REPORT OF THE

PENNSYLVANIA BAR ASSOCIATION

CONSTITUTIONAL REVIEW COMMISSION

October 20, 2011
CONSTITUTIONAL REVIEW COMMISSION

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I. MISSION AND HISTORY

The Pennsylvania Bar Association Constitutional Review Commission was established by a Resolution of the PBA House of Delegates adopted on October 19, 2009. The Commission was charged with the responsibility of examining specific issues related to the improvement of the government of the Commonwealth of Pennsylvania and making concrete recommendations, if needed, for alterations and/or improvements to the existing governmental structure and/or the Constitution of the Commonwealth of Pennsylvania including how those changes or alterations would be most effectively implemented, e.g., by Legislation, by the Amendment process, or by consideration of the delegates at a duly convened Limited or General Constitutional Convention.

The Board of Governors of the PBA selected individuals to serve on the Commission reflecting the diversity of the PBA membership and representation of its Committees and Sections. The Board also proposed a timeline and suggested operating procedures for the development and presentation of reports by the Commission to the Board of Governors and the House of Delegates.

The Commission, consisting of thirty members and a Reporter, was appointed in December 2009. The Commission was tasked by the Board of Governors to review the Pennsylvania Constitution and to make recommendations as deemed appropriate to improve the structure and operation of Government in the Commonwealth. The Commission was further advised to consider the following five specific areas:

- Legislative Reapportionment;
- Local Government;
- Public Education;
- Structure of the General Assembly; and
- Taxation and the Uniformity Clause.

The Commission was authorized upon a two-thirds vote of its members to review other Articles of the Constitution other than any changes that would reduce or eliminate the protections provided by Article I of the Constitution. The Commission, at its March 2010 meeting, voted unanimously to add Article V, the Judiciary, to the five areas previously identified for study and review. A Miscellaneous provision evolved from discussions related to the Taxation Article and its provision related to budget surpluses.

The Commission immediately established a website seeking comments from all concerned as to proposed changes to the Pennsylvania Constitution. The website was also used to announce and advertise public hearings held throughout the Commonwealth by the various Committees. Since its inception, the website has received over 55,000 “hits.” The Commission scrupulously adhered to the precept that all information submitted should be considered carefully and that we should conscientiously maintain a record of our efforts. Many reviewed items offered valuable information. Where possible, we have tried to post such resources on our website. Similarly,

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1 Subsequent to its original composition, various members resigned and the Board of Governors appointed other distinguished citizens to replace them. At the time of the publication of this report, there are twenty-nine members of the Commission.
transcripts of hearings and other documentation relating to the Commission’s work have been retained. These materials have been posted on the Commission’s website. If, in reviewing this Report, additional background material is sought, the website offers a ready resource. To that end, the Commission suggests that those seeking more detailed information may wish to start their investigation by accessing the website information. A more focused inquiry may appropriately begin with accessing the specific Committee’s link related to the specific subject under consideration. The Commission’s main webpage can be found at www.pabarcrc.org.

A total of 17 Committee hearings were held throughout the Commonwealth at venues in 7 Counties. Most hearings were televised on the Pennsylvania Cable Network. Numerous full Commission meetings were held either in personam or via telephone conference call and the Commission/Committee members expended, in the aggregate, thousands of hours in research, interviews, study and drafting, all in furtherance of the appointed task.

Focused efforts to identify logical, interested parties or groups with reasonable pretension to particularized knowledge in areas subject to our investigation were developed. Invitations were extended or communications were undertaken to develop relationships and gather information from such sources. Written submissions or references to information were submitted for review. Testimony was taken not only from members of the general public, but from constitutional experts, statisticians, university professors, present and retired public officials, and representatives of interested organizations, as to what, if any, modifications should be constitutionally implemented to improve the quality of government within the Commonwealth. The Commission also invited the Pennsylvania Bar Association Committees and Sections as well as local Bar Associations or members to participate in the hearings and the information-gathering process, and to submit comments to the Commission.

Each Committee carefully identified issues of import and developed reports for submission to the full Commission. Many Committees benefited greatly from the volunteer efforts of highly dedicated interns who assisted in researching and drafting such reports. All Commission members were given individual reports from the various Committees. The Commission met on Thursday, September 8 and Friday, September 9, 2011 following the eighteen months of Committee work and study of various sections of the Pennsylvania Constitution. There was considerable difficulty assembling on the scheduled dates because of the severe flooding in the aftermath of Hurricane Irene and Tropical Storm Lee. Nevertheless, twenty-one of the members of the Commission persevered in the face of difficult travel conditions to convene at the Pennsylvania Bar Institute in Mechanicsburg, and five other members participated in the meeting by telephone conference call.

The Commission reviewed and debated the recommendations from each Committee and, in turn, as charged, adopted recommendations for presentation to the House of Delegates. After deciding whether recommendations warranted approval, the Commission addressed the issue of how best to implement the recommended changes to the Constitution, and that determination is reported separately.

The Commission completed its study of the six Articles by adopting recommendations in two categories. The first category includes recommendations that the Commission believes will
require constitutional amendment. The second category offers recommendations for the general improvement of government without the need for constitutional change.

The reports of each of the six Committees of the Commission are attached and serve both as background and as the basis for the recommendations adopted by the Commission. Careful consideration of this Report would include scrupulous attention not only to the details of the various recommendations but also the nature of the votes of the full Commission on such recommendations. It can be readily seen that some recommendations garnered the full and unqualified support of the entire Commission. Others, however, engendered significant dissension. Indeed, the strength of the Report resides in the undisputed reality that issues were joined in spirited and sometimes heated discourse. But the Commissioners maintained deep and abiding respect for each other and the views espoused thus allowing the full airing of significant concerns in the crucible of careful and open debate. To that end, the Commission’s efforts and recommendations represent thoughtful decision-making by a diverse group of interested citizens dedicated to improving the Commonwealth’s governance and government.
II.  RECOMMENDATIONS

STRUCTURE OF THE GENERAL ASSEMBLY

ARTICLE II – THE LEGISLATURE

SECTION 3: Terms of Members

Current:
Senators shall be elected for the term of four years and Representatives for the term of two years.

Commission Recommendation:
The Commission recommends that Article II, Section 3 be amended as follows:

   a) Term lengths for Senators should be increased to 6 years;
   b) Term lengths for members of the House should be increased to 4 years;
   c) Staggered terms, so that 50% of the House is running at any given time; and,
   d) Term limits, permitting three consecutive terms.

Recommendations a), b) and c) were adopted by a vote of 18 in favor and 1 opposed. Recommendation d) was adopted by a vote of 14 in favor and 5 opposed.

Commission Recommendation Not Requiring Constitutional Amendment:
The Commission recognizes that limiting the number of terms and the length of terms should result in a measure of de facto campaign finance reform. Given the constitutional limitations placed by the U.S. Supreme Court, limits on spending and contributions are not part of the Commission recommendations. The Commission believes that full disclosure of contributions should be required in a timely fashion. The Commission believes that there should be a time period prior to the opening of the polls on Election Day during which contributions are precluded. The Commission believes that appropriate sanctions should be enacted for failure to comply with any existing statutes addressing these issues.

This recommendation was adopted by the Commission by a vote of 13 in favor and 6 opposed.

SECTION 4: Sessions

Current:
The General Assembly shall be a continuing body during the term for which its Representatives are elected. It shall meet at twelve o’clock noon on the first Tuesday of January each year. Special sessions shall be called by the Governor on petition of a majority of the members elected to each House or may be called by the Governor whenever in his opinion the public interest requires.
Structure of the General Assembly

**Commission Recommendation:**
The Commission recommends that Article II, Section 4 be amended to state that the General Assembly session shall conclude on or before October 31 in the year of a general election.

This recommendation was adopted unanimously by the Commission.

**SECTION 8: Compensation**

**Current:**
*The members of the General Assembly shall receive such salary and mileage for regular and special sessions as shall be fixed by law, and no other compensation whatever, whether for service upon committee or otherwise. No member of either House shall during the term for which he may have been elected, receive any increase of salary, or mileage, under any law passed during such term.*

**Commission Recommendation:**
The Commission recommends that Article II, Section 8 be amended as follows:

a) Expenses shall be reimbursed only upon voucher and documentation; and,
b) Per diem reimbursements are prohibited.

Recommendations a) and b) were adopted by a vote of 18 in favor and 1 opposed.

**Commission Recommendation Not Requiring Constitutional Amendment:**
The Commission supports elimination of preferential financial treatment in deferred compensation plans or health care benefit programs as between elected officials and state employees.

This recommendation was adopted unanimously by the Commission.

**SECTION 16: Legislative Districts**

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

**Commission Recommendation:**

This recommendation was adopted by a vote of 18 in favor and 2 opposed.
ARTICLE III – LEGISLATION

SECTION 4: Consideration of Bills

Current:
Every bill shall be considered on three different days in each House. All amendments made thereto shall be printed for the use of the members before the final vote is taken on the bill and before the final vote is taken, upon written request addressed to the presiding officer of either House by at least twenty-five percent of the members elected to that House, any bill shall be read at length in that House. No bill shall become a law, unless on its final passage the vote is taken by yeas and nays, the names of the persons voting for and against it are entered on the journal, and a majority of the members elected to each House is recorded thereon as voting in its favor.

Commission Recommendation:
The Commission recommends that Article III, Section 4 be amended to require that every bill shall be considered on three different calendar days. A legislative day is a calendar day, defined as 24 hours, ending at midnight, regardless of adjournment or recess.

This recommendation was adopted unanimously by the Commission.

ARTICLE VIII – Taxation and Finance

SECTION 12: Governor’s Budgets and Financial Plan

Current:
Annually, at the times set by law, the Governor shall submit to the General Assembly:
(a) A balanced operating budget for the ensuing fiscal year setting forth in detail (i) proposed expenditures classified by department or agency and by program and (ii) estimated revenues from all sources. If estimated revenues and available surplus are less than proposed expenditures, the Governor shall recommend specific additional sources of revenue sufficient to pay the deficiency and the estimated revenue to be derived from each source;
(b) A capital budget for the ensuing fiscal year setting forth in detail proposed expenditures to be financed from the proceeds of obligations of the Commonwealth or of its agencies or authorities or from operating funds; and
(c) A financial plan for not less than the next succeeding five fiscal years, which plan shall include for each such fiscal year:
(i) Projected operating expenditures classified by department or agency and by program, in reasonable detail, and estimated revenues, by major categories, from existing and additional sources, and
(ii) Projected expenditures for capital projects specifically itemized by purpose, and the proposed sources of financing each.
Structure of the General Assembly

**Commission Recommendation:**
The Commission recommends Article VIII, Section 12 be amended as follows:

If the budget is not passed by June 30, no salaries or funds will be paid to members of the legislative branch and staff, and members of the executive branch and staff out of any fund.

This recommendation was adopted unanimously by the Commission.

**SECTION 13: Appropriations**

**Current:**
(a) Operating budget appropriations made by the General Assembly shall not exceed the actual and estimated revenues and surplus available in the same fiscal year.
(b) The General Assembly shall adopt a capital budget for the ensuing fiscal year.

**Commission Recommendation:**
The Commission recommends the following changes to the budgeting process:

a) No appropriation to the legislature can be a continuing appropriation; and,
b) All amendments to appropriations bills must first be considered by an appropriations committee. This will not preclude the introduction of an amendment from the floor of the General Assembly provided such amendment had been previously submitted to an appropriations committee and rejected.

These recommendations were adopted by the Commission by a vote of 12 in favor and 7 opposed.
LEGISLATIVE REAPPORTIONMENT

ARTICLE II – THE LEGISLATURE

SECTION 16: Legislative Districts

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

Commission Recommendation:
It is the recommendation of the Commission that Article II, Section 16 be amended to include a definition of “compact” based on generally accepted measures of compactness. The Commission therefore recommends the adoption of a definition of compactness that compares legislative districts to the area of a circle. The new definition of “compact” is as follows:

Compactness for purpose of measuring the fairness of a legislative district’s boundaries shall consist of \( \pi \), multiplied by four, multiplied by the area of the district, divided by the perimeter squared.

For a full explanation of this recommendation see pages 37-40 of the attached Legislative Reapportionment Committee report.

This recommendation was adopted unanimously by the Commission.

SECTION 17: Legislative Reapportionment Commission

Current:
(a) In each year following the year of the Federal decennial census, a Legislative Reapportionment Commission shall be constituted for the purpose of reapportioning the Commonwealth. The commission shall act by a majority of its entire membership.
(b) The commission shall consist of five members: four of whom shall be the majority and minority leaders of both the Senate and the House of Representatives, or deputies appointed by each of them, and a chairman selected as hereinafter provided. No later than sixty days following the official reporting of the Federal decennial census as required by Federal law, the four members shall be certified by the President pro tempore of the Senate and the Speaker of the House of Representatives to the elections officer of the Commonwealth who under law shall have supervision over elections. The four members within forty-five days after their certification shall select the fifth member, who shall serve as chairman of the commission, and shall immediately certify his name to such elections officer. The chairman shall be a citizen of the Commonwealth other than a local, State or Federal official holding an office to which compensation is attached.
If the four members fail to select the fifth member within the time prescribed, a majority of the entire membership of the Supreme Court within thirty days thereafter shall appoint the chairman as aforesaid and certify his appointment to such elections officer. Any vacancy in the commission shall be filled within fifteen days in the same manner in which such position was originally filled.

(e) No later than ninety days after either the commission has been duly certified or the population data for the Commonwealth as determined by the Federal decennial census are available, whichever is later in time, the commission shall file a preliminary reapportionment plan with such elections officer.

The commission shall have thirty days after filing the preliminary plan to make corrections in the plan.

Any person aggrieved by the preliminary plan shall have the same thirty-day period to file exceptions with the commission in which case the commission shall have thirty days after the date the exceptions were filed to prepare and file with such elections officer a revised reapportionment plan.

If no exceptions are filed within thirty days, or if filed and acted upon, the commission's plan shall be final and have the force of law.

(d) Any aggrieved person may file an appeal from the final plan directly to the Supreme Court within thirty days after the filing thereof. If the appellant establishes that the final plan is contrary to law, the Supreme Court shall issue an order remanding the plan to the commission and directing the commission to reapportion the Commonwealth in a manner not inconsistent with such order.

(e) When the Supreme Court has finally decided an appeal or when the last day for filing an appeal has passed with no appeal taken, the reapportionment plan shall have the force of law and the districts therein provided shall be used thereafter in elections to the General Assembly until the next reapportionment as required under this section 17.

(f) Any district which does not include the residence from which a member of the Senate was elected whether or not scheduled for election at the next general election shall elect a Senator at such election.

(g) The General Assembly shall appropriate sufficient funds for the compensation and expenses of members and staff appointed by the commission, and other necessary expenses. The members of the commission shall be entitled to such compensation for their services as the General Assembly from time to time shall determine, but no part thereof shall be paid until a preliminary plan is filed. If a preliminary plan is filed but the commission fails to file a revised or final plan within the time prescribed, the commission members shall forfeit all right to compensation not paid.

(h) If a preliminary, revised or final reapportionment plan is not filed by the commission within the time prescribed by this section, unless the time be extended by the Supreme Court for cause shown, the Supreme Court shall immediately proceed on its own motion to reapportion the Commonwealth.

(i) Any reapportionment plan filed by the commission, or ordered or prepared by the Supreme Court upon the failure of the commission to act, shall be published by the elections officer once in at least one newspaper of general circulation in each senatorial and representative district. The publication shall contain a map of the Commonwealth showing the complete reapportionment of the General Assembly by districts, and a map showing the reapportionment districts in the area normally served by the newspaper in which the publication is made. The
Commission Recommendation:
The Commission recommends that Article II, Section 17(b), providing for the selection of the chair of the Redistricting Commission, should be amended to provide as follows:

a) To provide that no sitting or former judge of the Pennsylvania Courts or sitting or former member of the Pennsylvania Legislature may serve as Chair of the Redistricting Commission. It is the Commission’s view that such a change reinforces the appearance of independence of the Pennsylvania Supreme Court in addressing any challenge to the Redistricting Plans proposed by the Commission.
b) That the present system of selecting the Chair of the Legislative Reapportionment Commission by the other four legislative members of the Commission be retained. If, however, the Legislative members fail to agree on the appointment of a Chair, then the Supreme Court will do so as is presently required by Article II, Section 17, but with the added requirement that the appointment be made by a super-majority of five of the seven members of the Supreme Court.
c) If the Supreme Court cannot achieve a super majority to appoint the chair, a majority of the sitting commissioned appellate justices and judges of the Supreme, Commonwealth and Superior Courts shall make the appointment.

Recommendations a) and b) were adopted unanimously by the Commission. Recommendation c) was adopted by a vote of 17 in favor and 1 opposed.

Commission Recommendation:
The Commission recommends that Article II, Section 17(c) be amended to require that the Redistricting Commission prepare a detailed record supporting both the preliminary and final reapportionment plans.

This recommendation was adopted unanimously by the Commission.

Commission Recommendation:
The Commission believes that the reapportionment process should be an open and public process. It is the Commission’s recommendation that Article II, Section 17(c) be amended to provide that during the 120 day period currently provided for the Legislative Redistricting Commission to develop its preliminary plan (90 days) and to receive comments thereto (an additional 30 days). Further that the Chair of the Commission be required to undertake or oversee the following measures:

a) Conduct hearings across the State to receive public comment relating to the development of the proposed redistricting plan for the Senate and House Districts.
b) Provide for public participation in the redistricting process through the use of advanced communications technology and for publishing the Commission’s preliminary plan for public comment within the currently prescribed 30-day period.
Legislative Reapportionment

c) Review of all public comment and alternate proposed plans and consideration of such in development of the Commission’s preliminary and final reapportionment plans.
d) Advise the public, through the use of advanced communications technology, including both electronic and print editions of all newspapers of general circulation in the Commonwealth, about the importance of the reapportionment process and its impact on voting rights.

Recommendations a), b), c) and d) were adopted unanimously by the Commission.

**Commission Recommendation:**
The Commission appreciates that the proposed amendments to Article II, Section 17 place an added burden on the Legislative Reapportionment Commission and on the Commission Chair. The Commission therefore recommends that Article II, Section 17(g) be amended to authorize the Commission Chair to retain an Executive Director as well as such additional support staff as may be required and that such staff resources would be adequately funded by the legislature.

This recommendation was adopted unanimously by the Commission.

**REAPPORTIONMENT OF UNITED STATES CONGRESSIONAL DISTRICTS IN PENNSYLVANIA**

**Current:**
*Not presently provided for in the Pennsylvania Constitution.*

**Commission Recommendation:**
The Commission comprehends that the same deficiencies in the process for reapportioning Pennsylvania House and Senate districts are present in the process for drawing Pennsylvania Congressional districts. The boundaries for Congressional districts in Pennsylvania have frequently been drawn to protect incumbents and to increase advantage for one political party over another. It is apparent from the distorted shapes of the Pennsylvania Congressional districts why these districts are considered to be among the most gerrymandered in the nation (see appendix 4). Therefore, the Commission proposes a constitutional amendment to provide that Congressional districts would be determined by the same Commission charged with drawing state legislative districts under the Pennsylvania Constitution. The Commission concedes that this proposal will have no impact until at least 2021. It is the opinion of the Commission that there is more than sufficient time for careful consideration of this proposal to change the manner in which Congressional districts are established in Pennsylvania.

This recommendation was adopted unanimously by the Commission.
ARTICLE III – LEGISLATION

SECTION 14: Public School System

Current:
The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.

Commission Recommendation:
It is the recommendation of the Commission that Article III, Section 14 be amended to read as follows:

The education of children is a fundamental value of the citizens of the Commonwealth. It is, therefore, a paramount duty of the Commonwealth to make adequate provision for the education of all children residing in the State. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of other public education programs that serve the needs of the Commonwealth. All actions by the General Assembly regarding education shall be subject to review by the court.

This recommendation was adopted by the Commission by a vote of 16 in favor and 4 opposed.
JUDICIARY

ARTICLE V – THE JUDICIARY

SECTION 13: Election of Justices, Judges, and Justices of the Peace, Vacancies

Current:
(a) Justices, judges and justices of the peace shall be elected at the municipal election next preceding the commencement of their respective terms of office by the electors of the Commonwealth or the respective districts in which they are to serve.
(b) A vacancy in the office of justice, judge or justice of the peace shall be filled by appointment by the Governor. The appointment shall be with the advice and consent of two-thirds of the members elected to the Senate, except in the case of justices of the peace which shall be by a majority. The person so appointed shall serve for a term ending on the first Monday of January following the next municipal election more than ten months after the vacancy occurs or for the remainder of the unexpired term whichever is less, except in the case of persons selected as additional judges to the Superior Court, where the General Assembly may stagger and fix the length of the initial terms of such additional judges by reference to any of the first, second and third municipal elections more than ten months after the additional judges are selected. The manner by which any additional judges are selected shall be provided by this section for the filling of vacancies in judicial offices.
(c) The provisions of section thirteen (b) shall not apply either in the case of a vacancy to be filled by retention election as provided in section fifteen (b), or in the case of a vacancy created by failure of a justice or judge to file a declaration for retention election as provided in section fifteen (b). In the case of a vacancy occurring at the expiration of an appointive term under section thirteen (b), the vacancy shall be filled by election as provided in section thirteen (a).
(d) At the primary election in 1969, the electors of the Commonwealth may elect to have the justices and judges of the Supreme, Superior, Commonwealth and all other statewide courts appointed by the Governor from a list of persons qualified for the offices submitted to him by the Judicial Qualifications Commission. If a majority vote of those voting on the question is in favor of this method of appointment, then whenever any vacancy occurs thereafter for any reason in such court, the Governor shall fill the vacancy by appointment in the manner prescribed in this subsection. Such appointment shall not require the consent of the Senate.
(e) Each justice or judge appointed by the Governor under section thirteen (d) shall hold office for an initial term ending the first Monday of January following the next municipal election more than twenty-four months following the appointment.

Commission Recommendation:
The Commission recommends that the Pennsylvania Constitution be amended to create an appointive system for the appellate judiciary.

This recommendation was adopted by the Commission by a vote of 12 in favor and 10 opposed.
SECTION 18: Suspension, Removal, Discipline and Compulsory Retirement

Current:
(a) There shall be an independent board within the Judicial Branch, known as the Judicial Conduct Board, the composition, powers and duties of which shall be as follows:
(1) The board shall be composed of 12 members, as follows: two judges, other than senior judges, one from the courts of common pleas and the other from either the Superior Court or the Commonwealth Court, one justice of the peace who need not be a member of the bar of the Supreme Court, three non-judge members of the bar of the Supreme Court and six non-lawyer electors.
(2) The judge from either the Superior Court or the Commonwealth Court, the justice of the peace, one non-judge member of the bar of the Supreme Court and three non-lawyer electors shall be appointed to the board by the Supreme Court. The judge from the courts of common pleas, two non-judge members of the bar of the Supreme Court and three non-lawyer electors shall be appointed to the board by the Governor.
(3) Except for the initial appointees whose terms shall be provided by the schedule to this article, the members shall serve for terms of four years. All members must be residents of this Commonwealth. No more than three of the six members appointed by the Supreme Court may be registered in the same political party. No more than three of the six members appointed by the Governor may be registered in the same political party. Membership of a judge or justice of the peace shall terminate if the member ceases to hold the judicial position that qualified the member for the appointment. Membership shall terminate if a member attains a position that would have rendered the member ineligible for appointment at the time of the appointment. A vacancy shall be filled by the respective appointing authority for the remainder of the term to which the member was appointed. No member may serve more than four consecutive years but may be reappointed after a lapse of one year. The Governor shall convene the board for its first meeting. At that meeting and annually thereafter, the members of the board shall elect a chairperson. The board shall act only with the concurrence of a majority of its members.
(4) No member of the board, during the member's term, may hold office in a political party or political organization. Except for a judicial member, no member of the board, during the member's term, may hold a compensated public office or public appointment. All members shall be reimbursed for expenses necessarily incurred in the discharge of their official duties.
(5) The board shall prescribe general rules governing the conduct of members. A member may be removed by the board for a violation of the rules governing the conduct of members.
(6) The board shall appoint a chief counsel and other staff, prepare and administer its own budget as provided by law, exercise supervisory and administrative authority over all board staff and board functions, establish and promulgate its own rules of procedure, prepare and disseminate an annual report and take other actions as are necessary to ensure its efficient operation. The budget request of the board shall be made by the board as a separate item in the request submitted by the Supreme Court on behalf of the Judicial Branch to the General Assembly.
(7) The board shall receive and investigate complaints regarding judicial conduct filed by individuals or initiated by the board, issue subpoenas to compel testimony under oath of witnesses, including the subject of the investigation, and to compel the production of documents, books, accounts and other records relevant to the investigation; determine whether there is probable cause to file formal charges against a justice, judge or justice of the peace for conduct
proscribed by this section; and present the case in support of the charges before the Court of Judicial Discipline.

(8) Complaints filed with the board or initiated by the board shall not be public information. Statements, testimony, documents, records or other information or evidence acquired by the board in the conduct of an investigation shall not be public information. A justice, judge or justice of the peace who is the subject of a complaint filed with the board or initiated by the board or of an investigation conducted by the board shall be apprised of the nature and content of the complaint and afforded an opportunity to respond fully to the complaint prior to any probable cause determination by the board. All proceedings of the board shall be confidential except when the subject of the investigation waives confidentiality. If, independent of any action by the board, the fact that an investigation by the board is in progress becomes a matter of public record, the board may, at the direction of the subject of the investigation, issue a statement to confirm that the investigation is in progress, to clarify the procedural aspects of the proceedings, to explain the rights of the subject of the investigation to a fair hearing without prejudgment or to provide the response of the subject of the investigation to the complaint. In acting to dismiss a complaint for lack of probable cause to file formal charges, the board may, at its discretion, issue a statement or report to the complainant or to the subject of the complaint, which may contain the identity of the complainant, the identity of the subject of the complaint, the contents and nature of the complaint, the actions taken in the conduct of the investigation and the results and conclusions of the investigation. The board may include with a report a copy of information or evidence acquired in the course of the investigation.

(9) If the board finds probable cause to file formal charges concerning mental or physical disability against a justice, judge or justice of the peace, the board shall so notify the subject of the charges and provide the subject with an opportunity to resign from judicial office or, when appropriate, to enter a rehabilitation program prior to the filing of the formal charges with the Court of Judicial Discipline.

(10) Members of the board and its chief counsel and staff shall be absolutely immune from suit for all conduct in the course of their official duties. No civil action or disciplinary complaint predicated upon the filing of a complaint or other documents with the board or testimony before the board may be maintained against any complainant, witness or counsel.

(b) There shall be a Court of Judicial Discipline, the composition, powers and duties of which shall be as follows:

(1) The court shall be composed of a total of eight members as follows: three judges other than senior judges from the courts of common pleas, the Superior Court or the Commonwealth Court, one justice of the peace, two non-judge members of the bar of the Supreme Court and two non-lawyer electors. Two judges, the justice of the peace and one non-lawyer elector shall be appointed to the court by the Supreme Court. One judge, the two non-judge members of the bar of the Supreme Court and one non-lawyer elector shall be appointed to the court by the Governor.

(2) Except for the initial appointees whose terms shall be provided by the schedule to this article, each member shall serve for a term of four years; however, the member, rather than the member's successor, shall continue to participate in any hearing in progress at the end of the member's term. All members must be residents of this Commonwealth. No more than two of the members appointed by the Supreme Court may be registered in the same political party. No more than two of the members appointed by the Governor may be registered in the same political party. Membership of a judge or justice of the peace shall terminate if the judge or justice of the
peace ceases to hold the judicial position that qualified the judge or justice of the peace for appointment. Membership shall terminate if a member attains a position that would have rendered that person ineligible for appointment at the time of the appointment. A vacancy on the court shall be filled by the respective appointing authority for the remainder of the term to which the member was appointed in the same manner in which the original appointment occurred. No member of the court may serve more than four consecutive years but may be reappointed after a lapse of one year.

(3) The court shall prescribe general rules governing the conduct of members. A member may be removed by the court for a violation of the rules of conduct prescribed by the court. No member, during the member's term of service, may hold office in any political party or political organization. Except for a judicial member, no member of the court, during the member's term of service, may hold a compensated public office or public appointment. All members of the court shall be reimbursed for expenses necessarily incurred in the discharge of their official duties.

(4) The court shall appoint staff and prepare and administer its own budget as provided by law and undertake actions needed to ensure its efficient operation. All actions of the court, including disciplinary action, shall require approval by a majority vote of the members of the court. The budget request of the court shall be made as a separate item in the request by the Supreme Court on behalf of the Judicial Branch to the General Assembly. The court shall adopt rules to govern the conduct of proceedings before the court.

(5) Upon the filing of formal charges with the court by the board, the court shall promptly schedule a hearing or hearings to determine whether a sanction should be imposed against a justice, judge or justice of the peace pursuant to the provisions of this section. The court shall be a court of record, with all the attendant duties and powers appropriate to its function. Formal charges filed with the court shall be a matter of public record. All hearings conducted by the court shall be public proceedings conducted pursuant to the rules adopted by the court and in accordance with the principles of due process and the law of evidence. Parties appearing before the court shall have a right to discovery pursuant to the rules adopted by the court and shall have the right to subpoena witnesses and to compel the production of documents, books, accounts and other records as relevant. The subject of the charges shall be presumed innocent in any proceeding before the court, and the board shall have the burden of proving the charges by clear and convincing evidence. All decisions of the court shall be in writing and shall contain findings of fact and conclusions of law. A decision of the court may order removal from office, suspension, censure or other discipline as authorized by this section and as warranted by the record.

(6) Members of the court and the court's staff shall be absolutely immune from suit for all conduct in the course of their official duties, and no civil action or disciplinary complaint predicated on testimony before the court may be maintained against any witness or counsel.

(c) Decisions of the court shall be subject to review as follows:

(1) A justice, judge or justice of the peace shall have the right to appeal a final adverse order of discipline of the court. A judge or justice of the peace shall have the right to appeal to the Supreme Court in a manner consistent with rules adopted by the Supreme Court; a justice shall have the right to appeal to a special tribunal composed of seven judges, other than senior judges, chosen by lot from the judges of the Superior Court and Commonwealth Court who do not sit on the Court of Judicial Discipline or the board, in a manner consistent with rules adopted by the Supreme Court. The special tribunal shall hear and decide the appeal in the same manner in which the Supreme Court would hear and decide an appeal from an order of the court.
(2) On appeal, the Supreme Court or special tribunal shall review the record of the proceedings of the court as follows: on the law, the scope of review is plenary; on the facts, the scope of review is clearly erroneous; and, as to sanctions, the scope of review is whether the sanctions imposed were lawful. The Supreme Court or special tribunal may revise or reject an order of the court upon a determination that the order did not sustain this standard of review; otherwise, the Supreme Court or special tribunal shall affirm the order of the court.

(3) An order of the court which dismisses a complaint against a judge or justice of the peace may be appealed by the board to the Supreme Court, but the appeal shall be limited to questions of law. An order of the court which dismisses a complaint against a justice of the Supreme Court may be appealed by the board to a special tribunal in accordance with paragraph (1), but the appeal shall be limited to questions of law.

(4) No justice, judge or justice of the peace may participate as a member of the board, the court, a special tribunal or the Supreme Court in any proceeding in which the justice, judge or justice of the peace is a complainant, the subject of a complaint, a party or a witness.

(d) A justice, judge or justice of the peace shall be subject to disciplinary action pursuant to this section as follows:

(1) A justice, judge or justice of the peace may be suspended, removed from office or otherwise disciplined for conviction of a felony; violation of section 17 of this article; misconduct in office; neglect or failure to perform the duties of office or conduct which prejudices the proper administration of justice or brings the judicial office into disrepute, whether or not the conduct occurred while acting in a judicial capacity or is prohibited by law; or conduct in violation of a canon or rule prescribed by the Supreme Court. In the case of a mentally or physically disabled justice, judge or justice of the peace, the court may enter an order of removal from office, retirement, suspension or other limitations on the activities of the justice, judge or justice of the peace as warranted by the record. Upon a final order of the court for suspension without pay or removal, prior to any appeal, the justice, judge or justice of the peace shall be suspended or removed from office; and the salary of the justice, judge or justice of the peace shall cease from the date of the order.

(2) Prior to a hearing, the court may issue an interim order directing the suspension, with or without pay, of any justice, judge or justice of the peace against whom formal charges have been filed with the court by the board or against whom has been filed an indictment or information charging a felony. An interim order under this paragraph shall not be considered a final order from which an appeal may be taken.

(3) A justice, judge or justice of the peace convicted of misbehavior in office by a court, disbarred as a member of the bar of the Supreme Court or removed under this section shall forfeit automatically his judicial office and thereafter be ineligible for judicial office.

(4) A justice, judge or justice of the peace who files for nomination for or election to any public office other than a judicial office shall forfeit automatically his judicial office.

(5) This section is in addition to and not in substitution for the provisions for impeachment for misbehavior in office contained in Article VI. No justice, judge or justice of the peace against whom impeachment proceedings are pending in the Senate shall exercise any of the duties of office until acquittal.
**Commission Recommendation:**
The Commission recommends that Article V, Section 18 be amended to include a new section as follows:

Following a preliminary investigation, if the board determines there may be imminent danger to litigants, the court system, or the administration of justice, it may petition the court for an emergency hearing. Following the emergency hearing, the court may issue an interim order directing the suspension, with or without pay, of any justice, judge or justice of the peace. An interim order under this paragraph shall not be considered a final order from which an appeal may be taken.

For a full explanation of this recommendation see page 104 of the Judiciary Committee report and page 142 of the Judicial Discipline report.

This recommendation was adopted by the Commission by a vote of 12 in favor and 7 opposed.

**REQUIREMENT OF COUNSEL IN DELINQUENCY OR DEPENDENCY PROCEEDINGS**

**Current:**
*Not presently provided for in the constitution.*

**Commission Recommendation:**
The Commission recommends that Article V be amended to include the following:

A waiver of counsel shall not be accepted by the court in any juvenile delinquency or dependency proceeding.

This recommendation was adopted unanimously by the Commission.

**MANDATORY VOTER’S JUDICIAL ELECTION GUIDES**

**Commission Recommendation Not Requiring Constitutional Amendment:**
The Commission recommends that the legislature enact a provision that would require mandatory voter guides for appellate court candidates to be published and mailed to every household. The Commission notes that this is would be an interim program, since the Commission is recommending the adoption of an appointive system for the appellate courts.

The Commission adopted this recommendation by a vote of 14 in favor and 8 opposed.

**RECUSAL**

**Commission Recommendation Not Requiring Constitutional Amendment:**
The Commission urges the Supreme Court task force on recusal to adopt a concrete and predictable mechanism to promote judicial independence and the public’s perception of the
Judiciary

integrity of the judicial process by imposing guidelines to assure that a sitting judge is not beholden to a specific litigant, lawyer, or party.

The Commission adopted this recommendation by a vote of 18 in favor and 3 opposed.

ARTICLE VIII – TAXATION AND FINANCE

SECTION 13: Appropriations

Current:
(a) Operating budget appropriations made by the General Assembly shall not exceed the actual and estimated revenues and surplus available in the same fiscal year.
(b) The General Assembly shall adopt a capital budget for the ensuing fiscal year.

Commission Recommendation:
The Commission recommends that Article VIII, Section 13 be amended to provide as follows:

The General Assembly shall, by separate annual appropriation, adequately fund the unified judicial system through the Supreme Court, in an amount sufficient to perform its core functions and duties as a co-equal branch of government.

This recommendation was adopted unanimously by the Commission.
TAXATION AND UNIFORMITY CLAUSE

ARTICLE VIII – Taxation and Finance

SECTION 1: Uniformity of Taxation

Current:
All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.

Commission Recommendation:
The Commission recommends that Article VIII, Section 1 be amended as follows:

a) All property taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; a tax on income is not a tax on property.

b) Real property is not a single class of property and the legislature may establish specific classes of real estate for taxation purpose.

Recommendation a) was adopted by the Commission by a vote of 18 in favor, 3 opposed and 1 abstention. Recommendation b) was adopted by the Commission by a vote of 18 in favor, 4 opposed and 1 abstention.
LOCAL GOVERNMENT

ARTICLE IX – LOCAL GOVERNMENT

SECTION 1: Local Government

Current:
The General Assembly shall provide by general law for local government within the Commonwealth. Such general law shall be uniform as to all classes of local government regarding procedural matters.

Commission Recommendation:
The Commission recommends that Article IX, Section 1 be amended to include the following:

The State will not impose any new spending requirements that do not have state funding.

This recommendation was adopted unanimously by the Commission.

SECTION 4: County Government

Current:
County officers shall consist of commissioners, controllers, or auditors, district attorneys, public defenders, treasurers, sheriffs, registers of wills, recorders of deeds, prothonotaries, clerks of the courts, and such others as may from time to time be provided by law.
County officers, except for public defenders who shall be appointed as shall be provided by law, shall be elected at the municipal elections and shall hold their offices for the term of four years, beginning on the first Monday of January next after their election, and until their successors shall be duly qualified, all vacancies shall be filled in such a manner as may be provided by law.
County officers shall be paid only by salary as provided by law for services performed for the county or any other governmental unit. Fees incidental to the conduct of any county office shall be payable directly to the county or the Commonwealth, or as otherwise provided by law.
Three county commissioners shall be elected in each county. In the election of these officers each qualified elector shall vote for no more than two persons, and the three persons receiving the highest number of votes shall be elected.
Provisions for county government in this section shall apply to every county except a county which has adopted a home rule charter or an optional form of government. One of the optional forms of county government provided by law shall include the provisions of this section.

Commission Recommendation:
The Commission recommends that Article IX, Section 4 be amended to remove the compulsory election of the following row officers: Treasurer, Register of Wills, Recorder of Deeds, Prothonotary, and Clerk of Courts. There is no longer a justification for the election of these offices. Those officials with authority to set “policy,” such as Sheriff, should continue to be elected.

This recommendation was adopted by a vote of 14 in favor and 4 opposed.
SECTION 8: Consolidation, Merger or Boundary Change

Current:
Uniform Legislation. -- The General Assembly shall, within two years following the adoption of this article, enact uniform legislation establishing the procedure for consolidation, merger or change of the boundaries of municipalities.
Initiative. -- The electors of any municipality shall have the right, by initiative and referendum, to consolidate, merge and change boundaries by a majority vote of those voting thereon in each municipality, without the approval of any governing body.
Study. -- The General Assembly shall designate an agency of the Commonwealth to study consolidation, merger and boundary changes, advise municipalities on all problems which might be connected therewith, and initiate local referendum.
Legislative Power. -- Nothing herein shall prohibit or prevent the General Assembly from providing additional methods for consolidation, merger or change of boundaries.

Commission Recommendation Not Requiring Constitutional Amendment:
The Commission did not take a position on proposing an amendment to Article IX, Section 8, but instead it is the recommendation of the Commission that the issue of whether or not benefits could be achieved through a reduction in the number of municipalities in Pennsylvania should be subject to further examination and study.

This recommendation was adopted unanimously by the Commission.
MISCELLANEOUS

ARTICLE III – LEGISLATION

SECTION D: Other Legislation Specifically Authorized

Current:
Not presently provided for in the constitution.

Commission Recommendation:
The Commission recommends that Article III be amended by the addition of a Section 27.1* to provide as follows:

Future Legislative Action
a) The Legislature may enact laws relating to legislative procedure to be followed in the enactment of legislation.
b) A law under subsection (a) shall be binding upon the legislature until it is repealed, and the repeal shall only be effective as applied to legislation enacted after the repeal takes effect. A repeal of a law under subsection (a) containing a legislative procedure requiring a supermajority vote must be enacted with the same supermajority vote as that required in the law subject to repeal.
c) The Judiciary shall invalidate enactment of legislation on the ground of noncompliance with a law under subsection (a) if it finds, under the particular facts of the case, that the public interest in enforcing the procedural requirements of the law under subsection (a) outweighs any public interest in sustaining the validity of the enactment of the new legislation.

For a full explanation of this recommendation see page 143.

This recommendation was adopted by the Commission by a vote of 21 in favor, 0 opposed and 2 abstentions.

*The Commission suggests adding this provision to Article III, D. Other Legislation Specifically Authorized as Section 27.1 to avoid the renumbering of existing sections in Article III.
COMMISSION RECOMMENDATION FOR IMPLEMENTATION OF THE RECOMMENDED CHANGES

The Commission took no steps to address the methodology for amending the Constitution until it had fully debated and considered Committee proposals and decided which recommendations would be adopted. Thus, the final question before the Commission was whether or not to recommend amendment of the Constitution under the provisions of Article XI of the Constitution or through a Limited Constitutional Convention. The Commission recognizes that this is primarily a political question. The Commission, however, is also aware that many of the recommended amendments to the Constitution have for many years been the subject of efforts by various members of the legislature to amend the Constitution under the provisions of Article XI. Most members of the Commission believe that it is unlikely that the Commission’s recommendations can be accomplished through the Article XI amendment process.

Before considering the possibility of recommending a Limited Constitutional Convention the Commission received a report on both the authority for assembling a limited constitutional convention and the case law supporting such a call. The Commission recognizes that the Constitution was amended in 1874 and 1968 through a Limited Constitutional Convention and that in both instances the constitutionality of a convention limited in scope by the legislature was sustained by the Pennsylvania Supreme Court.

The Commission resolved that the amendments recommended by the Commission be addressed through the convening of a Limited Constitutional Convention. The motion in support of this resolution was adopted by a vote of 17 in favor and 3 opposed.

Even after the final meeting and vote, the issue continued to percolate. Further informal discussion among members of the Commission suggested the wisdom of reconsidering the decision to commit to a specific recommendation. The Commission reconsidered and, by a vote of 24 in favor and 1 opposed, adopted an approach of deference to others.

By way of explanation, and notwithstanding the Commission’s charge to identify the most effective method for implementing the changes recommended, we now recognize that selection of a single method ignores political reality. The Commission does not know what those realities will be at the time a decision is made to pursue constitutional change. Thus, such a decision is best left to the others in the PBA who will be in a superior position to gauge the then-current winds of (and for) change.

