[J-18A-2022, J-18B-2022, J-18C-2022, J-18D-2022 and J-18E-2022]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BAER, C.J., TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

DOUG MCLINKO, Appellee v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE; AND LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, Appellants	:	No. 14 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 244 MD 2021 dated January 28, 2022. ARGUED: March 8, 2022
TIMOTHY R. BONNER, P. MICHAEL JONES, DAVID H. ZIMMERMAN, BARRY J. JOZWIAK, KATHY L. RAPP, DAVID MALONEY, BARBARA GLEIM, ROBERT BROOKS, AARON J. BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W. KEEFER, DAN MOUL, FRANCIS X. RYAN, AND DONALD "BUD" COOK, Appellees v. LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, Appellants	:	No. 15 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 293 MD 2021 dated January 28, 2022. ARGUED: March 8, 2022

DOUG MCLINKO	:	No. 17 MAP 2022
	:	
	:	Appeal from the Order of the
v.	:	Commonwealth Court at No. 244
	:	MD 2021 dated January 28, 2022.
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE; AND LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA	:	ARGUED: March 8, 2022
	:	
CROSS APPEAL OF: YORK COUNTY REPUBLICAN COMMITTEE, WASHINGTON COUNTY REPUBLICAN COMMITTEE, BUTLER COUNTY REPUBLICAN COMMITTEE	:	
	:	
TIMOTHY R. BONNER, P. MICHAEL JONES, DAVID H. ZIMMERMAN, BARRY J. JOZWIAK, KATHY L. RAPP, DAVID MALONEY, BARBARA GLEIM, ROBERT BROOKS, AARON J. BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W. KEEFER, DAN MOUL, FRANCIS X. RYAN, AND DONALD "BUD" COOK	:	No. 18 MAP 2022
	:	
	:	Appeal from the Order of the
	:	Commonwealth Court at No. 293
	:	MD 2021 dated January 28, 2022.
	:	
	:	ARGUED: March 8, 2022
	:	
v.	:	
	:	
LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE	:	
	:	
CROSS APPEAL OF: YORK COUNTY REPUBLICAN COMMITTEE, WASHINGTON COUNTY REPUBLICAN	:	
	:	

COMMITTEE, BUTLER COUNTY REPUBLICAN COMMITTEE	:	
TIMOTHY R. BONNER, P. MICHAEL JONES, DAVID H. ZIMMERMAN, BARRY J. JOZWIAK, KATHY L. RAPP, DAVID MALONEY, BARBARA GLEIM, ROBERT BROOKS, AARON J. BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W. KEEFER, DAN MOUL, FRANCIS X. RYAN, AND DONALD "BUD" COOK,	:	No. 19 MAP 2022
	:	Appeal from the Order of the Commonwealth Court at No. 293 MD 2021 dated January 28, 2022.
	:	ARGUED: March 8, 2022
Cross Appellants	:	
v.	:	
LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE,	:	
Appellees	:	

OPINION

JUSTICE DONOHUE **DECIDED: August 2, 2022**

This is a case that is steeped in the history of this Commonwealth and the development of its Constitution. More than one hundred years ago, this Court recognized that our Constitution mandates that elections be free and equal, but that the "[t]he power to regulate elections is a legislative one, [which] has been exercised by the General Assembly since the foundation of the government." *Winston v. Moore*, 91 A. 520, 522-23 (Pa. 1914). Before the Court now is a question of whether the General Assembly overstepped the bounds of this power and violated our Constitution when it enacted

legislation that allows for universal mail-in voting. For the reasons that follow, we find no constitutional violation, and so we reverse the order of the Commonwealth Court.

A. Background

The legislation at issue in this case is the Act of October 31, 2019, P.L. 552, No. 77, commonly referred to as "Act 77." Act 77 effected major amendments to the Pennsylvania Election Code.[1] Although its provisions establishing state-wide, universal mail-in voting are the subject of this appeal, *see* 25 P.S. §§ 3150.11-3150.17, these are only a fraction of the scope of the Act. For instance, Act 77 eliminated the option for straight-ticket voting;[2] moved the voter registration deadline from thirty to fifteen days before an election; allocated funding to provide for upgraded voting systems; and reorganized the pay structure for poll workers, along with other administrative changes. Act 77 was an enormously popular piece of legislation on both sides of the aisle. In the state Senate, Act 77 passed 35-14, with Republicans voting 27-0 in favor along with eight Democrats. Charlie Wolfson, *Trump Politicized Mail-In Voting in 2020, But it Came to PA with Strong Republican Support*, PUBLICSOURCE (Dec. 10, 2020), https://www.publicsource.org/trump-politicized-mail-in-voting-in-2020-pa-republicans-supported-it-originally/. In the state House of Representatives, it passed 138-61, with 105 Republicans and thirty-three Democrats voting in favor of it. *Id.* As put by Bryan Cutler, Pennsylvania's House Majority Leader at the time,

