition in *United States v. Leon*¹²⁰ of a good-faith exception to the exclusionary rule¹²¹ under Article I,

¹¹⁴ *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991).

¹¹⁵ *Id.* at 894–95.

¹¹⁶ *Id.* at 895.

¹¹⁷ *Michigan v. Long*, 463 U.S. 1032 (1983).

¹¹⁸ *See Edmunds*, 586 A.2d at 894–95 (citing *Long*, 463 U.S. 1032). In *Edmunds*, there was only a state ground, which means the adequate and independent state ground doctrine modified in *Long* was irrelevant to the actual decision. *See Edmunds*, 586 A.2d at 894.

¹¹⁹ *See id.* at 901. The dissent by Justice McDermott was to the wisdom of the result, and even to the need generally for independent constitutional interpretation at the state level. But Justice McDermott did not suggest that considerations of policy are merely subjective. *See id.* at 908.

¹²⁰ *United States v. Leon*, 468 U.S. 897 (1984).

¹²¹ *See Edmunds*, 586 A.2d at 892.

Section 8 of the Pennsylvania Constitution.¹²² The majority was concerned that a good faith exception would undermine the strict requirements of the Pennsylvania Rules of Criminal Procedure, doubted the actual costs of the exclusionary rule itself, was not convinced of the need for a good faith exception given a recent loosening of the difficulty of establishing probable cause and feared that under a good faith exception, magistrates might become “rubber stamps” for the police because there would be no negative consequences of the issuance of a defective warrant.¹²³

I am not sure whether Justice Scalia would consider any of these particular considerations to be subjective. The value issue is not so much what the majority included within the category of policy as the use of the category itself. The idea that courts should concern themselves with policy when determining what the law is would presumably strike Justice Scalia as an improper mixing of what the law is with what the law ought to be.¹²⁴ But that was not a consideration that occurred to any of the justices when the *Edmunds* formulation was first announced.

Later, however, in *Commonwealth v. Russo*,¹²⁵ that consideration did arise. In *Russo*, the court adopted the federal open fields search doctrine as a matter of Pennsylvania constitutional law.¹²⁶ In what is the only invocation of the fear of subjectivism I know of in Pennsylvania constitutional jurisprudence, then-Justice Castille limited the fourth *Edmunds* factor to “public policy considerations unique to Pennsylvania.”¹²⁷ He did this at the suggestion, he wrote, of a law review article by then-Justice Saylor, explaining “why ‘[i]mplementation of a state constitutional value . . . necessarily entails a searching, evaluative inquiry’ into genuinely ‘unique state sources, content, and context as bases for independent interpretation.’”¹²⁸ If policy were not limited to unique state sources, “the tag-line ‘policy’ could metamorphose into cover for a transient majority’s implementation of its own personal value system as if it

¹²² See *id.* at 903 (citing *Leon*, 468 U.S. at 905).

¹²³ See *id.* at 901, 904.

¹²⁴ See John F. Manning, *Classic Revisited: Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 749 (2017).

¹²⁵ *Commonwealth v. Russo*, 934 A.2d 1199 (Pa. 2007).

¹²⁶ See *id.* at 1213.

¹²⁷ See *id.* at 1212.

¹²⁸ *Id.* (alteration in original) (quoting Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule*, 59 N.Y.U. ANN. SURV. AM. L. 283, 309–11 (2003)).

were an organic command.”¹²⁹

There is something sadly ironic about this fear of imposition of subjectivism if any invocation of policy were rendered without some specific textual, historical or other grounding, other than just an argument about the value itself. After all, the author of this caution is the same jurist who, in the *Applewhite* voter ID case above, ignored contrary U.S. Supreme Court precedent to ensure that no voter ID law could take effect in Pennsylvania unless “vulnerable” populations were absolutely protected.¹³⁰ What was that concern other than a moral, political judgment without the slightest support in any unique Pennsylvania considerations? Yet, Justice Castille did not worry in *Applewhite* that his concern for the poor and aged was the result of a “personal value system.”¹³¹ He plainly considered those concerns objectively justified.¹³²

The *Russo* episode is not only an anomaly in Pennsylvania constitutional jurisprudence, which normally is not subject to the fear of subjectivism that so haunts the U.S. Supreme Court.¹³³ *Russo* is also an objective lesson in how easy it is in this culture to express value skepticism even though there is reason to think we do not really believe that all values are subjective.¹³⁴ Insofar as lack of faith in the rational unfolding of truth has undermined the rule of law, we have done this unnecessarily, almost as a bad habit rather than a serious conclusion. If we pay attention to the healthy values engagement that still goes on in state courts,¹³⁵ we will perhaps discover a way back to the foundation of a rule of law nationally, once again.

