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FOREWORD: STEPPING OVER THE PROCEDURAL THRESHOLD IN THE PRESENTATION OF STATE CONSTITUTIONAL CLAIMS

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It has been nearly twenty years since United States Supreme Court Justice William J. Brennan, Jr. sounded the battle cry for the birth of the "New Federalism." Characterizing state constitutions as "fonts of individual liberties," Justice Brennan encouraged state courts to "thrust themselves into a position of prominence in the struggle to protect the people of our nation from governmental intrusions on their freedoms."[1] The Justice was, of course, addressing those instances in which a state court is called upon to interpret a provision of its own constitution and is, therefore, free to grant rights to its citizens greater than those granted by the United States Supreme Court under a similar provision of the Federal Constitution.

The response to Justice Brennan's call has been certain and steady; the breadth and depth of state constitutional law has increased significantly, as evidenced by the thoughtful analyses compiled in these pages.[2] Indeed, the fact that *Emerging Issues in State Constitutional Law* has become an annual publication of the *Temple Law Review* is a testament to the sustained interest in this ever-expanding area of the law.

A noteworthy aspect of the growth of the New Federalism is the procedural method by which courts enable litigants to present state constitutional claims, and the standards those courts impose upon themselves to decide

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1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491, 502-03 (1977).

2. There has been extensive recognition of the advancements in state constitutional law. *See generally* FEDERALISM, THE SHIFTING BALANCE 1, 65 (J. Griffith ed., 1989) (tracing course of federalism in America and examining states' protections of individual liberties); Charles G. Douglas, *Federalism and State Constitutions*, 13 VT. L. REV. 127, 137 (1988) (discussing battle between federal and state constitutions and various approaches states should use in their decision-making process).

such claims. Relatively recent developments in Pennsylvania law illustrate that the mechanics of bringing a state constitutional claim can be just as important as the substance of the claim itself.

For the past decade or so, the Pennsylvania Supreme Court has espoused, applauded, and applied the rule that when determining the rights and privileges granted by their own constitutions, states look to federal constitutional law only as establishing certain minimum levels which must be met, but which clearly may be exceeded.[3] In 1991, the court began to address state constitutional claims in a definitive and detailed framework.[4]

In *Commonwealth v. Edmunds*,[5] the court addressed whether article I, section 8 of the Pennsylvania Constitution allowed for a good-faith exception to the exclusionary rule.[6] Under *United States v. Leon*,[7] it was clear that the exception did not offend the Fourth Amendment to the United States Constitution.[8] The *Edmunds* court ultimately decided that the state constitution does not incorporate a good-faith exception.[9] However, the method by which the court arrived at its decision became just as significant, and more far-reaching, than the substantive decision itself.

Noting the recent focus on the New Federalism, the *Edmunds* court rejected the rationale of *Leon* and imposed upon the litigants the following standard:

> [W]e find it important to set forth certain factors to be briefed and analyzed by litigants in each case hereafter implicating a provision of the Pennsylvania constitution. . . . Accordingly, 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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3. *See, e.g.*, Commonwealth v. Melilli, 555 A.2d 1254, 1258 (Pa. 1989) (acknowledging that Pennsylvania Constiution serves as independent source of supplemental rights and requiring law enforcement to obtain a court order to use a pen register); Commonwealth v. Sell, 470 A.2d 457, 466-67 (Pa. 1983) (emphasizing that state can provide broader standards than those mandated by Federal Constitution and granting automatic standing to challenge admissibility of evidence to persons accused of possessory crimes); Commonwealth v. DeJohn, 403 A.2d 1283, 1289 (Pa. 1979) (holding that state constitutional provision pertaining to unreasonable searches and seizures extends protections to zones where one has reasonable expectation of privacy and granting standing to bank depositors to challenge seizure of bank records), *cert. denied*, 444 U.S. 1032 (1980).

4. For purposes of this passage, state constitutional claims are defined as those in which a party seeks greater protections under a state constitutional provision than is presently afforded under the analogous federal constitutional provision. A straightforward claim grounded in state constitutional law where no federal constitutional law is implicated is not the subject of this foreword.

5. 586 A.2d 887 (Pa. 1991).

6. *Id.* at 891.