[1] Act of June 3, 1937, P.L. 1333, *as amended*, 25 P.S. §§ 3150.11-3150.17.

[2] This was the subject of intense legislative debate, with Democratic state legislators in favor of preserving the straight-ticket option and Republican state legislators seeking its elimination. *See, e.g.*, House Legislative Journal, Session of 2019, No. 63, at 1706-11 (Oct. 28, 2019).

> [Act 77] was not written to benefit one party or the other, or any one candidate or single election. It was developed over a multi-year period, with input from people of different backgrounds and regions of Pennsylvania. It serves to preserve the integrity of every election and lift the voice of every voter in the Commonwealth.

House Republican Caucus, *Historic Election Reform*, http://www.pahousegop.com/electionreform (last visited, July 11, 2022) (quoting Bryan Cutler, then-House Majority Leader). Act 77 was the result of years of careful consideration and debate that began in 2017 with a series of hearings, ultimately spanning twenty-seven months, on the reform and modernization of elections in Pennsylvania. Stephen E. Friedman, *Mail-In Voting and the Pennsylvania Constitution*, 60 DUQ. L. REV. 1, 6 (2022). With a bi-partisan majority of the General Assembly voting in favor of Act 77, Governor Wolf signed it into law on October 31, 2019. *See* Press Release, *Governor Wolf Signs Historic Election Reform Bill Including New Mail-In Voting* (Oct. 31, 2019).

With specific regard to the universal mail-in provisions, Act 77 for the first time allowed all qualified voters to cast their vote by mail. Prior to Act 77's enactment, a voter was required to establish that he or she fit the criteria of an absentee voter to be able to cast a ballot by mail. As we discuss at greater length in this opinion, absentee voting has a long history in the Commonwealth, dating to 1864. At the time of its inception, only otherwise qualified voters who were not present in their election districts on Election Day because of active military duty were allowed to cast an absentee ballot. Both the categories of qualified voters who are permitted to cast absentee ballots and the methods for casting absentee ballots have changed over the intervening century and a half.

However, since 1963, a qualified voter has been able to receive and return an absentee ballot through the mail.[3] Act 77's universal mail-in provisions extended the ability to receive and return a ballot through the mail to the electorate without the excuse of absenteeism. *See* 25 P.S. §§ 3150.11-3150.17.

Act 77 became effective immediately upon its October 31, 2019 enactment, allowing the Department of State and local election boards alike to notify the electorate about universal mail-in voting, which would be available for the April 2020 Primary Election.[4] Within months after the passage of Act 77, the COVID-19 pandemic began its spread across the world. *See* Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES, https://www.nytimes.com/article/coronavirus-timeline.html (last visited July 11, 2022). In March 2020, the first cases were detected within this Commonwealth. By April 1, 2020, all Pennsylvania schools were closed, and residents were required to stay at home by order of the Governor. *See A Year of COVID-19 In Pennsylvania*, WHTM, https://www.abc27.com/timeline-of-a-year-of-covid-19-in-pennsylvania. Among other responses to this unparalleled public health crisis, the General Assembly passed a bill delaying the upcoming Primary Election from April 28 to June 2. *See id*. Nonetheless, because of the prescient passage of Act 77 in late 2019, the stage in this Commonwealth was set to allow the electorate to exercise the right of suffrage without leaving their homes, should they so choose. And an overwhelming number of Pennsylvanians so chose. In the June 2, 2020 Primary Election, 1,459,555

[3] As discussed infra, the return process involves the use of dual envelopes and a voter declaration.