As noted previously, there exist two principal methods for making changes to our constitution. Although the Pennsylvania Constitution contains no express procedure for calling a Constitutional Convention, well-recognized past practice based on Article I, Section 2 of the Pennsylvania Constitution has established that the starting point commands a legislative call for such a proceeding. Our Constitution also offers a specific mechanism for amendment. It requires invocation of such a process by a majority of both houses of the General Assembly in two consecutive but separate legislative sessions and then approval by the electorate. Pa. Const. art. XI. Under any circumstance, the process begins with the legislature.
Given the inherent political nature of our General Assembly and the increasingly rapid pace of change today, any effort to promote constitutional modification necessarily entails awareness of the extant political conditions. In performing the calculus of political action, considerations may include the practical; (What will a Constitutional Convention cost? How may possible changes affect a given legislator’s future prospects for advancement?); the political (Are any issues related to a specified amendment being promoted by an active group or portion of a given legislator’s constituency? Can constitutional change enhance the legislator’s own personal agenda?); the purposeful (Is there a current, identified, overarching necessity for a given proposal?) and the prevailing (Is there a strong, general sense among the citizenry that specific or general changes are needed now – or will wholesale change to the legislative body result from a failure to act?). One thing is clear, the prospect of constitutional revision as reposed in the legislature is a moving target – subject to the vagaries of many variables – all of which may evolve over time. As such, the prospect of implementing constitutional change and the preferred mechanism for achieving the modifications should be made on an ad hoc basis, giving due regard to all prevailing factors at the time that it is made. Our Commission firmly believes that its recommendations possess significant value for improving the Commonwealth’s government and the lives of its people. To that end, we place paramount importance on implementation efforts. Therefore, we also conclude that allowing others to select the method most likely to result in acceptance of our proposals at a future point in time maximizes the prospect of successful constitutional change.
III. COMMITTEE REPORTS

STRUCTURE OF THE GENERAL ASSEMBLY

The Pennsylvania Legislature has authorized the submission to the voters of 53 ballot questions and proposed amendments to the Constitution from 1968-2005. Not one has addressed the significant issues of procedural and structural reform addressed by the Structure of the General Assembly Committee in public hearings and during our deliberations. Given the legislature’s control of the amendment process, the Committee recommends either a limited constitutional convention to address the changes proposed or a constitutional amendment that would permit the constitutional voter initiative limited in scope to the matters addressed in Articles II and III.

The SGA Committee members are, fundamentally, opposed to an open constitutional convention, recognizing the perils associated with convening same. The Committee recognizes that many of the reforms discussed in this report have been proposed in different forms in multiple pieces of legislation, many of which are still pending in Harrisburg. The Committee conceives that many of the reforms we suggest could be accomplished legislatively. However, given the legislature’s unwillingness to adopt these reforms, the Committee believes that a limited constitutional convention may be the only method available to adopt these reforms. In doing so, the voters of the Commonwealth of Pennsylvania will be given a voice in legislative reform, something the legislature has blocked at every attempt.

After research and public hearings, the Structure of the General Assembly recommends the following:

I. Size of General Assembly

The Structure of the General Assembly Committee recommends that the PBA CRC recommend amending the constitution, either by limited constitutional convention or through the legislative process, to reduce the size of the General Assembly, limit staffing of the General Assembly and limit its budget.

Comment:

Pennsylvania boasts the largest full-time legislative body in the United States. The population of California, New York and Florida all have exceeded that of Pennsylvania by at least 50%, yet each has fewer legislators. Only California’s legislature and staff cost more than Pennsylvania’s. The legislative staff in Pennsylvania has more than doubled in the last 10 years. The size of Pennsylvania’s legislature undermines consideration of individual opinions and undercuts the prospect of meaningful debate in either the House or the Senate. Without more input and research, it is impossible for the Committee to make a specific recommendation as to the appropriate size for either the House or the Senate. However, it is the opinion of the Committee that the size of the legislature should be reduced by amendment to the Constitution.

II. Term Limits/Length of Terms

The SGA Committee recommends to the PBA CRC that Article II, Section 3 be amended, either through limited constitutional convention or through the Article XI process, as follows:

- Term lengths for Senators should be increased to 6 years.
Term lengths for members of the House should be increased to 4 years.
Staggered terms, so that 50% of the House is running at any given time.
Term limits, permitting three consecutive terms

Comment:

Longer terms for members of the Legislature result in less time campaigning. Further, it results in less fund-raising and less potential abuse in the campaign finance area. Longer terms support the commitment needed to treat the office as a full-time job and enables legislators to “learn the ropes” before they have to seek reelection. Longer terms enable legislators to consider long term implications of legislation. Shorter terms may result in legislators being overly concerned with public opinion as it impacts their re-election. Term limits inhibits the possibility of career politicians and reduces electoral advantages for incumbents. It may also result in lower state and local spending and taxes.

III. Legislative Sessions

The SGA Committee recommends to the PBA CRC that it recommend that Article II, Section 4 be amended, either through limited constitutional convention or through the Article XI process, to state that the general assembly session shall conclude on or before October 31 in the year of a general election.

Comment:

Pennsylvania is one of only ten full-time legislatures in the United States. This adds to the high cost of the legislature. Critics have reported that a large number of pieces of legislation are passed in the time frame following the general election in what is called the “lame duck” session. To cut costs and to make the legislature more accountable to their constituents, the Constitution, Article III, Section 4 should be amended to require adjournment prior to November 1 of the year of a general election.

IV. Compensation

The SGA Committee recommends to the PBA CRC that it recommend that Article II, Section 8 be amended, either through limited constitutional convention or through the Article XI process, as follows:

- Expenses shall be reimbursed only upon voucher and documentation;
- Per diem reimbursements are prohibited;
- Pension and health care plans will be the same as those provided to all other state employees.

Comment:

Article III, Section 8 provides language for compensation reimbursement for members of the General Assembly. Currently, members have been reimbursed for expenses without providing any proof of actual expenses and have awarded themselves pensions and health care plans that are much more generous than those provided to other state employees. The Constitution should be amended to specifically require payment for expenses only upon receipt of
vouchers for costs expended and to provide specifically that the General Assembly’s pension and health care plans will be the same as those provided to all other state employees.

In addition, the Committee recommends an inquiry into the expenditures of the General Assembly for members and staff including but not limited to health benefits, pension, per diem. This examination can take place either as legislative hearings or as part of a limited constitutional convention.

V. Legislative Processes

The SGA Committee recommends to the PBA CRC that it recommend that Article III, Section 4 be amended, either through limited constitutional convention or through the Article XI process, as follows:

- Every bill shall be considered on three different calendar days. A legislative day is a calendar day, defined as 24 hours, ending at midnight, regardless of adjournment or recess.

Comment:

On the issue of legislative days, the current practice of each chamber of the General Assembly is to recess rather than adjourn at the end of a day. This results in a fictitious computation of days. The reconvening of the chamber on a different day takes place, as a legal fiction, on the day of recess, which could be months earlier. On the actual day of reconvening, there could be two days: the day of recess, following the legal fiction; and the actual day of reconvening, following the calendar.

The most important reason for this practice is to avoid the interpretation that the Constitutional provision on adjournment of the General Assembly preventing return of a veto is not limited to sine die adjournment. Jubelirer v. Pennsylvania Department of State, 859 A.2d 874, 877, n.2 (Pa. Commonwealth 2004), aff’d per curiam, 582 Pa. 364, 871 A.2d 789 (2005). The simplest solution is to amend Article IV, Section 15 so that the provision applies only to sine die adjournment. The practice of recess rather than adjournment, and the resulting fictitious computation of days, would no longer be necessary.

To make sure the practice of fictitious computation is completely eliminated, Article II, Section 14 would have to be amended to require each adjournment to be to a subsequent day. Suggested language follows.

ARTICLE II

Neither House shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting. Each adjournment shall be to a subsequent day.

ARTICLE IV
Section 15. Approval of bills; vetoes.

Every bill which shall have passed both Houses shall be presented to the Governor; if he approves he shall sign it, but if he shall not approve he shall return it with his objections
to the House in which it shall have originated, which House shall enter the objections at large upon their journal, and proceed to re-consider it. If after such re-consideration, two-thirds of all the members elected to that House shall agree to pass the bill, it shall be sent with the objections to the other House by which likewise it shall be re-considered, and if approved by two-thirds of all the members elected to that House it shall be a law; but in such cases the votes of both Houses shall be determined by yeas and nays, and the names of the members voting for and against the bill shall be entered on the journals of each House, respectively. If any bill shall not be returned by the Governor within ten days after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the General Assembly, by their adjournment sine die, prevent its return, in which case it shall be a law, unless he shall file the same, with his objections, in the office of the Secretary of the Commonwealth, and give notice thereof by public proclamation within 30 days after such adjournment.

The Committee recognizes that the Pennsylvania Senate and House of Representatives have adopted internal operating procedures to prohibit the practice described above. However, this Committee believes that this problem should be addressed constitutionally as well.

VI. Legislative Qualifications

The SGA Committee recommends that Article II, Section 5 be supplemented by the legislature to broaden those areas that would impute disqualification of members including ethical violations and failure to meet statutory requirements germane to holding office and/running for election.

Comment: Article II, Section 5 currently states the following:

...Senators shall be at least twenty-five years of age and Representatives twenty-one years of age. They shall have been citizens and inhabitants of their respective districts one year next before their election (unless absent on the public business of the United States or of this State) and shall reside in their respective districts during their terms of service...

As currently phrased, if the Pennsylvania Supreme Court follows the reasoning of the United States Supreme Court in Powell v. McCormack, 395 U.S. 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), this would mean that the Pennsylvania General Assembly could not add or subtract from the qualifications or disqualifications currently enumerated in Article II, Section 5 of the Pennsylvania Constitution. The SGA Committee believes that additional criteria for determining qualification or disqualification should be added to the constitution. The SGA Committee believes that the Pennsylvania Constitution should permit the General Assembly to add additional enumerated disqualifications. The SGA Committee could not achieve a consensus as to specific language but we unanimously agreed that additional disqualifications for holding legislative office should be considered.

VII. Representative Democracy

The SGA Committee recommends that legislative recall be included in Pennsylvania’s constitution but this Committee lacked sufficient information to recommend a specific method of recall. The Committee recommends that legislative recall be discussed at either a limited constitutional convention or through the Article XI process.
VIII. Campaign Finance Reform

By limiting number of terms and by lengthening terms, the Committee recognizes that these changes should result in a measure of de facto campaign finance reform. Recall brings a further measure of accountability. Given the constitutional limitations placed by the U.S. Supreme Court, limits on spending and contributions are not part of this Committee’s recommendations. Nevertheless, we believe that full disclosure of contributions should be required in a timely fashion. This Committee concludes that disclosure of access to elected officials by contributors is essential. This Committee also believes that appropriate sanctions should be enacted for failure to comply with any statutes enacted addressing these issues.

IX. Budgeting Process

The SGA Committee recommends to the PBA CRC the following changes to the budgeting process:

A. Continuing Appropriation: No appropriation to the legislature or a legislative agency can be a continuing appropriation.

Comment:

Many appropriations are made beyond a given fiscal year. These are referred to as continuing appropriations.


The Supreme Court has addressed the issue of whether continuing appropriations violate the surplus clause:

[T]he language of Article VIII, Section 14 leads to the conclusion that continuing appropriations do not constitute surplus within the meaning of that constitutional provision. Definitions of the term “surplus” near the time of the constitutional convention in 1968 during which the appropriations provisions of Article VIII were adopted include “[A] quantity or amount over and above what is needed; something left over,” Webster's Third New International Dictionary 1836 (2d ed. 1964), and “[T]hat which remains above what is used or needed[,]” The American College Dictionary 1219 (1965).

As Article VIII, Section 14 applies only to “operating funds” at the “end of the fiscal year,” in accordance with the accepted meaning of surplus, only funds that remain unspent and uncommitted at the end of the fiscal year for which they were appropriated “shall be appropriated during the ensuing fiscal year by the General Assembly.” Funds which are appropriated for a duration that exceeds the end of the fiscal year in which the appropriations are made are committed and are not surplus, i.e., left over, at the end of the fiscal year in which they are made. Therefore, we conclude the Commonwealth Court properly found the term “surplus” in Article VIII, Section 14 does not apply to continuing appropriations. Stilp v. Commonwealth, General Assembly, 601 Pa. 429, 446-47, 974 A.2d 491, 501-02 (2009).
To reverse this interpretation, Article VIII, Section 14 would have to be rewritten. Suggested language follows:

Article VIII
Section 14. [Surplus] Lapse of unexpended funds.

All [surplus of operating] funds not expended at the end of the fiscal year shall [be appropriated during the ensuing fiscal year by the General Assembly] lapse into the General Fund.

B. Two Year Budget Cycle: Article VIII, Section 12(a), be amended, either through limited constitutional convention or through the Article XI process, as follows:

   o A balanced operating budget for the “ensuing two fiscal years.”

C. No Budget, No Pay: If budget not passed by June 30, no salaries or funds will be paid to members of the legislative branch and staff and members of the executive branch and staff out of any fund.

D. No Amendments to Appropriations from the Floor: Amendments to appropriations bills go to the appropriations committee first. They are then ruled on by the appropriations committee. This will not preclude introducing an amendment on the floor. The only amendments that can be introduced on the floor are those that have been submitted to the appropriations committee and rejected.

Respectfully Submitted,

Structure of General Assembly Committee
Chair: Carol A. Shelly, Esq.
Andrew B. Cantor, Esq.
Vincent C. DeLiberato, Esq.
Joann M. Jofery, Esq.
Prof. Michael E. Libonati, Esq.
Frederick R. Mogel, Esq.

Student Extern:
Hiromi Sanders
LEGISLATIVE REAPPORTIONMENT

The Pennsylvania Bar Association Constitutional Review Commission (Commission) was charged by the House of Delegates of the Pennsylvania Bar Association to examine specific issues related to the improvement of the Government of the Commonwealth of Pennsylvania and make concrete recommendations, if needed, for alterations and/or improvements to the existing governmental structure and/or the Constitution of the Commonwealth of Pennsylvania including how those changes would be most effectively implemented.


The Committee also considered the issue of reapportionment as it relates to Congressional Districts. The Pennsylvania Constitution does not address reapportionment of Congressional districts. Congressional reapportionment in Pennsylvania is accomplished through the normal legislative process.

The Committee examined how the current process for State and Congressional redistricting has served the Commonwealth and, to the extent that significant problems and concerns on the part of citizens and various organizations were identified, the Committee is making recommendations for improvement of the current reapportionment process relating to the creation of House and Senate Districts in the Pennsylvania Legislature and in the drawing of Congressional districts in Pennsylvania.

The Committee began its inquiry by reviewing the history of redistricting in Pennsylvania. The history of legislative reapportionment is reported in detail in the 108 page Legislative Apportionment Reference Manual prepared for the Delegates of the 1967-68 Limited Constitutional Convention. A book by Ken Gormley on the Pennsylvania Legislative Reapportionment of 1991 also provides a concise history of legislative Reapportionment from the colonial period to modern times.1 A detailed history of reapportionment in Pennsylvania is also found in a paper on Reapportionment in Pennsylvania a History of the Reapportionment Process and the Legislative Reapportionment Commission.2

Pennsylvania’s first Constitution of 1776 introduced the concept that representation in proportion to the number of taxable inhabitants is the only principle that can at all times secure liberty and make the voice of a majority of the people the law of the land. This concept of representation based on population replaced the earlier practice of providing a fixed number of representatives for each county regardless of population.3 Under that constitution,

“Every seven years, the General Assembly prepared new tallies of taxable inhabitants for each city and county and adjusted the number of representatives. In other words, Pennsylvania

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3 See Gormley, supra note 1 at 4.
established a scheme for reapportioning its legislature as a part of a broader effort to enfranchise its citizen/electors."^4

The Constitution of 1790 replaced the unicameral legislature of 1776, preserved the septennial reapportionment and further provided that neither the City of Philadelphia nor any County would be divided in forming a district. This action introduced the concept that city and county boundaries should be preserved in redistricting.\(^5\) The Constitution of 1838 allowed traditional boundaries to be disturbed in favor of establishing districts roughly equivalent in population.\(^6\) The Constitution of 1873 introduced the modern concept of reapportionment based upon total population rather than taxable population – each citizen was counted equally; districts were based solely on population and drawn without regard to political boundaries.\(^7\)

Although defeated, a proposal to conduct reapportionment through a twelve member commission elected by the House and Senate was the subject of heated debate during the Constitutional Convention of 1873.\(^8\) The Constitutional Convention of 1873 also failed to provide strict safeguards regarding the degree of population equality, compactness, or continuity of territory required in formulating districts. Consequently the 1874 legislature was able to engage in blatant gerrymandering in drawing districts under the 1874 Constitution.\(^9\) “Moreover the legislature quickly strayed from the constitutional mandate that it reapportion every ten years following the federal census.”\(^10\)

The Pennsylvania legislature, like legislatures all over the country, paid limited attention to reapportionment in the years between 1901 and 1962.\(^11\) In Pennsylvania no reapportionment occurred after the 1910 census and the next reapportionment did not occur until 1921 after the 1920 census.\(^12\) The Pennsylvania House was reapportioned in 1953 but a similar effort at the same time to reapportion the Senate was not successful.\(^13\) Following the United States Supreme Court’s landmark decisions in *Baker v Carr* and *Reynolds v Sims*, the lower federal courts and the state courts moved rapidly toward compliance with the concept that state legislative districts must be roughly equivalent in population.

The Pennsylvania constitution of 1874 contained a number of restrictive provisions that made it virtually impossible to reflect population changes in a completely fair system of representation.\(^14\) The Pennsylvania General Assembly enacted new apportionment and districting laws in 1964 that were ultimately struck down by the Pennsylvania Supreme Court as violating federal standards. When the legislature subsequently failed to adopt a new reapportionment plan the Pennsylvania Supreme Court itself redistricted both houses in 1966.\(^15\) Thus, Senate districts in Pennsylvania were redrawn for the first time in over forty years.

With this background, delegates to the 1967-68 Limited Constitutional Convention were faced with the task of proposing amendments to address provisions of the 1874 Constitution dealing with apportionment and redistricting that had been largely nullified by decisions of the US Supreme Court. A number of

\(^{4}\) Id. at 5
\(^{5}\) Id.
\(^{6}\) Id.
\(^{7}\) Id. at 5-6
\(^{8}\) Id. at 6
\(^{9}\) Id. at 6-7
\(^{10}\) Id. at 7
\(^{11}\) Legislative Apportionment Reference Manual No. 6 p 1
\(^{12}\) See Gormley, supra note 1 at 7.
\(^{13}\) Id. at 7
\(^{14}\) See Legislative Apportionment Reference Manual supra at 2.
\(^{15}\) Id. at 2
advocacy groups submitted proposals for legislative representation to the Constitutional Convention. These groups included the Pennsylvania Bar Association, the Americans for Democratic Action, the AFL-CIO, the League of Women Voters, and A Modern Constitution for Pennsylvania, Inc.

Following in the footsteps of the 1959 Woodside Commission, the Pennsylvania Bar Association had been advocating for change to the 1874 Constitution since the early 1960s. The first report of the 1963 Pennsylvania Bar Association’s “Project Constitution “called for elimination of restrictions in the 1874 Constitution on the maximum number of senators from any city or county,” and for procedures to ensure that redistricting occurred following each federal decennial census. The 1963 report included an alternative proposal calling for the convening of an Apportionment Commission in the event that the legislature failed to act, but this proposal was dropped in the subsequent 1966 report of the PBA Special Committee on Project Constitution. The full recommendations of the PBA Special Committee on Project Constitution are summarized in the following statement of William Schnader

Act No. 2 of 1967 requires the limited Constitutional Convention to supply provisions on Legislative Apportionment to take the place of the provisions now in Sections 16, 17 and 18 of Article II of the Constitution.

Sections 16 and 17 are plainly unconstitutional . . . These provisions run afoul of the decision of the Supreme Court of the United States in Baker v Carr, 369 U.S. 186 (1962).

In the proposal which we are offering to the Committee and the Convention we are recommending that the Senate shall be composed of 50 Senators each elected from a district “of compact and contiguous territory as nearly equal in population as may be “ and that the House of Representatives consist of 210 Representatives each elected from a district similarly described. These provisions certainly conform to the decision of the Supreme Court of the United States.

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When our proposal was before the Legislature in 1966, it was not approved because the Senate wanted some way found to permit a Senator elected for four–year term with two years remaining when a new apportionment became effective, to serve out his full term.

The Bar Association Committee did not feel that there was any way possible to do this without violating the Supreme Court’s “one-man, one-vote” rule. The three and five year terms are suggested as in the nature if a compromise. How the members of the Preparatory Committee will view this proposal, we shall be very interested to learn as all of the members of the Preparatory Committee except the Chairman are members of the Legislative Department of the government.

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16 William Schnader served as Attorney General of Pennsylvania and as President of the Pennsylvania Bar Association in 1962, the year after a legislative call for a constitutional convention was defeated. He was a supporter of the need for constitutional revision in Pennsylvania. President Schnader proposed and supported “Project Constitution”, a PBA initiative that studied problems with the Pennsylvania Constitution and proposed changes to that document. When the Project completed its work in 1963, it issued twelve proposed changes to the Pennsylvania Constitution that the entire membership of the PBA approved. Most of those twelve proposals were adopted by Governor Scranton, whose call for a constitutional convention led to the 1967 Constitutional Convention and the 1968 amendments to the Pennsylvania Constitution.
The Constitutional Convention may desire to change the number of Senators and of members of the House of Representatives or it may even wish to recommend a unicameral legislature, however, it is the opinion of the Bar Association that the people will prefer to stick to a legislature composed of two houses of substantially the membership which they have today.

There are many devices for having apportionments made by others if the Legislature does not do its job in this respect. Some States have commissions composed of legislative and executive officers. We believe that our present proposal is much the best for Pennsylvania.

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The Reapportionment Committee of the 1967-68 convention proposed a hybrid Commission process dominated by the legislative leaders but including a neutral Chairman selected by the legislative leaders. In the event that the legislative leaders fail to select a Chairman the appointment defaults to the Pennsylvania Supreme Court. The Supreme Court was required appoint the Chairman in the first reapportionment in 1971 following the 1968 amendments. The four legislative members of the Commission agreed on the appointment of a Chairman in 1981. However, the legislative members failed to agree and the Supreme Court has been called on to make the selection in every subsequent reapportionment, including the current reapportionment in 2011. Time limits for the Commission to act are established in Pennsylvania Constitution Article II, Section 17 and the Supreme Court is empowered to act if the Commission fails to submit an acceptable redistricting plan. Amendments to Pennsylvania Constitution Article II, Section 16 & 17 were ratified by the electorate on April 23, 1968 and are the basis for reapportionment in Pennsylvania today.

The Committee carefully examined how the reapportionment process as established by the 1968 constitutional amendments has worked in practice and is perceived in Pennsylvania today. The Committee’s study included interviews with individuals with acknowledged expertise or direct experience in redistricting. These persons included past chairs and legislative reapportionment members and public employees who participated in the work of the legislative reapportionment commission. The Committee also held public hearings to which all interested parties statewide were invited to participate, and also solicited comments through the Commission’s website and other media from all interested parties including Bar Association Sections and Committees. In addition, the Committee worked with four Widener law student externs who conducted research on selected issues that arose. A summary of testimony received by the Committee is attached as Appendix 1. Papers and related information submitted by those appearing at Committee hearings are published and available on the Constitutional Review Commission’s website [www.pabarcrc.org](http://www.pabarcrc.org).

From testimony presented at hearings, from observations and comments received through interviews, and from newspaper editorials and other published sources statewide it is evident to the Committee that there is a high level of dissatisfaction with the way in which reapportionment is currently conducted in Pennsylvania. The Committee observed that there is a widely held concern that the power of political caucuses to draw district lines that serve to protect incumbents and in some instances punish legislators may result in a diminution of individual voting power. The Committee also observed that gerrymandering is a source of voter belief that representatives do not pay attention to the wishes of their electorate. One strong objection to the present system for reapportionment that was voiced in public hearings and presentations was the lack of opportunity for public input and the lack of availability of actions of the Reapportionment Commission to the public. This public concern for more transparency and for more opportunity for public comment in the drawing of legislative districts is recognized in various bills that

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17 Those externs were Seth Blume, Diane Brannon-Nordtome, Brianne Henninger, and Jim Strupe. Adam Gibbons also performed extensive research in spring, 2011 that was useful to the Committee.
have been introduced in the legislature over a number of years to amend the current constitution. It is also a matter of serious concern to this Committee. A summary of the Bills introduced in the legislature in 2011 addressing the subject of reapportionment and a description of the changes recommended by those proposed bills is found in Appendix 2.

The Committee heard from a number of witnesses that Pennsylvania is the second most highly gerrymandered State in the United States, and the Committee was provided with statistical data that supports this finding. This finding is further confirmed by an examination of the maps of the Pennsylvania House and Senate Districts as they have evolved over the past forty years.

The Committee was assisted by maps and statistical analysis of the least compact Congressional and Pennsylvania Senate and House districts. These maps and the related analysis were provided by Azavea, a company based in Philadelphia that specializes in geospatial analysis and develops geographic web and mobile software. Attached in Appendix 4 are examples of gerrymandering in Pennsylvania Congressional Districts, State General Assembly Districts, and State Senate Districts prepared by Azavea.

While some experienced observers commented to the Committee that “gerrymandering” is ultimately not successful, and that history demonstrates that turnover and change in legislative seats between the parties continues, the Committee believes that a pervasive degree of gerrymandering presents a continuing threat to the democratic process. As Terry Madonna, a well respected political scientist is reported to have observed “gerrymandering has a tendency to weaken various community voices in government. To the extent that it occurs, it is not overall healthy for democracy.” It is apparent to the Committee that the major parties divide the Commonwealth into districts that are historically safe for their parties and adjust district boundaries if necessary to protect incumbents. The parties then negotiate over those few districts left in play. Under the present system there is limited opportunity for meaningful public input or scrutiny of the redistricting process.

Since 1968 the operation of the Legislative Reapportionment Commission has been wholly political. One example is that the Committee has deadlocked on the selection of the chair four times since 1968 (including this year, 2011); that is an outcome that is not surprising, since the four legislative members of the Reapportionment Commission are divided equally between the two major political parties. Consequently, the Supreme Court has appointed the chair as provided in the Pennsylvania Constitution. And each time that the Reapportionment Commission deadlocked, the Pennsylvania Supreme Court has appointed a person of the same political party as the majority of the Court. Many observers believe that the present process has “politicized” the Pennsylvania Supreme Court. Even assuming or establishing that the action of the Supreme Court is not political in nature does not solve this problem, because the Supreme Court action has created the appearance of politics and partiality that undermines the legitimacy and authoritativeness of the Pennsylvania judiciary.

Furthermore, under the present system, there is, practically speaking, only the most limited public opportunity for correction of gerrymandering. Those aggrieved by a proposed redistricting plan have an opportunity under Pennsylvania Constitution Article II, Section 17 to file exceptions and ultimately to file an appeal from a final plan to the Pennsylvania Supreme Court. Arguably, Article II, Section 16 creates a standard that requires the House and Senate Districts to “be composed of compact and contiguous territory as nearly equal in population as practicable” … and that “unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a House or Senate District.” These standards are very general. Without further objective definitions these standards provide only limited guidance to the Supreme Court. As a result, reapportionment challengers have faced an apparently insurmountable burden. They must either establish that the final plan is contrary to law or convince the Court to overturn the political judgment of representatives of a coequal branch of State government. The result is that even in the face of blatant and admitted gerrymandering the Supreme Court
has rejected challenges to the Pennsylvania redistricting plans in 1971, 1982, 1992, and 2002. The Committee therefore recognizes the need for objective standards to be followed by the Legislative Reapportionment Commission and to guide the Pennsylvania Supreme Court in reviewing challenges to final reapportionment plans each decade. The Committee is convinced that action should be taken to establish some more precise objective standards for reapportionment.

The testimony presented to the Committee underscores that control of redistricting in Pennsylvania is fundamentally a partisan political matter. Consequently, it is equally apparent to the Committee that there is a reasonable threat to a fundamental tenet of our democracy that the voters choose their representatives, as opposed to the present process under which the representatives choose their constituents. Voters have a basic right to cast their vote with the knowledge that their vote will count; they have a right to effectively exercise their franchise.

The Committee reviewed various approaches to redistricting established by state constitutions in all fifty states. While each State sets its own rules and procedures for redistricting every ten years, some common elements exist among the fifty distinct systems. Generally, there are three approaches to redistricting established by state constitutions. **Commission based redistricting** is employed in eight States. **Legislative based redistricting** is followed in twenty-seven States. **Hybrid redistricting** (legislature and government agency or commission working together in some fashion to conduct redistricting) is followed in the remaining states. Pennsylvania is included in the hybrid category. For a more complete description of redistricting models, see Appendix 3.

The Committee considered the relative merits of a commission based system, but favored preserving the present approach of directly involving the legislature because legislators possess knowledge regarding municipal boundaries and communities of interest. However, the conclusions of the Committee are that three changes are necessary to the existing Pennsylvania hybrid reapportionment commission system. First, the Committee believes that it should recommend standards for drawing legislative districts, especially in terms of further defining the term “compact,” to provide an objective standard in order to prevent the egregious gerrymandering that is at present part and parcel of Pennsylvania reapportionment. Second, the Committee believes that we must strengthen the role of the “neutral” Chairman. Third, the Committee believes that we must increase transparency by encouraging public participation by various means, including the use of an internet web site available to the public, and by providing access to all citizens and interested groups to publically owned redistricting software to ensure that citizens can effectively participate in the redistricting process.

**Committee Recommendations:**

1. Pennsylvania Constitution Article II, Section 16 of the Constitution provides that State House and Senate districts “shall be composed of compact and contiguous territory as nearly equal in population as practicable” and that “unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.” Representatives of the League of Women Voters and Pennsylvania Common Cause, and other experienced observers of the redistricting process cited the need for a more precise definition of the term “compact.” It is the recommendation of the Committee that those engaged in redistricting should have a measureable standard

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Compactness has geographic, political, and geometric dimensions. The shape of water bodies, mountains, and other landforms suggest district boundaries. Districts that honor these boundaries may be said to be compact. Political subdivisions and the boundaries of communities of interest suggest district boundaries. A district that responds to these boundaries may also be said to be compact. Each of these dimensions of compactness can be mapped so that the shape of any district can be evaluated. But these evaluations are necessarily subjective because they are not easily quantifiable.

On the other hand, the geometric dimension readily lends itself to mathematical evaluation. There are numerous mathematical determinants of a shape’s compactness that are applicable to legislative districts. The most important aspects of compactness for such purpose are the relative distance of points along the district’s boundary to its center and the complexity of that boundary’s shape. In this sense, a circle is the most compact shape possible; all points along its boundary are equidistant from its center and the boundary is smooth and uninterrupted.

A circle, however, is ill-suited to form district boundaries because circles cannot be arranged to encompass each populated area without overlapping one another. A multi-sided figure, a polygon, is necessary to include compactness and the geographic and political factors outlined above... It is not difficult to form polygons comprising the requisite population that are geometrically compact.

A minimum measure of compactness can be established. The compactness of any polygon can be mathematically determined by comparing its area to its perimeter. Where the relationship of a circle’s area to its perimeter is the ideal, the relationship of any other shape’s area to its perimeter is necessarily some percentage of the circle’s compactness measurement. One single and relatively simple mathematical calculation yields the “Compactness Quotient” for any given shape.

After considerable consultation and study, the Committee concludes that requiring a minimum compactness measurement that compares districts by a measure of compactness to a circle is the most direct and effective means of reducing political gerrymandering. The Committee recognizes that redistricting necessarily involves a political dimension in addition to those discussed above. The Committee is convinced that the proposed definition and minimum measure of “compactness” will prevent egregious gerrymandering while permitting some degree of discretion.

It is the recommendation of the Committee that the standard of “compact” as it appears in the Constitution be defined by the addition of a definition based on generally accepted measures of compactness. The Committee received recommendations based on the expert Philadelphia mapping, geographic data, geospatial, demographic, and web firm, Azavea. Azavea has generated several tests to assure some measure of compactness of legislative districts.\textsuperscript{19} After study and evaluation, the Committee has concluded that we should adopt a definition of compactness that compares legislative districts to the area of a circle. The new definition of compactness that the Committee recommends is:

Compactness for purposes of measuring the fairness of a legislative district’s boundaries shall consist of pi, multiplied by four, multiplied by the area of the district, divided by the perimeter squared.\textsuperscript{20}

Azavea notes that under this definition, a circle yields a value of 1, and the following figures and their values measured under this formula are:

- Circle value 1
- Square value 0.785
- Rectangle value 0.589
- Odd shape 1 value 0.240
- Odd shape 2 value 0.071

If the compactness definition is then multiplied by one hundred, it yields a numeric index in which: a circle is valued at 100; a square at 78.5; a rectangle at 59; Odd shape 1 above at 24; and Odd shape 2

\textsuperscript{20} In terms of a mathematical formula, this measure is expressed by the formula: $C = \frac{4\pi a}{p^2}$ where C equals compactness, a equals area, and p equals perimeter.
above at 7. Language would then be adopted to set a minimum in applying this standard to an objective value such as, 50 for example. An example of further language to accomplish this is:

The product of each district’s compactness measure shall be multiplied by one hundred to yield a compactness index number. Any compactness index number of a value less than fifty\textsuperscript{21} shall presumptively constitute a non-representative district. The Legislative Reapportionment Commission shall have the burden of establishing that non-representative districts shape and compactness index number are justified on the basis of political district boundaries or communities of interest or geographic features.

Under this test and suggested language, the two odd shapes immediately above would be excluded unless the Legislative Reapportionment Commission is able to meet the burden of establishing that the boundaries are justified on the basis of political boundaries or community of interest.

2. The Committee also believes that the process for selecting the Chairman of the Redistricting Commission should be changed to provide that no sitting or former judge of the Pennsylvania Courts or sitting or former member of the Pennsylvania Legislature may serve as the Chairman of the Redistricting Commission. It is the Committee’s view that such a change reinforces the appearance of independence of the Pennsylvania Supreme Court in addressing any challenge to Redistricting Plans proposed by the Commission. Further, and for the same reason, the Committee recommends that the present system of selection of the chair of the Legislative Reapportionment Commission by the other four legislative members of the Commission be continued. If, however, the Legislative members fail to agree on the appointment of a Chairman, then the Supreme Court will do so as is presently required by Pennsylvania Constitution Article II, Section 17, but with the added requirement that the appointment be made by a super-majority of five of the seven members of the Supreme Court.

3. It is the view of the Committee that judicial review of a reapportionment plan submitted by the Redistricting Commission must be supported by published findings of the Redistricting Commission documenting the basis for the proposed plans and providing justification for any deviation from the redistricting standards as provided by the Constitution and any other restrictions under State or Federal law. The Committee is therefore recommending that Pa. Const. Article II, Section 17 be amended to require that the Commission prepare a detailed record supporting both the preliminary and the final reapportionment plans.

4. The Committee also believes that the reapportionment process should be a far more open process than is presently the case in Pennsylvania. It is the Committee’s recommendation that Article II, Section 17 be amended to provide that during the 120 day period currently provided for the Legislative Reapportionment Commission to develop the Commission’s preliminary plan (90 days) and to receive comments thereto (an additional 30 days) that the Chairman of the Commission be required to undertake or oversee the following measures:

a) Conduct hearings across the State to receive public comment relating to the development of the proposed redistricting plan for the Senate and House Districts.

b) Open a website for the Redistricting Commission for the purpose of receiving public comments, for making software available to the public so that citizens or citizen groups can participate by recommending alternate redistricting plans and for publishing the Commission’s preliminary plan for public comment within the currently proscribed 30 day period.

\textsuperscript{21} The number could be set lower. It appears that a minimum compactness standard of 43 to 45 would exclude egregious gerrymanders.
c) Further the Committee recommends that the Redistricting Commission be required to review all public comment and alternate proposed plans and to consider such in the development of the Commission’s preliminary and final reapportionment plans.

d) That the Commission be required to publically advertise the availability of the website and to inform the public of the importance of the reapportionment process by emphasizing the importance of reapportionment on the individual citizens voting rights. The Commission would be required to provide such notice in both electronic and print editions of all papers of general circulation in Pennsylvania.

5. The Committee recognizes that these additional requirements place an added burden on the Reapportionment Commission and the Commission Chairman. The Committee, therefore, recommends that Pennsylvania Constitution Article II, Section 17 be amended to authorize the Commission Chairman to retain an Executive Director and such additional support staff as may be required and that such staff resources would be funded by the legislature.

6. It is as readily apparent to the Committee, as it is to any informed citizen, that the boundaries for Congressional districts in Pennsylvania have been drawn to protect incumbents and to increase advantage for one party over another. It is easy to understand from the distorted shapes of the Pennsylvania Congressional districts why these districts are considered to be among the most “gerrymandered “in the nation. The Committee believes that with the recommendations that it is proposing to amend the present system for the drawing of State Senate and House seats that consideration should be given to further amending the Constitution to provide that the drawing of Congressional districts would be accomplished by the same Commission presently charged with drawing the State legislative districts. Any of the changes proposed by the Committee would have no impact until at least 2021. It is the opinion of the Committee, therefore, that there is more than sufficient time for careful consideration of this proposal to change the manner in which Congressional districts are determined in Pennsylvania.

7. The Committee proposes that amendments to the Constitution recommended in 1 through 6 above be accomplished through the legislative amendment process as provided by Article XI, Section 1. These recommendations are relatively complex, and explaining them to voters will be a challenge. Use of the legislative amendment machinery may be employed to limit the amount of material that voters will be forced to confront and make the task of explanation to the voters easier. An alternative method would be to introduce these changes at a limited constitutional convention.

Respectfully Submitted,

Legislative Reapportionment Committee
Chair: Prof. John L. Gedid, Esq.
Arthur L. Piccone, Esq.
Michael J. McDonald, Esq.
Roger L. Meilton, Esq.
Keith B. McLennan, Esq.

Student Externs:
Seth Blume
Jim Strupe
Brianne Henninger
Jennifer Brannon-Nordtomme
APPENDIX 1

SUMMARY OF TESTIMONY BEFORE
LEGISLATIVE REAPPORTIONMENT COMMITTEE

Prepared by extern Seth Blume

Steve MacNett, Esq.

Mr. MacNett was the general counsel for the senate majority caucus and has been part of the legislative redistricting process in 1981, 1991, and 2001. Mr. MacNett believes that the current constitutional provisions for redistricting create a bipartisan process that sets a time line which assures that there is not a deadlock which means that the Supreme Court does not need to get involved. He believes that the court is well situated to rule on plans, but not to create the maps. Furthermore, Mr. MacNett feels that the districts that are created are relativity compact and that political subdivisions are not broken unless absolutely necessary to fit in with other constitutional provisions such as being contiguous and conforming to the federal Voting Rights Act.

Mr. MacNett is under the belief that the Reapportionment Commission actually functions as two, three member commissions. One being for the House of Representatives and the other for the Senate where the senate members do not get involved with the house redistricting and vice-versa.

In his tenure as general counsel for the senate majority, Mr. MacNett has seen three different chairs with different approaches. In 1981, Dr. Freedman was consensus builder. Justice Montermuro tired to be more of an arbitrator who would step in if something was blatantly out of line. Judge Cindrich had the most difficult job in dealing with a host of voting rights issues which were to empower minority populations through the redistricting process.

As for the best approach, Mr. MacNett does not believe that there is one answer, because as long as the court upholds the commission’s decision then they have done their job, but consensus building seems to be the most effective and efficient way for a commissioner to go about the job. An interesting note about the 1991 redistricting is that both house leaders voted yes with the commissioner while both senate leaders voted against the redistricting. This leads to the idea that there is a big difference between the redistricting of both houses. House districts are much smaller and to fit within the population limits it is often times necessary to split municipal districts to fit within the population range.

In regards to the time line to complete redistricting, Mr. MacNett believes that the process will take as long as it is given. The math is finite. There will be 50 house districts with about 250,000 people in each and 203 house districts consisting of a population of about 62,000 people. Additionally, there will be four minority-majority districts. There are going to be issues with population change where a district will be lost on one side of the state and moved to another, but this can all be done within the tight constraints of the time line laid out for this process.

Furthermore, computers can provide accurate information regarding where people live, which is especially helpful in redistricting the House in some of the 4 or 5 bedroom communities in the Philadelphia and Allentown-Bethlehem suburbs.

As to the idea of protecting incumbents, Mr. MacNett says that the federal courts see it is legitimate and that any system that this Commonwealth would use would have incumbency consideration. Mr. MacNett says that the political parties are a check on one another.
Finally, the data used by each caucus is created by its own respective staff, but the commissioner does not have access to this information unless it is specifically asked for. The data must be current, and once the Commissioner determines that the data is current, than the reapportionment process begins.

**Judge Robert Cindrich**

To start, Judge Cindrich believes that the steps taken in Iowa and other states to create redistricting without incumbency consideration are not practical. He believes that protecting incumbents is not a bad thing, and that by actively making competitive races, we are taking away people’s rights to choose who they want to represent them. By breaking districts that vote for the same candidate or party, democracy is being stifled.

Another problem with invoking the Iowa method of redistricting is the topography of Pennsylvania. As a result of the mountains and rivers in the Commonwealth it is difficult to create these perfectly geometrical districts. Judge Cindrich gives the example of a representative whose district is cut by a river where they have to drive 25 miles to a bridge to get to the other half of the district making the constituents inaccessible.

As for the system created at the 1968 constitutional convention, Judge Cindrich believes that it is “pretty good.” The districts are contiguous and despite the chaotic nature of the process where each caucus is trying to get as many seats for their party as possible, the process works. As a commissioner, Judge Cindrich felt that he was not in tune with the individual districts to make determinations about each ones constituency so he felt his job was to protect minority rights when faced with protecting an incumbent. This protection was necessary in the cities due to the size of some cities, districts would extend into the suburbs and citizens from the suburbs felt like their interests would not be protected if the majority of the district was located in the city. Overall, as the Chairman, Judge Cindrich left the decision-making to these legislators as he considered them experts in the field.

Judge Cindrich also felt that one of the biggest issues related to data gathering and evaluation. The caucuses possess the data and computer equipment that scrutinizes voting patterns and trends throughout the Commonwealth while the Chair has none of this information. He found that the caucuses did not readily share this information with the Chairman although he conceded that this may be different now because of the legislative data processing center. The lack of this information prevented the Chairperson from knowing where the legislators are running. Twice during his time as Commissioner the boundaries changed making it difficult for a candidate to run because the candidate lacked the signatures necessary or the changing boundaries affected the district in which the candidate was running.

In terms of funding, there is a large enough budget for the Chairperson to have a staff. The funds come from the general appropriations Act that looks at prior costs and makes accommodations for inflation. The money is used for defending appeals that follow every redistricting process. Most of these appeals are quickly thrown out by the Pennsylvania Supreme Court. Now that the courts have ruled on voting rights issues, Judge Cindrich expects there to be fewer valid arguments against the plan because the Commission recognizes the court’s concerns.