IV. STATE CONSTITUTIONAL LAW AS A SOURCE OF VALUES EXPRESSION

Although the *Edmunds* formulation had no precursor in Pennsylvania constitutional jurisprudence, its invocation of values

¹²⁹ *Russo*, 934 A.2d at 1212.

¹³⁰ See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008); *Applewhite v. Commonwealth*, 54 A.3d 1, 4–5 (Pa. 2012) (per curiam); *Russo*, 934 A.2d at 1212.

¹³¹ See *Russo*, 934 A.2d at 1212; *Applewhite*, 54 A.3d at 4.

¹³² See *Applewhite*, 54 A.3d at 5.

¹³³ See Ledewitz, *Beyond Edmunds*, *supra* note 79, at 389–90, 393; cf. Paulo Barrozo, *Reconstructing Constitutional Punishment*, 6 WASH. U. JURIS. REV. 175, 193 (2014) (explaining the Supreme Court’s subjectivism in the context of the Eighth Amendment).

¹³⁴ See Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 336 n.42 (2007).

¹³⁵ See, e.g., *Sacramento Cty. Deputy Sheriff’s Ass’n v. County of Sacramento*, 59 Cal. Rptr. 2d 834, 843 (Ct. App. 1996); *State v. Marshall*, 613 A.2d 1059, 1089 (N.J. 1992); *Russo*, 934 A.2d at 1212–13.

did have a hidden precursor. In one of the seminal texts of the New Federalism renaissance of state constitutional jurisprudence in the 1980s,¹³⁶ Washington State Supreme Court Justice Robert F. Utter set forth an *Edmunds*-like three-factor list of matters to consider in interpreting a state constitutional Declaration of Rights: textual analysis, intent of the people and current values.¹³⁷

Of course, “current” values could be narrowly confined to easily determined sources of evidence.¹³⁸ But that is not what Justice Utter had in mind. To be sure, for Justice Utter, the primary meaning of a state constitutional provision was to be determined by the text and the intent of the people in enacting it.¹³⁹ Values were to be utilized when the text was ambiguous or the intent of the people obscure.¹⁴⁰

However, Justice Utter also envisioned current values as a kind of brake on ancient prejudice.¹⁴¹ He wrote that text and intent might be so “inappropriate in light of modern conditions and values” that they provide no practical guidance to interpretation.¹⁴² Even more dramatically, he added that even when text and intent are clear, they “may no longer be acceptable to our society.”¹⁴³

Utter justified such an expansive approach to constitutional interpretation in the usual way. He endorsed a “living” constitution approach that applies fixed principles to changing conditions.¹⁴⁴

Justice Utter was not insensitive to the criticism that such an approach would substitute a judge’s own views for the views of those who wrote a state constitutional provision.¹⁴⁵ In other words, he understood the fear of subjectivism. Invoking G. Edward White, however, Justice Utter argued that the “primary defense against ‘bad

¹³⁶ See Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 951–52 (1982).

¹³⁷ Justice Utter originally set forth these considerations in *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*. Justice Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 508–21 (1984).

¹³⁸ See, e.g., John Wihbey, *The Supreme Court, Public Opinion and Decision-Making: Research Roundup*, JOURNALIST’S RESOURCE (June 28, 2013), <https://journalistsresource.org/studies/politics/polarization/research-roundup-supreme-court-public-opinion/> (indicating the effectiveness of polling data to measure current values on key social issues in the context of the Affordable Care Act).

¹³⁹ See Utter, *supra* note 137, at 492–93.

¹⁴⁰ See *id.* at 521, 524.

¹⁴¹ See *id.* at 521.

¹⁴² *Id.*

¹⁴³ *Id.* at 522.

¹⁴⁴ *Id.* (quoting State *ex rel.* Linn v. Superior Court for King Cty., 146 P.2d 543, 547 (Wash. 1944)).