[4] Mail-in voting was not available for the November 5, 2019 General Election, which occurred only days after Act 77's enactment.

mail-in ballots were cast, which represented 51% of all votes cast in that election. PA. DEP'T OF STATE, *Pennsylvania 2020 Primary Election Report*, at 6, 9, 10 (Aug. 1, 2020). In the November 3, 2020 General Election, 2,648,149 mail-in ballots were cast, representing 38% of the total votes. PA. DEP'T OF STATE, *Report on the 2020 General Election*, at 12, 20 (May, 14, 2021).[5] A "clear partisan split when it came to the method of voting" was soon evident; Joseph R. Biden defeated Donald J. Trump by more than three-to-one among mail-in ballots, while Trump beat Biden by two-to-one among the votes cast in person on Election Day. *Pennsylvania Elections – Summary Results*, PA. DEP'T OF STATE, https://www.electionreturns.pa.gov/General/SummaryResults?ElectionID=83&ElectionType=G (last visited July 11, 2022). The election was officially called in President Biden's favor on November 24, 2020. *See* Press Release, *Department of State Certifies Presidential Election Results* (Nov. 24, 2020).

On November 21, 2020, eight petitioners – including a Republican congressman and Republican candidates for the United States House of Representatives and the Pennsylvania House of Representatives – filed a petition for review in the Commonwealth Court seeking to halt the certification of the 2020 General Election. The petition for review set forth a facial challenge to the portions of Act 77 that established universal mail-in

[5] In the 2021 Primary Election, approximately 26% of the voting electorate cast mail-in ballots, *see* PA. DEP'T OF STATE, Reporting Center, Reports, 2021 Municipal Primary, Justice of the Supreme Court, Statewide, https://www.electionreturns.pa.gov/ReportCenter/Reports (last visited July 11, 2022), and in the 2021 General Election, approximately 27% voted by mail-in ballot. *See* PA. DEP'T OF STATE, Report Center, Reports, 2021 Municipal Election, Justice of the Supreme Court, Statewide, https://www.electionreturns.pa.gov/ReportCenter/Reports (last visited July 11, 2022).

voting. In particular, the petitioners argued that the state Constitution requires voters to cast their votes in person on Election Day, except for the voters whom the Constitution excuses from this requirement because of their absentee status. The petitioners sought a declaration that Act 77's contrary provisions were unconstitutional and void ab initio, as well as an order enjoining the certification of the results of the November 3, 2020 General Election. *See Kelly v. Commonwealth*, 240 A.3d 1255, 1256 (Pa. 2020), *cert. denied sub nom*. *Kelly v. Pennsylvania*, 141 S. Ct. 1449, 209 L. Ed. 2d 171 (2021). The Commonwealth Court granted preliminary relief, enjoining the Commonwealth from certifying the results of the General Election.

In response to a request by the named respondents (the Commonwealth of Pennsylvania, Governor Wolf and Secretary Boockvar), this Court exercised extraordinary jurisdiction over the matter. We found a "complete failure to act with due diligence in commencing [the] facial constitutional challenge, which was ascertainable upon Act 77's enactment[,]" as the petitioners waited until the ballots from the General Election were in the process of being tallied, and the results were becoming apparent, to raise their claim. *Id.* at 1256-57. Thus, the Court found the claim barred by the doctrine of laches. In a concurring opinion, Justice Wecht laid bare the petitioners' want of due diligence, detailing precisely how the claim was ascertainable and could have been raised and fully adjudicated before the June 2020 primary – the first election to occur following Act 77's enactment, and therefore the first election upon which the electorate relied on its universal mail-in voting – but they inexplicably waited until after the 2020 General Election. *See id.* at 1258. Having found the petitioners equitably barred from the adjudication of their claims, this Court dismissed their petition with prejudice and vacated

the Commonwealth Court's order enjoining the certification of the results of the 2020 General Election. *Id.* at 1256. The petitioners sought further review via a writ of certiorari to the United States Supreme Court. In February 2021, their petition was denied. *Kelly v. Pennsylvania*, 141 S. Ct. 1449, 209 L. Ed. 2d 171 (2021).