As for recommendations, Judge Cindrich believes that public hearings are important. These hearings allow the Commission to receive input from community groups which allows these groups to submit arguments and ideas to the Commission.
Dean Kenneth G. Gormley - Duquesne University School of Law

Dean Gormley worked with Judge Cindrich as Executive Director of the Redistricting Commission working in Harrisburg. Working with Judge Cindrich, he followed his lead and tried to allow the parties to resolve any issues themselves.

The large issue at the time Dean Gormley was working on the Commission was the race issue. This is where the chair is most important. While the case law had yet to be finalized, it seemed that if a majority-minority district could be created than it should, under the 14th and 15th Amendments as well as the federal Voting Rights Act. Every lawsuit that resulted from the reapportionment was successfully defended, including a civil rights action in federal court. Dean Gormley felt that both political parties were resistant to creating majority-minority districts because they wanted to keep the political status quo. Even African-American legislators in Philadelphia were worried about creating new majority-minority districts because the African-American populations in their districts would decline as a result.

While there were some issues of legislators being drawn out of their districts that were unknown to the chair, overall Dean Gormley felt that those who were involved in the process were fair and professional and the overall product was successful.

Dean Gormley felt that not having access to data was a hindrance because the chair and his staff could not generate their own maps. Even so, Dean Gormley conceded that the chair’s and the staff’s job was to arbitrate, not create maps. As a result, they required the caucuses to create maps that the caucuses themselves would not advocate because of the minority district issues. Dean Gormley felt “if you did not intentionally create districts to encompass minorities, someone would quite consciously create districts to not encompass those racial minorities.”

In terms of this particular system, Dean Gormley feels it best represents the interests of the people. A system like Iowa does not take into account individual communities, and if a community is not properly represented, that community will continue to have problems. Therefore, it is important to have people who know the communities drawing the district lines, as to ensure the best possible representation for Pennsylvania citizens.

Public hearings positively promote the process. In 1991, the Commission created a preliminary plan, hearings, and then a final plan. This allowed the chair to see if any candidate or potential candidate was being pushed out of a race. It also allowed community groups to express their views in regard to representation. Dean Gormley believes that public hearings would be a good addition to any constitutional change on this issue.

In terms of the timing issue, Dean Gormley expressed the opinion that both parties are working on the redistricting process well before the Commission is created (pursuant to Constitutional mandate). If the Constitution was changed to create a truly independent Commission, then this process would have to be initiated sooner. While the timeframe is already aggressive, any extension of the process needs to consider other factors, such as the additional expense entailed by a longer time frame.

Dean Gormley concluded by saying that a purely legislative model would not work because of a lack of a neutral arbitrator. Without an arbitrator the party in power would potentially create districts that would not pass the muster of a court proceeding. One solution would be to delegate initial efforts to a neutral administrative body that works with the Chair, has access to data and can make maps before the Chairperson is chosen. The preparation and analysis of such information would offer the incoming Chair a head start and foster the Chair’s ability to facilitate negotiations between the two parties.
Lora Lavin - Vice-President for Issues and Action, League of Women Voters of Pennsylvania

While Pennsylvania’s Constitution offers two anti-gerrymandering clauses, Article II, Section 16, (discussing compact and contiguous districts) and Article II, Section 17, (division of municipalities), the criteria for applying these provisions is lacking. As such, there are many examples of practices that impinge upon the democratic process.

A prime example is House District 172. What was once a fairly geometric district in 2000 became badly fragmented to protect a Republican incumbent in a Democrat-dominated area by 2002. This revision also made other districts in the area safe for Democrats.

House District 161 is another example of partisan gerrymandering. Again the district was drastically changed during the 1991 redistricting. This district consists of two full municipalities and parts of nine other municipalities. Radnor Township was split into three separate house districts despite the fact that a cursory review of the map, shows that this district could easily have been redrawn to render it more compact.

Another type of gerrymandering is “cracking,” which dilutes voting strength. Monroe County is split into six Senate districts that include 11 different counties. Of these 11 counties, 5 share a border with Monroe. A Senate bill states that Monroe must share revenues from gaming operations with adjacent counties. Yet, none of the Monroe’s six senators actually live in Monroe County. This causes Monroe to lose millions from slot revenue because of a legislative action that was enacted without a representative actually living in Monroe's district. Furthermore, Philadelphia Ward 42 is divided into five separate House districts that are greatly stretched and none of the five House Representatives lives in Ward 42.

Ms. Lavin also pointed out three separate instances where the Commission used cracking to punish dissenters within their own party. This happened to Democrats and Republicans where their districts were either split or moved completely to make reelection more difficult. This threat compels legislators to vote with their party as opposed to their conscience or constituency. Furthermore, in 2001 when the Republicans controlled both houses of the General Assembly, they forced two Democratic incumbents to face each other in Congressional District 12. Finally, prison gerrymandering allows districts to reach population requirements despite the fact that prisoners cannot vote.

Ms. Lavin takes issue with the current reapportionment system of Pennsylvania for several reasons. First, important reapportionment decisions are made by only a few people, who can overrule an impartial chair to keep their parties legislators in power. The four legislators also have the ability to use the process as an enforcement mechanism to punish members of their own party. Furthermore, Ms. Lavin worries both about diminishment of voting power and the effect of gerrymandering on low voter turnout. It can also detract from an accountable democracy because if legislators are assured of winning a reelection, they will stop listening to their constituents.

Ms. Lavin referenced the Council for Excellence in Government and the Campaign Legal Center. At a 2005 conference the Center identified these problems with the reapportionment process, which are relevant to Pennsylvania:

1) A bipartisan compromise Commission, with equal numbers named by both parties, can easily become an incumbent protection plan under the guise of independence.
2) Having a tie breaker on the panel give essentially total power to that individual and the ability to broker a deal with one side or the other. On the other hand, the partisan members can collude to outvote the chair.
3) A Commission adds another layer between the process and direct voter accountability.
4) Many Commission structures under discussion or in practice involve suing state Supreme Court or other judges to name members to the Commission. Rather than de-politicizing the redistricting process, this may instead politicize the judiciaries.

As a result, Ms. Lavin and the League of Women Voters of Pennsylvania would like to take the redistricting process away from legislators and has suggested the following proposals:

1) Assign congressional and legislative redistricting to a non-partisan redistricting body using strict criteria for mapping, transparency and public input.
2) Prohibit the use of data concerning voter registration and voter performance, as well as home addresses of legislators in drawing the districts.
3) Assign responsibility for coordinating public input to a 5 member temporary Redistricting Advisory Commission whose members may not be current office holders or related to or employed by members of Congress or the General Assembly.
4) Set forth procedures for public input and plan adoption.
   a. All Advisory Commission meetings would be publicly advertised and open to the public.
   b. All external communications between the Bureau and the Commission and to or from the Commission and other persons are to be in written form and part of the public record.
   c. All oral and written testimony and all data used in drafting a redistricting plan would be posted on the Internet and otherwise made available to the public as soon as it is available.
   d. The Advisory Commission would conduct hearings before and after development of a preliminary redistricting plan. Based on public comment a revised redistricting plan would be sent to the General Assembly for approval under a rule prohibiting amendments. If the plan is approved by both Houses it becomes the adopted plan. If either or both Houses reject the plan it is sent back to the Bureau for revision with comments on why the plan was rejected.
   e. If necessary, a final plan is presented to the General Assembly for consideration as above.
   f. All legislators will be publicly on record regarding their approval or disapproval of a plan.
   g. If the General Assembly fails to approve the final plan the revised and final plans are sent to the Secretary of State for selection by lot.
5) Set clearly defined parameters for redistricting criteria
   a. Compliance with federal law;
   b. Population equality;
   c. Respect for political subdivisions;
   d. Strict rules for dividing political subdivisions more than once;
   e. Assure that all parts of each district are contiguous. Districts joined at a single point shall not be considered contiguous;
   f. Make districts as compact as possible consistent with above criteria; and
   g. Limit redistricting to once per decade following the Federal census unless otherwise directed by court order.

Joseph Holaska

Mr. Holaska began by discussing what reapportionment is and how it is based on the census. He says that it is important to ensure that people are properly represented and that the legal standard of “one person, one vote,” is ensured. Mr. Holaska goes on to discuss how the decision in *Baker v. Carr*, has lead many states to stop using the legislature to redistrict but instead move towards commissions to do the job.
Mr. Holaska claims that 13 states use commissions to redistrict, two use advisory commissions, five use backup commissions, Iowa has its unique way of redistricting and the rest use legislatures to redistrict. Mr. Holaska outlines about Pennsylvania's reapportionment commission, and its five members. He states that because of the even split between the two parties, the reapportionment process should be relatively “even-handed.”

Mr. Holaska than discusses the history of redistricting in Pennsylvania. The 1776 constitution stated the representation is determined by taxable inhabitants. The 1790 constitution added that counties should not be divided to form a district and that if two counties are need to make a district, they must be adjoining. By the 1960's the Supreme Court of the United States said in Reynolds v. Sims, that the Equal Protection clause must be followed by states and that when redistricting they must make each district as close in population as possible.

In 1968 Pennsylvania had a constitutional convention where the new rules that govern legislative reapportionment were created. The Commission was created to be bipartisan, with the heads of both caucuses in each legislative house (or their appointees) made members. This puts the reapportionment process in the hands of very few people which allows for lines to be drawn protecting incumbent or political allies. To counter this, the Chairperson of the Commission is supposed to be nonpolitical because they cannot hold political office per the constitution. On the other hand, this person may have political leanings and may work with the Commission to further a political objective.

Mr. Holaska then goes on to compare the pros and cons of bipartisan redistricting commissions and nonpartisan commissions. First, a bipartisan system works as a check against one party gerrymandering a state. The fifth commission member also helps prevent one party gerrymandering. Another benefit is the members of the Commission are likely more in-tuned with their constituents than a completely non-partisan Commission would be. A nonpartisan commission has no accountability to the citizens that they are redistricting and therefore are insulated from the people.

Furthermore, by having bipartisan commissions, incumbents will be protected. Constant turnover in the legislature means gridlock, and by protecting incumbents progress is more likely to happen. There are also obvious issues with incumbent protection, the biggest being shaping the entire ideology of a state for the next ten years.

Next, nonpartisan commissions are designed to prevent gerrymandering, but it is impossible to completely eliminate. First, a commission member will likely have some political affiliation and therefore want to help one party more than the other, even if on a subconscious level. Second, to prevent gerrymandering there must be some objective criteria for redistricting.

If one were to create a nonpartisan commission where the members could not be affiliated with a political party, who gets to choose the members? Likely they are going to be appointed by someone with a political affiliation and there is a chance that whomever they choose will be sympathetic to the political ideology of the person who gives them the position on the commission.

As for drawing the lines, many people say let computers do it. A computer can draw many maps to make correct population ratios while factoring compactness and respect boundaries. However, whoever chooses the map to use will probably have a political affiliation though and therefore map choice becomes political.

Mr. Holaska's recommendations to create a less partisan process are as follows:

1) Elected officials should be disqualified from serving on the Commission.
2) A person may not serve elected office for a reasonable period of time (2 years) before serving on the Commission.
3) A person may not serve elected office after serving on the Commission while the plan is in effect (10 years).
4) Both the House of Representatives and the Senate would each select 2 members by 2/3 vote.
5) These four appointees select the fifth member.
6) If these members are challenged the Supreme Court will review under these factors
   a. Political party affiliation of the member
   b. Nature and Extent of the member's activities in partisan politics
   c. Specialized expertise of the member, and
   d. Whether the member has served on the commission during prior redistricting efforts.
7) A computer should draw new maps using the proper criteria.
8) The Commission selects one of these plans.
   a. The Commission may make small alterations to the plan.

Professor Michael R. Dimino, Sr. – Widener University School of Law

Professor Dimino is of the opinion that there will not be a fair, neutral or apolitical redistricting process without a clear goal in mind. Is it to have a representative for every demographic group? If so, who are these groups? If each group has a representative, what about those who do not identify with a group? Should the Commonwealth instead look to create a legislature that is uniform and moderate? Furthermore, when creating districts, how important are things such as compactness and political boundaries? How important is it to protect incumbents? Do we want to create a proportionate representation of parties? These questions are all important in determining what the point of redistricting is and what redistricting is meant to accomplish.

Next, Professor Dimino says that these choices will be made even if the Redistricting Commission making the decisions is nonpartisan. First, the Committee members will not be politically neutral no matter how they are selected, and even if the actively try to be neutral their view of “fair” will reflect their political views. Furthermore, Professor Dimino points out that a person who would willingly serve on this Redistricting Commission would probably have a great deal of interest in politics even if that individual is not registered to a political party.

As a result, at the central focus is not on how redistricting is accomplished, but why. By determining the reason, we can then enact legislation to ensure that the underlying purpose is achieved. For example, if we want to make competitive districts, then the requirement should be that districts are competitive and not just assume a nonpartisan commission will make that happen.

Professor Dimino offers these recommendations, in order of priority:

1) The most important consideration is competitive districts because this allows for the electorate to be responsible to the people and their feelings at the time. This also gives each voter a reasonable belief that their vote counts and encourages greater voter turnout.
2) Compactness is not an essential issue.
3) Incumbency protection is not valid because it disconnects the representative from the voter.
4) While there are good points to keeping municipal boundaries intact, a small number of districts could be packed with like minded people who would minimize voter influence.
5) A prohibition on Commissioners from running for office (two or four years) after serving on the Commission.
6) Creation of a mechanism for judicial review.
Barry Kauffman – Executive Director of Common Cause Pennsylvania

Mr. Kauffman characterizes the courts as “hands-off” when it comes to redistricting. He says that the advent of computer software used to “gerrymander districts to legislator’s advantage,” can also be used by citizens to create superior plans.

Mr. Kauffman's believes that because of the way districts are drawn, there is a loss of connection between the citizens and their legislators. Citizens may not know their legislators because of the geography of the districts, which can make it burdensome to meet with legislators.

Also, Mr. Kauffman points out that redistricting can be used to punish legislators. He offered the examples of Senator Pecora in 1991 when his district was moved across the state after disagreements with his leadership. Representative Ralph Kaiser in 2001 suffered the same fate. Districts could be shaped by “squeezing the balloon,” which would make districts bigger and smaller to fit population changes instead of cutting and moving districts entirely.

Further, districts are often “packed” or “cracked” for discriminatory reasons. “Packing” a district consists of putting a large number of voters associated with one particular racial or ethnic group into one district so that group wins the district with little chance of winning elsewhere. “Cracking” splits an ethnic or racial minority into many different districts making, diffusing its voting power and making it difficult for a minority candidate to win.

Another problem in past redistricting is incumbent protection. This occurs when lines are drawn based on voting history to protect a legislator running for reelection. This can be accomplished by drawing lines that exclude a potential challenger, or by expanding a likely incumbent-sympathetic political base. As a result, the meaningful election is the primary. This prevents anyone not registered with the dominant political party from having a meaningful vote.

Finally, convoluted districts lead to a greater dependence on expensive media campaigns. As a result, candidates spend more time raising money and less time concentrating on legislative duties. Candidates are forced to rely on special interest groups for money. Even if a candidate is not influenced by the money, the cynical public perception remains.

Common Cause feels that both the Iowa and California systems should be studied and considered for use in Pennsylvania. Further, Mr. Kauffman recommends theses actions:

1) All Commission functions comply with the Sunshine Law - 65 Pa.C.S.A. § 702. Legislative findings and declaration
   a. Findings. — The General Assembly finds that the right of the public to be present at all meetings of agencies and to witness the deliberation, policy formulation and decision making of agencies is vital to the enhancement and proper functioning of the democratic process and that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society.

2) All data, testimony, redistricting plans, commission meetings be posted on a website within 48 hours.

3) Series of public hearings prior to commission creation of preliminary plan.

4) Series of public hearings after preliminary plan is created.

5) Prohibit the Commission from utilizing information or data that would disclose voter registration patterns of any voting precinct or other political subdivision. Also ban information that discloses voting patterns.

6) Ban utilizing information that would disclose location of person's residence.
7) The long term goal should be to create a strictly non-partisan Commission that requires members to be registered independents and from minor parties. To achieve this, the size must be increased and Congressional redistricting should be added to the Commission’s duties.

Hon. Babette Josephs

Pennsylvania House of Representatives member from the 182nd District Babette Josephs has introduced legislation, HB 2420, which is intended to make the redistricting process more transparent. The five points of this bill are as follows:

1) Preliminary plan, subject to a 30 day public comment period, prior to final plan.
2) 5 public hearings in 5 different geographical locations.
3) Public website where citizens can create their own plans.
4) Commission must consider these plans and comment on them in writing that is accessible for the public.
5) Public can appeal final plan within 30 days, the plan must show that plan is contrary to law.

Jeffrey Albert and Kenneth Myers - Jewish Social Policy Action Network

After a brief introduction about how the Redistricting Commission is comprised, the authors discuss what is unusual about the Commission in Pennsylvania. Their first point is that there are no procedures specified by law on how to create the redistricting plan. The Commission is not required to do any fact-finding or comparisons to other plans. Furthermore, the plan becomes law without being voted on by the General Assembly or being approved by the Governor. The authors point out that the Supreme Court will not review the plan for any reason other than the populations of the districts. They do not look at compact and contiguous as specified in the Constitution, or following existing political boundaries, and do not require any explanation from the Reapportionment Commission on how the plan was reached.

The redistricting plan is a legislative action without the protections that normally accompany the legislative process. First, the two members of the Senate on the Commission represent 4% of the population. The two House members on the Commission represent about 1% of the population. Therefore, 95% of Pennsylvanians did not vote for the members of the Reapportionment Commission who are playing a crucial role in the democratic process of this state. The authors claim that “one man one vote,” is ignored by this process. Furthermore, because the Governor cannot veto the plan, and the legislature cannot override a veto by supermajority, the normal checks and balances of the legislative process are ignored. By taking the Governor out of the process, the one person with statewide interest and no conflict of interest (unlike legislators), is ignored.

As a result of the current process, there is little trust by the population with both the reapportionment system, and legislators as a whole. By manipulating boundaries in creating safe seats, the reapportionment process undermines both the primary and general elections and insulates legislators from their constituents. According to the authors, during the political upheaval four years ago, not one of the 25 Senate seats changed parties. As a consequence of safe seats, legislators are becoming more extreme on both sides of the aisle because they do not have to court the centrist and independent vote.

Brett Heffner

Mr. Heffner's first point is that Pennsylvania currently protects its incumbents. He says that legislators “choose their own voters, rather than the other way around.” He looks at the shape of the districts and says that they are not compact or contiguous. Furthermore, municipal boundaries are split
too often. Also, districts do not reflect communities of interest and racial and ethnic groups are unnecessarily dispersed into many districts.

Mr. Heffner gives the example of the 24th Senate district which prior to 2001 was represented by Edwin Holl. Prior to 2001 it consisted only of Montgomery County, but after the reapportionment, it consists of portions of Bucks, Lehigh, Montgomery, and Northampton Counties and was created to oust Senator Holl in favor of a younger candidate. Republican Rob Wonderling won the general election and had offices in Easton, Emmaus, Lansdale, and Quakertown. When he took another job in 2009, Bob Mensch won a special election. As a result of staff members leaving with Wonderling and no funds from the Senate to hire more, these four full time offices have been consolidated to three and are no longer open five days a week. Furthermore, the outreach office hours that are provided are much heavier in Montgomery County where there are wealthier donors and strong party organizations.

Dr. William M. Sloane

Mr. Sloane believes that by creating a “quantitative definition” for compactness, the extreme cases of gerrymandering will be curbed while common interest communities will be enhanced. Mr. Sloane researched a Philadelphia-based company called Azavea which uses computer software and mathematical formulas to analyze gerrymandering and compactness in legislative districts.

According to Azavea, compactness can be measure in two ways, dispersion and indentation. Dispersion takes that idea that perfect compactness is a circle, so the farther you get away from a circle, such as an ellipse, the less compact a district is. Indentation is another way to measure how compact a district is, with the smoother the edges of a district are, the more compact it is, as opposed to contoured edges making a district less compact. For example, one equation, the Polsby-Popper method, is \( C = \frac{4\pi a}{p^2} \) with \( a \) being the area and \( p \) being the perimeter. This will give you a ration between 0 and 1 with 1 being a perfect circle. Another way to measure compactness is the Reock method which compares the area of a district to the area of the minimum spanning circle that can enclose the district.

Mr. Sloane contends that the following definition of compactness should be added to the Pennsylvania Constitution under Article II, Section 16:

 Territory that meets all of the following criteria:
 i. the perimeter squared of the district is at least 30% of the product of 4\( \pi \) times the area of the district;
 ii. the area of the district is at least 20% of the area of the smallest circle that spans the entire district;
 iii. the area of the district is at least 40% of the area of the minimum convex bounding polygon enclosing the district; and
 iv. the perimeter of the district is no more than five times the perimeter of a circle of equal area.

According to Mr. Sloane, these definitions are strong enough to eliminate the “most egregious eyesores” of the legislative districts. On the other hand, the definitions above provide enough leeway for the reapportionment commission to still adhere to municipal boundaries and these ratios could still possibly be increased without creating geographical impossibilities because of the natural landscape of Pennsylvania.
Professor Brian F. Carso – Misericordia University

Professor Carso was in both county and state government in New York State before moving to Pennsylvania in 2006. As an introduction, Mr. Carso provides two quotations. The first is from Pamela Karlan, a professor of Public Interest Law at Stanford who said, “It used to be that the idea was, once every two years voters elected their representatives, and not, instead, it’s every ten years the representatives choose their constituents.” The second quote is from the novel “Mason & Dixon,” by Thomas Pynchon which says, “Nothing will produce Bad History more directly not brutally, than drawing a Line, in particular a Right Line, the very Shape of Contempt, through the midst of a People…”

To begin, Professor Carso says that redistricting started in at least 1787 with the establishment of the House of Representatives. It was created to be large, and constantly changing to better represent the will of the people. According to Carso, “[t]he House of Representatives was never intended to house a permanent political class.” Despite this, Carso acknowledges that legislative redistricting was used for political purposes immediately.

The term gerrymander is derived from a Massachusetts district from the 1800’s. Governor Elbridge Gerry was accused of creating a district that took so contoured it looked like a salamander, hence “Gerrymander.” In 1842, Congress enacted legislation to prevent these types of political maneuvers, mandating that districts be contiguous although this language was consistently withdrawn and reinstated. Further in 1901 and 1911, Congress changed the requirement to “contiguous and compact territory.” In 1929, this requirement was dropped, allowing for bizarrely shaped districts.

Professor Carso goes on to discuss the idea of “cracking” and “packing.” “Cracking” involves watering down a group’s impact while “packing” puts all of one group into a single district to limit its power. This type of political manipulation can be extreme or subtle, but either way influences elections.

After a discussion of many cases involving political gerrymandering, Professor Carso comes to the following conclusions. First, that the judiciary will not “accept the role of referee over allegations of excessive partisanship,” and instead would prefer the legislative branch to regulate the process. Second, Carso concedes that redistricting will have political elements, but politics should not manifest itself into poorly conceived districts that cross municipal boundaries and punish sitting politicians or potential candidates. Further, Professor Carso states that today more people are being represented in the “one man one vote” ideal, but that the next step is to redistrict in a way that stops incumbency protection and manipulation of voter groups. Finally, Professor Carso says that democracy should encourage change if change is what is needed and that redistricting should not be used in a way that is illogical and hinders democracy.

Dr. Thomas J. Baldino - Wilkes University

Dr. Baldino begins with the premise that the Constitution requires a decennial census to determine the seats in the House of Representatives. After, each state is authorized to determine the districts from which their representatives will be elected. From the beginning, legislatures have been using the census for political gain in the redistricting process. Dr. Baldino states that political science research shows that gerrymandering may not be as important as other factors in determining the success of a political party.

First, Dr. Baldino asks the question, “Does Gerrymandering work?” His answer is that the parties believe that it does. They believe that by gerrymandering, elected officials choose their own voters as opposed to the other way around. As proof of their belief that gerrymandering works, the political parties are going to raise $10,000,000 to defend redistricting plans.
Baldino next looks at who the actors are in this process and what they want. First, the voters want a choice when they go to the polls. They want more than one party and more than one candidate. Further, they want competitive elections, that is, for each political party’s candidate to have a reasonable chance of winning. Next, the political parties want to win as many seats in the legislature as possible and by as comfortable a margin as possible. Also, if no political party has an upper-hand in the redistricting process, they will seek to protect incumbents. The parties and the voter’s wants are polar opposites.

Furthermore, political scientists want more transparency in the redistricting process, as well as responsive or competitive elections. One way political scientists measure gerrymandering is through something called swing ratios. An example would be if a party had a 2% increase in votes, but a 5% increase in seats in the legislature, the swing ratio would be 2.5% and indicative that the district lines were drawn to favor that party. Also political scientists will look at bias in elections. The example Dr. Baldino gives is; if D’s win 52% of the vote and 56% of the seats in an election, an unbiased process would have the R’s win 56% of the seats if they receive 52% of the vote in the next election. Finally, political scientists look at districts to see if communities of interest are being respected.

Dr. Baldino provides two tables that show that gerrymandering may not be as big a factor in determining election results as we think. The first table shows gains and losses in terms of congressional seats after the redistricting process. In three of the last four elections following redistricting in Pennsylvania, the party in control of the process has either lost more seats or the same amount of seats as their counterpart in that election. Furthermore, Competition Rate refers to how competitive elections are, and to be deemed competitive there must be less than a 20% gap between the candidates. In Pennsylvania, in three of the last four elections following the census, Competition Rate increased between 7% and 11%. For example, when the Democrats controlled the legislature in 1990, 22% of the state wide elections were competitive. After redistricting, 29% of elections were competitive in 1992.

Professor David Sosar – King’s College

Professor Sosar first discusses four factors that should be kept in mind in any redistricting proposal. First, he believes it is imperative to protect the rights of voting minorities. Next, any redistricting process should promote competitiveness and partisan fairness. Also, any process should respect political subdivisions as well as communities of interest. Finally, any process should encourage geographical compactness and have a respect for natural geographic boundaries.

Professor Sosar next gives four recommendations if any changes in the current redistricting process are enacted. First, the commission should be independent from political parties as much as possible. Also, the work must be transparent for it to be both effective and well received from the public. Third, the decennial redistricting process should be direct and as timely as possible. Finally, he gives a recommendation of an independent reapportionment bureau. This would require a direct up or down vote by the general assembly and as a result, get rid of the negotiations and much of the gerrymandering that results from the current process.
APPENDIX 2

SUMMARY OF PROPOSED REAPPORTIONMENT LEGISLATION
PENNSYLVANIA GENERAL ASSEMBLY

2009-2010 Legislative Session:


- HB 1805 (PN 2341) – Josephs – An Act providing for legislative reapportionment and for openness and fairness in the redistricting process.


- HB 1568 (PN 1943) – Gibbons – A Joint Resolution proposing integrated amendments to the Constitution of the Commonwealth of Pennsylvania, further providing for terms of members and for the Legislative Reapportionment Commission.

- HB 2005 (PN 2709) – Drucker – A Joint Resolution proposing an amendment to the Constitution of the Commonwealth of Pennsylvania, further providing for a Legislative Reapportionment Commission to designate legislative districts for the General Assembly within this Commonwealth.

- SB 403 (PN 0405) – Leach – A Joint Resolution proposing an amendment to the Constitution of the Commonwealth of Pennsylvania, further providing for a legislative reapportionment commission to designate legislative districts for the General Assembly within this Commonwealth.

- SB 83 (PN 0066) – O’Pake – A Joint Resolution proposing an amendment to the Constitution of the Commonwealth of Pennsylvania, further providing for the Legislative Reapportionment Commission.

- SB 795 (PN 0957) – Boscola - A Joint Resolution proposing an amendment to the Constitution of the Commonwealth of Pennsylvania, providing for a Legislative and Congressional Reapportionment Bureau for the purpose of reapportioning and redistricting the Commonwealth of Pennsylvania.


2011-2012 Legislative Session:

- HB 134 (PN 0409) – Josephs – Act providing for legislative reapportionment and for openness and fairness in the redistricting process.
• HB 259 (PN 0210) – Curry – Act providing for legislative and congressional reapportionment.

• HB 876 (PN 0914) – Kauffman – Joint Resolution proposing an amendment to the Constitution of the Commonwealth of PA further providing for legislative districts.

• HB 920 (PN 0983) – Gibbons – Joint Resolution proposing integrated amendments to the Constitution of the Commonwealth of Pennsylvania, further providing for terms of members and for the Legislative Reapportionment Commission.

• SB 441 (PN 0426) – Leach – Joint Resolution proposing an amendment to the Constitution of the Commonwealth of Pennsylvania, further providing for a legislative reapportionment commission to designate legislative districts for the General Assembly within this Commonwealth.

• SB 650 (PN 0665) – Boscola - Joint Resolution proposing an amendment to the Constitution of the Commonwealth of PA providing for a Legislative & Congressional Reapportionment Bureau for the purpose of reapportioning & redistricting the Commonwealth of PA.
APPENDIX 3

LEGISLATIVE REAPPORTIONMENT COMMITTEE
AN OVERVIEW OF REAPPORTIONMENT MODELS USED IN THE VARIOUS STATES

Prepared by extern Brianne Henninger

I. INTRODUCTION

Congressional and legislative redistricting is an overtly political and highly debatable process in the United States. There is no question that partisan gerrymandering and incumbency protection are an inherent part of the redistricting process. Black’s Law Dictionary defines political gerrymandering as “the practice of dividing a geographic area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.”22 Although gerrymandering has been a topic of debate for the last three centuries, it has greatly intensified in the last twenty years because of the U.S. Supreme Court’s involvement with the issue.23 Although partisan gerrymandering was considered a justiciable claim for eighteen years, the Supreme Court recently held that such claims are nonjusticiable.24 In Vieth v. Jubelirer, the plurality of the Court held that “no judicially discernable and manageable standards for adjudicating political gerrymandering claims have emerged.”25 Consequently, the controversy will continue and the state of gerrymandering jurisprudence in the United States will be convoluted.

Each state is responsible for drawing district boundaries for purposes of electing members of both the state legislature and the U.S. House of Representatives.26 Historically, the task of redistricting rested solely in the hands of state legislators. Since Baker v. Carr and Reynolds v. Sims, however, a redistricting revolution has provoked numerous states to reform their constitutional or statutory redistricting mechanisms.27 The most prominent reform measure, now adopted by thirteen states, has been the creation of independent redistricting commissions. These commissions are made up of a small group of individuals who are responsible for redrawing district lines after each decennial Census. Because states are considered “laboratories of democracy,” these commissions vary in their authority, size and membership.28 Some states employ redistricting commissions for both congressional redistricting and state legislative redistricting, while others only employ them for state legislative redistricting.29 This paper will focus solely on the commissions created for state legislative redistricting.

Although redistricting commissions are “one step removed” from the legislative process, most of them are still highly political and partisan in nature. In fact, many states permit legislators to serve on the commission and actively participate in the map-drawing process. Other states give the legislators or other public officials the power to appoint the commission members. The most recent movement, however,

25 Vieth, supra at 281, 124 S.Ct. at 1778, 158 L.Ed. 2d at 560.
26 Justin Levitt, Brennan Center for Justice at NYU School of Law, A Citizen’s Guide to Redistricting 16 (2010).
spurred by the increasing success of partisan and bipartisan gerrymandering, has focused on creating independent commissions with nonpolitical or neutral members. Still, California and Iowa are the only states that do not permit public officials to either serve on the commission or appoint the commission members.

Another reform measure has been the adoption of specific redistricting criteria on how the lines should be drawn. The most common redistricting criteria are: 1) compact and contiguous territories; 2) respect for political subdivisions; 3) respect for geographic or natural boundaries; 4) preserving communities of interest; and 5) encouraging competition. Reformers believe that these measures help control partisan gerrymandering by defining and prioritizing map-making objectives. Critics, on the other hand, argue that these criteria are ambiguous and often conflict with one another when being applied. This then opens the door for commissioners to ignore the criteria and apply their own “personal redistricting tastes.” Two of the most popular criteria and the only two that will be discussed in this paper are the requirements that districts be compact and contiguous.

II. PRIMARY AUTHORITY IN LEGISLATURE

The United States is one of the very few democracies in the world in which legislatures still have the responsibility of drawing electoral districts in most states. Most countries, including Australia, Canada, Germany, New Zealand, and the United Kingdom assign responsibility to independent commissions. Currently, thirty-six states give their legislature primary authority to draw congressional and state legislative boundaries. In the majority of these states, the executive and judicial branches of government are only minimally involved in the process and citizens are almost entirely excluded from participation. Four of these states, however have created advisory commissions, which assist the legislature but have no binding authority. Another six of these states have created backup commissions, which take over the process when the legislature is unable to pass a plan in a timely fashion.

In each one of these states, the legislature creates electoral boundaries by passing laws just like any other law. Some states have delegated the first responsibility to specific standing committees in both the House of Representatives and the Senate. These committees are usually those that deal with either the judiciary or election laws. Other states have created permanent, standing committees that focus solely on redistricting and reapportionment. With respect to these states, some have a permanent committee in each house, while others have one joint committee made up of members from both houses. The majority of these states, however, create special joint committees after each decennial census to take on the task of drawing district boundaries. Once the committee draws a redistricting map, it is considered a bill and placed on the calendar for debate and vote. Just like any other law, the proposed plan must pass both

30 Id. at 165-68.
31 Kubin, supra note 27 at 851.
32 Id.; Levitt, supra note 26 at 50-71.
33 Kubin, supra note 27 at 852.
35 Id.
36 These states are Alabama, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Mexico, New York, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.
37 These states are Maine, New York, and Vermont. Rhode Island also created an advisory commission for the 2001 redistricting process but it is not yet clear whether the commission will be utilized in the future.
38 These states are Connecticut, Illinois, Mississippi, Oklahoma, Oregon, and Texas.
houses before being presented to the Governor for his or her approval. Some states however, do not allow the governor to veto redistricting plans. The states that do give the governor veto power then permit the legislature to override a veto by a two-thirds or three-fourths vote.

Because redistricting plans must be passed by a majority vote, the district lines often favor the interests of the majority party and the interests of the incumbent legislators in getting re-elected. Politicians undoubtedly have a personal interest in preserving their incumbencies and gaining partisan advantage. Gene Nichol, the Vice-Chairman of the Colorado Reapportionment Commission explained, “. . . that if reapportionment is partly about race and partly about partisan maneuvering, it is almost entirely about protecting incumbents.” In the 2000 congressional elections, almost ninety-nine percent of incumbent representatives regained their seats in the U.S. House of Representatives. Additionally, in the 2000 state elections, 40.6% of the legislative seats in the forty three states that hold partisan elections were uncontested by the other major party. As a result of these statistics, many scholars and commentators believe that giving incumbent legislators the power to draw congressional and state legislative districts makes voting a nearly futile exercise.

Critics also argue that redistricting is an “area in which appearances do matter” and that the appearance of impropriety by incumbents diminishes public confidence in the electoral process. Many Americans already believe that their vote doesn’t matter and partisan gerrymandering only perpetuates this belief. Many voters believe that giving politicians the power to determine their own membership automatically results in self dealing and incumbency protection. It is an undeniable fact that citizens are fed up with partisan legislative redistricting and the effects of gerrymandering. Accordingly, many states have been and will continue to reform the process. This is evidenced by the fact that after each decennial redistricting cycle since the 1960’s, at least two or three states have created independent redistricting commissions.

Although this is the most highly criticized method of redistricting, there have been noted advantages of giving legislatures primary responsibility for redrawing the lines. One popular argument is that “redistricting is an inherently political question that ultimately requires political answers.” As Emory Law Professor, Michael S. Kang, observes, “choices in redistricting . . . must be made on the basis of contested political values and require judgments that are distinctly political in character.” These academic commentators believe that only legislators are best suited for the task of redistricting because of their experience with representation, electoral competition, and negotiating tradeoffs. They claim that legislatures are superior to independent commissions because they possess the required expertise and are structured to handle the political conflicts involved with redistricting.

40 See e.g. Levitt, supra note 26 at 31-33.
41 Id. at 24.
44 Id.
45 Mosich, supra note 29 at 176.
46 Id. at 177.
47 Confer, supra note 28 at 129-30.
49 Id. at 688-89.
Another argument in favor of giving legislatures primary responsibility is that it may be the only method to guarantee accountability. In theory, because legislators are elected, they are directly accountable to the public and their constituents in the event that district lines become controversial. Conversely, apolitical institutions, like courts and independent commissions are typically isolated from popular sentiment, making them unaccountable to the electorate. Delegate, Mark Cole of the Virginia General Assembly, also points out that appointed commissioners become accountable to those who appointed them rather than the public.

III. ADVISORY AND BACK-UP COMMISSIONS

A. Advisory Commissions

Some states employ independent advisory commissions, which lack any binding authority and merely recommend district plans to the legislature. The legislature still retains the ultimate authority to accept or reject the recommended plans. The states that employ advisory commissions for state legislative redistricting are Iowa, Maine, New York and Vermont. Ohio employs one for congressional redistricting, but not state legislative redistricting. Additionally, Rhode Island employed an advisory commission in 2001 for both types of redistricting but it is not yet clear whether the commission will be utilized again in the future.

Although only three states employ an advisory commission, the compositions of these commissions are very different. For example, New York’s commission has six members chosen by the majority and minority leaders of the legislature. The Speaker of the House and the President of the Senate each appoint two members and the minority leaders of both houses each appoint one member. The partisan structure of the commission therefore depends on which party currently has control over the legislature. On the other hand, Maine’s advisory commission is made up of 15 members, usually seven from each major party and one tiebreaker acceptable to both parties. Twelve members are chosen by the legislative leadership and party chairs. Those twelve members then choose three members from the general public. Vermont’s advisory commission is unique because no member of the commission may be a member or employee of the legislature. The Chief Justice appoints one member, the Governor appoints one member from each major political party, and both major parties each appoint one member.

B. Backup Commissions

Some states employ independent commissions only when the state legislature is unable to pass a redistricting plan in a timely fashion. Connecticut, Illinois, Mississippi, Oklahoma, Oregon and Texas employ this model. Indiana uses a backup commission for congressional redistricting and Connecticut

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52 Cole, supra note 50 at 303.
53 Kang, supra note 48 at 690.
54 Cole, supra note 48 at 303.
56 Levitt, supra note 26 at 31-36.
57 Id. at 20.
59 N.Y. Legis. Law § 83-m.
60 Me. Const. art. IV, pt. III, § 1-A.
62 Conn. Const. art. III, § 6(c); Ill. Const. art. IV, § 3(b); Miss. Const. art. XIII, § 254; Okla. Const. art. V, § 11A; Or. Const. art. IV, § 6; Tex. Const. art. III, § 28. See also Confer, supra note 28 at 123.
uses one for both congressional and state legislative redistricting. These commissions are referred to as “backup commissions” because they are used as a last resort when the legislature cannot pass a plan within the allotted time. If a backup commission is employed, its plan then becomes binding without legislative approval.

These backup commissions also vary in their size, composition, and partisanship. In half of the states that employ such commissions, legislators can still appoint the members, making these bodies highly partisan in nature. However, all three of these states have adopted measures in an attempt to remove some of the politics from the redistricting process. For example, in Connecticut, the backup commission is made up of nine members. The Majority and Minority Leaders in both the House of Representatives and Senate each select two members. The eight selected members then have to nominate a ninth member to be the tie-breaking vote. The other two states have adopted bipartisan backup commissions, in which both parties are equally represented. In Illinois, the backup commission is composed of eight members and no more than four may be from the same political party. The Speaker and Minority Leader of the House of Representatives each appoint one representative and one person who is not a member of the General Assembly. Additionally, the President and Minority Leader of the Senate each appoint one Senator and one member who is not a member of the General Assembly. Oklahoma recently amended its constitution in 2006 to create a six-member, bipartisan backup commission. The Speaker of the House, the President of the Senate and the Governor each appoint one Democrat and one Republican. The Lieutenant Governor is the chairman of the commission but he or she is nonvoting.

The other three backup commissions are composed of individuals who hold offices in the legislative or executive branches of the state’s government. In Mississippi, the backup commission is composed of the Chief Justice of the Supreme Court, the Attorney General, the Secretary of State, the Speaker of the House, and the President of the Senate. Texas’s backup commission is also made up of five public office holders: the Lieutenant Governor, the Speaker of the House, the Attorney General, the Comptroller of Public Accounts, and the Commissioner of the General Land Office. Oregon employs a unique backup commission, which is composed solely of the Secretary of State. Once the Secretary of State drafts a plan, he or she must conduct a public hearing and then submit the plan to the state supreme court for approval.

IV. COMMISSIONS WITH PRIMARY AUTHORITY

There are currently fourteen states rely upon an independent commission primary authority to draw state legislative districts. These commissions are independent from the legislature and only a few of them allow legislators to sit on the commission. The redistricting plans drawn by these commissions are binding and neither the legislature nor the governor has any veto power over the enacted plans. The states that employ independent commissions are Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Iowa, Missouri, Montana, New Jersey, Ohio, Pennsylvania, and Washington. Only seven

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63 Levitt, supra note 26 at 21.
64 Id.
65 Conn. Const. art. III, § 6(c).
66 Ill. Const. art. IV, § 3(b).
67 Okla. Const. art. V, § 11A.
68 Miss. Const. art. XIII, § 254.
70 Or. Const. art. IV, § 6.
71 Confer, supra note 28 at 118; Levitt, supra note 26 at 21-22.
72 See all constitutional provisions listed in notes 75 and 77 infra.
of these states—Arizona, California, Hawaii, Idaho, Montana, New Jersey, and Washington—are given authority to draw both congressional and legislative districts.\footnote{Mosich, \textit{supra} note 29 at 188.}

Independent commissions inevitably vary in their size, composition and partisanship. One key difference has been described as “politician commissions” versus “independent commissions.”\footnote{Levitt, \textit{supra} note 26 at 21-22.} Legislators or other elected officials can sit on a “politician commission” and vote on the proposed plans. Seven states that utilize politician commissions: Arkansas, Colorado, Hawaii, Missouri, New Jersey, Ohio and Pennsylvania.\footnote{Ark. Const. art. VIII, § 1; Colo. Const. art. V, § 48; Haw. Const. art. IV, § 2; Mo. Const. art. III, §§ 2, 7; N.J. Const. IV, § 3, ¶ 1; Ohio Const. art. XI, § 1; Pa. Const. art. II, § 17.} “Independent commissions,” on the other hand, are composed of individuals who are not themselves legislators or other public officials. Although legislators may have a role in appointing the commission members, they are not involved in the re-drawing process.\footnote{Levitt, \textit{supra} note 26 at 22.} The states that employ “independent commissions” are Alaska, Arizona, California, Idaho, Iowa, Montana, and Washington.\footnote{Alaska Const. art. VI, §§ 3-10; Ariz. Const. art. IV, pt. 2, § 1; Cal. Const. art. XXI, §§ 1-2; Cal. Gov’t Code §§ 8251-53.6; Idaho Const. art. III, § 2; Idaho Code § 72-1502; Mont. Const. art. V, § 14(2); Mont. Code §§ 5-1-101-05; Wash. Const. art. II, § 43; Wash. Rev. Code §§ 44.05.030-.100.}

Another key difference in these commissions is the balance in partisan membership. Five states with independent redistricting commissions have adopted a “tie-breaking commission,” which consists of an equal number of members from each major political party and one tie-breaking member. Another four states employ an “unbalanced partisan commission,” created to allow or guarantee an unequal number of partisan members. Another three states have adopted perfectly bipartisan commissions, composed of an equal number of members from each major political party.\footnote{Mosich, \textit{supra} note 29 at 190.} Because the role of legislators in the redistricting process has already been discussed, the following will categorize commissions by the balance in partisan membership.