7. 468 U.S. 897 (1984).

8. *Id.* at 913. In *Leon*, the United States Supreme Court held that the Fourth Amendment does not mandate suppression of illegally-seized evidence obtained pursuant to a constitutionally-defective warrant if the police officer acted in good-faith reliance on the warrant, which was issued by a neutral and detached magistrate. *Id.*

9. *Edmunds*, 586 A.2d at 894.

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.[10]

This aspect of the *Edmunds* decision had immediate and significant impact. Pennsylvania courts quickly embraced the *Edmunds* framework as the only method for analysis of state constitutional claims;[11] soon the failure of a litigant to plead and brief the *Edmunds* factors operated as a complete waiver of his or her claim.[12] Courts disregarded claims grounded in the additional protections of the state constitution in cases in which an appellant's brief did not include an *Edmunds* analysis.[13]

It was not long, however, before the Pennsylvania Supreme Court eliminated the "mandate" of *Edmunds* in *Commonwealth v. Swinehart*.[14] The issue in *Swinehart* was whether use and derivative use immunity was in keeping with the Pennsylvania Constitution or whether only transactional immunity could insure a Pennsylvania citizen's right against self-incrimination.[15] Thirteen years earlier, in 1972, the United States Supreme Court had decided *Kastigar v. United States*,[16] which held that use and derivative use immunity did not offend the Fifth Amendment.[17] With *Swinehart*, the Pennsylvania court had before it a classic *Edmunds* claim.

As expected, the court painstakingly reviewed the case under the four-factor standard.[18] Unexpectedly, however, the court decided that the *Edmunds* framework was not a procedural prerequisite to deciding the issue. Despite characterizing the *Edmunds* analysis as "the most thorough manner of accomplishing the task [at hand]," the court, in a footnote, made the following statement:

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10. *Id.* at 895.

11. *See* Commonwealth v. Peterfield, 609 A.2d 540, 544-45 (Pa. Super. Ct.) (finding briefing and analysis of four *Edmunds* factors to be procedural prerequisite to review of state constitutional claims), *appeal denied*, 618 A.2d 400 (Pa. 1992).

12. *Id.* at 545.

13. *See, e.g.*, Commonwealth v. Breeland, 664 A.2d 1355, 1359 n.3 (Pa. Super. Ct. 1995) (declining to consider state constitutional analysis where defendant did not comply with *Edmunds* requirements and failed to distinguish state and federal constitutional protections); Commonwealth v. Toro, 638 A.2d 991, 996 n.10 (Pa. Super. Ct. 1994) (same); Commonwealth v. Lucas, 622 A.2d 325, 327 (Pa. Super. Ct. 1993) (same), *appeal denied*, 644 A.2d 733 (Pa. 1994).

14. 664 A.2d 957 (Pa. 1995).

15. *Id.* at 958. There are two types of immunity which may be offered a witness who is compelled to testify. One is transactional immunity, which provides the witness complete protection from prosecution for the entire crime (or transaction) about which he testifies. The other is use and derivative use immunity which provides only that the prosecutor will not use the witness's testimony against him, nor will it seek out and use other evidence derived from that testimony. *Id.* at 960 n.5.

16. 406 U.S. 441 (1972).

17. *Id.* at 453.

18. *Swinehart*, 664 A.2d at 961-68. The *Swinehart* court concluded that Pennsylvania's use immunity statute was constitutional. *Id.* at 969.

> In *Edmunds*, this Court set forth certain factors that we found helpful in our analysis herein. We reiterate, the factors set forth are helpful. The failure of a litigant to present his state constitutional arguments in the form set forth in *Edmunds* does not constitute a fatal defect, although we continue to strongly encourage use of that format.[19]

In relieving litigants of the burden of presenting their state constitutional claims in a strict format, Pennsylvania joined numerous other states whose analyses of these types of claims are dictated not by a rigid framework, but by the particular circumstances of the issue at hand. A brief glance at the cases reviewed in *Swinehart* reveals the varying manners in which other states decided the *Kastigar* issue.[20]