B. Procedural History

The issue raised in *Kelly* laid dormant for only a brief time. On July 26, 2021, Appellee Doug McLinko, a member of the Bradford County Board of Elections, filed a petition for review and application for summary relief in the Commonwealth Court raising the same claims that had been advanced in *Kelly*. McLinko argued that the Pennsylvania Constitution requires a qualified elector to establish residency sixty days before an election in "the election district where he or she shall offer to vote[,]" PA. CONST. art. VII, § 1, and that this Court has definitively construed the term "offer to vote" to mean that the elector must "physically present a ballot at a polling place[;]" in other words, that electors must vote in person at their designated polling place on Election Day. While McLinko acknowledged that Article VII, Section 14(a) of the Pennsylvania Constitution provides an exception to this in-person requirement, he argued that Section 14 provides only narrow exceptions for those who fit its classifications of "absentee."[6] In short, McLinko argued that only electors that meet one of the Section 14(a) exceptions may vote by mail;

[6] Section 14(a) provides that a qualified elector may vote by absentee ballot where he is (1) absent from his residence on Election Day because of business or occupation, (2) unable to attend his proper polling place because of illness, disability, or observance of a religious holiday or (3) cannot vote because of his Election Day duties. PA. CONST. art. VII, § 14(a).

and therefore, it would be unlawful for him to certify the universal mail-in ballots. He asked that the Commonwealth Court declare Act 77 unconstitutional and therefore void.

Approximately one month later, Pennsylvania State Representative Timothy R. Bonner and thirteen additional Republican members of the Pennsylvania House of Representatives (collectively "Bonner")[7] filed a petition for review and application for summary relief in the Commonwealth Court, wherein they raised the same Article VII challenges to Act 77's universal mail-in voting provisions as raised by McLinko. Bonner also raised federal claims, arguing that Act 77 violated the United States Constitution and the Civil Rights Act. *See* Petition for Review, 8/31/2021, ¶¶ 79-90.

The respondents, the Pennsylvania Department of State and the Acting Secretary of the Commonwealth (collectively "Secretary")[8] filed responses and cross-motions for summary relief, in which the Secretary argued that the Appellees' petitions should be dismissed because they were untimely and barred by the doctrine of laches[9] and Section 13 of Act 77, which the Secretary interpreted as vesting exclusive jurisdiction in this Court

[7] Joining Bonner are Representatives Timothy F. Twardzik, David H. Zimmerman, P. Michael Jones, Barry J. Jozwiak, Kathy L. Rapp, David Maloney, Barbara Gleim, Robert Brooks, Aaron J. Bernstine, Dawn W. Keefer, Dan Moul, Francis X. Ryan, and Donald Cook. Of these fourteen Appellees, eleven voted in favor of Act 77 (Representatives Jones, Jozwiak, Rapp, Maloney, Gleim, Brooks, Bernstine, Keefer, Moul, Ryan and Cook). Representative Zimmerman voted against Act 77. Representatives Bonner and Twardzik assumed office after the passage of Act 77.

[8] At the time these proceedings commenced, the Department of State was led by Acting Secretary Veronica Degraffenreid. In January 2022, Leigh M. Chapman was appointed Acting Secretary of State, and so she has been substituted for former Acting Secretary Degraffenreid.

[9] On this point, the Secretary relied upon *Kelly*, in which, as discussed above, a constitutional challenge to Act 77 was dismissed on the basis of laches.

to hear constitutional challenges to Act 77 and providing that all such challenges were required to be raised within 180 days of the date of Act 77's enactment.

The Commonwealth Court consolidated the petitions for consideration, following which the York County Republican Committee, Washington County Republican Committee, Butler County Republican Committee ("Republican Intervenors") intervened as petitioners, and the Democratic National Committee and the Pennsylvania Democratic Party ("Democratic Intervenors") intervened as respondents.[10]

C. The Commonwealth Court's Decision

On January 28, 2022, the Commonwealth Court denied the Secretary's procedural challenges and held that Act 77 violates Article VII, Section 1 of the Pennsylvania Constitution. *See McLinko v. Dep't of State*, 244 & 293 M.D. 2021, 270 A.3d 1243 (Pa. Commw. 2022) (hereinafter "*McLinko*"); *McLinko v. Dep't of State*, 244 & 293 M.D. 2021, 270 A.3d 1278 (Pa. Commw. 2022) (hereinafter, "*Bonner*"). Addressing the substantive constitutional challenge first, the Commonwealth Court considered the three sections of Article VII that it found were implicated in this controversy. To begin, the court considered Article VII, Section 1 of the Pennsylvania Constitution, which states the following:

> **Qualifications of Electors**
>
> Every citizen 21 years of age, possessing the following qualifications, shall be entitled to vote at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.