Although these commissions vary from state to state, they are all positive steps toward removing legislators from the redistricting process. Many commentators believe that independent redistricting commissions are absolutely necessary. The American Bar Association has even adopted a recommendation that every state assign redistricting responsibility to an independent commission.\footnote{See ABA H. Delegates, Report No. 102A (February 11, 2008), at http://search.americanbar.org/search?q=102A+redistricting&client=default_frontend&proxystylesheet=default_frontend&site=default_collection&output=xml_no_dtd&oe=UTF-8&ie=UTF-8&ud=1.} Advocates have identified multiple benefits of employing independent redistricting commissions. The biggest argument is that taking legislators out of the process decreases the chances of partisan gerrymandering and increases the chances of competitive races.\footnote{Scott M. Lesowitz, \textit{Independent Redistricting Commissions}, 43 Harv. J. on Legis. 535, 540 (2006).} In fact, some recent studies demonstrate that commission-drawn plans generally result in higher levels of electoral competition than those drawn by legislatures.\footnote{Mosich, \textit{supra} note 29 at 195.} When commissioners’ own careers are not directly affected by the district maps they draw, they are able to focus more on redistricting criteria and public values.\footnote{Nicholas Stephanopoulos, \textit{Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail}, 23 J.L. & Pol. 331, 338 (2007).}
Tie-Breaking Systems

A tie-breaking system consists of an equal number of members from each major political party plus a single tie-breaking chairman. All of the partisan members are chosen by legislative majority and minority leaders, who then select the tie-breaking member by a majority vote. The five states that have adopted this type of commission include: Arizona, Hawaii, Montana, New Jersey, and Pennsylvania. New Jersey’s tie-breaking commission is unique for two reasons: 1) it is the largest with eleven members; and 2) the Chief Justice of the state supreme court only appoints a tie-breaker if the initial bipartisan commission cannot agree on a redistricting plan. Hawaii’s commission is composed of nine members and the other three states – Arizona, Montana, and Pennsylvania – only employ five-member commissions.

These five states have also adopted measures to reduce the chances of partisan gerrymandering and incumbency protection. For example, no member of the Arizona Independent Redistricting Committee can hold any political office within the three years preceding their appointment, during their appointment, or three years after their appointment. This includes candidates for public office, officers of a candidates’ campaign committee, and registered or paid lobbyists. Hawaii only looks forwards, prohibiting commissioners from serving on the state legislature or the U.S. House of Representatives for two years following enactment of the commission’s redistricting plan. Montana denies membership to any incumbent public official and forbids any commissioner from running for election for any legislative seat within two years after the enactment of the redistricting plan. Pennsylvania is the least restrictive, only forbidding the “tie-breaking member” from holding a local, state, or federal public office.

Many advantages arise from employing a tie-breaking redistricting commission. The most notable is that these types of commissions can create districts with far less partisan bias than other redistricting systems. In fact, during the 1990 redistricting cycle, not one plan drawn by a tie-breaking commission was overturned. Additionally, all the lawsuits filed against the Montana and Pennsylvania plans in the 2000 cycle were either dismissed or failed on the merits. Pennsylvania provides an interesting and illustrative case study because it uses a tie-breaking commission for state legislative redistricting, but employs the legislature for congressional redistricting. All of Pennsylvania’s commission-drawn legislative plans have been upheld during the last four redistricting cycles. On the other hand, one part of the congressional plan of 2002 was declared unconstitutional on equal protection grounds, and another part led to the United States Supreme Court’s holding that partisan gerrymandering cases were non-justiciable Vieth v. Jubelirer.

In conjunction with the above argument, commentators have suggested that tie-breaking commissions encourage compromise and moderation among members, which results in a “fair fight.”
The idea of a “fair fight” mechanism in the redistricting process prevents the majority party from controlling the minority party as it does in an unevenly split legislature. This type of commission offers both political parties equal representation and power, but also prevents deadlock by employing a tie-breaking chairman to monitor and referee ensuing struggles. Tie-breaking members also tend to encourage commissioners to act fairly and moderately for fear that if they act unreasonably, the tie-breaking member will vote for the other party.  

Another argument favoring tie-breaking commissions stems from their inherent fairness and efficiency which restores public confidence in the legitimacy of the redistricting process. Although redistricting always involves a certain amount of partisanship, tie-breaking commissions are the most neutral out of all the redistricting commissions. The removal of the legislature from the decision-making process and the intercession of a tie-breaking member discourages partisan gerrymandering and deadlock. Additionally, these commissions are small, which makes it much easier to communicate and complete the task. Some commentators also believe that public confidence will be restored because legislators will have more time to focus on their more important responsibilities.

Commentators have also pointed out several disadvantages of tie-breaking commissions. One argument is that tie-breaking commissions increase the likelihood of a bipartisan gerrymandering. Bipartisan gerrymandering, also known as “sweetheart gerrymandering,” occurs when district boundaries are drawn in a way that ensures re-election of most or all of incumbent legislators from both parties. Some commentators believe that all commissioners may mutually agree to protect their own parties, rather than take the risk that the tie-breaking member will vote for the other side. Others argue that the chances of partisan gerrymandering are also prevalent in tie-breaking commissions. Because no individual is completely politically neutral, every odd-numbered commission will give advantage to one political party over the other. Further, there is always the risk that the tie-breaking member may take over the redistricting process when the bipartisan members refuse to compromise.

Unbalanced Commissions

The other predominant type of independent commission is the “unbalanced commission,” composed of an uneven number of individuals, thus resulting in an imbalance in partisan membership. Four states that have adopted an unbalanced commission are Alaska, Arkansas, Colorado, and Ohio. Three of these states allow public officials to serve as members and two even require that they do. Alaska is the only state in which commissioners are forbidden from holding any public office; however all five members are appointed by incumbent public officials.

The independent commissions in Alaska and Colorado are unique because all three branches of government participate in appointing members. In Alaska, the Governor selects two members, the Chief Justice selects one member, and the legislative majority leaders each select one member. No member may be a public employee or official at the time of appointment or during the appointment to the commission. Additionally, no member may be a “candidate for the legislature in the general election following the

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95 Id.; Mosich, supra note 29 at 194-95.  
96 Kubin, supra note 27 at 861; Mosich, supra note 29 at 195.  
97 Confer, supra note 28 at 150-51.  
98 Id. at 128-29.; Mosich supra note 29 at 195.  
99 Kubin, supra note 27 at 860-61.  
100 Mosich, supra note 29 at 194-95.  
101 Kubin, supra note 27 849.  
102 Kumar, supra note 23 at 662.  
103 Alaska Const. art. VI, § 8; Ark. Const. art. VIII, § 1; Colo. Const. art. V, § 48; Ohio Const. art. XI, § 1.
adoption of the final redistricting plan. In Colorado, the Governor appoints three members, the Chief Justice appoints four members, and the legislative majority and minority leaders each appoint themselves or one designee. No more than six members may be affiliated with the same party, and no more than four may be members of the General Assembly. Additionally, at least one resident of each congressional district must serve on the commission, but no more than four may be from the same district.

The commissions of Arkansas and Ohio are also unique in their membership. Arkansas employs only three members: the Governor, the Secretary of State, and the Attorney General. Although the three members are from the same branch of government, they are elected officials and thus not necessarily of the same political party. The same holds true in Ohio where the Governor, the State Auditor and the Secretary of State serve on the redistricting commission. The other two members of the Ohio Apportionment Board are appointed by the legislative leaders of the two major parties. There is no provision in Ohio’s constitution or statutory code that prohibits public officials from serving on the commission.

The greatest advantage of these commissions is that even though one party will always have more power than the other, it won’t necessarily be the majority party of the legislature. Instead, the balance of partisan membership will depend largely on which party each public official is affiliated with at the time. This is especially true in Arkansas and Ohio where the majority of commissioners are also elected officials with strong political ties. Alaska is the only state in which the majority party of the legislature can affect the partisan balance of the commission. Because two of the five members are from the majority party of the legislature, only one additional party member is needed for a majority in the commission.

The greatest disadvantage of an unbalanced commission is the unavoidable fact that one party will always have more power than the other. When the minority party isn’t guaranteed equal representation, gerrymandering is much more likely to occur. Another weakness of these commissions is that they are extremely political in nature. All of these commissioners either hold public offices or answer to someone who does. Consequently, most of these members have political agendas and/or a duty of loyalty to their appointees. Additionally, appointed members are constantly lobbied by politicians and various interest groups. Essentially, what these states have done is removed the redistricting process from one political body (the legislature) and given it to another.

Bipartisan Commissions

Bipartisan commissions are perfectly balanced commissions, composed of an equal number of members from both major political parties. The only three states that employ bipartisan commissions for legislative redistricting are Idaho, Missouri, and Washington. Although California does not technically employ a bipartisan commission, its unique formula for membership will also be discussed here because of its similarities with a bipartisan commission. As one would expect, all four commissions differ in size and in composition. Washington employs the smallest commission with only four members. These four members are chosen by the majority and minority leaders in both houses of the state legislature. The bipartisan commission must then appoint a fifth member, by a majority vote. The fifth member is the
chairperson of the commission but he or she is nonvoting. Idaho also utilizes a small commission, which consists of only six members. The majority and minority leaders of both houses, as well as the two party chairs, each select one member.

Missouri has adopted a very unique and complex process for appointing commission members. For one thing, Missouri employs two separate bipartisan commissions to carry out the process for each chamber of the general assembly. In the House, each major party nominates two individuals from its own party from each of the nine congressional districts. The Governor then selects one member from each party for each district, resulting in an eighteen-member commission. In the Senate, each major party nominates ten individuals from its own party and the Governor then selects five from each list. Another unique requirement is that each commission must pass their respective plans with a 70% vote.

Just like the states with tie-breaking commissions, these states have also adopted statutes and constitutional provisions that prevent legislators and other public officials from serving on the redistricting commission. Missouri is the least restrictive and the only state with a bipartisan commission that allows legislators to sit as members. The only restriction is commission members are forbidden from sitting on the state legislature for four years following his or her service on the commission. Washington, on the other hand has implemented multiple restrictions. For example, no member of the redistricting commission may hold any political office at the time of his or her appointment, or within the two years preceding the appointment. Additionally, no member may run for a state legislative or congressional seat for two years after the redistricting plan becomes effective. This restriction also applies to any individual who is or was a lobbyist within one year prior to his or her appointment. Furthermore, no member of the commission may actively participate or contribute to any political campaign for any state or federal candidate while in office. Similarly, in Idaho, no member may be an elected or appointed state official at the time of selection or two years prior to selection. Additionally, all members are precluded from serving in the state legislature for five years after he or she serves on the commission.

The greatest advantage of bipartisan commissions is that both major political parties are equally represented and one party cannot dominate the other. Giving the minority party an equal voice in the redistricting process guarantees that their constituents will be represented fairly and it also tends to “keep the majority party honest.” Further, when both parties are equally represented, the majority is less likely to get away with partisan gerrymandering.

The greatest disadvantage of a bipartisan commission is its lack of an internal mechanism for dealing with a split commission. These commissions inevitably result in more deadlocks than any other type of commission. Consequently, deadlocks end up burdening the states by requiring them to implement costly alternatives. These alternatives often require some other public official or the state

111 Wash. Const. art. II, § 43.
112 Idaho Const. art. III, § 2.
113 Mo. Const. art. III, § 2.
114 Mo. Const. art III, § 7.
115 Mo. Const. art. III, § 2.
116 Wash. Const. art. II, § 43.
117 Wash. Rev. Code § 44.05.060 (West 2011).
118 Wash. Rev. Code § 44.05.050 (West 2011).
119 Wash. Rev. Code § 44.05.060 (West 2011).
120 Idaho Const. art. III, § 2(2); Idaho Code Ann. § 72-1502 (West 2011).
121 Idaho Const. art. III, § 2(6).
122 Mosich, supra note 29 at 194.
123 Id. at. 195-96.
supreme court to take over the process. These individuals are then taken away from their primary responsibilities to undertake the onerous and often time-consuming task of redistricting.

A related disadvantage of bipartisan commissions is the increased chance of bipartisan gerrymanders. Without the presence of a neutral, tie-breaking member, bipartisan commission members are more likely to compromise on a bipartisan gerrymander. Although these are generally more acceptable to the public than partisan gerrymanders, they too restrict electoral competition by safeguarding seats for incumbents. This is especially true in Missouri where incumbents are permitted to sit on the commission and participate in the map-drawing process.

California

California’s redistricting process is worth discussing on its own for two reasons: (1) it has recently created an independent commission unlike any other in the country; and (2) it has adopted reform measures that can serve as a model for other states. The current commission is composed of fourteen members: five republicans, five democrats, and four members who are not registered with either major party. State auditors nominate a pool of sixty voters which includes 20 Democrats, 20 Republicans and 20 who are neither. Legislative majority and minority leaders then get to strike two members from each sub-pool of twenty. From the remaining pool of applicants, the State Auditor randomly selects eight members: three Democrats, three Republicans and two who are from neither major party. These eight commissioners then nominate six additional members from the remaining pool of applicants used by the State Auditor.

With the creation of the Citizens Redistricting Commission in 2008, California also codified some of the most stringent restrictions on commission members to date. First, anyone who works for, is under a contract with, or is the immediate family member of the Governor, a member of the state legislature or Congress, or a member of the State Board of Equalization may not serve on the commission. Second, neither the commissioner, nor a member of his or her immediate family may have done any of the following for ten years preceding the appointment: (1) served or ran for any federal or state office; (2) served as an officer or employee of a political party or campaign committee; (3) served as a member of a political party central committee; (4) registered as a local, state, or federal lobbyist; (5) served as a paid congressional, legislative or Board of Equalization staff; or (6) contributed $2,000 or more to any candidate for public office. Further, members are also prohibited from holding any local, state or federal elective public office for ten years following his or her appointment. They are additionally prohibited from holding any appointed public office for five years following their membership.

California has also adopted measures to ensure fairness, equal representation and public transparency in the redistricting process. For example, the constitution was amended to reinforce the state’s goals of creating a commission that is “independent from legislative influence” and reinforces “public integrity of the redistricting process.” To accomplish these goals, the commission is required to hold public hearings and conduct all business “on the record.” Commissioners are forbidden from

124 Kumar, supra note 23 at 662.
125 Mosich, supra note 29 at 194.
126 See id. at 174.
129 See Initiative Measure (Prop. 11, § 4.1, approved Nov. 4, 2008, eff. Nov. 5, 2008).
130 Cal. Gov’t Code § 8252 (West 2011).
131 Cal. Const. art XXI, (c)(6).
132 Id.
communicating with anyone about redistricting matters outside of a public meeting. Finally, when the commission enacts a final plan, approval is required from three Democrats, three Republicans and three from neither party. The commission as a whole must then produce a report, explaining why the districts were drawn the way they were.

V. HYBRID COMMISSION – IOWA

The state of Iowa utilizes some of the most unique and politically-neutral redistricting mechanisms in the country. First, Iowa does not rely upon the legislature or upon a commission to redraw legislative districts. Rather, the Legislative Services Agency, (“LSA”) a nonpartisan administrative agency is given initial responsibility to re-draw the lines. The LSA is led by five executive directors and staffed with sixty five employees. The LSA technically acts as an advisory commission because its authority is not binding and the legislature must approve its plans by a majority vote. Although the LSA is only given initial redistricting authority, there is an especially strong tradition of abiding by the commission’s recommendations. In fact, the legislature has to deny two different plans submitted by the LSA before it can implement a plan of its own. Additionally, when drawing the district boundaries, the LSA has no access to incumbency, voter registration, or election information.

Iowa also utilizes a temporary redistricting advisory committee, which is established after each decennial Census. Four of the five members are selected by the majority and minority leaders of each house and those members then appoint a chairman. No member of the commission may be a member of the General Assembly or hold any other political public office. Furthermore, no commissioner can be related to any member of the General Assembly. The primary responsibilities of the advisory commission are to provide advice and guidance to the LSA on certain redistricting matters and to hold public hearings. In fact, the advisory commission is required to hold at least three public hearings once the LSA submits its first redistricting plan to the General Assembly. It should be noted, however, that the advisory commission has no binding authority over the actual map-drawing process.

VI. JUDICIAL REVIEW

Another reform measure worth noting is automatic judicial review of enacted redistricting plans by the state’s highest court. Three states – Colorado, Florida, and Kansas – currently mandate review by the state’s highest court. In these states, the court reviews redistricting plans to determine whether they comply with applicable federal and state regulations. All three states have allocated a timeframe for interested parties to present their views to the court. If the court is not satisfied with the plan, it returns it to the legislature or commission with its reasons for disapproval. The legislature or commission then revises the plan to conform to the court’s requirements and then resubmits it for approval.

Advocates argue that automatic judicial review increases the likelihood of constitutional redistricting plans. Redistricting plans are often challenged and many eventually reach the state’s highest
Court. Litigation is inevitable but automatic review expedites the process by eliminating the trial and appellate levels. Eliminating these steps unclogs the judiciary’s docket and saves the state a considerable amount of time and money. Moreover, it guarantees review of challenges that may have otherwise been dropped due to lack of time and/or resources. This expedited process also helps to secure timely elections. While advocates recognize that automatic judicial review does not eliminate all delays, they claim that it unequivocally eliminates many of them. Accordingly, timely elections make voters happy and help them regain confidence in the redistricting process.143

Critics, however, argue that judges and courts are ill suited for the task of reviewing redistricting plans. They argue that courts are supposed to be politically insulated, which leaves them poorly equipped to serve as institutions of democratic policymaking. First, judges do not have experience in weighing the complex political considerations that should influence the redistricting process. Further, judges do not possess the expertise and skill needed to adequately review district maps. Most have little or no experience with redistricting criteria and how district lines should be drawn to comply with those criteria. Moreover, courts are only faced with redistricting challenges once every ten years, and are typically “left in the dark” in the interim.144 Critics also argue that judges are not apolitical and that they may disapprove of plans that don’t help their political party. This is especially true for elected judges who have stronger political ties than those who are appointed.145

VII. COMPACT AND CONTIGUOUS

Another measure taken by states to reduce the chances of gerrymandering has been the adoption of specific redistricting criteria (principles).146 These constitutional amendments and statutory provisions focus on how district lines should be drawn. The two most popular criteria require districts to be compact and territory to be contiguous. In fact, forty-six states now require legislative districts to be compact and thirty-six states require them to be contiguous.147 Further, although not required by the federal constitution or federal statute, the U.S. Supreme Court has considered compactness and contiguity “traditional principles” of the redistricting process.148

Compactness

The compactness requirement is an elusive concept that varies in definition by state. There are currently three competing views of how compactness should be measured. Some state courts have taken the position that the compactness requirement refers to the geometric shape and size of a district. These states generally focus on the smoothness or jaggedness of the district’s edge to determine whether the district has a fairly regular shape.149 The smoother the borders are, the more likely the district will be deemed compact. For example, a district shaped like a circle or a square is very compact. On the other hand, an irregular shape with bizarre extensions in different areas of the state would not be considered

143 Kumar, supra note 2, at 676-78.
144 Kang, supra note 48 at 690-91.
145 Levitt, supra note 26 at 28.
compact. In describing irregularly shaped districts, the Supreme Court has used terms like “finger-like extensions,” “hook-like shapes,” “jigsaw puzzle,” and “a bug splattered on a window.”

The states that focus on the physical shape of the district have adopted different measuring techniques. For example, some states have taken the “eyeball” or “I know it when I see it” approach, which merely focuses on how smooth or contorted the boundaries of a district are. Other states use mathematical formulas to create a perimeter-area ratio. These states consider districts compact if they have a small perimeter in relation to the area encompassed by the boundaries. Another technique, known as the “Polsby-Popper” test, measures the district’s area and compares it to the area of a circle with the same perimeter as the district. This technique, among others, requires complex mathematical equations which are often accomplished through the use of computer software programs.

Other courts have taken a broader approach to compactness, defining it merely as a “closely united territory.” These states focus less on the physical shape of the district and more on the dispersion of the population. A district may be compact even with an irregular shape, so long as officials can adequately serve their constituents. This is easier to accomplish in a more limited geographical area, rather than one spread out over great distances. One of the main goals in these states is preserving lines of communication and transportation among representatives and constituents. Other common goals are preserving communities of interest and respecting local government boundaries. One way to measure compactness in this form is to compare the district’s shape to its population “center of gravity.” A district with its population center close to its geographic center will be more compact. The farther apart the centers are, the less compact the district will be.

Most states that require compactness neither define the term, nor specify how it should be measured. Further, the U.S. Supreme Court has not given us a precise definition of the term. However, most courts have generally recognized that absolute or perfect compactness is not required, or even possible. Instead, the general requirement is that districts be as compact as possible in view of all the other redistricting considerations. Because population equality is the single most important criteria, most, if not all courts accept some degree of non-compactness in order to accomplish this constitutional mandate.

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150 Id. Levitt, supra note 26 at 51.
152 See Herbert, supra note 149 at 43; Levitt, supra note 26 at 51.
156 Herbert, supra note 149 at 73.
159 Levitt, supra note 26 at 52.
160 Herbert, supra note 149 at 73.
Contiguity

The contiguity requirement is a lot less elusive and much easier to measure than the compactness requirement. Contiguous has been defined as “a single, unbroken shape,” in which “all parts of the district are attached and connected to one another.”\(^{163}\) A district is considered contiguous if someone can travel to one part of the district from any other part without crossing the district boundary. Just like with compactness, many courts have recognized that absolute contiguity is not always possible. For example, some districts may be divided by various types of waterways and others may include multiple islands whose borders cannot touch.\(^{164}\)

VIII. CONCLUSION (RECOMMENDATIONS)

Due to the increasing success of political gerrymanders and the resulting decrease in competitive elections, many states have adopted redistricting reform measures. The most popular of these measures has been the creation of independent redistricting commissions. The most modern movement has largely focused on creating commissions with nonpolitical members. Most scholars, including myself, recognize that removing politics entirely from the redistricting process is nearly impossible. However, states should create independent commissions that are as close to politically neutral as possible. Undoubtedly, Iowa’s use of a nonpartisan administrative agency is the most neutral type of commission to date. However, Iowa’s method may not be practicable in more populated and diverse states. Bipartisan commissions also seem ideally neutral, but they tend to be ineffective as they often result in bipartisan gerrymanders or deadlock. Thus far, the most effective type of independent commission is the tie-breaking structure used in Arizona, Hawaii, Montana, New Jersey, and Pennsylvania. Additionally, Maine uses a tie-breaking structure for its advisory commission and Connecticut employs one for its backup commission.

A tie-breaking commission seems to be the most viable type of redistricting commission for several reasons. First, it guarantees equal representation for both major political parties and prevents the majority party from dominating the process. Second, it provides an internal mechanism for dealing with a split commission. The tie-breaking member not only prevents deadlock, but he or she also tends to encourage compromise and moderation among the other members. As a result, these commissions are more likely to pass redistricting plans within a timely fashion and without the use of costly alternative methods. Further, the redistricting maps created by these commissions are often less partisan than those created by state legislatures. This is evidenced by the vast decrease in redistricting litigation in the states that currently employ tie-breaking commissions.

States should also enact provisions that restrict commissioners from holding any political office before, during, and following their appointment to the commission. Currently, nine of the fourteen states that have created independent commissions forbid members from holding public office for some time following their appointment. Seven of these states prohibit members from holding any office during their appointment and five states prohibit them from holding office for some time preceding their appointment. Although Washington does not utilize a tie-breaking commission, it has adopted restrictions that can serve as a model for other states. Washington has placed restrictions on members for two years preceding their appointment, during their appointment and two years following their appointment. These restrictions apply to lobbyists and they also prohibit members from actively participating and contributing to any political campaign. These restrictions are ideal because they remove redistricting power from political institutions, yet they do not require members to be completely nonpartisan. Removing incumbents and future candidates from the process unequivocally reduces the chances of political gerrymandering. Additionally, short term restrictions (two to three years) are more ideal because politicians and experts are

\(^{163}\) Spivak, supra note 157 at 19.

\(^{164}\) Levitt, supra note 26 at 50.
not completely banned from serving on the commission. Redistricting is a complex process, which requires expertise and experience that only politicians may provide.

Along with creating independent commissions, states should also create a permanent advisory commission or agency. These commissions or agencies should employ a large number of people who are not closely associated with public officials. Employees should be completely insulated from the political process and from political pressures. They should be prohibited from holding any political office before or during their employment. Additionally, these institutions should maintain transparency by making geographical and political data available to the public and by facilitating public input. These commissions should be permanent and not merely created after each decennial census. This permanency will provide an expertise in the field that can greatly assist each new redistricting commission.

States should also enact provisions that increase transparency within the redistricting commissions. The more transparent the redistricting procedures, the less likely gerrymandering and incumbent protection will occur. California has adopted provisions that can serve as a model for other states. For example, states should hold at least one public meeting and provide ample notice for interested parties to present their opinions. Additionally, members should conduct all business “on the record” and transcripts should be made available to the public. The commission or the advisory commission should provide all relevant data to the public via a website. Furthermore, the commission should be required to produce a public report stating its reasons for the final enacted plan.

Finally, states need to require their redistricting commissions to abide by specific criteria when drawing the lines. These criteria must be precisely defined by the legislature and they should be prioritized by their importance. The majority of states have already adopted specific criteria but many have failed to define them with certainty. Clarity is needed not only for the members drawing the lines, but also for the courts who frequently review redistricting plans. Just like every other reform measure, there is no perfect formula for defining and prioritizing redistricting criteria. Different states have different political cultures, as well as different goals for political representation. A redistricting system may work wonderfully in one state and disastrously in another. The most important thing for legislatures to remember when adopting redistricting criteria is to be thorough, concise and unambiguous.
APPENDIX 4

AZAVEA WHITE PAPER: REDRAWING THE MAP ON REDISTRICTING: 2010 THE PHILADELPHIA STORY

State Legislature

Pennsylvania is a particularly egregious offender in its state senate districting, with the average district compactness being the 4th worst among the nation’s 50 states. New Jersey is marginally better, ranking 12th. Table 2 displays the ten least compact state senate districts in Pennsylvania and New Jersey. Only two state senate districts from New Jersey land in the Top Ten, both of them in northern New Jersey. The rest of the senate districts displayed in Table 2 are in Pennsylvania, three of them in the Philadelphia region.

Table 2. Top Ten least compact state senate districts in Pennsylvania and New Jersey, national rank in parentheses

At the state assembly level this pattern is roughly reversed, with New Jersey having the nation’s 5th worst districts, on average, and Pennsylvania ranking 15th. However, all of the assembly districts displayed in Table 3 are in Pennsylvania, three of them in the Philadelphia region.

Azavea White Paper

APPENDIX 4 PAGE 1

AZAVEA WHITE PAPER:
REDRAWING THE MAP ON REDISTRICTING: 2010 THE PHILADELPHIA STORY
PENNSYLVANIA AND NEW JERSEY ASSEMBLY DISTRICT GERRYMANDERS.

Table 3: Top Ten least compact state assembly districts in Pennsylvania and New Jersey, national rank in parentheses.
AZAVEA WHITE PAPER:
REDRAWING THE MAP ON REDISTRICTING: 2010 THE PHILADELPHIA STORY
PENNSYLVANIA AND NEW JERSEY GERRYMANDERED CONGRESSIONAL DISTRICTS

APPENDIX 4
AZAVEA WHITE PAPER: REDRAWING THE MAP ON REDISTRICTING PA & NJ GERRYMANDERED CONGRESSIONAL DISTRICTS

Although Pennsylvania currently holds just 18 of the 435 seats in Congress, many of the state’s Congressional districts are among the least compact in the nation. No Pennsylvania district ranked among the Top Ten, but PA-1, which covers much of Philadelphia and Delaware Counties, narrowly missed, coming in 11th. A total of four Pennsylvania districts ranked in the Top 50, meaning that the while the state holds just 4% of the seats in Congress, it has double the percentage among the most gerrymandered. A similar pattern holds in New Jersey, where three of the state’s thirteen Congressional districts are among the Top 50 least compact, and two of these (NJ-6 and NJ-13) are among the Top Ten. Table 1 displays the ten least compact Pennsylvania and New Jersey districts, along with their national rank. Several of these districts—PA-1, PA-13, and PA-6—are in the Philadelphia region.

In addition to having a handful of extremely gerrymandered districts, the overall pattern of district drawing in New Jersey and Pennsylvania tends toward non-compactness and, potentially, gerrymandering. To make statewide comparisons, we determined the average district compactness in each of the 43 states with more than one Congressional delegate. According to this measure, New Jersey’s districts are the fifth least compact (potentially most gerrymandered) and Pennsylvania’s are 10th.

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<tr>
<td>PA-1</td>
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<td>PA-6</td>
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Table 1. Top Ten least compact congressional districts in Pennsylvania and New Jersey, national rank in parentheses

PUBLIC EDUCATION

Initially, our Committee solicited institutions and people with recognized expertise in issues relevant to public education for basic background information and identification of areas of concern. One of the foremost state constitutional experts regarding education, Molly Hunter, of the Education Law Center in Newark, NJ, provided us with a wealth of information. The Committee also met with attorneys who litigated the recent education equity funding cases in Pennsylvania and we benefitted from their insights and information regarding the litigation. We invited approximately 75 people to testify, and although many did not respond, we garnered sufficient interest to warrant 3 public hearings held in various locations across the state. Our Committee reviewed cases, journal articles and treatises and, with respect to the issue of school vouchers, testimony from legislative hearings. Based on that preliminary analysis, the development of the public record at hearings, and concerns raised by other stakeholders and interested parties regarding public education issues, the Committee determined that there were four major issues to address.

- Whether the judiciary has a role in enforcing the constitutional provisions relating to education and what effect it has on the quality of education and student outcomes;
- Whether public education should be an individual right or a collective obligation;
- Whether equity in funding school districts should be addressed in the Constitution; and
- Whether tuition vouchers are constitutional.

At its meeting of June 17, 2011, the minutes of which are available, we considered each of the above issues. In summary, the vote of the Committee regarding each follows:

- It was moved and passed unanimously that the thorough and efficient language in the state constitution be modified to make education issues justiciable.
- It was moved and passed unanimously that any changes to the education clause remain in Article III of the Constitution addressing a system of education as opposed to being added to Article I as an individual right.
- It was moved and passed unanimously to recommend a constitutional provision to provide state funding on an equitable basis for local school districts.
- It was moved and passed unanimously that the committee address Article III, Section 15 in an explanatory way and provide options for modification for tuition voucher proposals.

The attached provides a context and starting point for discussion by the full Commission of the issues raised and considered by the Public Education Committee.

JUSTICIABILITY, QUALITY AND OUTCOMES

The PBA’s CRC created the Public Education committee to study Article III, Education, of the Pennsylvania Constitution. Currently, the most specific language in the Pennsylvania Constitution relating to public education is contained in Article III, Section 14, titled “Public School System” and Section 15 titled “Public School Money Not Available to Sectarian Schools.” Each of these sections is one sentence long.

Section 14 states that “The General Assembly shall provide for the maintenance and support of a through and efficient system of public education to serve the needs of the Commonwealth.” Despite its brevity
and its lack of specificity, this provision engendered much contentious litigation concerning the practical aspects of “what constitutes an ‘adequate’ education or what funds are ‘adequate’ to support such a program.” Marrero ex rel. Tabalas v. Commonwealth, 559 Pa. 14, 20, 739 A.2d 110, 113-114 (1999)(quoting with approval from lower court decision). The same decision continued its observation by noting, “These are matters which are exclusively within the purview of the General Assembly’s powers, and they are not subject to intervention by the judicial branch of our government.” Id. at 20, 739 A.2d at 114 (quoting lower court’s opinion). Accordingly, the Marrero court decided to abstain from adjudicating the case, justifying its action based on the conferral of decision-making authority on the central issue – educational funding – being reposed in the legislature, thus rendering the legal issue a non-justiciable under the political question doctrine and the separation of powers doctrine. Id. at 20, 739 A.2d at 114. See also Harrisburg School Dist. v. Hickok, 762 A.2d 398, 414 n.24 (Pa. Commw. Ct. 2000).

Yet, the confusion surrounding this provision is compounded by the fact that prior decisions recognizing public education, under the Commonwealth’s Constitution, as a fundamental right. School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 343, 667 A.2d 5, 9 (1995). Curiously, earlier cases maintained that the right to a public education was not a fundamental right, but a statutory one and, in so deciding, focused on the state Constitutional language as imposing a duty on the legislature. See Lisa H. v. State Bd. of Educ., 67 Pa. Commw. Ct. 350, 356, 447 A.2d 669, 673 (1982) citing Danson v. Casey, 484 Pa. 415, 399 A.2d 360 (1979). So, the high court, in invoking nonjusticiability, effectively undercuts the significance of the fundamental right as an individual right, but relies instead on the conception of this clause as a repository of discretionary legislative responsibility. The result: Pennsylvania’s courts have been unable to address the inequities created by the existing constitutional language.

This Committee recognizes that education is one of the most important public functions and, perhaps, the most important function of state government. The best way to honor this value is to make meaningful provision for it in our Constitution. Accordingly, the Committee believes that a constitutional amendment is needed to strengthen the language in Article III by assuring adequate funding for public education in a fashion that offers meaningful redress if such funding is withheld. In proposing a revision of the language of the Pennsylvania Constitution, the Committee adopted the language employed in Florida, a state widely viewed as being in the vanguard in the area of education funding.

**Legislative History**

The lower court in Marrero, offered a scholarly outline of the historical development of the language regarding education in Pennsylvania’s constitutions. See Marrero ex rel. Tabalas v. Commonwealth, 709 A.2d 956, 960-62 (Pa. Commw. Ct. 1998). Specifically, it carefully reviewed the constitution of 1874 and the constitutional referendum of 1968, and decided that Article III, Section 14 of the Pennsylvania constitution places an affirmative duty upon the General Assembly to provide for a through and efficient system of public education. However, this mandate does not “conferr an individual right upon each student to a particular level or quality of education, but, instead… impose[s] a constitutional duty upon the legislature to provide for the maintenance of a through and efficient system of public schools throughout the Commonwealth. Id. at 961-62. Much of this language was approved by the Supreme Court in its review. Id. at 17-18.

Language from both the lower court and the Supreme Court prove informative:

> The people have directed that the cause of public education cannot be fettered, but must evolute or retrograde with succeeding generations as the times prescribe. Therefore all matters, whether they be contracts bearing upon education, or legislative determinations

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1 The opinion also offers insights into the Pennsylvania Public School Code. Id at. 962-63.
of school policy or the scope of educational activity, everything directly related to the
maintenance of a ‘thorough and efficient system of public schools,’ must at all times be
subject to future legislative control.

Id. at 963-64.

As long as the legislative scheme for financing public education “has a reasonable
relation” to “[providing] for the maintenance and support of a thorough and efficient
system of schools,” Teachers Tenure Act Cases [329 Pa. 213] at 224, 197 A. 344 at 352,
the General Assembly has fulfilled its constitutional duty to the public school students of
Philadelphia. The Legislature has enacted a financing scheme reasonably related to [the]
maintenance and support of a system of public education in the Commonwealth of
Pennsylvania.

Marrero, supra 559 Pa. at 18, 739 A.2d at 113 quoting Danson, supra at 427, 399 A.2d at 367.2

Proposed Language for Constitutional Amendment

Current law:

Article III, Section 14
“The General Assembly shall provide for the maintenance and support of a thorough and efficient
system of public education to serve the needs of the Commonwealth.”

Proposed law:

Article III, Section 14
“The education of children is a fundamental value of the citizens of the Commonwealth. It is,
therefore, a paramount duty of the Commonwealth to make adequate provision for the education
of all children residing in the State. Adequate provision shall be made by law for a uniform,
efficient, safe, secure, and high quality system of free public schools that allows students to
obtain a high quality education and for the establishment, maintenance, and operation of other
public education programs that serve the needs of the Commonwealth. All actions by the General
Assembly regarding education shall be subject to review by the court.”

This amendment does the following:

1. Makes education a “fundamental value.”
2. Makes it a paramount duty of the Commonwealth to make adequate provision for the education
   of children.
3. Replaces the terms “through and efficient” and requires that the public school system be
   “uniform, efficient, safe, secure, and high quality.”
4. Renders the actions of the legislature subject to judicial review and offers a standard against
   which the judiciary may assess whether the legislature has acted properly.

2 Copyright 2008-2011. Education Rights Center. All rights reserved.
The committee decided against defining education in terms of being an “individual right.” In response to concerns of Commissioners that the state might become liable for every individual's dissatisfaction with the education system, the term “fundamental value” was used.

**EDUCATION AS AN INDIVIDUAL RIGHT OR COLLECTIVE OBLIGATION**

The Public Education committee considered two means of change to the Pennsylvania Constitution in order to protect and provide for an adequate education. These included: (1) creating a system of education relevant to the Education Clause and (2) creating an individual right or entitlement equal to that of other civil rights.

All members of the Committee agreed that the obligation to provide public education to the citizenry needs to be grounded within the Constitution and all agreed that this should be accomplished through the language of the education clause itself. While the Committee concluded that the current “thorough and efficient” language in the Constitution is insufficient to hold the General Assembly accountable for meeting its constitutional obligation, the Committee also decided that elevating education to the status of an individual right is not the best remedy. The Committee recognizes that the “individual right” concept could readily cause an explosion of litigation thus crippling the public education system as limited resources were diverted to individual remedies and away from serving the greatest common good. In a conscientious effort to avoid such consequences, the Committee agreed that systemic requirements and defined state and local obligations in qualitatively measurable terms (such as those suggested by the proposed language change to Article III, Section 14) would greatly improve outcomes, allow for individual instruction and individual action plans, all couched within a system focused on the collective good. In reaching this conclusion, the Committee remained cognizant of the importance of local control and commitment of people within a school system to their school. The Committee considered and gave account to the different economic, geographic and diversity issues that have a role in establishing a high quality education system. We concluded that these factors could be addressed by setting measurable standards for a system instead of by providing for individual rights of recourse.

**EDUCATION FUNDING**

Our hearings and our collective experience lead us to conclude that public education funding is widely acknowledged to be one of the most important and controversial issues facing the Commonwealth. The meaning of Article III, Section 14, in particular, has been and remains a perennial focus of public policy debates regarding the adequacy and equity of school funding in Pennsylvania. As noted previously, the amount of litigation that has taken place over the years challenging education funding in Pennsylvania speaks to the importance of the issue. With that in mind, our Committee began its work by attempting to gain a better general understanding of the system of public education in Pennsylvania and the evolution of the funding system. Through interviews with advocates from both sides of the Marrero and the Pennsylvania Association of Rural & Small Schools v. Ridge (PARSS) litigation, the Education Law Centers of Philadelphia and New Jersey, and other public interest advocates, committee members gained a better understanding of public school funding in Pennsylvania.

Historically, state involvement in the funding of education in Pennsylvania goes as far back as the 1874 Constitution which employed language that required the General Assembly to appropriate at least a minimum state share of a million dollars to fund public education. That language was removed in the 1968 iteration of the Constitution and now Article III, Section 14 simply reads, “The General Assembly

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3 See Pennsylvania Association of Rural & Small Schools v. Ridge, Order of Commonwealth Court entered July 9, 1998 at No. 11 M.D. 1991 (Pellegrini, J.), aff’d per curiam, 558 Pa. 374, 737 A.2d 246 (1999). While this was a hotly contested case, it was handled around the same time as Marrero but did not result in a publicly issued opinion.

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shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.” In 1949, the General Assembly first established a system for funding basic education. 24 P.S. §§ 1-101 et seq. (Public School Code of 1949, Act of March 10, 1949, P.L. No. 30). Over time the state contributed more financial support to education, with a high of 55% state support in 1974. That support has ebbed and today the state support hovers around 35%. The balance of the funding for the 500 existing school districts comes through a system of property taxes which is determined by each local school board. One exception, the Philadelphia School District, lacks taxing authority and must seek funds from the City Council.

The current method of funding public education through local property taxes and a state subsidy results in funding disparities between districts. In one particularly glaring example, it was noted that one district may spend $3,000 per child while another within the same county may spend $9,000 per child, depending upon the wealth of the local community and the value of the local real estate. This funding scheme creates the unfortunate result that school districts with the highest property tax burden (i.e. the highest tax rate (millage)) often host the most underfunded schools (because the local property values are so low). Paradoxically, districts with higher property values impose lower tax rates (lower millage) while maintaining the ability to spend more money per child than the districts with high property taxes. Moreover, as noted above, Philadelphia which operates the largest school district in the Commonwealth is the only district that possesses no authority to tax residents to raise money to fund public education.

In 2005, in an attempt to address the perennial concern that Pennsylvania’s school funding formula was inadequate and that inequity among the districts was great, the state set a goal of support of every student with a minimum level of funding. This led to the General Assembly authorizing a “Costing out Adequacy” study conducted in conjunction with the State Board of Education’s adoption of state education performance standards. The study, which was conducted by an independent group (Augenblick, Palaich and Associates, Inc. of Denver, Colorado), published its findings in December 2007. It found, “The inequity of Pennsylvania’s funding system can be summarized by the conclusion that school districts with higher wealth and lower needs, spend more than lower wealth districts—and do so while making lower tax effort.” In addition, the study urged, “If additional revenues are needed to improve student performance, such funds should be collected at the state level and allocated by the state through a formula that is sensitive to the needs and wealth of the school districts.” (Costing out the Resources Needed to Meet Pennsylvania’s Public Education Goals—Executive Summary Page vi, available at https://www.epiconline.org/files/pdf/PA_Costing_Out_Study_Final%20(APA).pdf.)