¹⁴⁵ See *id.* at 522–23.

judges' imposing their personal views" in cases is that immoral or unjust interpretations of a constitution would not be "accepted by the public" and therefore would not be followed.¹⁴⁶ In addition, judges have to "give a written justification for their decisions" and this would be difficult to do with regard to decisions that do not comport with contemporary senses of justice.¹⁴⁷ Furthermore, a bad decision will "come back to haunt" a court.¹⁴⁸

This understanding of the role of judges rests on a robust notion of the foundations of truth. There is a sense here of Dr. Martin Luther King Jr.'s teaching "that the arc of the moral universe is long, but it bends toward justice."¹⁴⁹ Justice Utter is suggesting that truth has power—that it is more persuasive in the end than are falsehoods and that the public will see this.¹⁵⁰ In addition, Justice Utter is invoking the understanding set forth by Lon Fuller in the Hart-Fuller debate that it is harder to justify evil actions than good ones.¹⁵¹ There is even a nod in Justice Utter's formulation in the direction of Kant's categorical imperative—that the moral law is what can be universally applied.¹⁵² All of these unconscious references demonstrate a healthy relation of values and truth.

There is nothing in these considerations that would necessarily be limited to state constitutional interpretation. In the midst of the arguments over incorporation and the beginning of the fundamental rights revolution in the U.S. Supreme Court, Justice Harlan wrote a similar justification of judicial invocation of values in interpreting the concept of due process:

Due process has not been reduced to any formula If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is

¹⁴⁶ *Id.* at 523.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 524.

¹⁴⁹ Martin Luther King, Jr., Address at the Eleventh Annual Convention of the Southern Christian Leadership Conference (Aug. 16, 1967), in *A CALL TO CONSCIENCE* 171, 199 (Clayborne Carson & Kris Shepard eds., 2001).

¹⁵⁰ See Utter, *supra* note 137, at 523.

¹⁵¹ "Professor Hart seems to assume that evil aims may have as much coherence and inner logic as good ones. I, for one, refuse to accept that assumption." Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 636 (1958).

¹⁵² One formulation of the categorical imperative is "[a]ct upon a maxim that can also hold as a universal law." IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 51 (Mary Gregor trans., 1991).

the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.¹⁵³

But though Justice Harlan could write these words in 1961, he did so in a context in which his approach to substantive due process was very much subject to challenge, and, as we have seen, is not today the view of most of the Justices on the U.S. Supreme Court.¹⁵⁴ The fear of subjectivism is widespread and the notion that anything like objective truth, or a “rational process,” can be applied to political or moral judgments, which would inevitably include the unenumerated rights of substantive due process, has been undermined.¹⁵⁵

Yet, as we have also seen, a fairly robust confidence in values remains in Pennsylvania constitutional jurisprudence and, at least at the time Justice Utter wrote, in state constitutional interpretation generally.¹⁵⁶ To what might we attribute this difference between federal and state constitutional jurisprudence?

William Thro correctly describes the key difference between state and federal constitutional law in writing that “[s]tate constitutions are . . . much more ‘political.’”¹⁵⁷ In making this observation, Thro was referring specifically to the ease of amendment of state constitutions, allowing for more direct expression of the current values of the people of a state compared to the difficulty of amending the federal constitution.¹⁵⁸ This is certainly the case and I will return to its implications below.¹⁵⁹ But I would like to expand the notion of the political and its relation to value expression in state constitutional law.

In the first place, it is not just state constitutions that are more political, but state governments themselves, including their judicial

¹⁵³ *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

¹⁵⁴ *See supra* Part II.

¹⁵⁵ *See Poe*, 367 U.S. at 539–40 (Harlan, J., dissenting).

¹⁵⁶ *See Utter*, *supra* note 137, at 499–504; *supra* Part III.

¹⁵⁷ William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 602 n.27 (1994).

¹⁵⁸ *See id.*

¹⁵⁹ *See infra* note 184 and accompanying text.

branches.¹⁶⁰ State judges are generally elected, for example, rather than appointed, as at the federal level.¹⁶¹ And they generally do not serve lifetime tenure, as the federal Article III judges do.¹⁶² In Pennsylvania, for example, judges are elected in partisan elections to ten-year terms and face the voters at that point in retention elections.¹⁶³

Then, there is the rough and tumble of politics that also affects how state courts work. One need only consider recent events in West Virginia, in which the entire State Supreme Court faced impeachment and removal and a sort of rump State Supreme Court was self-selected in response and ordered a halt in impeachment trials.¹⁶⁴ Or, going back further, in 1986, voters in California removed three justices from the State Supreme Court, including the Chief Justice, Rose Bird, in a controversy that included opposition to judicial treatment of the death penalty, but may have gone beyond that.¹⁶⁵

Events like these do not happen at the federal level and would provoke a national constitutional crisis if they did. Criticism by President Trump of judicial decisions, such as the recent episode with which this Article began,¹⁶⁶ are very mild in comparison.