Mississippi, while noting its familiarity with the national debate on the subject, looked only to its own law in reaching its decision.[21] Alaska focused on the practical difficulties a court could encounter in its effort to insure that derivative use of compelled testimony does not occur.[22] Massachusetts relied wholly on its own historical treatment of the issue.[23] Hawaii focused on the federal history of the right against self-incrimination.[24] The Oregon court engaged in an exhaustive historical summary that included two of the *Edmunds* factors: a comparison of the law of other states and an in-depth analysis of federal law.[25] Nonetheless, that court soundly rejected the reasoning of *Kastigar*.[26]

None of these courts noted a particular model under which it was operating, nor was there any indication in any of the opinions that by failing to utilize a specific analysis, a party forfeited its access to the court's review. As access to the court is of primary importance to the individual, it is particularly appropriate that a litigant seeking to enlarge the rights of the individual, via

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19. *Id.* at 961 n.6.

20. *Id.* at 965-67.

21. *See* Wright v. McAdory, 536 So. 2d 897, 901-02 (Miss. 1988) (holding that immunity granted to witness by state constitution was inadequate, entitling witness to invoke privilege against self-incrimination).

22. *See* State v. Gonzales, 853 P.2d 526, 530 (Alaska 1993) (holding that statute granting use and derivative use immunity violated state constitutional provision that no person could be compelled to give testimony against self).

23. *See* Attorney General v. Colleton, 444 N.E.2d 915, 919 (Mass. 1982) (holding that only transactional immunity will supplant protection against self-incrimination afforded to individual by state constitution).

24. *See* State v. Miyasaki, 614 P.2d 915, 922 (Haw. 1980) (holding that transactional immunity is part of privilege against self-incrimination guaranteed in Hawaii's Bill of Rights).

25. *See* State v. Soriano, 684 P.2d 1220, 1222 (Or. Ct. App.) (allowing transactional and testimonial immunity as substitute for right against self-incrimination found in United States Constitution), *aff'd*, 693 P.2d 26 (Or. 1984).

26. Analogizing the grant of use immunity and the information it brings to the prosecution as "giving a dog a bone and expecting him not to chew on it," the Oregon court held that its own constitution forbade "giving the dog the bone." *Id.* at 1234 (quoting State *ex rel.* Johnson v. Woodrich, 566 P.2d 859, 861 (Or. 1977)).

state constitutional law, be free from a technical procedure that may not always serve to advance the inquiry at hand.[27]

While a formal framework for determining state constitutional claims tends to provide consistent analyses of such claims, the mandatory nature of that framework brings with it the danger that an otherwise meritorious claim may not be reviewed. This is particularly so in the case of a criminal defendant who has few resources to secure the services of a lawyer to insure "proper presentation." In such cases, the elevation of form over substance may deprive the litigants and the court of the opportunity to address an important issue. [28]

The Pennsylvania Supreme Court, in holding that failure to follow the *Edmunds* framework is not a defect fatal to appellate review, has made Pennsylvania's journey to Justice Brennan's vision a little easier. In that single footnote, the court dispensed with the formality of the *Edmunds* test and, I believe, opened wider the courthouse door to individuals who make state constitution-based challenges.

The articles in this issue demonstrate that the power of the states to create and maintain individual rights is alive and well. From voting rights to education, from search and seizure law to judicial reform, the state constitution can and should play a vital role in protecting our liberties. A liberal approach to the presentation and analysis of state constitutional law claims will insure that role is fulfilled.

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27. There is nothing inherently "wrong" with use of the *Edmunds* factors. Certainly there are instances where application of *Edmunds* is the most appropriate method of analysis. However, strict adherence to a rigid framework in all cases may unduly limit the scope of the inquiry in a particular case.

28. Of course form is, and always has been, an integral part of the law and the legal profession. Like most states, Pennsylvania requires appellants to develop fully their arguments before the court will consider them. *See* Commonwealth v. Martorano, 634 A.2d 1063, 1071 (Pa. 1993) (emphasizing that failure to properly raise state constitutional argument and rationale will result in waiver of claim); Commonwealth v. Montalvo, 641 A.2d 1176, 1184 (Pa. Super. Ct. 1994) (noting that Pennsylvania Superior Court must deem issue abandoned when it has been identified on appeal but not properly developed in party's brief). In my view, application of such a rule is sufficient to weed out vague and unsubstantiated claims.