As discussed previously, litigation challenging the way the state carries out its Constitutional mandate to provide a “thorough and efficient” system of public education has largely been unsuccessful as the Pennsylvania Supreme Court has consistently determined the issue to be non-justiciable. This was confirmed in two cases, both of which were brought in the late 1990’s in an attempt to challenge the way that the state funds public education. See Pennsylvania Association of Rural & Small Schools v. Ridge, Order of Commonwealth Court entered July 9, 1998 at No. 11 M.D. 1991 (Pellegrini, J.), aff’d per curiam, 558 Pa. 374, 737 A.2d 246 (1999)(“PARSS”); Marrero, supra. In PARSS, the Pennsylvania Association of Rural and Small Schools sued then Governor Ridge and the State Department of Education, in an attempt to have the courts find that Pennsylvania’s public school funding formula was unconstitutional under both the Equal Protection and Education Clauses of the state Constitution. The lawsuit included small school districts and also several third class school districts such as Harrisburg City. Plaintiffs maintained that the General Assembly’s “great reliance” on funding of public education through real property taxes, resulted in students in poorer districts receiving a lower quality education because there was less money available to those districts. Ultimately the case was dismissed by the Pennsylvania Supreme Court that exercised its King’s Bench power to remove the matter from the Commonwealth Court. PARSS, supra. See generally Comment, Been There, Done That: What Next? Looking Back and

At the same time PARSS was being litigated, Marrero found its way to the appellate courts. The latter was initiated on behalf of students and parents in Philadelphia and other urban school districts alleging funding inadequacies. The outcome of both cases reaffirmed our judiciary’s position that the adequacy of public education and the funds available for education falls exclusively within the purview of the General Assembly, and is not subject to intervention by the judicial branch of government.

With this background, Committee members met to formulate a possible change to the Constitution regarding the funding of public education. Our discussions were based upon the information obtained during the course of the information gathering phase as well as the testimony of participants at the public hearings. Issues considered included:

- Whether Pennsylvania should have a fully-funded state school system as is the case in Hawaii;
- Whether the Pennsylvania Constitution should specifically state who is responsible for the funding of public education;
- Whether the Pennsylvania Constitution should specifically define the duties of the state versus the local school districts; and
- Whether the Pennsylvania Constitution should include specific language of a minimum state appropriation for public education as it did in the 1874 Constitution.

Given that the Pennsylvania Supreme Court has determined the issue of funding of public education to be non-justiciable and “within the purview of the General Assembly,” and that the current system of funding leads to disparities between districts, members discussed other alternatives to fund public education. Those discussions included whether public education could be funded through other taxes, including: asset, income or sales tax. After spirited debate, the Committee agreed that although funding education through property taxes leads to disparities between districts, they are less fluid, and therefore lend some stability to education funding.

Regarding funding by the state, the Committee acknowledged the political reality that all schools receive state funding, not just those that need it the most. It is also unrealistic given the strong preference for local control in Pennsylvania to expect a proposal for fully state funded schools to be acceptable to Pennsylvania voters.

Finally, the committee discussed recommending a standard amount of funding in the Constitution to be interpreted by the judiciary which would allow the language to survive a challenge in court. It was agreed however that the focus should remain on the creation of equalized State funding, not through property taxes. Members were clear that whatever language was decided upon, schools that have greater local funding should not be penalized. Our Committee reached consensus that “equitable” funding does not necessarily mean equal money, but it does mean equal results for students.

At the completion of its discussion the Committee members voted unanimously to recommend to the Commission that it consider a constitutional provision to provide state funding on an equitable basis for local school districts, and that language be added to make this a justiciable issue for the districts.

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4 As noted in the Taxation and Uniformity Clause Committee Report, technological advances may offer some mechanisms to reduce the costs involved in the local real estate tax process and minimize the deviations from actual reality market values on an ongoing basis. See infra at 125. In addition, some relief may be available if the Tax and Uniformity Clauses recommendation to allow for different taxes for different forms of realty may offer a more equitable method of apportioning the overall tax burden with a given school district’s area. See id. at 128-29.
SCHOOL VOUCHERS

Article III, Section 15 of the Pennsylvania Constitution provides that "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

"Nearly every state constitution has a prohibition against sectarian instruction in the public schools, the use of public funds for sectarian purposes, or both." State Constitutions of the Twenty-first Century, Vol. 3, p.269 (Chapter 9, Education, Paul Tractenberg). Likewise, many state constitutions have language similar to that in Article III, Section 14 regarding providing a "thorough and efficient system of public education." But just as state courts and state legislatures have taken different approaches to interpreting or implementing the "thorough and efficient" language, so too have they applied the secular prohibition language differently. Thus, while it is helpful to look at what other jurisdictions have done with vouchers, precedent set by Pennsylvania law is most instructive.

In 2002, the United States Supreme Court ruled that a voucher program in Cleveland, Ohio, which allowed students to use vouchers for religious schools did not violate the First Amendment principle of the separation of church and state because the vouchers were given to the parents and not directly to the schools. Zelman v. Simmons-Harris, 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002). Many people have focused on this case, which outlined a five prong test for determining whether a voucher program is neutral on religion and thus within the First Amendment, as the road map for designing a voucher program which passes constitutional muster. While this gives validity to the constitutionality of vouchers under the establishment of religion clause of the federal constitution, it shifts the focus to state constitutions for review, and the language of state constitutions must be carefully considered in determining whether vouchers pass state constitutional muster.

In addition to Article III, Section 15, stated above, Pennsylvania has several other constitutional provisions that are implicated by the notion of using public tax dollars for religious education. Pennsylvania’s religious freedom clause is more specific than the federal constitution and reads in pertinent part "...no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent... ". Pa. Const. art. I, § 3. Additionally, Article III, Section 29 reads, "No appropriation shall be made for charitable, educational or benevolent purposes to any person or to any denominational or sectarian institution, corporation or association; provided that appropriations may be made...in the form of scholarship grants or loans for higher educational purposes nonresidents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology." It is important to recognize that language beginning with “provided that…” which allows grants to individual residents for higher education was added to the state constitution in 1963 when PHEAA (Pennsylvania Higher Education Assistance Agency) was created. Clearly, the legislature recognized that the constitutional language at that time prohibited public grants, even to individuals, that would then go to sectarian schools.

Pennsylvania legal precedent exists on the issue of public support for non-public schools. In Rhoades v. Abington Township School District, 424 Pa. 202, 226 A.2d 53 (1967) the Supreme Court held that it was constitutional to provide transportation to non-public schools because it was provided for the safety of the children and was under the total control of public schools. The court emphasized that transportation serves a purely secular, public purpose and that it was "... significant that the nonpublic schools will not be the donee of funds ...nor will they have control over them." Id. at 220, 226 A.2d at 64. The United States Supreme Court invalidated a Pennsylvania law providing reimbursement to non-public schools for salaries and textbooks in secular subjects as fostering excessive entanglement in religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745, 755 (1971)(creating tripartite test
for determining whether a particular program violates the establishment clause). Thereafter, the Pennsylvania legislature tried to circumvent the earlier Lemon decision by passing the Parent Reimbursement Act for Nonpublic Education, the court struck down the Act as having the primary effect of advancing religion. Sloan v. Lemon, 340 F. Supp. 1356 (E.D. Pa., 1972) aff’d 413 U.S. 825, 93 S.Ct. 2982, 37 L.Ed.2d 939, rehearing denied, 414 U.S. 881, 94 S.Ct. 30, 38 L.Ed.2d 128 (1973). Whether these two cases would meet the current neutrality test set forth by the U. S. Supreme Court in the more recent Zelman case is open to debate. While Zelman might change the federal constitutional analysis, it may not necessarily address the impediments raised by the state constitutional provisions cited above.

If proponents of vouchers for sectarian education at the elementary and secondary level want to move forward with legislation, they would be well advised to follow the procedure used by the legislature when it created PHEAA in the 1960’s and propose amending the constitution. Because Article III, Section 29, prohibits grants to any person or …institutions…, grants to parents would be as troublesome as direct grants to institutions, unless the language that was added in 1963 to enable PHEAA grants was further modified by deleting "higher" before "educational."

Finally, voucher proponents need to deal directly with the language contained in Article III, Section 15. On its face, Section 15 clearly prohibits the appropriation of money raised for the public schools being used to fund sectarian schools. Most commentators have concluded that since general fund tax dollars are typically the source of funds appropriated to public education, such funds cannot be diverted to the use of non-public schools, either directly to the schools or indirectly to the parents. (See Testimony from PSEA, PSBA, and the ACLU on SB 1 of 2011). Some have opined, however, that in Pennsylvania, the only money specifically raised to support public education derives from the local property taxes raised by school boards. See Commonwealth Foundation testimony on SB 1 of 2011. Given the controversy and strong feelings on both sides of the voucher issue, any attempt to proceed with a voucher plan will surely meet with a legal challenge. Since Section 29 already has to be amended to allow for grants to individuals to attend sectarian schools, voucher proponents would be wise to deal with the language in Section 15 directly by eliminating that section altogether.

Voucher opponents possess significant refuge in legal precedent and the current constitutional language. If they want to make it very clear that the citizens do not want tax dollars supporting secular education, they can propose an amendment to Article III, Section 15 specifying that "no money" means “no money” and therefore no taxpayer dollars from any source should be appropriated for sectarian education.

Two other related issues deserve mention. Pennsylvania currently has an Educational Improvement Tax Credit program ("EITC") which allows businesses to write off a portion of taxes owed to the Commonwealth if they make contributions to private schools for student scholarships. Proponents of vouchers argue that if EITC has not been challenged on constitutional grounds, the same would be true of vouchers. However, the language of our Constitution is much clearer with regard the appropriation of money already collected by the state versus the diversion of money not yet paid to the state. Reliance on EITC as precedent is not likely to avoid either legal challenge or evade constitutional scrutiny.

Finally, vouchers have been likened to charter schools as an extension of the same concept of educational choice for students. Proponents of this concept will need to address the constitutional language defining what type of public school state money can fund. Specifically, language in Article III, Section 15 prohibits the use of state funds for sectarian schools. This language cannot be ignored in any effort to legislate the viability of vouchers for sectarian schools.
Respectfully Submitted,

Public Education Committee
Chair: Hon. Kathy Manderino
Gerald C. Grimaud, Esq.
Stephanie F. Latimore, Esq.
Rhoda Shear Neft, Esq.
Jettie D. Newkirk, Esq.
Rhodia D. Thomas, Esq.
Hon. John W. Thompson, Jr.
Lisa M. Benzie-Woodburn, Esq.

Student Extern:
David M. Kelner
MINORITY REPORT
School Vouchers

This statement is necessitated by the School Voucher section of the Public Education committee’s report.

Objections:

I object to the report’s school voucher section being included in that:

a) It has not been accepted by consensus or a vote of either the Public Education Committee or the Constitutional Review Commission at a duly called meeting, and
b) Notwithstanding the Commission’s charge to stay clear of Article I of the Pennsylvania Constitution (Declaration of Rights) the school voucher issue necessarily involves Article I, Section 3 (Religious freedom), putting that most basic right at risk.

Vouchers Involve Racial Issues:

The so called “school choice” campaign involving vouchers started soon after the U.S. Supreme Court found separate but equal public schooling unconstitutional in Brown v. Board of Education, 347 U.S. 483 (1954), and the campaign continues today as a means of public funding of parochial schools and, many intend, restoring racial segregation.

Vouchers Involve Religious Issues:

The “school choice” campaign has gathered momentum even to the point of compromising our First Amendment’s Establishment Clause, “Congress shall make no law respecting an establishment of religion,” and putting like provisions within Pennsylvania’s Constitution at risk, viz. Article I, Section 3 (Religious freedom), Article III, Section 14 (Public school system), Article III, Section 15 (Public


3§3. All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship. Pa. Const. Article I, Section 3. See Constitution of 1790, Article IX, Section 3; Constitution of 1838, Article IX, Section 3 & Constitution of 1874, Article I, Section 3. The current Constitution’s Article I, Section 3 is a verbatim restatement of these provisions which have been in place since 1790. The language is essentially the same as that as written in 1682 by William Penn.

4§14. Public school system. The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth. Corresponding provisions have existed since 1776. Constitution of 1776, Article VII, Section 44; Constitution of 1790, Article VII, Section 1; Constitution of 1838, Article VII, Section 1 & Constitution of 1874, Article X, Section 1.
school money not available to sectarian schools)\(^3\) and Article, III Section 29 (Appropriations for public assistance, military service, scholarships).\(^6\)

The school voucher section of the Public Education committee report targets those provisions for amendment to allow tax funded school vouchers for religious schools.

**Article I, Section 3 – Religious Freedom**

For 329 years, from 1682 to the present, since William Penn’s 1682 Frame of Government, which “became an example of religious freedom for the Framers and others around the world”,\(^7\) man’s natural right has been recognized, namely not to “be compelled, at any time, to frequent or maintain any religious worship, place or ministry whatever.”\(^8\) In 1701, William Penn promulgated his Pennsylvania Charter of Privileges,\(^9\) which stated, in relevant part, “[N]o person . . . shall . . . be compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind, or to do or suffer any other Act or Thing, contrary to their religious Persuasion.”

And, since Pennsylvania’s 1776 Constitutional Convention (July 15 through September 28, 1776, presided over by Ben Franklin in Philadelphia), every man is deemed to have a “natural and unalienable right,” \textit{inter alia}, to not “be compelled to . . . support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent . . . .”\(^10\) As these expressions make clear, the Constitution has long provided that support and maintenance of religion may not be undertaken by government.

\textbf{Zelman v. Simmons-Harris Dissents}

In 2002, for the first time in history, the United States Supreme Court (specifically ruled school voucher legislation did not violate the Establishment clause and did not violate the federal Constitution. \(Zelman v. Simmons-Harris\), 536 U.S. 639, 122 S.Ct. 2460, 153 L.Ed.2d 604. The 5-4 decision engendered

\(^3\)§15. Public school money not available to sectarian schools. No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school. This language has remained unchanged since 1874. \textit{See Constitution of 1874, Article X, Section 2.}

\(^6\)§29. Appropriations for public assistance, military service, scholarships. No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association . . . . This language has remained unchanged since 1874. \textit{See Constitution of 1874, Article III, Section 18.}


\(^9\)\textit{Id.}, available at \url{www.constitution.org/bcp/penncharpriv.htm}.

\(^{10}\)Second. That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner control, the right of conscience in the free exercise of religious worship.

Corresponding provisions of subsequent Constitutions:

\begin{itemize}
\item Constitution of 1790, Art. IX, Sections 3 & 4.
\item Constitution of 1838, Art. IX, Sections 3 & 4.
\item Constitution of 1874, Art. I, Sections 3 & 4.
\item Constitution of 1968, Art. I, Sections 3 & 4
\end{itemize}
blistering dissents, one which characterized the majority’s decision as “profoundly misguided.” Id. at 685, 122 S.Ct. at 2485, 153 L.Ed.2d at 638 (Stevens, J., dissenting). While Justice Steven’s dissent provided a simple and summary approach to the majority’s analysis, the other dissenting Justices offered logical, scholarly and often eloquent discussions of the pertinent legal issues related to voucher programs. Rather than restate the cumulative wisdom of those opinions (and to keep this statement as brief as possible), I draw directly from the dissents while omitting most cited authorities to support the thesis that a governmentally-funded voucher system, in fact, implicates secular government into religious institutions thus violating the Establishment Clause.

Justice Souter commenced his robust dissent by summarizing the decision: “The Court’s majority holds that the Establishment Clause is no bar to Ohio’s payment of tuition at private religious elementary and middle schools under a scheme that systematically provides tax money to support the school’s religious missions.” Id at 686, 122 S.Ct. at 2485, 153 L.Ed.2d at 638 (Souter, J., dissenting, joined by Stevens, Ginsberg and Breyer, JJ.). Justice Souter focused on the “doctrinal bankruptcy” of the majority’s analysis. Id. at 688, 122 S.Ct. at 2485, 153 L.Ed.2d at 639.

“The applicability of the Establishment Clause to public funding of benefits to religious schools was settled in Everson v. Board of Ed. of Ewing, 330 U.S. 1, 91 L.Ed. 711, 67 S.Ct. 504 (1947).” Id. at 686, 122 S.Ct. at 2485, 153 L.Ed.2d at 638.

“Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools…” Id. at 687, 122 S.Ct. at 2486, 153 L.Ed.2d at 639.

“It is, moreover, only by ignoring the meaning of neutrality and private choice themselves that the majority can even pretend to rest today's decision on those criteria. Id. at 688, 122 S.Ct. at 2486, 153 L.Ed.2d at 639.

“…the cases can be categorized in three groups. In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned. Thereafter for some 15 years, the Court termed its efforts as attempts to draw a line against aid that would be divertible to support the religious, as distinct from the secular, activity of an institutional beneficiary. Then, starting in 1983, concern with divertibility was gradually lost in favor of approving aid in amounts unlikely to afford substantial benefits to religious schools, when offered evenhandedly without regard to a recipient's religious character, and when channeled to a religious institution only by the genuinely free choice of some private individual. Now, the three stages are succeeded by a fourth, in which the substantial character of government aid is held to have no constitutional significance, and the espoused criteria of neutrality in offering aid, and private choice in directing it, are shown to be nothing but examples of verbal formalism.” Id. at 688-89, 122 S.Ct. at 2486, 153 L.Ed.2d at 639-40.

“The scale of the aid to religious schools approved today is unprecedented…” Id. at 708, 122 S.Ct. at 2497, 153 L.Ed.2d at 652.

“It is virtually superfluous to point out that every objective underlying the prohibition of religious establishment is betrayed by this scheme, but something has to be said about the enormity of the violation. . . . these objectives . . . Everson, cataloged them, the first being respect for freedom of conscience. Jefferson described it as the idea that no one ‘shall be compelled to . . . support any religious
worship, place, or ministry whatsoever.

A Bill for Establishing Religious Freedom, in 5 The Founders' Constitution 84 (P. Kurland & R. Lerner eds. 1987), even a "teacher of his own religious persuasion," ibid., and Madison thought it violated by any "authority which can force a citizen to contribute three pence . . . of his property for the support of any . . . establishment." Memorial and Remonstrance ¶ 3, reprinted in Everson, 330 U.S. at 65-66. "Any tax to establish religion is antithetical to the command that the minds of men always be wholly free," Mitchell, 530 U.S. at 871 (SOUTER, J., dissenting) (internal quotation marks and citations omitted). 22 Madison's objection to three pence has simply been lost in the majority's formalism." Id. at 711, 122 S.Ct. at 2498-99, 153 L.Ed.2d at 654 (footnote omitted).

FN22 As a historical matter, the protection of liberty of conscience may well have been the central objective served by the Establishment Clause. See Feldman, Intellectual Origins of the Establishment Clause, 77 N.Y.U.L.Rev. 346, 398 (May 2002) ("In the time between the proposal of the Constitution and the Bill of Rights, the predominant, not to say exclusive argument against established churches was that they had the potential to violate liberty of conscience").

"As for the second objective, to save religion from its own corruption, Madison wrote of the "experience . . . that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." Memorial and Remonstrance ¶ 7. In Madison's time, the manifestations were "pride and indolence in the Clergy; ignorance and servility in the laity[,] in both, superstition, bigotry and persecution," ibid.; in the 21st century, the risk is one of "corrosive secularism" to religious schools, . . . and the specific threat is to the primacy of the schools' mission to educate the children of the faithful according to the unaltered precepts of their faith. Even "[t]he favored religion may be compromised as political figures reshape the religion's beliefs for their own purposes; it may be reformed as government largesse brings government regulation." Lee v. Weisman, 505 U.S. 577, 608, 120 L. Ed. 2d 467, 112 S. Ct. 2649 (1992) (Blackmun, J., concurring)." Zelman, supra at 711-12, 122 S.Ct. at 2499, 153 L.Ed.2d at 654-55 (internal citations omitted).

"The risk is already being realized. In Ohio, for example, a condition of receiving government money under the program is that participating religious schools may not "discriminate on the basis of . . . religion" . . . which means the school may not give admission preferences to children who are members of the patron faith . . . Nor is the State's religious antidiscrimination restriction limited to student admission policies: by its terms, a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming equal qualification for the job. . . . Indeed, a separate condition that "the school . . . not . . . teach hatred of any person or group on the basis of . . . religion," . . . could be understood (or subsequently broadened) to prohibit religions from teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others, if they want government money for their schools." Id. at 712-13, 122 S.Ct. at 2499-2500, 153 L.Ed.2d at 655-56.

FN23 And the courts will, of course, be drawn into disputes about whether a religious school’s employment practices violated the Ohio statute. In part precisely to avoid this sort of involvement, some Courts of Appeals have held that religious groups enjoy a First Amendment exemption for clergy from...
state and federal laws prohibiting discrimination on the basis of race or ethnic origin. See, e.g., Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1170 (4th Cir. 1985) (“The application of Title VII to employment decisions of this nature would result in an intolerably close relationship between church and state both on a substantive and procedural level”); EEOC v. Catholic Univ. of America, 317 U.S. App. D.C. 343, 83 F.3d 455, 470 (D.C. Cir. 1996); Young v. Northern Ill. Conference of United Methodist Church, 21 F.3d 184, 187 (7th Cir. 1994). This approach would seem to be blocked in Ohio by the same antidiscrimination provision, which also covers “race…or ethnic background.” Ohio Rev. Code Ann. § 3313.976(A)(4) (West Supp. 2002).

FN24 See, e.g., Christian New Testament (2 Corinthians 6:14) (King James Version) (“Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteousness? And what communion hath light with darkness?”); The Book of Mormon (2 Nephi 9:24) (“And if they will not repent and believe in his name, and be baptized in his name, and endure to the end, they must be damned; for the Lord God, the Holy One of Israel, has spoken it”); Pentateuch (Deut. 29:18) (The New Jewish Publication Society Translation) (for one who converts to another faith, “the LORD will never forgive him; rather will the LORD’s anger and passion rage against that man, till every sanction recorded in this book comes down upon him, and the LORD blinds out his name from under heaven”); The Koran 334 (The Cow Ch. 2:1) (N. Dawood transl. 4th rev. ed. 1974) (“As for the unbelievers, whether you forewarn them or not, they will not have faith. Allah has set a seal upon their hearts and ears; their sight is dimmed and a grievous punishment awaits them”).

“For perspective on this foot-in-the-door of religious regulation, it is well to remember that the money has barely begun to flow.” Id. at 714, 122 S.Ct. at 2500, 153 L.Ed.2d at 656.

“When government aid goes up, so does reliance on it; the only thing likely to go down is independence. . . . [W]onder when dependence will become great enough to give the State of Ohio an effective veto over basic decisions on the content of curriculums? A day will come when religious schools will learn what political leverage can do, just as Ohio's politicians are now getting a lesson in the leverage exercised by religion.” Id. at 715, 122 S.Ct. at 2501, 153 L.Ed.2d at 656.

“Increased voucher spending is not, however, the sole portent of growing regulation of religious practice in the school, for state mandates to moderate religious teaching may well be the most obvious response to the third concern behind the ban on establishment, its inextricable link with social conflict. See . . . Everson, 330 U.S. at 8-11. As appropriations for religious subsidy rise, competition for the money will tap sectarian religion's capacity for discord.” Zelman, supra at 715, 122 S.Ct. at 2501, 153 L.Ed.2d at 656-57.

“JUSTICE BREYER has addressed this issue in his own dissenting opinion, which I join, and here it is enough to say that the intensity of the expectable friction can be gauged by realizing that the scramble for money will energize not only contending sectarians, but taxpayers who take their liberty of conscience seriously. Religious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxing Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. 25 Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines "a nationalistic sentiment" in support of Israel with a "deeply religious" element. 26 Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes, 27 or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention. 28 Views like these, and innumerable others, have been safe in the sectarian pulpits and classrooms of this Nation not only because the Free Exercise Clause protects them directly, but because the ban on supporting religious establishment has
protected free exercise, by keeping it relatively private. With the arrival of vouchers in religious schools, that privacy will go, and along with it will go confidence that religious disagreement will stay moderate.” *Id.* at 715-16, 122 S.Ct. at 2501, 153 L.Ed.2d at 657.

FN25 See R. Martino, Abolition of the Death Penalty (Nov. 2, 1999) (“The position of the Holy See, therefore, is that authorities, even for the most serious crimes, should limit themselves to non-lethal means of punishment”) (citing John Paul II, *Evangelium Vitae* n. 56).

FN26 H. Donin, To Be a Jew 15 (1972).

FN27 See R. Martin, Islamic Studies 224 (2d ed. 1996)(interpreting the Koran to mean that “[m]en are responsible to earn a living and provide for their families; women bear children and run the household”).

FN28 See The Baptist Faith and Message, Art. XVIII… (“A wife is to submit herself graciously to the servant leadership of her husband even as the church willingly submits to the headship of Christ”).

“My own course as a judge on the Court cannot, however, simply be to hope that the political branches will save us from the consequences of the majority’s decision. *Everson’s* statement is still the touchstone of sound law, even though the reality is that in the matter of educational aid the Establishment Clause has largely been read away.” *Id.* at 717, 122 S.Ct. at 2502, 153 L.Ed.2d at 658.

Justice Breyer’s dissent reviewed the development of the Establishment Clause’s case law and the Court’s stated concern for past strife which historically followed government involvement in religion. He expressed deep concern for the potential practical problems associated with the majority’s decision and offered his own particular criticisms. In aligning himself with the other dissenters he stated, “I join JUSTICE SOUTER’s opinion, and I agree substantially with JUSTICE STEVENS. I write separately, however, to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict.” *Id.* at 717, 122 S.Ct. at 2502, 153 L.Ed.2d at 658 (Breyer, J. dissenting, joined by Stevens and Souter, J.J.).

“… [T]he Court’s 20th-century Establishment Clause cases -- both those limiting the practice of religion in public schools and those limiting the public funding of private religious education -- focused directly upon social conflict, potentially created when government becomes involved in religious education. In *Engel v. Vitale*, 370 U.S. 421 . . . (1962), the Court held that the Establishment Clause forbids prayer in public elementary and secondary schools. It did so in part because it recognized the “anguish, hardship and bitter strife that could come when zealous religious groups struggle with one another to obtain the Government’s stamp of approval . . . .” See also *Lee v. Weisman*, 505 U.S. 577 . . . (1992) (striking down school-sanctioned prayer at high school graduation ceremony because "potential for divisiveness" has "particular relevance" in school environment); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 . . . (1963) (Bible-reading program violated Establishment Clause in part because it gave rise “to those very divisive influences . . .”). *Zelman*, *supra* at 718-19, 122 S.Ct. at 2502-03, 153 L.Ed.2d at 658-59.

“When it decided these 20th century Establishment Clause cases, the Court did not deny that an earlier American society might have found a less clear-cut church/state separation compatible with social tranquility. Indeed, historians point out that during the early years of the Republic, American schools -- including the first public schools -- were Protestant in character. Their students recited Protestant prayers, read the King James version of the Bible, and learned Protestant religious ideals…. “The 20th century Court was fully aware, however, that immigration and growth had changed American society dramatically since its early years. By 1850, 1.6 million Catholics lived in America, and by 1900 that number rose to 12 million. Jeffries & Ryan, *A Political History of the Establishment Clause*, 100 Mich.
L. Rev. 279, 299-300 (Nov. 2001). There were similar percentage increases in the Jewish population.

Kosmin & Lachman, supra at 45-46. Not surprisingly, with this increase in numbers, members of non-Protestant religions, particularly Catholics, began to resist the Protestant domination of the public schools. Scholars report that by the mid-19th century religious conflict over matters such as Bible reading "grew intense," as Catholics resisted and Protestants fought back to preserve their domination. Jeffries & Ryan, supra at 300. "Dreading Catholic domination," native Protestants "terrorized Catholics." P. Hamburger, Separation of Church and State 219 (2002). In some States "Catholic students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds . . . rioted over whether Catholic children could be released from the classroom during Bible reading." Id. at 300.” Id. at 719-21, 122 S.Ct. at 2503-04, 153 L.Ed.2d at 659-60.

“The upshot is the development of constitutional doctrine that reads the Establishment Clause as avoiding religious strife, nor by providing every religion with an equal opportunity (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of separation between church and state -- at least where the heartland of religious belief, such as primary religious education, is at issue.” …

“The principle underlying these cases -- avoiding religiously based social conflict -- remains of great concern. As religiously diverse as America had become when the Court decided its major 20th century Establishment Clause cases, we are exponentially more diverse today. America boasts more than 55 different religious groups and subgroups with a significant number of members. . . . Major religions include, among others, Protestants, Catholics, Jews, Muslims, Buddhists, Hindus, and Sikhs. . . . And several of these major religions contain different subsidiary sects with different religious beliefs . . . . Newer Christian immigrant groups are "expressing their Christianity in languages, customs, and independent churches that are barely recognizable, and often controversial, for European-ancestry Catholics and Protestants." Id. at 722-23, 122 S.Ct. at 2505, 153 L.Ed.2d at 661-62 (citations omitted, emphasis supplied).

“Consider the voucher program here at issue. That program insists that the religious school accept students of all religions. Does that criterion treat fairly groups whose religion forbids them to do so? The program also insists that no participating school ‘advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.’ And it requires the State to ‘revoke the registration of any school if, after a hearing, the superintendent determines that the school is in violation” of the program’s rules.” § 3313.976(B). As one amicus argues, ‘it is difficult to imagine a more divisive activity’ than the appointment of state officials as referees to determine whether a particular religious doctrine ‘teaches hatred or advocates lawlessness.’ Brief for National Committee For Public Education And Religious Liberty as Amicus Curiae 23. “How are state officials to adjudicate claims that one religion or another is advocating, for example, civil disobedience in response to unjust laws, the use of illegal drugs in a religious ceremony, or resort to force to call attention to what it views as an immoral social practice? What kind of public hearing will there be in response to claims that one religion or another is continuing to teach a view of history that casts members of other religions in the worst possible light? How will the public react to government funding for schools that take controversial religious positions on topics that are of current popular interest -- say, the conflict in the Middle East or the war on terrorism? Yet any major funding program for primary religious education will require criteria. And the selection of those criteria, as well as their application, inevitably pose problems that are divisive. Efforts to respond to these problems not only will seriously entangle church and state, see Lemon, 403 U.S. at 622, but also will promote division among religious groups, as one group or another fears (often legitimately) that it will receive unfair treatment at the hands of the government.” Zelman, supra at 724-25, 122 S.Ct. at 2505-06, 153 L.Ed.2d at 663-63.

“I recognize that other nations, for example Great Britain and France, have in the past reconciled religious school funding and religious freedom without creating serious strife. Yet British and French societies are religiously more homogeneous -- and it bears noting that recent waves of immigration have begun to
create problems of social division there as well. See, e.g., The Muslims of France, 75 Foreign Affairs 78 (1996) (describing increased religious strife in France, as exemplified by expulsion of teenage girls from school for wearing traditional Muslim scarves); Ahmed, Extreme Prejudice; Muslims in Britain, The Times of London, May 2, 1992, p. 10 (describing religious strife in connection with increased Muslim immigration in Great Britain).

In a society as religiously diverse as ours, the Court has recognized that we must rely on the Religion Clauses of the First Amendment to protect against religious strife, particularly when what is at issue is an area as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits.” Id. at 725, 122 S.Ct. at 2506, 153 L.Ed.2d at 663.

“School voucher programs differ, however, in both kind and degree from aid programs upheld in the past. They differ in kind because they direct financing to a core function of the church: the teaching of religious truths to young children. For that reason the constitutional demand for "separation" is of particular constitutional concern. See, e.g., Weisman, 505 U.S. at 592 ("heightened concerns" in context of primary education); Edwards v. Aguillard, 482 U.S. 578, 583-584, 96 L. Ed. 2d 510, 107 S. Ct. 2573 (1987) ("Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools").” Id. at 726, 122 S.Ct. at 2507, 153 L.Ed.2d at 663-64 (emphasis supplied).

“Private schools that participate in Ohio's program, for example, recognize the importance of primary religious education, for they pronounce that their goals are to ‘communicate the gospel,’ ‘provide opportunities to . . . experience a faith community,’ ‘provide . . . for growth in prayer,’ and ‘provide instruction in religious truths and values.’ … History suggests, not that such private school teaching of religion is undesirable, but that government funding of this kind of religious endeavor is far more contentious than providing funding for secular textbooks, computers, vocational training, or even funding for adults who wish to obtain a college education at a religious university.”

“Vouchers also differ in degree. The aid programs recently upheld by the Court involved limited amounts of aid to religion. But the majority's analysis here appears to permit a considerable shift of taxpayer dollars from public secular schools to private religious schools. That fact, combined with the use to which these dollars will be put, exacerbates the conflict problem. State aid that takes the form of peripheral secular items, with prohibitions against diversion of funds to religious teaching, holds significantly less potential for social division. … Id. at 727-285, 122 S.Ct. at 2507, 153 L.Ed.2d at 664.

I do not believe that the 'parental choice' aspect of the voucher program sufficiently offsets the concerns I have mentioned. Parental choice cannot help the taxpayer who does not want to finance the religious education of children. It will not always help the parent who may see little real choice between inadequate nonsectarian public education and adequate education at a school whose religious teachings are contrary to his own. It will not satisfy religious minorities unable to participate because they are too few in number to support the creation of their own private schools. It will not satisfy groups whose religious beliefs preclude them from participating in a government-sponsored program, and who may well feel ignored as government funds primarily support the education of children in the doctrines of the dominant religions. And it does little to ameliorate the entanglement problems or the related problems of social division ... . Consequently, the fact that the parent may choose which school can cash the government's voucher check does not alleviate the Establishment Clause concerns associated with voucher programs.” Id. at 726-28, 122 S.Ct. at 2507-08, 153 L.Ed.2d at 664-65 (emphasis supplied).

“The Court, in effect, turns the clock back. It adopts, under the name of 'neutrality,' an interpretation of the Establishment Clause that this Court rejected more than half a century ago. In its view, the parental choice that offers each religious group a kind of equal opportunity to secure government funding
overcomes the Establishment Clause concern for social concord. An earlier Court found that ‘equal opportunity’ principle insufficient; it read the Clause as insisting upon greater separation of church and state, at least in respect to primary education . . . . In a society composed of many different religious creeds, I fear that this present departure from the Court's earlier understanding risks creating a form of religiously based conflict potentially harmful to the Nation's social fabric. Because I believe the Establishment Clause was written in part to avoid this kind of conflict, and for reasons set forth by Justice SOUTER and Justice STEVENS, I respectfully dissent.” Id. at 728-29, 122 S.Ct. at 2508, 153 L.Ed.2d at 665.

Thank you for considering the foregoing.

Respectfully Submitted,

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I. Introduction

The Constitutional Review Commission was charged by the House of Delegates of the Pennsylvania Bar Association:

“… to examine specific issues related to the improvement of the Government of the Commonwealth of Pennsylvania and make concrete recommendations, if needed, for alterations and/or improvements to the existing governmental structure and/or the Constitution of the Commonwealth of Pennsylvania including how those changes would be most effectively implemented.”

Committees of the Commission were appointed to study six specific areas relating to government of the Commonwealth. These six areas included: Legislative Reapportionment, Local Government, Public Education, Structure of the General Assembly, Taxation and the Uniformity Clause and the Judiciary.

Following the charge of the Commission, the Judiciary Committee (Committee) undertook a detailed study of the provisions of Article V of the Pennsylvania Constitution and current issues related thereto. Initially, the Committee identified four areas of study: the judicial conduct system, judicial selection and financing judicial campaigns, representation of the indigent and juveniles, and the funding of Pennsylvania Courts. The Committee held four public hearings across the state and invited over 150 speakers to participate. The hearings concluded in June of 2011 and the Committee members immediately started debating the issues, using the information received at the public hearings and their own independent research.

The Committee has held several meetings and devoted countless hours to researching, understanding and debating the issues. While the Committee was not able to reach a consensus on every issue, it was clear to all of the members that serious changes are needed in order to preserve a fair, efficient judicial system.

II. Judicial Funding

The Pennsylvania Bar Association (PBA) Constitutional Review Commission (CRC) created a Committee to study Article V, the Judiciary, of the Pennsylvania Constitution. The charge to the CRC is to examine five specific issues involved in improving the Constitution of Pennsylvania and to make concrete recommendations, if needed, to alter or improve the existing structure of government and the Pennsylvania Constitution. The charge is further to recommend how those changes, if needed, can best be made: by legislation (including by rule), by constitutional amendment, or by constitutional convention.

The Judiciary Committee at a duly convened meeting decided by majority vote to examine the issue of funding for the judicial branch as one of the specific issues for study. This document is the report of the study, discussion and decisions about recommendations taken by the Judiciary Committee.

As will be seen, there has been considerable litigation in Pennsylvania involving inherent power of the judiciary to compel funding. This litigation and commentary on it illustrate many of the constitutional issues and problems involved in any change in funding for the courts. This paper will examine several of the major Pennsylvania cases in involving inherent power of the courts to compel funding, because those cases involve most of the issues, especially those involving the separation of powers between the legislature and judiciary, involved in funding the judiciary as an independent, co-equal branch.
PRESENT CONSTITUTIONAL PROCESS FOR FUNDING THE JUDICIARY

Under the present process, the Supreme Court submits its requests and has a hearing before the Pennsylvania House of Representatives for the general appropriation for the Legislative, Executive, and Judicial Branches. The Governor prepares an overall budget under the Pennsylvania Constitution Article VIII, Section 12, and implementing legislation. The Governor also has line item veto power under the Pennsylvania Constitution Article IV, Section 16. The Pennsylvania statutes enacted to deal with finance and budget of the Pennsylvania judiciary refer to the Judicial Branch as a “Department” and mandate submission of its budget as “comparable to the request of an administrative department.”

The Chief Justice in his budget statement to the Legislature for 2011-2012 stated that the present system for funding the courts is not working, and has created structural underfunding for the judiciary for the past six years. He observed that the Legislature for the past six years has not met the requests of the Chief Justice for funding the Judiciary. He stated that the Judiciary has exhausted every means to economize, including increasing fees to cover the judicial fiscal shortfall. That shortfall, he testified, has now reached “crisis” proportions and puts the justice system of the Commonwealth at risk. Chief Justice Castille stated further that the “Pennsylvania Judiciary’s core function of government . . . is threatened by continued deficit funding.” After observing that statements of the head of the House Appropriations Committee in the budget hearings revealed that the Judiciary’s budget was set as an “afterthought” after all other appropriation matters had been decided, Chief Justice Castille concluded that:

. . . [T]he current process does not work, whether in good times or bad. It does not respect the symmetry of three, co-equal branches of government. It does not uphold the core function of the judiciary in democratic governance. It does not consider the impact of under-funding the courts

Subsequent to Chief Justice Castille’s statement and testimony, the Legislature and Governor approved a budget that kept the appropriation for the judicial branch level, thus adding a seventh year of structural underfunding for the judiciary.

CORE FUNCTIONS OF THE JUDICIARY UNDER THE PENNSYLVANIA CONSTITUTION

The Pennsylvania Constitution incorporates separation of powers. The Constitution divides governmental functions among the three branches, although there is some overlap and some sharing of powers. Under that concept, each branch is empowered to perform certain core functions assigned to it in

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1 Pennsylvania Constitution Article III, § 11.
2 Pennsylvania Constitution Article VIII § 12.
3 Pennsylvania Constitution Article IV § 16.
4 See 42 Pa.C.S.A. §3521 that is captioned “Development of Budget Information” [for the Judiciary]
   (a) General rule.--The Administrative Office shall annually obtain and prepare information for the
   preparation of a budget for the Judicial Department within such time as to comply with the requirements of
   section 610 of the act of April 9, 1929 (P.L. 177, No. 175), known as “The Administrative Code of 1929.”
   (Emphasis added).
5 42 Pa.C.S.A. §3524 is captioned ”Form of Judicial Department Appropriation” and provides:
   The budget request of the Judicial Department shall be prepared in a manner comparable to the request of
   an administrative department. (Emphasis added).
6 The 2011-2012 Budget Request of the Unified Pennsylvania Judiciary to the House and Senate Appropriations
7 Id.
8 Id.
9 Id.
the Pennsylvania Constitution without interference by the other branches, and each branch with some exceptions is confined to performing that function. Thus, the legislature enacts statutes; it may not adjudicate cases (except in case of impeachment of government officials as set forth in the Pennsylvania Constitution).

Funding for the judiciary must be adequate to enable performance of core judicial functions under the system of constitutional separation of powers in Pennsylvania.\(^\text{10}\)

SEPARATION OF POWERS AND THE NECESSITY FOR AN INDEPENDENT JUDICIARY IN THE PENNSYLVANIA CONSTITUTION

Under the federal and state constitutions the framers used the concept of separation of powers among the three branches of government to prevent one branch from grasping all power and to prevent tyranny over citizens.\(^\text{11}\) Separation of powers means that no branch can exercise the core functions of any other branch.\(^\text{12}\) And, under Madison’s concept of checks and balances, each branch acts to check the others and to keep them from overstepping the power assigned to them:

\[\text{[T]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others... Ambition must be made to counteract ambition.}\]

\(^\text{10}\) A non exclusive list of judicial branch core functions would include the following:

a. To resolve conflict impartially in civil cases in bench and jury trials.

   Every society requires an institution to resolve conflicts. Without such a state institution, chaos results. The judicial branch of government performs this indispensable function. Impartial adjudication is necessary in order to maintain the rule of law that is the bedrock of constitutional government.

b. To impartially decide criminal cases in bench and jury trials and impose sentence in accord with applicable legislation.

   Society must protect itself from those who commit criminal acts and do so in a way that comports with constitutional guarantees. Without an institution that performs this function, a society turns to the violence of feuds and vigilante justice. Without an institution that protects constitutional guarantees, citizens are exposed to arbitrary government action. The judicial branch is the institution that carries out these indispensable functions. They are among the most important elements of the rule of law that is the bedrock of constitutional government.

c. To embody and apply the rule of law.

   This concept means that courts impartially decide cases in accord with validly enacted statutes and the Pennsylvania and federal constitutions. Rule of law means that the judiciary does not favor any individual or official or branch of government, but decides all cases solely in accordance with law. Without the rule of law, a government conducted under a written constitution could not operate or exist. Paul R. Verkuil, Separation of Powers, the Rule of Law, and the Idea of Independence, 30 Wm. & Mary L. Rev. 301, 305-309 (1989).

d. To uphold the guarantees of the Pennsylvania Declaration of Rights\(^\text{10}\) and Federal Bill of Rights against government and individual encroachment; and

e. To enforce separation of powers between and among the three branches of government as part of its power of judicial review.


\(^\text{12}\) Id.