But what are the implications of more political institutions in terms of the acceptance of values as more than merely matters of opinion? I believe there are two.

Compared to state courts, the federal courts, and particularly the U.S. Supreme Court, are elite institutions.¹⁶⁷ The Justices

¹⁶⁰ See Barton H. Thompson, Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373, 1455 (1992); Thro, *supra* note 157, at 602 n.27.

¹⁶¹ "About 90 percent of the judges on state appellate courts and trial courts of general jurisdiction face the voters in some form of election." Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1217 n.1 (2012).

¹⁶² See *id.* at 1250; Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 862 (2012).

¹⁶³ See *Driscoll v. Corbett*, 69 A.3d 197, 213 (Pa. 2013).

¹⁶⁴ See Doug Criss, *The West Virginia House Impeached the Entire State Supreme Court*, CNN (Aug. 14, 2018), <https://www.cnn.com/2018/08/14/politics/west-virginia-supreme-court-impeach-trnd/index.html>; Mark Curtis, *New West Virginia Supreme Court Meets Legislature*, WOWKTV (Jan. 7, 2019), <https://www.wowktv.com/news/west-virginia/new-wv-supreme-court-meets-legislature/1690593155>.

¹⁶⁵ See *Rose Bird Deserved to Be Removed*, CHI. TRIBUNE (Nov. 19, 1986), <https://www.chicagotribune.com/news/ct-xpm-1986-11-19-8603270146-story.html>.

¹⁶⁶ See Mark Sherman, *Roberts, Trump Spar in Extraordinary Scrap over Judges*, ASSOCIATED PRESS (Nov. 21, 2018), <https://www.apnews.com/c4b34f9639e141069c08cf1e3deb6b84>.

¹⁶⁷ See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the*

themselves, and their law clerks, are more likely than judges at the state level to be the products of national law schools, with all that that implies.¹⁶⁸ This is the point that Justice Scalia made so memorably in *Romer v. Evans*¹⁶⁹: “When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn.”¹⁷⁰

What Justice Scalia failed to appreciate, however, is that his own exaggerated fears of subjectivism, his certainty that values are always merely matters of opinion, and his conclusion that there can be no reasoning in political and moral matters, are all also the product of elite culture. In a recent book, Sophia Rosenfeld makes the point that postmodern theory may not be the reason for the decline of popular confidence in truth, because most people have not read Richard Rorty.¹⁷¹ But we can assume that this is not the case with regard to the Justices and their law clerks, who are undoubtedly much more familiar with the skepticism of postmodernity than are people at large.¹⁷² Insofar as ordinary people retain a kind of common sense commitment to moral and political realism,¹⁷³ it is not surprising that state court judges do as well. We could say generally that state judges are epistemologically closer to the people than are the Justices on the U.S. Supreme Court.¹⁷⁴

Second, there is the more traditional sense in which the state courts are more political.¹⁷⁵ These judges face the people, either in elections to the court or in retention elections or both.¹⁷⁶ While

Supreme Court into a Partisan Court, 2016 SUP. CT. REV. 301, 330 (2016); Gil Seinfeld, *The Federal Courts as a Franchise: Rethinking the Justifications for Federal Question Jurisdiction*, 97 CALIF. L. REV. 95, 142 n.149 (2009).

¹⁶⁸ See Devins & Baum, *supra* note 167, at 330.

¹⁶⁹ *Romer v. Evans*, 517 U.S. 620 (1996).

¹⁷⁰ *Id.* at 652 (Scalia, J., dissenting).

¹⁷¹ See SOPHIA ROSENFELD, *DEMOCRACY AND TRUTH: A SHORT HISTORY* 145–46 (2019).

¹⁷² See, e.g., Laura E. Little, *Hiding with Words: Obfuscation, Avoidance, and Federal Jurisdiction Opinions*, 46 UCLA L. REV. 75, 139 n.260 (1998) (stating law clerks from the 80s and 90s would be familiar with postmodernism); William H. Young, *Postmodernism and Government*, NAT’L ASS’N SCHOLARS (Sept. 20, 2012), https://www.nas.org/articles/postmodernism_and_governance (claiming postmodernism has spread throughout society to the college-educated elites and in the highest levels of government).