[10] The arguments raised by the intervening parties substantially mirror those raised by the principal parties in both the Commonwealth Court and this Court. To avoid redundancy, we discuss the intervenor's arguments only to the extent they diverge from those of the Appellees and the Secretary.

> 2. He or she shall have resided in the State 90 days immediately preceding the election.
>
> 3. He or she shall have resided in the election district where he or she shall offer to vote at least 60 days immediately preceding the election, except that if qualified to vote in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, vote in the election district from which he or she removed his or her residence within 60 days preceding the election.

PA. CONST. art. VII, § 1. The Commonwealth Court recognized that in *Chase v. Miller*, 41 Pa. 403, 419 (1862), this Court interpreted the phrase "offer to vote" to mean to appear in person and deliver the ballot to election officials. *McLinko*, 270 A.3d at 1252 (quoting *Chase*, 41 Pa. at 419). At issue in *Chase* was the Military Absentee Act of 1839, which permitted absentee voting by electors in active military service. Because of the limitation imposed by "offer to vote," the *Chase* Court determined that the Military Absentee Act impermissibly absolved a group of voters (those in active military service) of a constitutionally required qualification, and therefore that the Act was unconstitutional. The Commonwealth Court observed that this definition was subsequently relied upon in *In re Contested Election of Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924), wherein this Court considered the constitutionality of the 1923 Absentee Voting Act, which expanded the opportunity for absentee voting to include civilians. The *Lancaster City* Court held that the General Assembly could address voting procedures only in a manner consistent with the "wording of our Constitution," which, at that time, limited absentee voting to those engaged in active military service. *McLinko*, 270 A.3d at 1253 (quoting *Lancaster City*, 126 A. at 200). Because the Constitution did not extend the absentee vote to electors other than those in active military service, the Court found that the 1923 Absentee Voting

Act violated the Constitution. The Commonwealth Court seized on this Court's explanation in *Lancaster City* that the General Assembly may confer voting rights "only upon those designated by the fundamental law, and subject to the limitations therein fixed[,]" and that no matter how admirable the purpose of the 1923 Absentee Voting Act, "an amendment to the Constitution must be adopted permitting this to be done." *Id.* (quoting *Lancaster City*, 126 A. at 201).

The court then turned its attention to Article VII, Section 4, which provides as follows:

> **Method of Elections; Secrecy in Voting**
>
> All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.

PA. CONST. art. VII, § 4.

The Commonwealth Court traced the development of this provision, beginning with the Constitution of 1776, to establish that through the passage of time, language was added to the initial spartan requirement that a vote be cast by ballot to provide that a vote so cast be done in secrecy. *See McLinko*, 270 A.3d at 1254-57. It characterized the 1901 amendment, which added the phrase "or by such other method as may be prescribed by law; [p]rovided[] that secrecy in voting be preserved" as the measure that "embedded" the requirement for secrecy in our Constitution. *Id.* at 1256. With regard to the phrase "such other method as prescribed by law," the Commonwealth Court opined that it was "likely" included to permit the use of voting machines. *Id.* (citing *Lancaster City*, 126 A. at 201; *People ex rel. Deister v. Wintermute*, 86 N.E. 818, 819 (N.Y. 1909)).

Finally, the court considered Article, VII Section 14:

Absentee Voting

> (a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.
>
> (b) For purposes of this section, "municipality" means a city, borough, incorporated town, township or any similar general purpose unit of government which may be created by the General Assembly.

PA. CONST. art. VII, § 14. The court explained that the first amendment to our Constitution permitting absentee voting occurred in 1864, in response to the *Chase* decision, when the electorate amended the Constitution to permit absentee voting by active-duty soldiers. Following this inaugural amendment, the court observed, amendments occurred in 1949, 1957, 1967 and 1985 to expand the class of "qualified electors" who were unable to vote in person. *See McLinko*, 270 A.3d at 1258-60.

From these three provisions, the Commonwealth Court synthesized the following. First, the phrase "offer to vote" requires the physical presence of the elector, as a "ballot cannot be sent by mail or express, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicile." *Chase*, 41 Pa. at 419.[11] Further, that this "in-person" requirement applies unless an elector falls into an

[11] The court found the holdings in *Chase* and *Lancaster City* to be clear, direct and binding, and that they leave no room for "modern" adjustment by interpretation. *McLinko*, 270 A.3d at 1261.

explicit exception thereto, and finally, that an amendment to the Constitution is required before legislation may "be placed on our statute books" to allow qualified electors to be absent from their polling place on Election Day and vote by mail. *McLinko*, 270 A.3d at 1260 (quoting *Lancaster City*, 126 A. at 201).