\(^\text{13}\) The Federalist No. 51 at 349 (J. Madison) (J.E. Cooke ed. 1961).
One of the causes of the American Revolution was the dependence of colonial judges on the king, thus rendering those jurists unable to deliver impartial justice. 14 Madison, quoting Montesquieu, said that there can be no liberty if the power of judging is subject to legislative and executive control. 15 In a constitutional system with separation of powers, it is crucial for the judiciary to constitute an independent branch of government that dispenses justice and is capable of checking the other branches. Under separation of powers the judiciary is a co-equal branch of government; it is not an agency of the executive or the legislature. 16 An independent judiciary:

1) Is indispensable to a constitutional government based on separation of powers.

   a) The judiciary draws the boundaries between the three branches when there is conflict or overstepping of constitutional boundaries. Separation of powers has been a part of the Pennsylvania Constitution since the beginning of the Commonwealth. 17 It is a check on the other branches; 18 judicial review is the tool by which the Judicial Branch prevents encroachment on constitutions against the other branches. 19

2) Makes possible and enforces the rule of law.

   a) First, it performs this function by fairly and impartially applying the law and constitution to all cases which come before it without interference or influence from the other branches. Without an independent judiciary the rule of law cannot exist; independence of the judiciary is a necessary condition to the existence of rule of law. 20

   b) There is a second, less well known component of rule of law: meaningful access to justice. There must exist an operating a body to which a person aggrieved by action of another person or the government can complain and receive an impartial decision. The existence of an organized bar is one component, but operative courts to which cases can be taken is the other crucial component. 21 Society must have an institution that resolves conflict.

3) The judiciary constitutes, and must be treated as, a co-equal branch of state government.

   a) Although individual judges must act in all cases independently, there is a second and equally important form of independence that is essential for the judicial branch in a constitutional form of government. It is the capacity of the judicial branch to maintain itself as an independent co-equal branch of government; for, without this power, the judiciary could not act as a check on the on the two other branches of government, and separation of powers would cease to exist. That is the reason why the state constitution establishes the judiciary as a separate branch of government. 22

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16 Id.
21 Id.
HISTORY OF FUNDING BATTLES IN PENNSYLVANIA

For many years funding of common pleas courts in Pennsylvania was by statute controlled by the counties in which they sat. Over time, numerous conflicts arose between the common pleas courts and county commissioners over court resources. Examples were conflicts over personnel, such as court reporter salaries, witness and jury fees, and additional courtrooms. This led the judiciary to defend its power to carry out its constitutionally mandated role in matters involving funding under the doctrine of inherent power of the judiciary. For example, in 1949 in *Leahey v. Farrell*\(^{23}\) the Pennsylvania Supreme Court opined that the county commissioners could not set the compensation for judicial employees at a level less than the court needed. The court explained that there were certain areas where the legislature could not act in matters that come before the courts “judicially”. \(^{24}\) In other words certain areas involve exclusively—e.g. core—judicial functions. The court in *Leahey* held that the judiciary possessed the inherent power to check action by the legislature that affects one of these exclusively judicial functions. At the same time the *Leahey* court carefully noted the overlap or sharing of power in the matter of financing the courts between the legislature and the judiciary. Finance matters are assigned to the legislature by the Pennsylvania Constitution:

Control of state finances rests with the legislature, subject only to constitutional limitations. The function of the judiciary to administer justice does not include the power to levy taxes in order to defray the necessary expenses in connection therewith. It is the legislature which must supply such funds. Under the system of division of governmental powers it frequently happens that the functions of one branch may overlap another. \(^{25}\)

The court in *Leahey* then held that there was no violation of separation of powers on the facts before it: only when the legislature acts arbitrarily or capriciously or refuses to comply with reasonably necessary requirements of the judiciary may the judiciary invoke the inherent power doctrine to obtain adequate funding. That situation occurs only when funding necessary for effective exercise of judicial functions is not provided or when an emergency arises.

The *Leahey* decision is important because in it the Supreme Court recognized the overlap between the power of the legislature and the judiciary, the express assignment of financial matters to the legislature, and the need of the judiciary as a co-equal, independent branch to perform its functions. Recognizing that both the judiciary and the legislature had legitimate constitutional powers and stakes in this area, *Leahey* balanced these factors and did not claim an absolute power in the judiciary to force the legislature to appropriate whatever amounts the judiciary demands.

A later case took the doctrine of inherent power further, perhaps unfortunately. In *Commonwealth ex rel Carroll v. Tate*\(^{26}\) the president judge of the Philadelphia Common Pleas Court made a budget request of 19 million dollars. The mayor budgeted 16 million dollars for the Philadelphia common pleas courts, and the city council approved the mayor’s budget. Several months later the Philadelphia common pleas president judge brought a mandamus action to compel the mayor to provide an additional 2.5 million dollars to the Philadelphia common pleas courts. Ultimately the Pennsylvania Supreme Court held that the mandate would be enforced against the City:

\(^{23}\) 362 Pa. 52, 66 A.2d 577 (1949).
\(^{24}\) 362 Pa at 55, 66 A.2d at 579.
\(^{25}\) Id. (Citations omitted) (Emphasis added).
It is a basic precept of our Constitutional form of Republican Government that the Judiciary is an independent and co-equal Branch of Government, [T]he co-equal independent Judiciary must possess rights and powers co-equal with its functions and duties, including the right and power to protect itself against any impairment thereof.\textsuperscript{27}

Later in the opinion, however, the majority appears to reaffirm the \textit{Leahey} holding that when a court invokes inherent power to compel funding the burden is on the court to establish that the additional funds are “reasonably necessary” for the “efficient administration of justice.”\textsuperscript{28}

However, the presence of unfortunate dicta in the \textit{Carroll} opinion magnifies the reach and meaning of its holding. Philadelphia raised the defense that the City was suffering from “deplorable” financial conditions, and that the “overall financial difficulties” of the city, and the need to supply public safety and other general welfare needs must be taken into account in setting the judicial budget.\textsuperscript{29} The Pennsylvania Supreme Court rejected this defense and held that, regardless of the financial distress of the City, . . . [T]he deplorable financial conditions in Philadelphia must yield to the Constitutional mandate that the Judiciary shall be free and independent and able to provide an efficient and effective system of Justice.\textsuperscript{30}

Under this \textit{Carroll} opinion language, if the legislature does not supply sufficient funding for the expenses that the court believes are reasonably necessary for the operation of the judicial branch, then under the doctrine of inherent power of a co-equal branch of government, the judiciary may compel funding at the level of its needs \textit{in spite of general budgetary problems or tax shortfalls affecting the City}. When the legislature makes what has been referred to as the “cupboard is bare” argument, if that defense is factually accurate, what the legislature argues is that it must set the priorities involved in cutting back expenses. What if in one year tax revenues as a result of a general economic depression fall by 50 per cent? In that situation, does the court have the power insist on the same appropriation for the judiciary as the prior year, even though that would mean that other vital non-judicial public safety and public services would be seriously impaired? Literally read, that is the import of this reading of \textit{Carroll}. However, the Pennsylvania Constitution expressly assigns the power to set appropriations to the General Assembly, and that assignment includes the power of the Legislature to set priorities in funding for government functions. Not only is it a function expressly delegated to the Legislature by the Pennsylvania Constitution, but it is also a task for which the Legislature is uniquely well-suited and equipped to discharge because of its fact-gathering and policy setting expertise. In addition, because the amount of appropriations has a relationship to taxes to pay for them, the Legislature was assigned this function because it is accountable to the electorate.

There is one other major case in which the Pennsylvania Supreme Court addressed funding for the judicial branch, \textit{County of Allegheny v. Commonwealth}.\textsuperscript{31} In that case, the Supreme Court held that the county-based funding system for the judiciary violated the mandate of the Pennsylvania Constitution Article V, Section 1, which provides for a unified judicial system under the Supreme Court.\textsuperscript{32} The court

\begin{itemize}
  \item\textsuperscript{27} 442 Pa at 51-52, 274 A.2d 196-97. (citations omitted).
  \item\textsuperscript{28} Id. at 55, 274 A.2d at 199.
  \item\textsuperscript{29} Id. at 56, 274 A.2d at 199.
  \item\textsuperscript{30} Id. at 56, 274 A.2d at 199.
  \item\textsuperscript{31} 517 Pa. 65, 534 A.2d 760 (1987).
  \item\textsuperscript{32} Pa. Const. art. V, § 1:
  The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community court,
observed that the present system of county funding had led to numerous lawsuits and battles between the common pleas courts and the county commissioners as a result of commissioners reducing judicial appropriations or failing to meet common pleas budgetary demands in several areas. According to the Allegheny County decision, this series of lawsuits was not “unified” as commanded by the Pennsylvania Constitution. Therefore, the court ordered the state legislature to adopt statewide funding of the judiciary.

Opinions differ on the inherent power of the judiciary to compel funding by the legislature. There is strong opposition in some quarters, and there are powerful arguments in favor of and against the existence and use of the inherent power doctrine. The opposition argues that the appropriation power is textually committed to the legislature. This should make the appropriation power, at least as regards the judiciary, a political question and non-justiciable. As a result, this line of argument concludes that the judiciary lacks jurisdiction over appropriations. Moreover, textual commitment is a strong indicator that appropriation and budgeting are core functions of the legislature. Under separation of power principles, another government branch cannot interfere with that core function; therefore, mandamus by the judiciary to compel funding is an interference with that core legislative function and prohibited.

Supporters of inherent power respond in a fashion similar to the inherent power argument (made by Justice Pomeroy in a concurring opinion in the Allegheny case) that the judiciary—indeed any branch—cannot be independent if its budget is set by another branch. As persuasive as that argument sounds, it is premised on the notion that the judiciary must be absolutely independent.33 But there are persuasive arguments against this position which gives the judiciary the power to set its budget. First, this argument contradicts the doctrine of checks and balances. In it, the judicial branch asserts that it has unlimited and unchecked power to determine and (through mandamus) decide and compel its own funding. This raw, unchecked power violates separation of powers and checks and balances. The whole idea of those concepts is to prevent one branch from asserting unrestrained power, and to trust no person or group with unlimited, unchecked power. Second, if the judiciary can make this argument, then the Legislature can pose the same argument. If and when the judiciary sets its own appropriation, the courts are interfering with a core function of the legislature as funding is a power expressly delegated by the people to the legislature in the Pennsylvania Constitution. It is the same argument made by the Legislature regarding one of its core functions as the Pennsylvania Supreme Court makes in the inherent power doctrine.34 Following this line of analysis, some have argued that use of the inherent power doctrine on facts similar to Carroll amounts to judicial usurpation of power from a co-equal branch, the legislature.35 Third, the legislature represents the will of the people; that is the meaning of the Pennsylvania constitutional language expressly conferring all legislative power on the legislature.36 One of the most highly developed and followed doctrines of constitutional law and judicial review expresses a strong presumption of constitutionality of legislative action. As such, the judiciary is not to overturn action of the legislature unless it clearly, palpably and plainly violates the constitution.37 Fourth, there is no indication that during the Constitutional Convention of 1967-68 that the delegates considered changing municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

33 Comment, State Court Assertion of Power to Determine and Demand its Own Budget, 120 U.Pa. L. Rev. 1187 (1972)
34 Id. at 1196.
35 Stuchell, supra note 19, at 206.
36 In re Likins, 223 Pa 456, 72 A. 858 (1909).
responsibility for judicial funding; and, in fact, the principal concern at that convention was to maintain separation of powers between the legislature and the judiciary.\textsuperscript{38}

There are also persuasive arguments supporting the power of the courts to compel funding based on separation of powers. In order to keep government from being taken over by one branch, the separation of powers doctrine built into the Pennsylvania Constitution divides the powers of the three branches so that a single branch cannot take over or tyrannize the others.\textsuperscript{39} Power must be wielded by co-equal branches that are sufficiently independent to check each other. That reasoning applies to judicial funding:

A breakdown of such independence would result in the inability of one branch of government to check the arbitrary or self-interested assertions of another... [C]ourts may not be obstructed by underfunding. While, as a general proposition, the authority of legislatures to control the purse in the first instance is unquestioned, legislative refusal to provide sufficient funding for courts would be an improper check on a co-equal branch of government. If the judicial branch is to perform its primary function (adjudication), it must be able to command adequate resources for that purpose.\textsuperscript{40}

The gist of this argument supporting inherent judicial power to compel funding is the absolute need for an independent judiciary in a constitutional system. If the judiciary is not to become a subordinate branch, the court must have implied inherent power to compel adequate funding under the Pennsylvania Constitution. Otherwise, instead of co-equal branches, we would move to a system where the judicial branch is not equal to the legislative branch and unable to discharge the vital functions assigned to it under the Pennsylvania Constitution. It is no secret that in several states recently the Legislature has cut the budget of the judiciary or reduced the size of the judiciary in retaliation for judicial action that displeased the Legislature.\textsuperscript{41}

CONCLUSION

The discussion above makes clear that funding for the judicial branch is a matter that involves interrelated, conflicting and complex constitutional issues. These issues involve separation of powers under the Pennsylvania Constitution.

\textit{Separation of powers considerations:}

1) At present, the Pennsylvania Constitution expressly assigns the appropriation power to the legislature. Appropriation is a core legislative power. Calculation and demand for a funding appropriation cannot be a matter solely for the judiciary; that would enable the judiciary to operate in an unchecked fashion, a violation of separation of powers and the policies underlying this bedrock principle.

On the other hand, failure to adequately fund the judiciary constitutes legislative action (or non-action in the face of a positive duty) that interferes with core functions of a co-equal branch—the judiciary—under the Pennsylvania Constitution. Failure of the legislature to adequately fund the core

\textsuperscript{38} Stuchell, \textit{supra} note 19 at 214-15.
\textsuperscript{40} Jeffrey Jackson, \textit{Judicial Independence, Adequate Court Funding, and Inherernt Judicial Powers,} 52 Md. L. Rev. 217, 224 (1993).
\textsuperscript{41} Executive Director’s Report, \textit{Political Assault on the Justice System,} 88 Judicature 197 (2005); Florida Senate Votes to put Changes in State Supreme Court on Ballot, Kathleen Haughney, Tallahasee Tribune, May 2, 2011.
functions of the judiciary represents a violation of the legislature’s duty and its \textit{core legislative function} to appropriate adequately for the other co-equal branches under the Pennsylvania Constitution.

2) Maintenance of the co-equal status of the judiciary is crucial under the doctrine of separation of powers. For only if the Judicial branch is co-equal to the other branches of government will it be capable of restraining potential abuses by the legislative and executive branches as part of the operation of separation of powers and checks and balances.

3) The Judicial branch must be independent. The administration of justice is a matter of the highest priority in Pennsylvania. Without an independent judiciary, our state would lose the essential judicial branch protections of impartial adjudication and the rule of law. In terms of funding for the judiciary, this means that:
   a) Appropriations must be sufficient to cover core judicial tasks.
   b) Legislative appropriations for judicial funding must reflect the status of the judiciary as a co-equal branch, and should not treat the judiciary either deliberately or in the budgetary process in the same fashion as administrative agencies or other non-branch entities of government. For example, as pointed out above, the statute that provides for judicial budgeting provides that the judiciary is to submit its budget in the same manner as other administrative agencies.\textsuperscript{42}

There is no simple solution to this question; there are persuasive arguments involving separation of powers and checks and balances between the legislature and the judiciary on both sides of the questions. The problem is complicated because there may exist in at least one sense an overlap in function between the two branches. While the legislature has the power of the purse, it is an essential attribute of separation that the judiciary remain independent, and failure to fund may give the judiciary the power to compel funding.

SUGGESTED SOLUTIONS

There is one constitutional approach that might resolve this problem and maintain consistency with the doctrine of separation of powers, the appropriation power of the legislature, judicial independence, adequate funding and the rule of law.

1) That solution is to amend the Constitution to provide that in considering and making judicial appropriations the legislature will treat the judiciary as a co-equal branch. A partial model might be the provision for establishing public education. The provision on the public school system in Article III, Section 14 of the Pennsylvania Constitution provides as follows:

The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.

\textsuperscript{42} Title 42 Pa.C.S.A. § 3524 \textit{FORM OF JUDICIAL DEPARTMENT APPROPRIATION} provides that
The budget request of the Judicial Department shall be prepared in a manner comparable to the request of an administrative department.
2) An analogous provision for funding of the judiciary might provide:

The General Assembly shall, by separate annual appropriation, adequately fund the unified judicial system through the Supreme Court, in an amount sufficient to perform its core functions and duties as a co-equal branch of government.

This suggested solution:

a) Recognizes the power of the Legislature to make appropriations;
b) Recognizes that the judiciary is not simply another administrative agency;
c) Creates a standard (“core functions and duties”). This standard is an important part of the provision. The benefit of establishing this standard is that it restrains the use of inherent jurisdiction by the judiciary by limiting its use to core functions. Thus, the judiciary could not interferfe with a core appropriation function of the legislature except in the face the most serious impediment to discharging the judicial function. On the other hand, the legislature could not refuse to fund the judiciary in an amount sufficient for the judiciary to discharge its core functions.
d) This standard also furnishes a guideline for the legislature on funding a co-equal branch.

This suggested solution could be enacted by legislatively initiated constitutional amendment under Article XI of the Pennsylvania Constitution or at a constitutional convention.

III. Judicial Selection

Judicial selection is an issue fraught with tension. The PBA has had a long-standing position in favor of adopting a Merit Selection system for the appellate courts. Like most Pennsylvanians, members of the Committee hold strong views about judicial selection and the system that is best for Pennsylvania. We outline below the areas of substantive agreement among the Committee members, our efforts to reach consensus, and our conclusion that this issue is one that cannot be resolved by this Committee.

CONSENSUS ON OBJECTIVES

The Committee members’ shared view envisions a judicial selection system for appellate courts staffed by qualified, fair and impartial Justices and Judges and that ensures judicial independence consistent with separation of powers.

Although it is difficult to define Judicial Independence, Committee members strongly believe that Justices and Judges must be able to operate and make their decisions without regard to outside pressures – including popular opinion, the desires of campaign contributors, or pressure from other branches of government.

CONSENSUS ON ISSUES AND CHALLENGES PRESENTED BY THE CURRENT SYSTEM

The Committee has identified the following issues and challenges presented by the current system of partisan elections:

43 This position has existed since 1947, and has been reaffirmed several times, most recently by the Board of Governors in 2002.
1) The presence and influence of money in judicial elections presents an appearance of impropriety and undermines public confidence in the judiciary;

2) The three appellate courts should each include men and women from racially and ethnically diverse backgrounds and who reflect the geographic diversity of this commonwealth;

3) The lack of knowledge by the electorate regarding judicial independence and the identity of and qualifications of appellate judicial candidates are important problems in the election of judges.

EFFORTS TO REACH A CONSENSUS ON A SOLUTION

As noted above, while the Committee reached agreement on the identification of the problems and challenges associated with the current appellate judicial selection system, the Committee has been unable to agree on a single solution. The Committee devoted many hours of research, meetings, and discussions toward the goal of achieving consensus on how to achieve the objectives and solve the problems identified above. We have discussed proposals that would:

1) Maintain the current electoral system without change (See Appendix A);

2) Adopt new campaign finance, recusal, and disqualification rules in an effort to address the money problem (See Appendix B);

3) Adopt a Merit Selection system for the appellate courts that would use a nominating commission to evaluate candidates for recommendation to the Governor; Gubernatorial nomination; Senate confirmation; and periodic retention elections (See Appendix C);

4) Adopt a hybrid Merit Selection/Election system for the appellate courts that would use a Merit Selection model to select the candidates who would then run in contested non-partisan elections (See Appendix D);

5) Adopt an appointment system modeled on the Federal system for appointment of Article III judges (See Appendix E); and

6) Adopt a system to divide Pennsylvania into distinct geographical judicial districts for the purpose of election or selection to solve the problems of the lack of geographic diversity on the statewide appellate courts and the cost of running statewide (See Appendix F).

The Committee examined and discussed the strengths and weaknesses of each of these proposals. While each of these proposed solutions to the problems identified above offer distinct advantages, none could muster a consensus, or even a majority vote, of the Committee members. We believe that our inability to achieve consensus likely will be reflected in the Constitutional Review Commission as a whole, the Pennsylvania Bar Association generally and the public.

CONCLUSION

The Committee therefore recognizes that the issue of how we select appellate judges commends discussion and, as appropriate, constitutional address by the people of Pennsylvania. Other problems identified above deserve attention and may be resolved by constitutional change, legislation, or court rule-making. Regardless of the ultimate outcome, the Committee recommends that the PBA work to expand education about judicial independence, the work of Pennsylvania's appellate courts and the candidates who seek to serve on those courts.
IV. Judicial Discipline

The Judiciary Committee believes that the issue of Judicial Discipline is a critical one for Pennsylvania. We also recognize that this issue has received substantial attention and action in recent months, including various legislative proposals, rule changes enacted by the Pennsylvania Supreme Court, and reports issued by the Interbranch Commission on Juvenile Justice; the PBA’s Task Force on the Report of the Interbranch Commission on Juvenile Justice; the American Bar Association; and Pennsylvanians for Modern Courts. We believe that other bodies, including the legislature, the Supreme Court, and the Judicial Conduct Board and Court of Judicial Discipline are exploring ways to improve the Judicial Discipline System. Accordingly, we have determined to focus only on whether changes to the existing constitutional language governing judicial discipline are necessary.

The Committee has reached consensus on two areas of the constitutional language governing the Judicial Discipline System. The first stems from our ongoing concerns about the Luzerne County Scandal and addresses interim action that may be taken during the pendency of an investigation of charges filed against a judge. The second addresses a procedural change in the discipline process that will make the system more responsive, transparent and accountable to those who file complaints about judicial misconduct.

EMERGENCY ACTION

The constitution already provides a process through which the Judicial Conduct Board “the Board”) can petition the Court of Judicial Discipline to temporarily suspend a judge, with or without pay, against whom the Board has filed charges or against whom criminal charges have been filed. Article V, Section 18(d)(2). In addition, the Pennsylvania Supreme Court recently held that it has the inherent power to order an emergency suspension of a judge during an investigation by the Board. In re Merlo, 17 A.3d 869 (Pa. 2011)(per curiam).

The Committee believes that there should be a constitutional procedure governing how the Board and the Court of Judicial Discipline may act in cases that have not yet reached the level of formal charges or criminal charges being filed against a judge but in which there is concern that litigants, the court system or the administration of justice may be harmed by the judge continuing to sit on the bench. Accordingly, we recommend that Article V, Section 18(d) be amended to include a new section:

Following a preliminary investigation, if the board determines there may be imminent danger to litigants, the court system, or the administration of justice, it may petition the court for an emergency hearing. Following the emergency hearing, the court may issue an interim order directing the suspension, with or without pay, of any justice, judge or justice of the peace. An interim order under this paragraph shall not be considered a final order from which an appeal may be taken.

STATUS REPORTS TO COMPLAINANTS

The second area on which the Committee has reached consensus is the constitutional language governing the processing of cases by the Judicial Conduct Board. There was agreement that complainants should be apprised on a regular basis of the status of their complaint and should ultimately receive some explanation for any action taken by the Board, including dismissal. Accordingly, we recommend that Article V, Section 18(a)(8) be amended by adding the following language at the end of the section: “The Board shall periodically inform the complainant of the status of the investigation.”
V. Other Issues Considered

The Committee also discussed whether juveniles should be permitted to waive their right to counsel. After reviewing the situation in Luzerne County, Mr. Robbins moved to adopt the following language as a constitutional amendment: “a waiver of counsel shall not be accepted by the court in any juvenile delinquency or dependency proceeding. The motion passed (9 in favor, 1 opposed). While the Committee believed this to be an important issue, the Pennsylvania Bar Association has issued a report addressing these concerns. The Committee decided to defer to the PBA report.

The Committee also addressed the issues of unpublished opinions. Mr. Robbins moved that a court may not prohibit or restrict the citation of any opinion, adjudication or other document issued explaining a judgment, order or other disposition. The motion passed unanimously. The Committee based the language on the analogous Federal Rule of Appellate Procedure 32.1 which states:

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like; and
(ii) issued on or after January 1, 2007

V. Conclusion

While the Committee was unable to reach a consensus on every issue, it is clear to each Committee member that change is necessary. The judicial system is designed to protect the rights and privileges of Pennsylvania citizens and unfortunately the system has failed in some instances. The Committee believes that judicial funding, judicial selection, judicial discipline, campaign finance, representation, and voter education are the most pressing issues facing the judicial system today, and hopes that these recommendations will address some of the problems. The Committee’s ultimate goal is to correct the problems identified in order to preserve an independent, efficient and fair judicial system.

Respectfully Submitted,

The Judiciary Committee
Co-Chair: Gerald C. Grimaud, Esq.
Co-Chair: Richard H. Galloway, Esq.
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APPENDIX A:

Maintain the Elective System

While there was strong support for the notion of continuing to elect judges at all levels in the Commonwealth of Pennsylvania, there was also strong support for addressing issues collateral to the election of judges, including but not limited to, campaign finance, voter education, geographical diversity, gender, racial, and ethnic diversity, and the like. The consensus is that those who support the election of judges also support reforms in the collateral areas.
APPENDIX B:

**Judicial Campaign Fundraising**

Because of our shared concern about the effects of judicial campaign fundraising on the actual and perceived delivery of justice, the Committee explored emerging Supreme Court case law relating to campaign financing as well as developments nationally and in other jurisdictions related to recusal rules.

In *Citizens United v. Federal Election Comm’n*, 558 U.S. __, 130 S.Ct. 876, 904, 175 L.Ed.2d 753, 788 (2010), the U.S. Supreme Court held that prohibiting all independent election expenditures by corporations and unions violated the First Amendment. The Court observed: “If the First Amendment has any force, it prohibits congress from fining or jailing citizens, for simply engaging in political speech.” The full scope of the decision has not yet been established, but it seems clear that more money will be flowing into all campaigns, including judicial election campaigns.

At the same time, the U.S. Supreme Court also has recognized that judicial campaign contributions can cause special problems. The Court held that Due Process was violated when a West Virginia Supreme Court justice refused to recuse from hearing a case in which one of the parties made significant campaign expenditures in support of that judge and against his opponent during the preceding election. *Caperton v. A.T. Massey Coal Co.*, Inc., 556 U.S. __, 129 S.Ct. 2252, 2263-64, 173 L.Ed.2d 1208, 1222 (2009). The Court found that “… there is a serious risk of personal bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had in the outcome of the election.”

Since *Caperton*, other jurisdictions and the American Bar Association have worked to address the issues associated with acceptance of funds by judicial candidates. In some cases, these efforts resulted in changes to recusal/disqualification rules that limit a judge's ability to preside over cases that involve parties or lawyers who have recently contributed to that judge's election campaign. See NY Rules of the Chief Administrative Judge section 151.1 (Assignments in Cases Involving Contributors to Judicial Campaigns – imposing contribution threshold within two year window). See generally http://www.americanbar.org/content/dam/aba/administrative/judicial_independence/report107_judicial_disqualification.authcheckdam.pdf (ABA report and resolution recommending development of clear standards relating to judicial disqualification, review and the impact of election contributions on judicial decision-making and public perception).

The Committee recognizes the value in a re-examination of recusal standards in Pennsylvania. Although we are particularly concerned with the issue of recusal as it relates to campaign contributions, we believe that judges should have clear guidelines on recusal in any case in which partiality or bias might exist in actuality or might be broadly perceived by the public. The Committee is aware, however, that the Pennsylvania Supreme Court has appointed a task force chaired by Superior Court Judge Anne Lazarus to study the problem. We, therefore, will refrain from making specific proposals about recusal, while urging the task force to adopt a concrete and predictable mechanism to promote judicial independence and the public’s perception of the integrity of the judicial process by imposing guidelines to assure that a sitting judge is not beholden to a specific litigant, lawyer or party.
APPENDIX C:  

Merit Selection

PURPOSE:

This outlines a Model for a Pennsylvania System of Merit Selection of Appellate Court Judges.

APPLICABILITY:

This Model would apply only to justices of the Supreme Court and judges of the Superior and Commonwealth Courts. Selection of common pleas judges, magisterial district judges and other members of the Minor Judiciary would not be affected.

OPERATION:

There are four steps in Merit Selection:

1) Screening and evaluation by a bipartisan citizens based nominating commission;
2) Nomination by the Governor from the nominating commission's list of the most highly qualified candidates;
3) Confirmation by the state Senate;
4) Retention election after an initial four year term and every ten years thereafter until the judge retires or reaches age of mandatory retirement.

NOMINATING COMMISSION:

Composition -- 15 members selected as follows

1) 4 non-lawyers selected by the Governor, all must reside in different counties and no more than two from the same political party;
2) 4 lawyers selected by the Legislature, one each by the Senate Pro Tempore, Senate Minority Leader, Speaker of the House of Representatives, and House Minority Leader; all must reside in different counties
3) 7 public members, selected as follows
   a) 1 seat to rotate among the deans of the law schools of Pennsylvania
   b) 6 seats that correspond with specific constituencies of the Commonwealth:
      i) Bar Associations
      ii) Non-lawyer Professional Associations
      iii) Civic Organizations (nonreligious 501(c)(3) organizations)
      iv) Unions
      v) Business Organizations
      vi) Public Safety Organizations
      vii) These six seats will be filled through a lottery process. Organizations in each category will be notified of the opportunity to apply to participate. The five largest (by Pa. membership) that apply in each category will be entered into a lottery. For each category, one organization will be selected to appoint a member for a term on the nominating commission. These six separate lotteries will fill six public seats. When a public seat becomes vacant or the term expires, a new lottery will be held, but the organization that appointed the vacating member will have to sit out for that term.
Each appointing authority shall be directed to consider that the nominating commission should include men and women as well as individuals who come from racially and ethnically diverse backgrounds and who reflect the geographic diversity of the Commonwealth.

Operation:

The nominating commission will screen and evaluate candidates with the goal of recommending the most highly qualified to the Governor for possible nomination. The nominating commission will interview candidates and those who know them, investigate candidates’ background, and seek public comment. Some interviews and hearings will be held in public session, so that the public may learn about those who may be considered for recommendation to the Governor. In addition, members of the public will have the opportunity to submit private written comments for consideration by the nominating commission.

Factors taken into Account in Determining Qualifications:

Minimum qualifications for appellate court judges, including being licensed as a member of the bar of the Supreme Court in good standing, at least 10 years of legal experience, demonstrated integrity, judicial temperament, professional competence and experience and commitment to the community, should be written into the Constitution. In addition, the nominating commission shall be directed to consider that each of the appellate courts should include men and women as well as individuals who come from racially and ethnically diverse backgrounds and who reflect the geographic diversity of the Commonwealth.

NOMINATION BY THE GOVERNOR:

The Governor shall be required to nominate a judge for an appellate court vacancy from the list of highly qualified candidates provided by the nominating commission. When the list is presented to the Governor, it should also be made public, so that members of the public know who is under consideration for nomination and can provide input to the Governor on those candidates.

CONFIRMATION BY THE SENATE:

Confirmation by the Senate is required for all appellate court nominees. The Senate should hold public hearings and accept public input about the nominees.

RETENTION ELECTION:

Following an initial four year term in office, the judge will stand before the public in a yes/no nonpartisan retention election. If retained, the judge will serve a full ten-year term and may stand for retention every ten years thereafter until reaching the age of mandatory retirement.
APPENDIX D:

Merit Vetting/Election of Appellate Court Judges

MOTION:

Motion made for Judiciary Committee’s recommendation to amend Article V of the Pennsylvania Constitution to provide for Merit Vetting/Election of Appellate Court Judges as set forth below.

APPLICABILITY:

This motion applies only to Justices of the Supreme Court and judges of the Superior and Commonwealth Courts. The selection of common pleas judges, magisterial district judges and other members of the Minor Judiciary remains unchanged.

COMMENTARY:

Our democracy relies upon both the rule of law and a fair and impartial judiciary as the ultimate guardian of our rights and freedoms. That system promotes accountability, security, equal opportunity and maintains stability and prosperity. To protect our heritage, we must insure that the courts are peopled by independent, fair and honest individuals who are well-versed in the law. With those concerns in mind, it is easy to see why our Committee’s discussions have emphasized that all proposals rest upon the identification and selection of highly-qualified, unbiased and impartial candidates. At the same time, another theme emerged: the consideration of geographical diversity. Our discussions also gave voice to an overarching concern for the potential corrupting impact of money on judicial selection. The clearest theme derived from our conversations reflected an almost universal understanding that complacency was not an option.

The United States Supreme Court’s decisions in Caperton v. A.T. Massey Coal\(^4\) and Citizens United v. FEC\(^5\) commend the Committee’s attention, impose legal limitations on our suggested action items and provide fodder for discussions of interventions to address the identified problems. While the full implications of these cases remain unknown, there are certain concepts that can and must be employed in considering the judicial selection and related issues.

A philosophical question has been broached but not directly addressed: whether we should concentrate on presenting suggestions possessed of characteristics that make them readily acceptable or do we offer “best practices” proposals without regard to political acceptability? An assumption that the “art of the possible” offers the best approach to actual achievement in this potentially politically-charged arena informs the presentation of the proposals outlined below.

\(^4\) 556 U.S. __, 129 S.Ct. 2252, 2263-64, 173 L.Ed.2d 1208, 1222 (2009)(In finding that a judge’s failure to recuse himself implicated a due process violation, the Court found that “…there is a serious risk of personal bias – based on objective and reasonable perceptions – when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent. The inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had in the outcome of the election.”).

\(^5\) 558 U.S. __, 130 S.Ct. 876, 904, 175 L.Ed.2d 753, 788 (2010)(in finding that portions of McCain –Feingold Act (Bi-Partisan Campaign Reform Act) that prohibited all independent expenditures by corporations and unions violated First Amendment, the court observed: “If the First Amendment has any force, it prohibits congress from fining or jailing citizens, for simply engaging in political speech.”).
This hybrid form employs both an evaluation/selection component and an election component in an effort to secure the benefits of a selection process (i.e. identification of fully qualified candidates) while offering recognition to the existing power of the electorate to take responsibility in choosing those who will interpret and apply the law. Preservation of the election process recognizes the Jacksonian ideals inherent in the democratic election of individuals, the existing reluctance of the citizenry to forgo their franchise and the benefits of imposing on candidates the responsibility to meet the electorate on a statewide basis and exposing them to the diversity of our Commonwealth and the vicissitudes of the election process.

OPERATION:

There are four steps in the Merit Vetting/Election process:

1) Candidates identify themselves and provide information to assure that they meet eligibility requirements;
2) Submission of responses to Nominating Commission Questionnaire;
3) Screening and evaluation of all candidates by a bipartisan, diverse Nominating Commission; Selection of best qualified candidates (two for each vacancy);
4) Vetted and approved candidates run in general election.

NOMINATING COMMISSION:

Composition:

All members of the Nominating Commission must be registered to vote in Pennsylvania. All lawyer members appointed by the Supreme Court must be members in good standing of the Bar of Pennsylvania with at least 10 years experience and no two may reside in the same state senatorial district, nor may any two reside in the same county. The appointment of members of the Nominating Commission shall be coordinated to assure the diversity elements state below are respected. A Nominating Commission shall be selected each election cycle where there is a judicial vacancy and each shall be composed of 15 members, including:

1) One seat to rotate among the Deans of Pennsylvania’s accredited law schools or a former Dean of a Pennsylvania or tenured Associate Dean, who shall serve as chair of the Commission, provided such individual meets the requirements of a lawyer (other than the geographical or political area bars), as referenced above. If no such individual is available or willing to serve, then, this duty shall be performed by the current Attorney General;
2) Four individuals selected by the Legislature, one each by the Senate President Pro Tempore, Senate Minority Leader, Speaker of the House of Representatives, and House Minority Leader; all must reside in different counties from each other and no more than two may be registered with the same political party;
3) Four individuals, selected by the Governor, all must reside in different counties from each other and from the individuals selected by the Legislature and no more than two may be registered with the same political party; and,
4) Six lawyers selected by the PA Supreme Court.

46 Alternatively, thought was given to the question of whether the Nominating Commission should act simply as a reviewing entity and only render a decision as to whether each candidate was deemed qualified to run or not. While such a method intrudes less on the elective process, the PBA’s Judicial Evaluation Commission presently performs such a function. As such, the vetting process model would largely duplicate an existing process.
Each appointing authority shall consider not only who other appointing authorities have selected, but must recognize that the Nominating Commission should include men and women as well as individuals who come from racially and ethnically diverse backgrounds and who reflect the geographic diversity of the Commonwealth. If, in the opinion of the Chair, diversity has not been fairly considered in the appointment process, the Chair may identify and seek replacement of up to 5 members of the statewide panel from the appointing authority. The Chair shall exercise reasonable discretion in identifying the individuals subject to replacement and shall specifically identify the deficiency so that the appointing authority may meet the diversity concerns at issue. Invocation of the replacement consideration by the Chair shall not alter any appointment requirements.

Operation:

Consistent with the above, the Nominating Commission will screen and evaluate eligible candidates with the goal of recommending the most highly qualified individuals to run in a nonpartisan general election (two candidates per vacancy). The Nominating Commission must conduct a face-to-face interview with each candidate. The Nominating Commission will investigate each candidate’s background and references, as well as seek public comment. The interviews of the candidates will be held in public session, so that the public may learn about those who may be considered for recommendation to run for judicial office. The Nominating Commission will contemplate (but not be bound by) the proceedings and information generated by the PBA’s Judicial Evaluation Commission. Consideration should be given to exacting a pledge from all candidates to adhere to appropriate and particular standards of conduct during the political campaigns. This could include Judicial Campaign Advertising Guidelines and a pledge similar to the Judicial Candidate Pledge form that has been employed recently by the PBA’s Judicial Evaluation Commission.

Factors taken into Account in Determining Qualifications:

Minimum eligibility requirements for appellate court judges, should be written into the state Constitution, including: licensure as a member of a state bar, in good standing, for a total of at least ten years and of the Pennsylvania Supreme Court in good standing, for at least three years. For the purpose of evaluating the eligible candidates the consideration should be given to each individual’s: legal experience and knowledge; demonstrated integrity; judicial temperament; professional competence and experience; diligence; personal financial responsibility; and, commitment to the community.

All candidates must submit sample legal writings which will be reviewed not for the position espoused but for legal analysis and other characteristics which show competence in crafting written legal positions. In addition, the Nominating Commission shall be directed to consider the current membership of each appellate court in which a vacancy exists and, in an effort to foster diversity, shall contemplate that each of the appellate courts should include men and women, individuals who come from racially and ethnically diverse backgrounds, individuals who reflect the geographic diversity of the Commonwealth and who present themselves with varied professional experiences.

ELECTION:

Following the vetting process, the approved candidates shall stand for general election. If there is more than one vacancy in any court, then the Nominating Commission shall identify two candidates for each opening. The candidates shall not run for a specific position and the candidates receiving the most votes (for the number of vacancies) shall be elected to serve.

The candidates shall run their election campaign consistent with any pledges made to the Nominating Commission. While the violation of a pledge by the candidate or the candidate’s campaign should not disqualify the candidate, the Nominating Commission should reserve the right to identify any such pledge violation and issue press releases or other communications to apprise the public of such deviations. Any political party may endorse an approved candidate but no individual may run under the banner of a political party. The Commonwealth shall be responsible for the preparation of a Voter’s Election Guide for all approved judicial candidates. The candidates shall have an opportunity to submit information for publication in the Guide. The Voter’s Guide shall be distributed to all households in the Commonwealth.

The election process could be improved and the potentially corrupting elements of campaign contributions might be blunted by carefully crafted recusal/contribution rules such as those recently promulgated by the New York Court of Appeals. Similarly, it may be appropriate to seek an agreement of candidates to adhere to self-imposed limits on campaign fund-raising. At the same time, a public financing election provision with detailed mechanisms for generating and making such funds available to qualified candidates would further the minimize the perceived and actual negative effects of significant private contributions to judicial election campaigns.

48 The funding, preparation and use of a Voter’s Election Guide would materially advance the Judiciary Committee’s consensus opinion that steps should be taken to educate and inform the electorate about the appellate judiciary and the approved candidates’ qualifications. This will assist voters in making intelligent, principled decisions as they select from among the approved candidates. We recognize that the state of North Carolina instituted the distribution of a mandatory Judicial Election Guide as part of its Judicial Public Campaign Fund legislation. See NC Gen. Stat. §163-278.69 (Voter education). The funding and procedures related to the preparation of that guide may inform Pennsylvania’s future efforts in that regard.

49 NY Rules of the Chief Administrative Judge §151.1 Rules Governing the Assignment of Cases Involving Contributors to Judicial Campaigns. This Rule (which took effect on July 15, 2011) calls for careful and public record-keeping of contributions to judicial campaigns. In addition it establishes a policy which generally precludes the assignment of cases to a judge where a “campaign contribution conflict” exists. Such a conflict is defined as a contribution of over $2,500 to a given judicial candidate by an individual ($3,500 for a “collective contribution”). The Rule also provides a “Conflict Period” during which the assignment preclusion remains viable. See http://www.nycourts.gov/rules/chiefadmin/151.shtml. The ABA’s House of Delegates recently endorsed the concept of implementing procedures to disqualify judges from cases where the jurist received campaign contributions from parties or counsel. See http://newsandinsight.thomsonreuters.com/Legal/News/2011/08_August/ABA_votes_to_adopt_new_rules_on_judicial_disqualification/.

APPENDIX E:

The Federal Model

Our Founders maximized judicial independence by giving our chief executive the power to appoint judges for life on good behavior provided they are first confirmed by the Senate. Our federal judges are free from political influences and able to check America’s majoritarian institutions, legislative and executive, by keeping them within constitutional boundaries, thereby protecting the separation of powers and facilitating checks and balances.

Our federal judicial system normally works well. U.S. Tenth Circuit Court of Appeals Judge David Ebel recently stated: “In twenty-two years as a judge, no one has ever called me ex parte and tried to persuade me how to decide a case.” The public, including litigants, must be able to trust that judges will decide their cases based only on the law and the evidence. We cannot take judicial independence for granted. It must be written into our constitution. A judge must be free of any concern for his job or pay.

Integrity is essential. There is integrity in the process of finding, nominating and confirming the best qualified honest persons available to serve on our courts.

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51 U.S. Const., art. II, § 2. “[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme court, . . . .” Article III, Section 1. “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance of Office.”

52 Marbury v. Madison, 5 U.S. (Cranch) 137 (1803) (Courts have authority to declare statutes invalid as unconstitutional; and, courts are to abstain from deciding political questions).

APPENDIX F:

Statewide Judicial Districts

The history of the present system of election of Judges presents these problems:

1) The presence and influence of money in judicial elections presents an appearance of impropriety and undermines public confidence in the judiciary;
2) The three Appellate Courts should each include men and women, as well as individuals from racially and ethnically diverse backgrounds and who reflect the geographic diversity of this Commonwealth;
3) The lack of knowledge by the electorate regarding the identity of and qualifications of Appellate Judicial Candidates is an important issue in the election of Judges.