¹⁷³ See, e.g., Thomas Pölzler, *Revisiting Folk Moral Realism*, 8 REV. PHIL. & PSYCHOL. 455, 455 (2016).

¹⁷⁴ See Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1168 (1999).

¹⁷⁵ See Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1064 (2010).

¹⁷⁶ See Bruhl & Leib, *supra* note 161, at 1232.

judicial elections may often not be very revealing in terms of underlying value commitments, that is not always the case.¹⁷⁷ The 2015 judicial election in Pennsylvania involved very clear denunciations of partisan gerrymanders by some of the candidates, for example.¹⁷⁸ And even where such elections involve banal invocations of the pieties of the rule of law, there is still, inevitably, a closer connection between elected judges and the people than between judges appointed for life and the people.¹⁷⁹ When you run for office, you still hear about the needs and hopes of ordinary folk and you have to respond.¹⁸⁰

The ease of amendment of state constitutions also plays a role here. As Thro explained above, the ease of amendment means that state constitutions express recent popular values much more clearly than can the federal constitutional text.¹⁸¹ This undoubtedly emboldens state judges to enforce these values vigorously, as occurred in enforcement of the Pennsylvania Environmental provision discussed above.¹⁸²

But the ease of amendment also means that state judges can act with more confidence that the judgment of the people will be brought to bear on judicial decisions than can any federal judge.¹⁸³ When Justice Harlan writes that decisions of the U.S. Supreme Court that radically depart from the will of the “country” will not survive, it is not immediately clear how a democratic correction is to take place.¹⁸⁴

There is no such doubt at the state level. Voters in Pennsylvania,

¹⁷⁷ See, e.g., Richard L. Hasen, “*High Court Wrongly Elected*”: A Public Choice Model of *Judging and Its Implications for the Voting Rights Act*, 75 N.C. L. REV. 1305, 1326 (1997).

¹⁷⁸ Indeed, comments made on the campaign trail formed the basis for motions to recuse when gerrymandering was actually challenged in the Pennsylvania Supreme Court. See Jonathan Lai, *Pa. Supreme Court Justice Was Biased in Gerrymandering Case, Republicans Say*, INQUIRER (Feb. 2, 2018), <http://www.philly.com/philly/news/pennsylvania-gerrymanderin-g-case-republicans-justice-david-wecht-20180202.html>.

¹⁷⁹ See Joanna M. Shepherd, *The Influence of Retention on the Politics on Judges’ Voting*, 83 J. LEGAL STUD. 169, 174 (2009).

¹⁸⁰ See *id.*

¹⁸¹ See Thro, *supra* note 157, at 602 n.27.

¹⁸² See *supra* notes 84–114 and accompanying text. Of course, such popular expressions can embrace bias and bigotry, as well. See Justin R. Long, *State Constitutions as Interactive Expressions of Fundamental Values*, 74 ALB. L. REV. 1739, 1739 (2010) (examining state constitutional amendment barring Oklahoma state judges from considering “legal precepts from other nations or cultures.”).

¹⁸³ See Thro, *supra* note 157, at 602 n.27.

¹⁸⁴ *Poe v. Ullman*, 397, U.S. 497, 542 (1961) (Harlan, J., dissenting). On the other hand, Barry Friedman has argued that the American people and Congress have exerted indirect influence over the Justices such that public accountability has been maintained despite appointment and lifetime tenure. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 14 (2009).

for example, have overturned several decisions of the State Supreme Court by constitutional amendment in recent years and the potential of doing so lends democratic legitimacy to the decisions of the courts even when this power is not exercised.¹⁸⁵

In other words, the rhetoric of the counter-majoritarian difficulty,¹⁸⁶ whereby value judgments of the courts are seen as imposed on the democratic branches of government and must therefore be especially justified, is not as much of a problem at the state court level.¹⁸⁷ So, state judges are freer for a variety of reasons to express their values more openly than are federal judges.¹⁸⁸

However, does not the political aspect of state court value expression run counter to the issue of the rule of law with which this Article began? Was not President Trump expressing a political theme when he criticized an “Obama judge” for reflecting the political commitments of his predecessor, who appointed that judge?¹⁸⁹

The problem that threatens the rule of law at the federal level is not politics, but value skepticism. The threat is not that judges express deeply held values as they interpret legal materials, but that they, and we, assume that there is no more to be said. Thus, Republicans appoint self-proclaimed originalists to the courts, while Democrats appoint living constitutionalists, but no one even attempts a reasoned justification of either position.¹⁹⁰ Moral and political judgments are assumed by most participants on both sides to be arational.¹⁹¹ In contrast, at the state level, values are more likely to be openly expressed *and then defended*.¹⁹² The assumption is that truth will emerge over time.