To eliminate those concerns and provide for a system that represents a fair opportunity for all Pennsylvanians in electing Judges the following proposed Constitutional provision is recommended:

1) That the Commonwealth of Pennsylvania be divided into seven Judicial Districts for the election of all Appellate Court positions thereby assuring that each Judicial District shall have at least one Judge or Justice on all three Appellate Courts.
2) To the extent possible each Judicial District shall be of equal population, compact and composed of contiguous counties.
3) The public should be informed on the nature of the appellate process and to the extent possible informed of salient characteristics of candidates so that the voters may make informed decisions in casting ballots for judicial candidates.

Additional Recommendations

1) Four Judges shall constitute a quorum and the concurrence of four is necessary for a decision.
2) The jurisdiction of the County Courts and the Appellate branches of Court shall be subject to those appropriate rules and regulation as determined hereafter by the Supreme Court and by legislative actions, but essentially as same presently exists until the year this Constitutional Provision is adopted. Thereafter, as the dictates and necessities of the law require, same shall be determined by the rules of the Supreme Court of Pennsylvania and appropriate legislative action as provided by the Constitution of Pennsylvania.
TAXATION AND THE UNIFORMITY CLAUSE

Bullet Points

● Difficulties imposed by current interpretation of Uniformity Clause
● Suggested amendment to constitution specifically excluding income from definition of property within the uniformity clause thus allowing legislature to consider graduated income tax
● Suggested amendment to constitution specifically allowing for classification of real estate within the uniformity clause thus allowing legislature to consider disparate taxation of specific types of realty
● Suggested amendment to constitution adopting Rainy Day Fund legislation (which currently calls for supermajority approval of release of funds) as adjunct to current provision relating to budget surplus, thus preventing repeal of current fund legislation as loophole to raid the fund based on a simple majority vote
● Suggested continued careful review of real estate taxation by legislature with special attention given to technology available to STEB and possible deployment of such technology (along with meaningful, enforceable local data submission) to improve assessment process (and possibly eliminate or minimize need for periodic local reassessment)
● Associated with the expanded capabilities of STEB in assessments, thought should be given to allowing computer-generated assessments on municipal, school district wide and county level and also upon specified spectrum of real estate classifications (to maximize assessment accuracy)

PROPOSED AMENDMENT to Article VIII, Section 1 to read as follows [changed language in bold italics]:

All property taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws; a tax on income is not a tax on property. Real property is not a single class of property and the legislature may establish specific classes of real estate for taxation purposes.


Article VIII, Section 1 Uniformity of Taxation – Generally

The major limitation on the Pennsylvania General Assembly’s taxing power resides in the Pennsylvania Constitution’s Uniformity Clause which provides: “All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws.” Pa. Const. art. VIII, § 1. The Uniformity Clause and similar provisions in state constitutions across the nation, embody the common-sense and equitable idea that every individual’s financial contribution to the government is being shared on a proportionate basis relative to all other taxpayers. Delaware, Lackawanna & West. R.R. Co.’s Tax Assessment, 224 Pa. 240, 243, 73 A. 429, 430 (1909). Yet, the Uniformity Clause is not absolute and the Constitution offers the statutory possibility of exemptions to the general rule for, among others, certain real property and public charities1. Pa. Const. art. VIII, § 2.

1 The General Assembly may by law exempt from taxation:
(i) Actual places of regularly stated religious worship;
(ii) Actual places of burial, when used or held by a person or organization deriving no private or corporate profit therefrom and no substantial part of whose activity consists of selling personal property in connection therewith;
Section 2 of the Constitution also permits the General Assembly to provide others with special tax treatment, including: holders of certain agricultural and forest lands; persons affected by “age, disability, infirmity or poverty”; owners of appreciated real property resulting from residential construction; and, to landowners that served and became disabled as a result of service in the military. Pa. Const. art. VIII, § 2(b)(i), (ii) & (iv) and § 2(c). Legislative latitude extends as well to allow some local taxing authorities to offer special tax treatment to: encourage improvement of real estate; for those long time residents whose realty values have increased based on local redevelopment; and, to exclude a portion of a property’s homestead value in assessing taxes. Id. at § 2(b)(iii), (v) & (vi).

Scope of the Problem

While the language of the Uniformity Clause has remained unchanged since its original enactment in 1874, its interpretation by Pennsylvania courts has not—wavered between strict construction and a more liberal understanding of the same essential phraseology. The vacillation reflects a struggle between reconciling the governmental provision of goods and services with the reality of imposing tax burdens on citizens. Born of the notion that individuals should not pay disproportionately for resources that benefit all, the prevailing stricter interpretation of the Uniformity Clause operates to violate that underlying principal of fairness.

Among all of the states with uniformity clauses, Pennsylvania stands among the few that interpret the constitutional requirement of uniformity as a prohibition of a graduated income tax. Yet, even as the judiciary has taken a very restrictive approach to the constitution’s uniformity clause, the General Assembly—while merely permitted (and not required) to grant most of the exceptions contained in Section 2—has acted expansively in invoking those exceptions to the Uniformity Clause’s reach. This dichotomy results in the unintended consequence of undermining the foundational premises of the Uniformity Clause.

The presentations of groups that have offered testimony concentrated largely on the Uniformity Clause and its legislative exceptions. Our discussions tracked that testimony. After considerable deliberation and research, we formulated proposals to address legitimate criticisms of the existing

(iii) That portion of public property which is actually and regularly used for public purposes;
(iv) That portion of the property owned and occupied by any branch, post or camp of honorably discharged servicemen or servicewomen which is actually and regularly used for benevolent, charitable or patriotic purposes; and
(v) Institutions of purely public charity, but in the case of any real property tax exemptions only that portion of real property of such institution which is actually and regularly used for the purposes of the institution.


2 Reluctance to alter the text of the Uniformity Clause gave rise to the stipulation that the 1967-68 Pennsylvania Constitutional Convention Preparatory Committee not consider a proposal that would alter it. See Taxation and State Finance—Reference Manual No. 7, at 5.

3 See infra note 6-9 and accompanying text for a discussion of the interpretation of uniformity clauses in states other than Pennsylvania.

4 Although the Committee on Uniformity and Taxation proposes no Constitutional changes to art. VIII, § 4 (Public utilities), our wide-ranging discussions broached several possible objects of taxation that might touch upon this section. The items discussed have one point in common; they all derive from technological advances and result in goods or services that might be taxable or revenue generating (e.g., extraction tax on Marcellus shale drilling, taxation of technologically advanced fixtures on property such as windmills, cellular towers and electronic billboards). Developing technology demands constant legislative attention. Not only to assure its proper deployment in serving the needs of the Commonwealth, but also in assuring that proper subjects of taxation, especially those that benefit in some way from government funded services, fairly share in financially supporting those services.
situation. First, we propose amending the Uniformity Clause to define tax as encompassing property tax only. This allows for our second suggestion: that the exemptions contained in Section 2 permit the levying of taxes on certain categories of previously exempt real estate at a reduced millage as set by the General Assembly.

These two suggestions segue into another area of significant attention during our hearings, public education funding. The information presented lead us to the inescapable conclusion that the mechanism of school funding, primarily by local real estate tax, commends review and reconsideration because it may not reflect the best interests (either short or long term) of Pennsylvania’s students or its citizens. The real estate funding source causes gross disparities in the quality of education between the wealthiest and poorest school districts in the state. This existing tax scheme unfairly imposes an extraordinarily high burden on taxpayers without school-age children who derive no direct benefit from the public school system. Decoupling school funding and local real estate tax must become a priority in the years to come if Pennsylvania is to reverse the apparent stratification of public education.

Uniformity Clause – Cases

The Supreme Court of Pennsylvania’s view of the Uniformity Clause exerts immense influence on the Commonwealth’s ability to generate revenue. In 1935, the Court held that a tax on income is a tax on property. Kelley v. Kalodner, 320 Pa. 180, 186, 181 A. 598, 601 (1935). This premise inexorably led to the conclusion that a graduated income tax defied our constitution because “a tax which is imposed at different rates upon the same kind of property, solely on the basis of the quantity involved, offends the uniformity clause.” Id. at 189, 181 A. at 602 (internal citation omitted). This interpretation of the Uniformity Clause, prohibits the classification of income for taxation purposes, thus restricting the General Assembly’s ability to raise revenue, has been consistently applied in Pennsylvania.

An examination of similar case law in other states reveals the Court’s view to be in a distinct minority. Of 48 states with uniformity clause language, only the courts of Massachusetts, New Hampshire and Washington have also interpreted their respective uniformity clauses to require prohibition of a graduated income tax. Conversely, courts in a majority of states tend to classify income as merely derivative of property and not itself property, thereby enabling the imposition of a graduated income tax without violating the uniformity requirement.

5 See Amidon v. Kane, 444 Pa. 38, 49-50, 279 A.2d 53, 59-60 (1971); Saudsbury v. Bethlehem Steel Co., 413 Pa. 316, 319, 196 A.2d 664, 666 (1964)(finding local occupational privilege tax of $10 for every individual whose gross income from within the municipality exceeding specified amount violated Uniformity Clause and imposition of tax could not be severed from minimum income requirement); id. at 321-24, 196 A.2d at 667-68 (Musmanno, J., dissenting)(distinguishing Kelley and expressing dissatisfaction with classification permitted in connection with corporate taxation as contrast with taxation of individuals).
The contrarian nature of the *Kelley* holding appears more pronounced when contrast with the majority of states with uniformity clauses (nearly identical in language and structure to that of Pennsylvania). Most of those states have held that a tax on income is not a tax on property, enabling their legislatures to levy a graduated income tax without violating the constitutional requirement of uniformity. Moreover, the constitutional embodiment of separating income from the property has found acceptance through the amendment process in at least nine states: Alabama, Arizona, Colorado, Kansas, Louisiana, Ohio, South Dakota, West Virginia, and Wisconsin. Each constitution was amended to specifically permit the legislative imposition of a graduated income tax.

When the object of the tax is not considered property, such as with an excise tax, the Supreme Court of Pennsylvania has held that the Uniformity Clause is not a prohibition against classification for taxation purposes “[s]o long as [the classification] is based upon some standard capable of reasonable comprehension, be that standard based upon ability to produce revenue or some other legitimate distinction.” *Aldine Apartments, Inc. v. Commonwealth*, 493 Pa. 480, 487, 426 A.2d 1118, 1122 (1981) (internal citation omitted). In other words, a classification will be upheld so long as a non-arbitrary distinction exists that is reasonable and just relative to the act in question. *Id.* at 487, 426 A.2d at 1122. When a challenger questions the constitutionality of a classification, the challenger bears the burden of demonstrating that the classification is unreasonable. *Leonard v. Thornburgh*, 507 Pa. 317, 320-21, 489 A.2d 1349, 1351 (1985). The court will presume that the tax in question is constitutional unless the challenger demonstrates otherwise. *City of Allentown v. MSG Associates, Inc.*, 747 A.2d 1275, 1278 (Pa. Commw. Ct. 2000). An “ability to produce revenue” has passed muster as a reasonable and non-arbitrary classification, which convincingly suggests that the Court would uphold a classification based on income level, were it not for the inconsistent holding of the *Kelley* court. *Aldine* *supra* at 487, 426 A.2d at 1122. Nevertheless, *Kelley* and its progeny’s continued vitality block potential streams of revenue by prohibiting the legislature from imposing classifications on income - despite the clear nationwide trend to the contrary.

A graduated income tax may or may not be viable, but this Committee maintains that the General Assembly, and not the court, is best suited to decide whether and how to impose such a tax. The *Kelley* court stated that “the General Assembly, and not the court, is best suited to decide whether and how to impose such a tax.” *Kelley*, *supra* at 192, 181 A. at 603. For these reasons the Committee proposes that Article VIII, Section 1 be amended as noted above. This modification would afford the General Assembly the

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8 See e.g., Ga. Const. art. VII, § 1, ¶ III (“all taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.”) and *Featherstone v. Norman*, 170 Ga. 370, 384, 153 S.E. 58, 65 (1930)(held, income is not property); Idaho Const. art. VII, § 5 (“all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.”) and *Diefendorf v. Gallet*, 51 Idaho 619, 639, 10 P.2d 307, 315 (1932) (held, income is not property); Minn. Const. art. X, § 1 (“taxes shall be uniform upon the same class of subjects.”) *Reed v. Bjornson*, 191 Minn. 254, 267-268, 253 N.W. 102, 108 (1934)(held, income is not property); Mo. Const. art. X, § 3 (“taxes may be levied and collected for public purposes only, and shall be uniform upon the same class or subclass of subjects within the territorial limits of the authority levying the tax.”) and *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 353, 205 S.W. 196, 198 (1918)(held, income is not property); *Kottel v. State*, 312 Mont. 387, 396, 60 P.3d 403, 410 (2002) (citing the former Uniformity requirement that was omitted from the 1972 Montana Constitution which read, “all taxes shall be levied and collected by general laws and for public purposes only, and that they shall be uniform upon the same class of property within the territorial limits of the authority levying the tax.”) and *Mills v. State Bd. of Equalization*, 97 Mont. 13, 19, 33 P.2d 563, 565 (1934) (held, income is not property); Or. Const. art. I, §32 (“all taxation shall be uniform on the same class of subjects within the territorial limits of the authority levying the tax.”) and *Standard Lumber Co. v. Pierce*, 112 Or. 314, 325-326, 228 P. 812, 815-816 (1924) (held, income is not property).

prerogative to classify income for the purposes of taxation, thus enabling the imposition of a graduated income tax if deemed appropriate.

Article VIII, Section 2 Exemptions and Special Provisions

The Pennsylvania Supreme Court does not permit the sub-classification of real property, despite some conflicting rhetoric suggesting that such classification may be just and appropriate. Nevertheless, even as some municipalities suffer financially, the tax burden falls disproportionately on non-exempt individuals and organizations.

Approximately one half of states directly exempt certain classes from taxation in their Constitution. Evelyn Brody, *All Charities Are Property-Tax Exempt, but Some Charities Are More Exempt Than Others*, 44 New Eng. L. Rev. 621, 624 (2010). Pennsylvania is one of nearly twenty states whose Constitution provides for a two step exemption process, whereby the legislature is empowered by the Constitution to exempt certain classes from taxation, but only if it chooses to do so. *Id.* at 624. The only exception to this process in Pennsylvania is the direct exemption provided in Article VIII, Section 2(c).

Prior to 1874, the General Assembly was empowered to grant exemptions at will. However, limitations on what groups the General Assembly could exempt from taxation were imposed when the Constitution was amended that year. The constitutional revisions following the state Constitutional Convention of 1968 pared the list of exceptions from sixty to seven.

Perhaps the greatest interpretative challenge raised by the Uniformity Clause rests with the fundamental conceptual disconnect between uniformity and classification. For the Uniformity Clause to have any true meaning there must be some classification that cannot rationally be further broken down into smaller classes. Not surprisingly, appellate courts of states with similar uniformity clauses are split on whether real property stands as an indivisible class. 2 Wade J. Newhouse, *Constitutional Uniformity and Equality in State Taxation*, § 3.38 at 1399 (2d ed. 1984) (noting Pennsylvania could have reasonably taken opposite tack prior to Madway decision in 1967).

Pennsylvania’s Constitution does not expressly provide that real property must be treated as a single class for tax purposes. In fact, in 1913, the Pennsylvania General Assembly adopted a two-tiered real property impost in Pittsburgh and Scranton that taxed land at twice the rate of improvements to land. Since then, a two-tiered real property tax has been adopted in other Pennsylvania cities as well.

Thereafter, in 1967, the Pennsylvania high court pronounced that “real estate, as a subject for taxation may not validly be divided into different classes.” *Madway v. Board for the Assessment and Revision of Taxes*, 427 Pa. 138, 133-134, 233 A. 2d 273, 276 (1967). *Madway* concerned the

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12 See Coughlan, supra note 10, at 262 (explaining that General Assembly enacted two-tier real property tax first for “second class cities” Pittsburgh and Scranton then eventually for third-class cities). The statute currently reads, in pertinent part: “They shall classify all real estate in such a manner...so as to distinguish between the buildings on land and the land exclusive of the buildings...It shall be the duty of said councils...to assess a tax upon the buildings equal to five-tenths of the highest rate of tax required to be assessed for each such year respectively, so that upon the said classes of real estate there shall, in any year, be two rates of taxation.” 53 Pa. Cons. Stat. Ann. §25894 (West 1998).
reassessment of real property by a township and local school district to reflect increased values associated with new construction. The Pennsylvania Supreme Court held that the local ordinance authorizing interim reassessments for nonresidential real property, but not for residential real property, was unconstitutional to the extent that it distinguished between the two categories. Since then, the Pennsylvania appellate courts have scrupulously hewed to this principle. Literally construed, this holding seems inconsistent with the already sanctioned classification of real property between “land” and improvements.” The result: while the General Assembly may exempt various charitable and educational institutions from real estate tax pursuant to Article VIII, Section 2, it may not instead tax these organizations at some other rate different from the rate otherwise levied on real estate. Outside the categories expressly singled out in Section 2 for complete exemption, Madway prevents classification of real estate for differential tax treatment.

Section 2 tax-exempt properties can be found in municipalities across the state. Local, state and federal government properties comprise the largest category, constituting approximately fifty percent of all tax-exempt property. Most of these properties fall within the exemption for property used for public purposes. The General Assembly’s authorized exemption for actual places of regularly stated religious worship constitutes the next largest percentage of tax exempt property, ranging from 10-20%, depending on the municipality. Similarly, the legislature was also empowered to exempt actual places of burial, property owned by honorably discharged veterans’ organizations and institutions of purely public charity. Article VIII, Section 2(a)(ii), (iv) & (v).

The General Assembly passed legislation to define the criteria that must be met in order for an institution to be classified as an “institution of purely public charity.” Public and private universities as well as acute care hospitals predominate among the class of institutions that enjoy the advantage of this exemption. According to the Pennsylvania Economy League, twenty-five percent of Pennsylvania’s municipalities that host either a public or private university or an acute care hospital suffer high fiscal distress scores.

In order to recover revenue lost due to exempt property, municipalities must raise their tax millage and, in effect, tax non-exempt property owners in a higher amount. This creates a “free-ride,” for these charitable and educational institutions. While these institutions reap the benefits of local tax-funded government infrastructure (e.g., police/fire departments and road maintenance) they bear no financial obligation to support those items.

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15 Id.
16 This Committee appreciates that assets owned and revenue realized by such entities could be taxed.
17 The question was raised whether an amendment should be added to the Constitution expressly defining what constitutes an “institution of purely public charity.” Such an addition could prevent a conflict between the statutory definition and the case law definition of the term. Compare 10 Pa. Cons. Stat. §375 (sometimes referenced as Act 55)(defining “institution of purely public percentage” as meeting criteria for performing “charitable purpose[,]” “entirely free from private profit motive[,]” which donates a “substantial portion of its services[,]” to benefit “an indefinite and substantial class of people who are legitimate subjects of charity.”) with Hospital Utilization Project v. Commonwealth, 507 Pa. 1, 11-12, 487 A.2d 1306, 1311-12 (1985)(court applies definition of an institution of purely public charity based upon Pa. Dept. of Revenue administrative provision defining “Charitable organization”). See 61 Pa. Code §32.1. See also Brody, supra at 717.
18 See Tax-Exempt Property and Municipal Fiscal Status, supra note 14 at S-2.
For example, thirty-five percent of real estate in the City of Pittsburgh is exempt from taxation. In a creative effort to compensate for declining tax bases and fiscal deficiency, municipalities and counties in Pennsylvania have resorted to seeking payment in lieu of taxes (PILOT) and service in lieu of taxes (SILOT) agreements from tax-exempt institutions. In comparison to other states, counties and municipalities in Pennsylvania have relied on PILOT and SILOT agreements more extensively because of the uncertainty that exists between the courts’ test for institutions of purely public charity as set forth in Hospital Utilization Project and the statutory definition of Act 55. Taxing authorities have leveraged this uncertainty to obtain revenue from non-profit institutions seeking to avoid litigating their precarious tax exempt status.

While LOT agreements offer a mechanism to address the perceived inequity of allowing exempt institutions to escape certain tax burdens, they are negotiated instruments which do not necessarily offer full compensation to the municipality and offer neither the municipality nor the institution certainty beyond the term of the agreement. To address these shortcomings, it may be appropriate to consider a constitutional amendment (or possibly legislative action). The form of proposed amendment to the existing language would operate to generate much-needed revenue for municipalities in fiscal distress (in a quantifiable and budget-conscious amount), ensure exempt institutions share the financial burden of paying for local resources from which they benefit, and provide non-profits and the municipality with a higher degree of financial certainty.

**Article VIII, Section 14 Budget Surplus – Rainy Day Fund**

Article VIII, Section 14 of the Pennsylvania constitution provides for the appropriation of any budget surplus to the General Assembly. One mechanism to assist state governments in their effort to cushion financial bumps is the establishment of a Rainy Day Fund; budget reserves designed to respond to economic downturns or other events that cause unanticipated reduced revenues or increased state expenses. See generally McNichol and Boady, *Why and How States Should Strengthen Their Rainy Day Funds*, Center on Budget and Policy Priorities at 2-4 (2011), http://www.cbpp.org/files/2-3-11sfp.pdf. Such a reserve fund offers advantages on many levels: 1) it typically improves the financial status and bond rating of the state (thus reducing the interest costs associated with the issuance of state bonds); 2) provides a resource from which to address significant, emergent situations or financial crises while reducing the need to impose a sudden tax increase upon the Commonwealth’s citizenry; 3) in times

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19 See Ira Weiss, Submission to the CRC Comments on Taxation and Uniformity Clause at 6.
21 Id. at 7.
22 § 2. Exemptions and special provisions.
   (a) The General Assembly may by law exempt from taxation in an amount not in excess of [to be determined] % of the millage:
      (i) Actual places of regularly stated religious worship;
      (ii) Actual places of burial, when used or held by a person or organization deriving no private or corporate profit therefrom and no substantial part of whose activity consists of selling personal property in connection therewith;
      (iii) That portion of public property which is actually and regularly used for public purposes;
      (iv) That portion of the property owned and occupied by any branch, post or camp of honorably discharged servicemen or servicewomen which is actually and regularly used for benevolent, charitable or patriotic purposes; and,
      (v) Institutions of purely public charity, but in the case of any real property tax exemptions only that portion of real property of such institution which is actually and regularly used for the purposes of the institution.
(emphasis supplied reflecting proposed change).
of economic stress, it allows for a release funds into an ensuing year’s budget thus permitting a balanced budget (despite reduced income expectations) without increasing taxes (demonstrating fiscal responsibility – again resulting in a likely improved bond rating); and, 4) it improves state’s ability to attract new business and industry because such planning reduces prospects of significant changes which might be imposed upon businesses operating within the state.23 See generally 72 Pa. Stat. Ann. § 3741.202 (Legislative findings and conclusions)(Cum. Supp. 2001)(repealed).

The Pennsylvania legislature took the forward-thinking step of amending its Fiscal Code (passed in 1929), creating such a “Rainy Day Fund” back in 1985 with the passage of the Tax Stabilization Reserve Fund Act. 72 Pa. Stat. § 3741.201 et seq. (Cum. Supp. 1988)(repealed).24 Consistent with the concept that any release of reserve funds should meet a high threshold, the Tax Stabilization Reserve Fund law imposed calculated executive standards combined with a supermajority legislative constraint on the release of reserves. Id. at § 3741.205(a) (reserve funds to be made available when the governor determines that money would be necessary to meet an emergency involving the health, safety or welfare of the citizens and, following such a determination, request made of the General Assembly to release funds to meet specified needs and then General Assembly approves same by a 2/3 vote of both the state House and Senate). The reserve was funded in varying amounts over the years with a percentage of the state’s budget year revenue. At the end of the fiscal year in June 2001, the legislature determined that, “… beginning July 1, 2001, and in any fiscal year thereafter in which the Secretary of the Budget certifies that there is a surplus of operating funds in the General Fund, 10% of such surplus shall be deposited by the end of the next succeeding quarter into the Tax Stabilization Reserve Fund.” 72 Pa. Stat. Ann. § 3741.202 & 704 (June 13, 2001)(Sen. Murphy’s remarks to the effect that the core purpose of such reserves provides a financial tool to support Pennsylvania’s bond rating and as a buffer to negotiate lower interest rates of interest on those bonds); Id. at 705-06 (Sen. Jubilerer’s observation that it was “bad public policy” to raid Rainy Day Fund for a special purpose at expense of bond rating which would necessarily entail raising state taxes). By establishing a mandatory savings account for the state, this proposal would remove the temptation for the Legislature to spend every available penny of revenue when times are relatively good. Money from the Economic Stabilization Fund could be tapped only in times of real need and used for purposes for which a clear political consensus existed. Money from the fund could be spent only to avoid a budget deficit and a sharp reduction in state services and only with the approval of at least three-fifths of the members present in each house of the Legislature. Spending from the fund under any other circumstances would require strong, bipartisan support – at least a two-thirds vote of each house. While the stabilization fund would help control the growth of state revenue available for state spending, it would not unduly inhibit spending for essential needs. The fund could not grow in an unchecked fashion, locking up billions of dollars. The fund would be capped at 10 percent of general revenue raised during the prior fiscal year. Once the fund reached the cap, the state actually would gain millions of dollars in new general revenue from interest generated from the fund.

23 Corporations would be more likely to establish operations here if they did not fear that wild swings in the state budget would suddenly force new taxes or cuts in vital state services. Pa. Senate Journal at 837 (June 27, 1995)(Sen. Loeper noted that Rainy Day reserve contributes to an improved tax climate in the Commonwealth admitting of an effort “to try to attract new business and industry to Pennsylvania. … [W]e are looking toward the future so if we do have a downturn in the economy we are prepared to deal with it and not have a tax increase….”). Establishing such a fund would also improve the state's credit rating, since Wall Street bond houses consider state stabilization funds to be an indicator of conservative fiscal management. See Pa. Senate Journal at 702 & 704 (June 13, 2001)(Sen. Murphy’s remarks to the effect that the core purpose of such reserves provides a financial tool to support Pennsylvania’s bond rating and as a buffer to negotiate lower interest rates of interest on those bonds); Id. at 705-06 (Sen. Jubilerer’s observation that it was “bad public policy” to raid Rainy Day Fund for a special purpose at expense of bond rating which would necessarily entail raising state taxes). By establishing a mandatory savings account for the state, this proposal would remove the temptation for the Legislature to spend every available penny of revenue when times are relatively good. Money from the Economic Stabilization Fund could be tapped only in times of real need and used for purposes for which a clear political consensus existed. Money from the fund could be spent only to avoid a budget deficit and a sharp reduction in state services and only with the approval of at least three-fifths of the members present in each house of the Legislature. Spending from the fund under any other circumstances would require strong, bipartisan support -- at least a two-thirds vote of each house. While the stabilization fund would help control the growth of state revenue available for state spending, it would not unduly inhibit spending for essential needs. The fund could not grow in an unchecked fashion, locking up billions of dollars. The fund would be capped at 10 percent of general revenue raised during the prior fiscal year. Once the fund reached the cap, the state actually would gain millions of dollars in new general revenue from interest generated from the fund.

24 With its initial passage, the intent and goal was to create a reserve “in an amount not to exceed 3% of the estimated revenues of the General Fund of the Commonwealth”). Id. at § 3741.204 (Cum. Supp. 1988) (repealed). Over the years, the legislature changed the maximum percentage of estimated revenue of the General Fund to be reserved. Id. at § 3741.204(b). However, any release of funds had to be part of a carefully orchestrated, larger recovery strategy. Unwarranted or undisciplined spending of reserves risked the state’s “financial flexibility and ability to respond to other unexpected situations such as natural disasters.” See Government Finance Officers Association website at http://www.gfoa.org/index.php?option=comcontent&task=view&id=1162&Itemid=462 (in section entitled, “Financial Planning and Analysis, Use Fund Balance to Soften the Landing”).
3741.203-1 (Cum. Supp. 2001)(Transfer of portion of surplus). Thus, the state’s budget surplus was linked with funding the rainy day reserve.

In 2002, the original Act was scrapped and a new Rainy Day Fund called the “Budget Stabilization Reserve Fund” was created. The precise nature of the change is not referenced in the General Assembly’s Journals.25 As with the earlier reserve, the Budget Stabilization Reserve Fund, required a 2/3 vote of the General Assembly to approve a proposal by the Governor to appropriate money to meet an emergency. Id. at §§ 1701-A & 1702-A (Funding). Nevertheless, this rendition of the history of the Rainy Day Fund legislation highlights a fundamental reality: while approval for the release of funds requires a supermajority in both houses of the General Assembly, the legislature maintains a ready loophole to evade that structure. The General Assembly can, at any time, circumvent the 2/3 vote requirement by repealing the existing iteration of the Rainy Day provisions.26

In light of the significant policy and financial benefits attached to the fund and the history demonstrating the legislature’s capacity and will to make changes to the fund on the basis of a simple majority vote, it may be appropriate to consider a constitutional change memorializing a commitment to a robust Rainy Day Fund and its basic functions. Such an addition to the Constitution would prevent the legislature from making changes without meeting the significant requirements for a constitutional amendment and would obviate the possibility of any changes by using a repeal as a loophole to access the funds by a simple majority vote of each of the houses of the General Assembly – even though the present (and previous) enabling legislation calls for a 2/3 supermajority vote.

The significance of the Rainy Day Fund provision can be readily ascertained in light of the current economic recession. Indeed, one policy think-tank showed remarkable prescience through its careful contemplation of reasonable state needs in funding rainy day reserves. Specifically, it was suggested that, on average, the amount needed to properly weather a three-year hypothetical recession - without cutting current services or raising taxes- would require a reserve of 18.6% of state spending. Lav & Berube, When it Rains it Pours: A Look at the Adequacy of State Rainy Day Funds and Budget Reserves, Center on Budget and Policy Priorities at ix & 23 (1999), http://www.cbpp.org/archiveSite/3-11-99sfp.pdf . That analysis specified that based upon the 1999 fiscal year budget, Pennsylvania would actually require 19.0% of that year’s budget as a sufficient set-aside for a properly funded rainy day reserve. Id. at 23. Several years later, the 1999 analysis was reconsidered and it was recognized that,

25 It is interesting to note that the repeal and replacement took place as an “add-on” to the final version of a Bill dealing largely with abandonment of property and escheat that had already gone through 5 prior iterations without language relating to the Fund. See Senate Bill No. 1366 Session of 2002 (and Printer’s Nos. 1826, 1840, 2025, 2079, 2134 and 2173). See also 72 P.S. §§ 1701-A (Establishment of Budget Stabilization Reserve Fund) & 1702-A (Funding)(Cum. Supp. 2011).

26 Indeed, an examination of the enacted budget for fiscal year 2002-03 reflects a “Transfer from Tax Stabilization Reserve Fund” of “$1,037,800,000”). See 2002-03 General Fund Enacted Budget Overview at 1, http://www.portal.state.pa.us/portal/server.pt?open=512&objID=4571&mode=2&2002-03 (click link to 2002-03 General Fund Enacted Budget Overview (Act 7-A of 2002)). That Overview, under the heading “Sound Management,” specifically acknowledged that “[t]he enacted budget utilizes the Rainy Day Fund as it was intended – to replace a large portion of revenue shortfalls during an economic downturn. A substantial portion of the Rainy Day Fund is utilized in the enacted budget.” Id. at 2. The report also recognized that “… $300 million dollars are retained in the newly created Budget Stabilization Reserve Fund.” Id. See also id. at 1. The most recent version of the Rainy Day Reserve legislation calls for a transfer into the Budget Stabilization Reserve Fund (where there is a certified surplus in the General Fund for a specific fiscal year) in the amount of 25% of that surplus. The transfer requirement is reduced to 10% of the General Fund’s final balance if the Budget Stabilization Reserve Fund equals or exceeds 6% of the actual General Fund revenues for the fiscal year. 72 P.S. §§ 1702-A (b)(Transfer of portion of surplus).
given the depth and length of the [then] current economic downturn, it appears that the 1999 estimates were rather conservative. McNichol & Filipowich, *Rainy Day Funds: Opportunities for Reform*, Center on Budget and Policy Priorities at 5 (2007), http://www.cbpp.org/files/4-16-07sfsp.pdf. Given that these observations were made over four years ago and that the analysis was based on a three-year hypothesized recessionary period, it seems unlikely that implementation of the projected 19.0% set-aside would have been sufficient to avoid service cuts or tax hikes in the Commonwealth over the (now) recently economically challenging years.

To that end, the Commission recommends the creation of a Constitutional Budget Stabilization Reserve Fund by amendment of the state constitution. Such an amendment requires an addition to the existing language of Article VIII, Section 14 dealing with a Budget Surplus27.

**Real Property Valuation/Assessment Issues**


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27 Insert “(a)” before existing language in sec 14, to be followed by [new language which deviates from language of current Budget Stabilization Reserve Fund Act noted in *italics*]:

(b) There is established a special fund to be known as the *Constitutional* Budget Stabilization Reserve Fund.

(c) It is hereby declared as the intent and goal of the *People* to create a stabilization reserve in an eventual amount of 20% of the revenues of the General Fund of the Commonwealth from the *prior fiscal year*.

(d) (i) Except as set forth in this paragraph, if the Secretary of the Budget certifies that there is a surplus in the General Fund for a specific fiscal year, 25% of the surplus shall be deposited by the end of the next succeeding quarter into the *Constitutional* Budget Stabilization Reserve Fund.

(ii) If, at the end of any fiscal year, the ending balance of the *Constitutional* Budget Stabilization Reserve Fund equals or exceeds 20% of the actual General Fund revenues received for the fiscal year in which the surplus occurs, 10% of the surplus shall be deposited by the end of the next succeeding quarter into the *Constitutional* Budget Reserve Stabilization Fund.

(iii) Except when the ending balance of the *Constitutional* Budget Stabilization Reserve Fund equals or exceeds 20% of the actual General Fund revenues received for the fiscal year in which the surplus occurs, the General Assembly may at any time provide additional amounts from any funds available to this Commonwealth as an appropriation to the *Constitutional* Budget Stabilization Reserve Fund.

(e) It is the intent of the General Assembly that:

(i) Money from the *Constitutional* Budget Stabilization Reserve Fund be appropriated only when emergencies involving the health, safety or welfare of the residents of this Commonwealth or downturns in the economy resulting in significant unanticipated revenue shortfalls cannot be dealt with through the normal budget process.

(ii) Money in the *Constitutional* Budget Stabilization Reserve Fund shall not be used to begin new programs but to provide for the continuation of vital public programs in danger of being eliminated or severely reduced due to financial problems resulting from the economy.

(f) Whenever the Governor determines that an appropriation from the *Constitutional* Budget Stabilization Reserve Fund is necessary to meet emergencies involving the health, safety or welfare of the residents of this Commonwealth or to counterbalance downturns of the economy which result in significant unanticipated revenue shortfalls, the Governor shall present a request for an appropriation along with the specifics of the proposal and suggested ancillary and substantive legislation as may be necessary to the chairman of Appropriations Committee of the Senate and the chairman of the Appropriations Committee of the House of Representatives. The General Assembly may then through approval of a separate appropriation bill by a vote of two-thirds of the members elected to the Senate and the House of Representatives appropriate money from the *Constitutional* Budget Stabilization Reserve Fund to meet the needs identified in the Governor's proposal. Any money appropriated according to this section which has then lapsed shall be returned to the *Constitutional* Budget Stabilization Reserve Fund.

(g) Upon creation of the *Constitutional* Budget Stabilization Reserve Fund, any funds in the Budget Stabilization Reserve Fund or such other fund as may exist, shall be transferred into the *Constitutional* Budget Stabilization Reserve Fund and the existence of such other statutory fund shall be terminated.
much of this Committee’s attention during our hearings related to real property taxation, especially as it concerns the funding of public education. While we will not encroach upon the education issue generally, we recognize one discrete issue deserving consideration. Even while the existence of a multiplicity of laws relating to tax assessment bears on real estate tax issues, the Uniformity Clause calls for consistency in countywide assessments so that all property in each county is uniformly assessed. In its application, the courts have conceded the difficulty in attaining absolute uniformity but have recognized the concept of substantial equality of burden and uniformity of method in determining what share of the burden each taxable subject must bear. Delaware, Lackawanna, supra at 243, 73 A. at 430 (internal citation omitted).

Each county in the Commonwealth selects either a current market basis or a base year basis for property valuation and assessment. See Clifton, supra at 672-73, 969 A.2d at 1203. As was discussed at length during our hearings, the Commonwealth established a mechanism to compensate for a lack of statewide uniformity in real estate tax assessment especially as it related to distribution of school subsidies. 72 P.S. §§ 4656.1-4656.17 (Tax Equalization for School Subsidy Purposes – Creation of State Tax Equalization Board). See also 61 Pa. Code § 601.1 et seq. The law employs an agency, the State Tax Equalization Board (“STEB”) which collects information concerning transfers of real estate on an ongoing basis and assessed valuations of real estate\(^\text{28}\). 72 P.S. § 4656.7 (General powers and duties of the board).

Property assessment evaluation on a county-wide basis creates the possibility of anomalous outcomes. It is generally assumed that changes (appreciation or depreciation) in real estate market values across a specific county occur at relatively uniform rates. Yet, any given county may have very distinct housing markets. For example, Delaware County’s Radnor Township boasts real estate/housing stock ranging from modest to lavish estates. Yet, at the other end of the county, Chester City’s older, more urban, housing stock reflects its far less affluent status. Other counties likely also possess municipalities with radically different real estate housing features not only in a discrete type of improvement (i.e., residential), but also across categories of real estate (e.g., residential, industrial, open land, etc.). As such, the cross-county assumption of relatively uniform valuation changes may work generally, but may also

\(^{28}\) The real property assessment law applicable in all 67 counties finds expression in the General County Assessment Law. 72 P.S. §§ 5020-1 to 5020-602. Specific aspects of the tax law are governed by the various statutory provisions based upon the categorization of the particular taxing county. See 72 P.S. §§ 5341.1 to 5341.21 (First Class County Tax Assessment Law); 72 P.S. §§ 5452-1 to 5452-20 (Second Class County Assessment Law); 72 P.S. §§ 5342 to 5350k (Second Class A and Third Class County Assessment Law); and, 72 P.S. §§ 5453.101 to 5453.107 (Fourth to Eighth Class County Assessment Law).

\(^{29}\) Many of the specific issues have been the subject of detailed address by the Education Committee of the CRC. See Education Committee Report supra at 75.

\(^{30}\) Through acceptable statistical techniques, the STEB annually determines the aggregate market value of taxable real estate in each political subdivision and school district throughout the Commonwealth. 72 P.S. § 4656.16a (Establishment of common level ratio). See also 61 Pa. Code §603.1 (Aggregate Market Value Approach). These market values are used as one factor (among others) in a legislative formula for the distribution of state subsidies to each school district. See generally 72 P.S. § 4656.15 (Determination and apportionment of Commonwealth subsidies). In addition, the STEB, again through a statistical model, establishes a Common Level Ratio (“CLR”) of assessed value to market value in each county for the previous calendar year. 72 P.S. § 4656.7(9)(Duties of STEB, directive to set CLR for each county). The analysis relies upon information gathered from transfer tax records generated by each county based on “arms length” sales transactions. 61 Pa. Code §609.1 (Duties of county officials in submitting basic information), §609.11 (Property Inventories – Responsibility) & §603.31 (Market value conversion indices). The universe of tax assessment litigation contains other sanctioned statistical indicators of uniformity in tax assessments. See generally Clifton, supra at 673 & 691-95, 969 A.2d at 1203 & 1214-16 (discussion and application of Established Predetermined Ratio (EPR), CLR, Coefficient of Dispersion (COD) and Price-Related Differential (PRD) as well as International Association of Assessing Officers standards as criteria for judging these statistics and adequacy of property assessment).
fail miserably in particular circumstances – thus engendering over-taxation (relative to actual real property values) in areas that are actually decreasing in value while creating under-taxation in areas where the values are increasing. Greater exaggeration of the inequity occurs where the overall county change is the opposite of the prevailing change in a given municipality. Further complexity enters this calculation when consideration is given to the possibility that different types of real estate holdings may be faring differently in terms of market values relative to others.

Another complicating factor in the overall real property taxing scheme derives from geographical boundaries - especially where the local school district transgresses municipal or county boundaries. Accounting for these details in the context of school district funding, which receives the greatest portion of real estate tax revenue, heightens the importance of assuring proper valuation.

During our hearings it was suggested that improvements in computing may prove a boon to efforts to maintain realty valuation or transfer records on a real-time and on a more local basis. Further investigation by the Commission suggests the wisdom of that testimony. In 2009, the legislature, through the Legislative Budget and Finance Committee, undertook a comprehensive study of Pennsylvania’s real property valuation and assessment systems. See Pennsylvania HR 334 of 2009. See also Pa. House Journal at 1217-22 (June 24, 2009). The resulting report represents a thorough, searching review of the assessment process. See Pennsylvania Legislative Budget and Finance Committee, Pennsylvania’s System for Property Valuation and Reassessment (July 2010)(hereafter “Property Valuation Report”). In February 2011, the Pennsylvania Auditor General issued a Special Performance Audit of the STEB (hereafter “Special Audit”). See http://www.auditorgen.state.pa.us/Reports/Performance/Special/speSTEB021011.pdf. Both emphasized computer resource development and deployment as ready, transformative opportunities for centralization and advancement of uniformity compliance concerns.

The Property Valuation Report precipitated current consideration of two bills relating to assessment issues in the Pennsylvania legislature. The first seeks creation of a task force to study county systems of assessment, development of standards for property valuation and assessment and identification of other recommendations to improve the assessment process. Pennsylvania HR 343 of 2011. The second allows for a study that focuses on improved and uniform property valuation data collection (at the county level) and transmission to the STEB. Pennsylvania HR 344 of 2011. Both represent laudable pursuits that could well advance the equitable assessment of real estate taxes with due respect for the constitutional uniformity mandate.

31 At the same time, the STEB, in such situations, will be compelled to seek a greater allocation of state funds to support the local school district connected with that particular municipality. For the purpose of determining the state educational subsidy offered to a specific school district, the STEB employs a five year trailing average in calculating property market values (which tends to moderate changes in market value assessment). Thus, if the five year averages reflected significant increases or decreases, then the municipalities within school districts that diverge from the overall direction of the market values for the county face contradictory, but real, consequences. While this market value assessment may blunt the municipal tax anomaly referenced above, it is difficult to appraise whether the overall effect assures uniform (fair and equitable) taxation.


33 The Report not only offers a complete articulation of the many issues and problems related to real estate taxation but provides a study of comparative systems from other states as well. The complete nature of the Study commends its use as a starting point in any effort to consider an evaluation of the reassessment process in the Commonwealth.

34 The Special Audit provided specific findings of defects and inaccuracies in the STEB’s processing and valuation certifications. Special Audit Report at 10 & 18. But it also suggested twelve detailed recommendations to improve the STEB’s internal controls and fulfillment of its commission. Id. at 15 & 24. Our review of those recommendations reflects a positive critical analysis of the STEB’s operations and offers meaningful methods of improving its valuations and increasing is accountability.
Ongoing legislative and executive branch efforts (both past and present) offer potential improvement in the real estate taxation process. In addition, the STEB has recently completed a significant revision of its computing resources. A new hardware purchase imposed specifications that will facilitate record-keeping and data analysis not only on a county-wide basis, but on local municipality and school district-wide basis as well. Logically, then, it makes greater sense that these calculations should be determined on a school district by school district basis. While this approach may be complicated by situations where school districts transcend municipal and county borders, the practical consideration that the taxes go mostly to the school district, in a relative sense, minimizes the possible overall inequities. Indeed, the current regulations already call for tabulation of property “… inventories by school districts and municipalities, despite differences in boundary lines”). 61 Pa. Code § 603.11. Ultimately, it may well be discovered that the division of labor increases the propriety of the shared tax burden among the taxpayers served by the various local taxing entities. Common Lever Ratios that would better, more accurately and more fairly offer tools for assessing real property taxes.

Moreover, the prospect of the uniform presentation of data by local entities maximizes the practical possibility of a more accurate ongoing valuation of current property values. If such records are maintained accurately, it is conceivable that county-wide assessments (and their attendant expense) may no longer be necessary. See generally Property Valuation Report, supra at 11 (Selected Reasons for Not Initiating a Countywide Reassessment).35

As a practical matter any change that sanctions the centralization of tax assessment functions through the submission of data to the STEB which will have the computing power and flexibility to properly massage the data, requires a mechanism assuring the timely presentation of accurate, uniformly-created data to the STEB. But while increased attention to accuracy and detail may cause marginal, local cost increases, as noted previously, with proper funding and information technology, the centralization of this function may not only offer the benefits of greater flexibility in generating more meaningful and discrete tax assessment information but also the prospect of sparing each county from the far more significant expense of periodic reassessment.

We commend these inquiries and suggest that care be taken not to miss an opportunity to study and consider the possibility of centralizing and standardizing the valuation process through the STEB. Indeed, thought should be accorded a construct that generates funds to support the STEB’s increased responsibility from a small portion of the tax revenue. The end result may allow the STEB to focus on the assessment/valuation task while the various taxing entities could use the valuation calculation and set an appropriate millage to meet budgeted needs.

While Pennsylvania’s uniformity clause jurisprudence does not admit the possibility of different classes of real estate, the new computer software deployed by the STEB offers the capacity to breakout realty into sub-types: residential; lots (less than 10 acres); industrial; commercial; agricultural; land & woods (10 acres or more); oil, gas & mineral property; trailers; and, seasonal housing.37 Whether this technological reality can justify revision of Pennsylvania’s uniformity clause jurisprudence – in light of the likelihood that such classifications could advance the underlying policy concerns of uniformity

35 We recognize that while the law does not require periodic reassessments, the Clifton court made clear that the failure to perform such reassessments may so undermine the possibility of valid, uniform taxes that the local scheme may be found constitutionally wanting. A change in the law eliminating mandatory reassessment carries the collateral benefit of removing a law which local tax authorities routinely ignore.

36 Clearly, proper funding of the STEB with expanded functionality might require additional staffing over and above the current staff of four plus the seven field agents (not including the three STEB Board members. Derived from conversation with Renee Reynolds, Executive Director, STEB, 8/10/11 (hereafter “ED, STEB - 8/10/11”).

37 ED, STEB - 8/10/11.
itself – may be a worthwhile endeavor. See also Property Valuation Report, supra at S-28 (Bullet point – Permit property to be treated as separate classes).\(^\text{38}\) Stated differently, especially given the information technology basis to perform sub-type tax assessment calculations, the judicial gloss on uniformity which precludes classification of property sub-types, actually discourages uniformity in taxation.

The power of computing, properly applied (and assuming the timely collection and submission of valid data), could massage the information that now remains indivisible for assessment purposes (i.e., segregation of each taxing authority, unitary classification of real estate). The result: each individual taxing authority could set its millage based upon closely-tailored assessment data evaluation that promotes the fair and proper allocation of the tax burden among all the taxpayers and across an intelligent classification of realty. Such an outcome aligns with the fundamental purpose of the Uniformity Clause and the goal of equitable taxation.

In light of the above, especially the apparent and ready ability of the STEB to segregate realty into discrete classifications that can reflect local realities, it seems reasonable to revisit (and change) the uniformity clause to permit different taxes on specifically defined classes of real estate by local taxing entities. To that end, the Committee suggests, in addition to the previously referenced change to the Uniformity Clause, that an additional sentence be engrafted onto the proposed Uniformity Clause as noted previously, to allow for identification of classes of real estate for separate tax treatment.

Respectfully submitted,

Taxation and the Uniformity Clause Committee
Chair: David E. Robbins, Esq.
Hon. James Gardner Colins
Vincent C. DeLiberato, Jr., Esq.
Joel Fishman, Ph.D.
John A. Hanna, Esq.
Keith Mooney, Esq.

Student Externs:
Ryan Cribbs
Katherine M. Nugent

\(^\text{38}\) As an interesting sidelight, the Property Valuation Report exposes the potential deleterious effect that a failure to distinguish between property types may insinuate into the assessment process. Id. at S-11-12. The possibility that any specific taxing authority’s real estate stock predominately consists of a specific sub-type could easily skew the quality of the CLR and render it inconsistent with a CLR from a different (but similar) taxing authority.
LOCAL GOVERNMENT

Introduction

Long ago the Pennsylvania Supreme court spoke to the nature of the relationship between state and local government:

Municipal corporations are agents of the state, invested with certain subordinate governmental functions for reasons of convenience and public policy. They are created, governed, and the extent of their powers is determined, by the legislature, and subject to change, repeal, or total abolition at its will. They have no vested rights in their offices, their charters, their corporate powers or even their corporate existence. Commonwealth v. Moir, 199 Pa. 534, 541, 49 A. 351, 352 (1901).

Nothing in the current local government article of the Pennsylvania Constitution derogates from that statement. Even home rule units may be stripped of their capacity to "exercise any power" or "perform any function" .... "by the General Assembly at any time". Pa. Const. art. IX, § 2.

The question presented for the Commission is whether to include in Article IX some constitutional limits on the General Assembly’s plenary power over the activities and affairs of local government units or to retain the status quo.

Section 1

Question: Should the PBA consider recommending that Section 1 of Article IX be amended?

Suggested Answer: Yes. The Pennsylvania Constitution should be amended by adding the following provision to Article IX:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service. A mandated new program or higher level of service includes a transfer by the Legislature from the State to local government of complete or partial financial responsibility for a required program for which the State previously had complete or partial financial responsibility.

I. The structure of local government

Local governments are, in broad terms, creatures of the legislature. The Pennsylvania Constitution, Article IX, Section 1 simply provides: “The General Assembly shall provide by general law for local government within the Commonwealth. Such general law shall be uniform as to all classes of local government regarding procedural matters.” Pennsylvania thus operates under what is known as “Dillon’s Rule,” named after Judge John Forest Dillon, a noted local government scholar. Under Dillon’s Rule, the General Assembly has plenary power over municipal government except as limited by the state or federal constitution. Local government is limited to those powers which are: (1) granted in express words; (2) necessarily implied or necessarily incident expressly granted powers; and (3) essential to the declared objects and purposes of the municipal government, not merely convenient, but indispensable.¹

Many of the issues raised by public comment to the PBA CRC Local Government Committee, and by Committee members, involve matters that may be addressed through legislation by the General Assembly, which controls all of local government. Whether the legislature has any serious interest in reforming any significant feature of local government is doubted.

II. Description of local government units

In addition to the 2,565 municipalities in Pennsylvania, there are 67 counties, 501 school districts and about 1,500 municipal authorities, most with authority to raise revenue. It is not uncommon for residents to sleep in one municipality, work in a second and shop in a third without thinking of the effect of these patterns on the ability of the various municipalities to provide the infrastructure and services these patterns demand. There are arguments to be made for consolidation of local government units to reflect regional areas, and to more efficiently provide services. As of 2000, only 249 municipalities in Pennsylvania, or 9.7 percent, had a population of 10,000 or more. Despite this multiplicity of units, the Committee found no strong voice urging consolidation, merger or dissolution of small local government units as a way to achieve efficiency and reduce costs of government. In general, people in Pennsylvania are either content with, or supportive of, their local government units.

There are seven municipal codes and dozens of statutes that apply to local government. The laws and regulations governing how municipalities raise revenue have been essentially unaltered for more than a half century. The complexity of these laws, regulations, and the seven basic forms of municipal government are described in great detail in “Local Government,” Reference Manual No. 4, The Pennsylvania Constitutional Convention 1967-1968. This Manual is available online at http://www.duq.edu/law/pa-constitution/pdf/conventions/1967-68/reference-manuals/reference-manual04.pdf. The issues discussed in great detail in the Reference Manual largely remain those at issue today: how to efficiently accommodate growth and economic development, provide services and generate revenue needed to meet the services provided by local government.

II. The dire financial state of local government

Little attention has been paid to the dismal financial health of municipalities by the public at large. A 2003 Pennsylvania Economy League (PEL) study, Structuring Healthy Communities – Part 1, looked at fiscal trends from 1970 through 2003. It offered a disturbing finding that the overall fiscal condition of our communities is declining. PEL described a five-step path that Pennsylvania municipalities follow from prosperity with low taxes, through growth and increased demand for services, through decline and reduction in services to a loss of tax base and outright distress.\(^2\) An update to this study revealed that if municipalities are limited to reliance upon tax revenues from within their own boundaries, they will fall short of the revenues needed to provide necessary services. As stated by Gerald Cross, Executive Director of the Central Pennsylvania Division of PEL in his comments:

As an example, in 1970, across the Commonwealth – excluding Philadelphia and Pittsburgh – local taxes produced 58 percent of total revenues, [and] in 2006 that share fell to 39 percent. The result of this shift in revenue mix is increasing reliance on fees and charges for services that were once paid by taxes, transfers from traditional enterprise funds such as sewer and water, and by the increasing use of debt to fill the gap created by declining tax revenue. Expenses tell another side of the problem, when adjusted for inflation, spending in the cities and boroughs nearly doubled since 1970, expenses in the townships of the second class rose nearly over 330 percent. Other data in the study indicates that even prosperous municipalities that have relied on seemingly

unlimited growth in earned income taxes and real estate transfer taxes will have to rely more upon and more on raising real estate taxes to keep up with their service costs.

The PEL concludes that the structure of financing and control of expenditures in inadequate and in need of new approaches to both delivery of services and local taxation.

Local government officials complain about “unfunded mandates” imposed by the legislature and state agencies. Unfunded mandates are generally perceived as state laws or regulations which do not provide local governments with any financial aid or resources to offset the costs incurred by the local government for implementation of the law or regulation. Unfunded mandates put an increased financial burden on many local governments that are already struggling to balance their books.

One of these unfunded mandates is an aspect of the Heart and Lung Act. 53 P.S. § 637 (Enforcement officer disability benefits). The original purpose of the Heart and Lung Act was to temporarily complement the two-thirds of salary benefit payable under the Workers’ Compensation Act to injured police officers and firefighters. Together, the two laws were to provide employees with 100% of salary. Tax changes and conflicts between the two laws now result in payments of 125% of salary for indefinite periods of time. Testimony of John S. Brenner, Director of Development for the Pennsylvania League of Cities and Municipalities, to Constitutional Review Commission/Local Government Committee (Mar. 25, 2011)

Another substantial financial burden upon municipalities is the cost of the many roads and bridges that they must maintain and repair. Executive Director of the Pennsylvania State Association of Township Supervisors (PSATS), David Sanko, stated, "Everybody's studied the problem long enough and we all recognize there isn't enough money to get the job done." He notes of the 117,000 miles of roads in the state, 77,000 are under local government jurisdiction. PSATS is also hoping for significant "mandate relief." PSATS is also seeking relief from prevailing wage requirements in public bids, and some form of permitted electronic public notice to reduce advertising costs. Sanko asserts that the recommended changes of PSATS would cost the Commonwealth little, if anything, but, would save communities money. Tim Lambert and Melanie Herschcorn and Radio Pennsylvania, PA’s Township Supervisors Talk Transporting Funding, Unfunded Mandates, WITF.org, April 22, 2011, http://www.witf.org/regional-state-news/pa-s-township-supervisors-talk-transportation-funding-unfunded-mandates.

Yet another example of what is perceived as an unfunded mandate upon local government is the collective bargaining and binding arbitration required by Act 111, The Police and Fireman Collective Bargaining Act. See 43 P.S. §§ 217.1 - 217.10. The Act is viewed as giving uniformed employees the upper hand when it comes to collective bargaining and binding arbitration. Specifically, there is no requirement for consideration of a community’s ability to pay for the benefits awarded through arbitration and the ability for a municipality to appeal an arbitration award in court is very narrowly limited. Testimony of John S. Brenner, Director of Development for the Pennsylvania League of Cities and Municipalities, to Constitutional Review Commission/Local Government Committee (Mar. 25, 2011).

III. A possible limit on unfunded mandates

Some states have amended their constitutions or laws to prohibit the legislature from imposing unfunded mandates upon municipalities as a solution to these problems. California, for example, amended its constitution, in Article 13B, section 6, to provide:

Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse that local government for the costs of the program or increased level of service….. A mandated new
program or higher level of service includes a transfer by the Legislature from the State to cities, counties, cities and counties, or special districts of complete or partial financial responsibility for a required program for which the State previously had complete or partial financial responsibility.

When drafting the amendment, clarity as to what constitutes an unfunded mandate and a mechanism, such as a review commission, for determining what laws impose unfunded mandates is crucial to successfully addressing such mandates. California has created such a commission which recently ruled that large portions of the San Diego County Large Municipal Stormwater Permit exceeded the requirements set by federal law and were unfunded by the state and therefore unconstitutional. In re Test Claim on: San Diego Regional Quality Control Board Order No. R9-2007-0001, Case No. 07-TC-09 (San Diego Decision).

California’s Commission on State Mandates was created in 1985 to adjudicate mandate claims filed by local government entities. This commission is intended to serve as a non-partisan “watchdog” over state mandates and ensures appropriate enforcement. It is composed of seven members: the State Controller (Controller), State Treasurer, Director of the Department of Finance, Director of the Governor's Office of Planning and Research, a member of the public with experience in public finance, a school board member and a county supervisor. http://cpr.ca.gov/CPR_Report/Issues_and_Recommendations/Chapter_1_General_Government/Strengthening_Government_Partnerships/GG32.html

Gov. C. Section 17525. That California Commission reviews “test” claims submitted by a local government on behalf of itself and other local government units, and determines whether the claim at issue is an unfunded mandate. If the Commission on State Mandates determines that the state has imposed an unfunded mandate on local government, it approves the claim. To determine the reimbursement amount owed to local agencies, the claimant develops proposed parameters and guidelines that identify the mandated program, eligible claimants, reimbursement period, reimbursable activities, and other necessary claiming information. The Commission reviews and may adopt, amend, or reject the claimant's proposed parameters and guidelines following a comment period for state agencies and interested parties. Commission on State Mandates, "Mandate Determination Process," www.csm.ca.gov/chart.html. (Last visited June 1, 2004.)

Following the Commission's adoption of the parameters and guidelines, the Commission adopts a statewide cost estimate for eligible costs. These estimates are reported to the Legislature, which forms the basis for funding the mandates through the annual budget bill and an annual claims bill. In the final step, the Controller issues claiming instructions, which local agencies follow when filing claims for reimbursement. Id.

Over the past few years, there have been several attempts to amend the Pennsylvania Constitution to prevent unfunded mandates, including House Bill 1377 (Session of 2009) and Senate Resolution 323 (Session of 2010). More recently, in the session of 2011, House Bill 883, the Pennsylvania House of Representatives has considered a legislative approach to unfunded mandates. This most recent bill contemplates the creation of a council on mandates similar to the California Commission, and gives that council authority to suspend unfunded mandates. Despite these several proposals against unfunded mandates, there have been no votes by the legislature on any of the proposed legislation above.

Section 4

Proposed Revisions Re: Appointed vs. Elected County Officials

Question: Should Article IX, Section 4 of the Constitution be amended to remove the compulsory election of “row officers” such as Treasurer, Sheriff, Register of Wills, Recorder of Deeds, Prothonotary, and Clerk of Courts?
Suggested answer: Yes. There is no longer a justification for the election of the offices of Treasurer, Register of Wills, Recorder of Deeds, Prothonotary, and Clerk of Courts. Those officials with authority to set ‘policy,’ such as Sheriff, should continue to be elected.

I. Pennsylvania groups support appointment

During the public hearing on March 25, 2011, Mr. Gerald E. Cross, executive director of the PA. Economy League, Central Pennsylvania offered that this organization believes that 6 Home Rule counties have eliminated the election of “row officers” (Allegheny, Delaware, Erie, Lackawanna, Lehigh, and Northampton) and that not a single one has gone back to electing these positions. There seems to be a valid reason for electing a Controller, or a Sheriff, but certainly the same import does not attach to officers like Recorder of Deeds or Register of Wills. No other testimony was offered to the Committee in favor of, or opposed to, a shift away from electing. The Pennsylvania State Association of Elected County Officials wrote to oppose the elimination of the election of “row officers”, but offered no reasoning or rationale for their position. (The Association did not appear or give testimony before the Committee.)

II. Court moves to absorb Prothonotaries

Recently Pennsylvania Chief Justice, Ronald Castile announced that the Pennsylvania Supreme Court and the Administrative Office of Pennsylvania Court (AOPC) have been studying the feasibility of “transitioning” county-level Clerks of Court and Prothonotaries to the state-level judiciary within the Unified Judicial System. Currently only Common Pleas and Magisterial District Judges and District Court Administrators in the counties are state-level judicial officers or staff.

The Supreme Court and AOPC view Prothonotaries and Clerks as vital components in developing integrated management teams in each judicial district. Together with President Judges and District Court administrators, the presently somewhat “independent” Clerks and Prothonotaries are seen as logical additions to those teams, enabling them to more seamlessly collaborate in service delivery and with implementation of advanced technology.

III. The Prevalence of County Official Elections in other states

The vast majority of states elect all of their county officers. There are, however, some exceptions, as indicated in the table below. The table is derived from a report entitled “County Government Structure: A State by State Report,” published by the National Association of Counties (“NACo”). The NACo report categorized officer selection as elected, appointed, or discretionary, meaning that it was up to the discretion of the individual county whether the officer was elected or appointed. Because the majority of states elect the officers at issue here, the tables include only those states where officers are not elected.

<table>
<thead>
<tr>
<th>Office</th>
<th>Appointed</th>
<th>Discretionary</th>
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<tbody>
<tr>
<td>Auditor</td>
<td>Kansas, Missouri, Nevada, Vermont</td>
<td>California, Minnesota</td>
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<tr>
<td>District Attorney</td>
<td>None</td>
<td>Hawaii</td>
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<tr>
<td>Treasurer</td>
<td>Alaska, Vermont</td>
<td>California, Hawaii, Minnesota</td>
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<td>Clerk of Court</td>
<td>None</td>
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Despite the overwhelming predominance of county official elections, it behooves us to consider the rationale behind these elections before we consider any recommendation regarding the perpetuation or discontinuation of decide to perpetuate the procedure.

IV. Monetary Consequences of Elections and Appointments for Taxpayers and for Candidates

There is mixed empirical evidence suggesting that elected officials are more likely than appointed officials to save taxpayers money. For example, a 2003 study by Timothy Besley and Stephen Coate found that elected electricity regulators tend to enact more pro-consumer policies than appointed regulators. See Timothy Besley & Stephen Coate, Elected Versus Appointed Regulators: Theory and Evidence (2003). However, a 2009 study by Alexander Whalley found that in California, cities that appoint their treasurers spend 13 to 23 percent less when borrowing money than cities that elect their treasurers. See Alexander Whalley, Bureaucrats, Politicians, and Government Performance: Evidence from City Treasurers, Apr. 12, 2009. Whalley explains this savings by observing that appointed treasurers tend to be better educated, and this added expertise may result in better decision-making (e.g., greater savings due to more efficient refinancing of debt, the hiring of better financial advisors and improved debt ratings, etc.) See id. The lesson is clear: elected officials can reduce costs for citizens in certain positions, but may inadvertently increase costs in others.

In spite of this conflicting evidence regarding monetary consequences for taxpayers once officials begin their terms, it is incontrovertible that county official candidates save money when they are appointed because the significant cost of campaigning for elections is avoided.

V. The Benefits of Elections and Appointments

The large number of elected local, state, and federal government positions in the United States reflects the value we place on federalism and the democratic form of government. Elections give citizens the opportunity to influence government policies. Moreover, they ensure accountability to the public.

On the other hand, appointment of government officials offers significant benefits because large amounts of money, time, and resources are saved when elections are avoided. Furthermore, improvement of the caliber of the office holder may be found if elections are eliminated. In order to strike a just balance between these competing values, we must determine when the benefits from elections outweigh the benefits from appointments.

VI. Conclusions

Elected officials have a greater incentive to enact policies that benefit the residents of their county because they must be re-elected by those residents in order to keep their positions. Therefore, for those positions in which officials have the ability to impact county policies, the importance of public input and public accountability should outweigh the benefits of appointment. Accordingly, these positions: Sheriff, District Attorney, Controller, and Auditor, should be elected.

However, in many county positions, officials will not have the opportunity to affect county policies whatsoever. For these positions, it would likely be more beneficial to county residents to appoint the officials because appointment avoids the expense and distraction of elections. Furthermore, the primary incentive to hold an election is eliminated when policies are not at stake because citizens will have no hope of influencing the direction of government with their vote.

Finally, when county officials are ineffective in their positions, appointment is beneficial because these officials may be discharged prior to the next election, when appropriate. Thus, in spite of the
prevalence of county official elections in this country, the Commission believes non-policy making county positions should be appointed. As such, the row office positions of Register of Wills, Recorder of Deeds, Prothonotary, and Clerk of the Courts should be removed from Article IX, Section 4, requiring election, and should, together with the Public Defender, be appointed positions.

Section 5

Intergovernmental Cooperation

Question: Should Article IX, Section 5 of the Pennsylvania Constitution be amended to either provide or require greater cooperation in providing services and/or protections to the various municipal governments.

Suggested Answer: No.

Section 5 provides that “A municipality by act of its governing body may, or upon being required by initiative and referendum in the area affected, cooperate or agree in the exercise of any function, power or responsibility with a delegate or transfer any function, power or responsibility to, one or more governmental units including other municipalities or districts, the Federal Government, or any other state or its governmental units, or any newly created governmental unit.”

Any amendment to this provision would take the ability to cooperate with other governmental units out of the control of the municipality and would take away the functions of local government from the locally elected officials and could result in decisions that would adversely affect the local government unit. The Committee recommends that there is no need to amend this section of the Constitution.

I. Reasoning:

The existing language permits cooperation by a local government in all aspects of their responsibility, by their entering into agreements with other governing bodies. This cooperation offers governmental entities the prospect of substantial savings in the bulk purchase of goods and services and through joint cooperation agreements for the provision of police, fire, trash removal, road services, etc. However, the provision protects the local government from any arbitrary action by another governmental unit.

Pennsylvania House Bill 2431 calls for 2,567 local municipalities to be consolidated into the 67 counties. There has been wide opposition to this bill opposing big government and taking important decisions away from the people affected. (Pittsburgh Post Gazette, art. 618, 2010). Article IX limits the legislature from compelling inter-governmental cooperation since the subject of cooperation is within the powers delegated to the municipality by the Constitution.

The legislature can enact legislation to deal with:

a) Regional policing;

b) Permitting local authorities to enter into cooperative agreements with local governments by amending the County Code to clearly provide the authorizing municipalities to enter into partnerships with local authorities to provide services. These issues are best dealt with through legislation, not Constitutional amendment.
Pennsylvania has on average one local governmental unit for each 5,000 individuals through 2,567 total units of local government and 67 counties. The U.S. average is 7,724 people per unit. Pennsylvania has a local government unit for every 25 square miles while the U.S. averages 90.6 square miles per local government unit. (As stated in the Wall Street Journal, June 8, 2011). The testimony before our Committee indicated that most citizens do not want others to decide what is best for them. Intergovernmental contracts permit for elected officials to provide for their constituents’ needs while protecting what they believe is important for the local citizenry. (Testimony of Pennsylvania State Association of Township Supervisors).

**Section 8**

**Question:** Should the PBA consider recommending that Article IX, Section 8 (relating to consolidation, merger or boundary changes) be amended?

**Suggested Answer:** No.

**I. Introduction**

In answering the question whether an amendment to the Pennsylvania Constitution should occur with respect to Article IX, Section 8, there are two important questions to be answered. First, should consolidation/merger occur? Second, if it is agreed that merger/consolidation should occur, what mechanism should be utilized? These questions are equally difficult. The written submissions, testimony and available materials, generally speaking, agree that a mechanism for consolidation is a serious challenge. The main argument for consolidation/merger rests on financial reasoning, but one of two main obstacles to effectuating consolidation/merger is the expense. The second, an equally challenging issue, is popular support. These questions and obstacles are inextricably linked and may ultimately suggest that, despite recognition that improved efficiency is necessary, merger/consolidation is not the best option at this time.

**II. Current Framework for Consolidation**

Following the 1968 Constitutional Convention, Article IX, Section 8 of the Pennsylvania Constitution was amended to provide as follows:

The General Assembly shall, within two years following the adoption of this article, enact uniform legislation establishing the procedure for consolidation, merger or change of the boundaries of municipalities. Initiative. -- The electors of any municipality shall have the right, by initiative and referendum, to consolidate, merge and change boundaries by a majority vote of those voting thereon in each municipality, without the approval of any governing body. Study. -- The General Assembly shall designate an agency of the Commonwealth to study consolidation, merger and boundary changes, advise municipalities on all problems which might be connected therewith, and initiate local referendum. Legislative Power. -- Nothing herein shall prohibit or prevent the General Assembly from providing additional methods for consolidation, merger or change of boundaries.

Despite the admonition to enact legislation within two years of the 1968 amendment, it was not until 1994 that the General Assembly finally enacted legislation concerning merger and consolidation. 53 Pa.C.S. § 731 et seq. This legislation, the Municipal Consolidation or Merger Act, is the only guidance for the process of merger or consolidation even today. It is a concise piece of legislation which sets out, quite simply, the method by which two or more municipalities may merge or consolidate. There are essentially two ways in which the process can be initiated, by elector initiative or by agreement of the
governing bodies of the interested municipalities. The Act also provides how the merger or consolidation will be effectuated following an affirmative decision to actually merge or consolidate.

III. Obstacles to Merger and/or Consolidation

The Municipal Merger/Consolidation and Sharing Services 2009 (hereinafter the “Study”) is a study prepared by the Pennsylvania Economy League for Team Pennsylvania Foundation and 10,000 Friends of Pennsylvania. The Study provides an excellent explanation of many of the obstacles inhibiting merger and consolidation. A brief review of these obstacles is essential in considering whether Constitutional revision is necessary and/or desirable and whether such action would remove such obstacles.

a. Supremacy of the Legislature

The supremacy of the legislature over the activities and affairs of local government in Pennsylvania was forcefully expressed by the Pennsylvania Supreme Court as follows:

[A municipal corporation]...is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government--essentially a revocable agency--having no vested right to any of its powers or franchises--the charter or act of erection being in no sense a contract with the state--and therefore fully subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangement, or destroy its very existence, with the mere breath of arbitrary discretion. *Sic volo, sic jubeo*, that is all the sovereign authority need say. This much is undeniable, and has not been denied. *Philadelphia v. Fox*, 64 Pa. 169, 180 (1870)

In Pennsylvania, even a home rule unit's competence to "exercise any power or perform any function" is subject to the legislature's overriding power to preempt "at any time." Pa. Const. art. IX § 2.

b. The Mechanism Itself

As previously mentioned, the Municipal Consolidation or Merger Act provides two methods by which merger or consolidation can be initiated. First, the interested municipalities may agree to consolidate. 53 Pa.C.S. § 733(a)(1) & § 734. Second, the electorate may initiate the process. 53 Pa.C.S. § 733(a)(2), § 735 & 735.1.

The first method, as the Study points out, is a very long process requiring the agreement of, at a minimum, two separate municipal governing bodies. The Study describes the process as follows:

The respective councils, commissioners, or supervisors must vote to authorize the joint commission to begin the merger or consolidation study process. The same respective councils, commissioners, or supervisors can vote at anytime during the study process to withdraw and end participation. At the conclusion of the study process, the same councils, commissioners, or supervisors must each accept the findings of the commission and authorize their respective solicitors to prepare an identical ordinance to be approved prior to its placement on the ballot. The joint ordinance must be voted on and approved by the respective councils, commissioners, or supervisors at least 13 weeks before the election in order to be placed on the ballot. Defeat of the proposed ordinance by one municipality ends the process.
Clearly, the process is laborious and can be struck down at many points with no regard to the time and financial expense incurred. Admittedly, the method by which the electorate initiates the process is much shorter and less complicated but is by no means “easy.”

Assuming we do not question the conclusion that undertaking the merger and consolidation initiation process is time consuming and often unsuccessful due to the many opportunities for disagreement, is it undesirable for such a crucial matter to be “easy?” The length of the process and chances for “disagreement” can also be viewed as opportunities for input. The ease or difficulty of the process is likely a matter of perspective depending on the opinion held on the merger or consolidation at hand.

c. **Financial Considerations**

The Study also points to the absence of financial support at the State level to assist in the merger or consolidation process as an obstacle to merger/consolidation. It is a Catch-22 that very often the incentive for municipal consolidation or merger is a financial savings. Yet, the process itself is so expensive, and without much financial aid the anticipated net savings is largely elusive if not illusory.

d. **Attachment to Community**

Many of the submissions offered by parties interested in this issue cited attachment to community, local identity, and a belief that representation at the municipal level is more effective as significant obstacles to merger and consolidation. These notions cannot be easily explained or categorized. Some communities are bound by their football team and others by a historical figure or landmark. Some communities are divided not just by their boundaries but by a team rivalry that could never be put aside for the potential financial advantages created by merger or consolidation.

Another significant obstacle is the widely held belief that true representation occurs at the local level. Citizens associate “representation” with their local governments. In a 2010 Temple University Institute for Public Affairs Study, citizens across Pennsylvania (34% of those surveyed) defined their community as their neighborhood. About 47% of those surveyed stated that they trust municipal governments to make the best tax and spending decisions. *The Temple Municipal Governance Survey: How Pennsylvanians View Their Local Governments.*

These conceptions, appropriate or not, silly or strange, present obstacles that can never be overcome by an amendment to the Constitution. Whether citizens can be convinced that the benefits of merger or consolidation outweigh their attachment to their community or their belief that the best opportunity to be represented is by their locally elected officials is uncertain. In either case, it is not the role of the Constitution to do the convincing.

**IV. Submissions and Testimony to the Local Government Committee**

Although the Local Government Committee did not receive an overwhelming response to the request for written and oral input, it is important to summarize those comments that pertain in particular to the issue of merger and consolidation.

The Pennsylvania Economy League. In their submissions to the Committee they discuss the obstacles referenced above. They concluded that a constitutional change could unburden the process but hesitate to recommend such action as futile and unnecessary in the face of citizen attachment to their local government.
Pennsylvania State Association of Township Supervisors. PSATS concluded that the 1994 Merger & Consolidation Act more than adequately provided for a merger and consolidation process. PSATS supports initiatives that originate with the citizenry. Although not explicitly stated, it seems that PSATS prefers voluntary cooperative efforts between municipalities rather than formal consolidation or merger.

10,000 Friends. Although 10,000 Friends does not specifically comment in their materials on the issue of merger and consolidation, they do state that intergovernmental cooperation should be incentivized and such cooperatives should be simplified. They do not address whether such modifications should be made by constitutional change.

V. Recent Legislative Action and Reform Measures

Senate Bill No. 1357 Session of 2010 – Boundary Review Commission

Introduced over one year ago, this bill proposes to create a Boundary Review Commission. The stated purpose of the commission is to “study and recommend boundary changes to the General Assembly and affected local governments to promote orderly development, encourage sound economic growth, conservation of resources and effective delivery of government services.” Of its list of powers, the Commission, most notably, may conduct studies and make findings and recommendations to the General Assembly and to affected municipalities or counties regarding consolidation. The Commission may recommend annexation, consolidation and/or merger of one or more contiguous municipalities. The Commission may also propose plans for reorganization if three (3) enumerated criteria establishing non-viability are present.

How are studies initiated? Outlined in the Bill, are the methods by which a study may be initiated. First, the Commission will initiate a boundary study if 5% of registered voters residing in each county/municipality sign a petition. Second, the governing bodies of the county/municipality affected may, by resolution, submit a request for a boundary study. Following a boundary study, the Commission must reach a majority vote for an action on the plan of reorganization. The results are then published in the Pennsylvania Bulletin with a 60 day period for public comment. Finally, the General Assembly must vote to approve or rejected a plan of reorganization.

Senate Bill 1429 Session 2010

Introduced on June 28, 2010, Senate Bill 1429 proposes a new procedure for consolidation and merger. The legislation permits the consolidation or merger of two or more municipalities if each is contiguous to “at least one of the other consolidating or merging municipalities and if together the municipalities would form a consolidated or merged municipality.” The bill also sets out the way in which consolidation/merger may be initiated. The process may be initiated by: the joint agreement of the municipality’s governing bodies, followed by voter approval; initiative of the electors; or a combination thereof.

Essentially, the purpose of the bill is to make the current merger and consolidation legislation easier and less cumbersome. The essential elements of voter approval present in the 1994 Act remain in Senate Bill 1429. Neither of these bills passed.
VI. Alternative to Merger or Consolidation - Functional Consolidation; Regionalizing the Delivery of Services

This mechanism, not really a mechanism for consolidation/merger at all but an alternative, is advocated by the group 10,000 Friends of Pennsylvania. The concept of functional consolidation or regional solutions as an alternative to the process of consolidation or merger is outlined in 10,000 Friends’ leaflet, “Smart Growth: A Winning Strategy for Pennsylvania.” It advocates that municipalities remain intact but that they work together for regional provision of services like fire and police protection. The Municipal Merger/Consolidation and Sharing Services 2009 report provides direction in the implementation of this method by suggesting that Pennsylvania can modify the current merger/consolidation procedure and “allow for the provision of shared municipal services through a special purpose service delivery area that provides services without regard to municipal boundaries but operates with a unified budget funded by special purpose taxes levied uniformly on member municipalities.” Id. at vi.

Unlike merger and/or consolidation, the report explains that this method of shared services and pooling of resources may not require voter approval - only municipal board approval. Id. at vi. It further recognizes that special purpose taxation would need to be expanded to fund this sort of measure. Id. at vii.

VII. Conclusion

Having reviewed the obstacles to merger and consolidation as well as the submissions to the Local Government Committee, a constitutional amendment is not recommended for several reasons. First, constitutional change to the provision at issue will likely not address the practical obstacles to effectuating a merger or consolidation. Despite citizen concerns about local financial issues, they are not, at this point, willing to surrender their perceived local control. Second, constitutional change is not generally supported for this particular issue. Third, there is a notable lack of funding to support merger and consolidation. Finally, the submissions and written materials support cooperation by means other than merger or consolidation. Such alternative avenues are less costly and address the largest obstacle to merger and consolidation - popular support.

Respectfully Submitted,

Local Government Committee
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JUDICIAL DISCIPLINE

The members of the Constitutional Review Commission believe that the issue of Judicial Discipline is a critical one for Pennsylvania. Contributing to this concern were the revelations about the Judicial Discipline System’s handling (or lack of handling) of allegations related to former Luzerne County Judges Michael Conahan and Mark Ciavarella. However, the CRC also was hesitant to recommend revising the structure of the System as a reaction to this hopefully aberrant case. We therefore had difficulty reaching consensus on how the issue should be addressed by the CRC.

Although there was agreement that the Judicial Discipline System is not functioning as effectively or efficiently as it ought to, there was also concern that the problems will not be solved simply by amending the constitution or legislating change. Instead, there seemed to be consensus that what is also needed is internal “cultural” or “attitudinal” change toward the issue of judicial discipline, rather than structural change of the system itself.

Indeed, there was some consensus that within the current System, procedures and policies exist that, if followed, could have addressed the problems in Luzerne County swiftly and decisively. Although the CRC did vote to recommend one amendment to the Constitution that would add a new procedure by which judges could be temporarily removed from office while an investigation is pending, in general, the CRC members believed that problems was not the structure, but the failure of the disciplinary bodies to use the tools they had in place.

Correcting this problem will involve effort and commitment by the staff and members of the Judicial Conduct Board and Court of Judicial Discipline. We are hopeful that recent events in Pennsylvania have solidified this commitment and dedication.

The CRC also recognizes that in the past year, the Judicial Discipline System has received substantial attention, including various legislative proposals, rule changes enacted by the Pennsylvania Supreme Court, and reports issued by the Interbranch Commission on Juvenile Justice; the PBA’s Task Force on the Report of the Interbranch Commission on Juvenile Justice; the American Bar Association; and Pennsylvanians for Modern Courts. We believe that other bodies, including the legislature, the Supreme Court, and the Judicial Conduct Board and Court of Judicial Discipline are exploring ways to improve the Judicial Discipline System. We believe that structural change should proceed through these vehicles, which may ultimately inform any constitutional convention or constitutional amendment process.
Analysis of the possibility of the General Assembly evading a supermajority requirement for certain action became a focal point of concern in the deliberations of the Taxation and Uniformity Clause Committee while reviewing the interplay of the Article VIII, Section 14 and Budget Stabilization Reserve Fund (colloquially referred to as a Rainy Day Fund). The concern arose from the ability and the legislature’s effectuation of that ability to circumvent the supermajority requirement to access the reserved funds as was undertaken in 2002. See generally discussion at 122 supra. Further contemplation of the issue guided us to an identification of related matters arising from other legislation, which contains express supermajority provision for legislative action. See 35 P.S. §5701.307 (Tobacco Settlement Act - 2/3 approval of legislature demanded to release funds for a special appropriation to Health Accounts). Senate supermajorities are also required to approve appointments to fill vacancies or to remove people from positions. See e.g. 30 Pa.C.S.A. §301 (Appointment to Fish and Boat Commission – approval by 2/3 of Senate); 42 Pa.C.S.A. §3132 (Appointment to fill Judicial vacancy – approval by 2/3 of Senate); 71 Pa. Stat. Ann. §745.4 (Removal of Commissioner from Independent Regulatory Review Commission – approval by 2/3 of Senate). Further inquiry revealed the existence of certain laws that mandate specific action for subsequent legislation. See 43 P.S. § 1407 (Public Employee Retirement Commission Act – requirement that any bill or amendment be accompanied by actuarial note assessing impact of proposal on public employee pension or retirement system). The discussion centered on whether one legislature – through the passage of laws by a simple majority - can impose requirements on future legislatures. If so, an issue of secondary but also significant import, requires address: in the event a subsequent legislative body fails to adhere to the law, is there a standard that would assure the removal of the situation from court abstention through the political question doctrine and provide the courts with a measuring stick to gauge the propriety of the legislature’s action? The necessity to address laws that affect “Future Legislative Action” actuated our attention to these matters.

In addressing these issues, the Commission offered recognition to the philosophical underpinning of supermajority approval that has been the subject of debate since the formation of the Republic. James Madison reflected on the ability of supermajority provisions to act as both a “shield to some particular interests and another obstacle generally to hasty and partial measures.” FEDERALIST No. 58. Similarly, Alexander Hamilton espoused respect for supermajorities when he observed: “It establishes a salutary check upon the legislative body … calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.” FEDERALIST No. 73. Clearly these founders respected the power of the supermajority to temper the impulsive tendencies of the public and blunt the influence of well-organized special interest groups. Yet, the decision to include a supermajority imperative as a prerequisite in promoting specific, future legislative activity should not be undertaken lightly. Nor should it be included as a hollow effort to placate an immediate, perceived public need. To that end, a proposal that compels the legislature to undo its action on the same terms in which it is passed, creates an incentive to pass supermajority legislation only where the need is plain and to obviate the prospect of undermining such provisions by mere whim or caprice (by a simple majority). Similarly, where the legislature specifies predicate action to support future legislation, the legislature should be held to account. If the legislature may ignore the law with impunity, the rule of law is compromised thus breeding the pernicious prospect of contempt for the law. See generally Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944, 959-60 (1928)(“Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.”)(Brandeis, J., dissenting).
Moreover, any statutory provision is rendered meaningless if the legislature may evade the stricture because of the possible lack of judicial review in the event of defiant legislative action. Not only does this suggest the wisdom of the Commission’s proposal in the context of supermajority legislation, but also offers meaningful application in a broader array of situations where prior legislation imposes requirement upon future legislative procedure. By articulating a specific standard of review, the prospect of political question abstention is removed and the courts are offered a meaningful, principled basis upon which to undertake review of legislative action, which seemingly defies prior legislation. For those reasons, the addition of such language offers a device to assure transparency, accountability, meaningful legislation and legislative compliance – all of which serve to improve governmental function.

It is for this reason that it is proposed that the Commission consider the addition of Constitutional language that would prevent a cavalier approach to inserting legislative requirements that could be ignored and likely would not now be subject to judicial review and enforcement.

It is suggested that Article III be amended by the addition of a Section 27.1* to provide as follows:

Future Legislative Action

a) The Legislature may enact laws relating to legislative procedure to be followed in the enactment of legislation.

b) A law under subsection (a) shall be binding upon the legislature until it is repealed, and the repeal shall only be effective as applied to legislation enacted after the repeal takes effect. A repeal of a law under subsection (a) containing a legislative procedure requiring a supermajority vote must be enacted with the same supermajority vote as that required in the law subject to repeal.

c) The Judiciary shall invalidate enactment of legislation on the ground of noncompliance with a law under subsection (a) if it finds, under the particular facts of the case, that the public interest in enforcing the procedural requirements of the law under subsection (a) outweighs any public interest in sustaining the validity of the enactment of the new legislation.

The Commission adopted this recommendation by a vote of 21 in favor and 2 abstentions.

*In order to avoid radical renumbering, it is suggested that this proposed provision be added to Article III, D. Other Legislation Specifically Authorized as Section 27.1. This will avoid the need to renumber the subsequent existing sections in Article III.

Respectfully submitted,

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