To put this more directly, when Chief Justice Castille asserts that it is the role of a court in protecting the fundamental right to vote to be especially attentive to the effect of voting laws on the vulnerable,

¹⁸⁵ See, e.g., Harry L. Witte, *Rights, Revolution, and the Paradox of Constitutionalism: The Processes of Constitutional Change in Pennsylvania*, 3 WIDENER J. PUB. L. 383, 466 (1993).

¹⁸⁶ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (2d ed. 1986).

¹⁸⁷ See *id.* at 16–17.

¹⁸⁸ See Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Approach*, 72 WASH. & LEE L. REV. 483, 498 n.87 (2015).

¹⁸⁹ See *Chief Justice Roberts Rebukes Trump's 'Obama Judge' Gibe*, BBC NEWS (Nov. 22, 2018), <https://www.bbc.com/news/world-us-canada-46294734>.

¹⁹⁰ See Edward Whelan, *The Judicial Divide Between Conservatives and Liberals*, ETHICS & PUB. POL'Y CTR. (Nov. 20, 2018), <https://eppc.org/publications/interview-with-ed-whelan-judicial-divide-conservatives-liberals/>.

¹⁹¹ See *McDonald v. City of Chicago*, 561 U.S. 742, 803–04 (2010) (Scalia, J., concurring); Ledewitz, *When Values Died in American Law*, *supra* note 14, at 117–19.

¹⁹² See, e.g., *Commonwealth v. Edmunds*, 586 A.2d 887, 901 (Pa. 1991) (invoking and defending policy considerations).

he is expressing a deeply held value that is not derived from any objective legal source.¹⁹³ He is asserting this as a truth of the universe, so to speak. At that point, we can counter Chief Justice Castille by claiming that his value expression is merely personal or we can take issue with it and challenge him to show that this value is objectively right. The former route, the route of value skepticism, renders a rule of law impossible. For in the end, all judgments will be deemed merely subjective. The latter course, on the other hand, is the one that the rule of law as we have known it, has been built upon.¹⁹⁴ That is the tradition that is still alive in our state courts.¹⁹⁵

V. CONCLUSION

How did the rule of law go from constituting the goal of a law school education to become an unattainable ideal, instead? I suppose many people would say that this happened when judges began to express their own values, rather than reflecting what the law actually is.¹⁹⁶ That is certainly the conservative critique.¹⁹⁷

That diagnosis, if it were the case, would be comforting because a majority of the Justices on the U.S. Supreme Court now are self-proclaimed originalists, who have pledged themselves to law as law.¹⁹⁸ Therefore, if the conservative critique is correct, we should soon recover the rule of law.

Obviously, that is not going to happen. The reason for this likely failure is that under the very theory of conservative jurisprudence—that moral and political judgments are inherently subjective—the commitments so proudly made by these Justices are themselves merely personal judgments. Since we do not believe in reason, we do not trust these proclamations as anything more than disguised power plays. And the same suspicion will be present if Democrats pack the Supreme Court sometime in the near future and obtain their own majority.

As surprising as it may seem, the only way back to a rule of law is to embrace and express our values openly and to defend them

¹⁹³ See Ledewitz, *Beyond Edmunds*, *supra* note 79, at 399.

¹⁹⁴ See BARNETT, *supra* note 7, at 47; *cf.* SMITH, *supra* note 9, at 41–82 (discussing whether the Law exists and how it is impacted by value).

¹⁹⁵ See, e.g., *Edmunds*, 586 A.2d at 901.

¹⁹⁶ See Neil S. Siegel, *Interring the Rhetoric of Judicial Activism*, 59 DEPAUL L. REV. 555, 557–58 (2010).

¹⁹⁷ See *id.*

¹⁹⁸ See Marcia Coyle, *Jeff Sessions Lauded New ‘Originalist’ Majority at Supreme Court. Not So Fast*, NAT’L L.J. (Oct. 19, 2018), <https://www.law.com/nationallawjournal/2018/10/19/jeff-sessions-lauded-new-originalist-majority-at-supreme-court-not-so-fast/>.

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rationality. That activity still goes on in state constitutional jurisprudence. It is there where we must begin to recover the rule of law as a nation.