The Commonwealth Court found no merit to the Secretary's argument that Section 4 gives the General Assembly broad authority to enact legislation providing for different methods of voting. The court reasoned that the authority imparted by Section 4 is restricted by the General Assembly's ability to enact legislation only within the bounds of the Pennsylvania Constitution; thus, it concluded that Section 4 could not be read, as suggested by the Secretary, to authorize a system of universal mail-in voting that would permit voting to occur from any location. The court reiterated its understanding that "such other method" in Section 4 refers merely to an alternative to a paper ballot for use at a polling place. *Id.* at 1262. In addition, the court explained that Section 4 and Section 14 speak to wholly different concerns, with Section 4 ensuring elections would be conducted free of coercion and fraud, and Section 14 addressing the concern that some electors who are physically unable to "attend at their proper polling places" should not be denied their right to vote. Thus, the court concluded that Act 77 contravenes Article VII, Sections 1 and 14 of the Pennsylvania Constitution because, in effect, the General Assembly created a new class of voter that could be exempt from the Section 1 qualifications without constitutional authority. *Id.* at 1262-64.

The court then turned to the procedural objections to the petitions for review on the basis that they were untimely. The Commonwealth Court rejected the argument that laches should bar the petitions, distinguishing *Kelly* on the basis that here the Appellees

filed their petitions in the summer of 2021, between elections, and sought expedited relief "in sufficient advance" of the November 2021 General Election so that electors would not have their votes disqualified. *McLinko*, 270 A.3d at 1269; *Bonner*, 270 A.3d 1278. The Commonwealth Court thus found no such risk in the present cases, given that Appellees sought prospective relief.[12]

The court next addressed the Secretary's argument that the petitions should have been dismissed because pursuant to Section 13 of Act 77, the legislature required that challenges to the mail-in voting provisions be brought within 180 days of its enactment. The Commonwealth Court initially questioned the notion that the General Assembly could prevent judicial review of a statute whose constitutionality is challenged, opining that an unconstitutional statute is void ab initio. The court also found that Section 13 of Act 77 does not establish a statute of limitations for instituting a constitutional challenge to Act 77, but rather gave this Court exclusive jurisdiction to hear challenges to the enumerated provisions of Act 77 for the first 180 days after enactment, after which jurisdiction to hear such constitutional challenges reverted to the Commonwealth Court in accordance with the Judicial Code, 42 Pa. C.S. § 761(a)(1). *McLinko*, 270 A.3d at 1271-72. Having rejected the procedural challenges, the court granted summary relief to the Appellees by declaring that Act 77 violates Article VII, Section 1 of the Pennsylvania Constitution, PA. CONST. art. VII, § 1. In light of the summary relief granted, the Commonwealth Court declined to address Bonner's federal claims. *Bonner*, 270 A.3d at 1283 n.12.

[12] We include this background for purposes of completeness, although the Secretary does not pursue a challenge to the Commonwealth Court's ruling regarding laches before this Court.

The Honorable Michael H. Wojcik, joined by the Honorable Ellen Ceisler, disagreed with the finding of unconstitutionality.[13] The dissent found that Section 4, by its plain language, empowered the General Assembly to provide for the method of universal mail-in voting. In the dissent's view, *Lancaster City* "merely stands for the proposition that the General Assembly may not by statute extend the scope of a method of voting already specifically provided for in [A]rticle VII, [S]ection 14 of the Constitution[,]" but the holding "in no way limits the authority conferred upon the General Assembly by [A]rticle VII, [S]ection 4 to provide for a new and different method of voting such as the universal mail-in ballot provisions of Act 77." *McLinko*, 270 A.3d at 1276 (Wojcik, J., concurring and dissenting). The dissent further challenged the majority's reading of the language in Section 4 that elections shall be by ballot "or such other method as may be prescribed by law" as referring only to the use of voting machines. Such a reading, in the dissent's view, reduced Section 4 to surplusage because an amendment was made to Article VII, Section 6 specifically to permit the use of voting machines.[14] To the dissent,

[13] Judge Wojcik filed a concurring and dissenting opinion, as he agreed with the majority regarding the Secretary's procedural challenges. *See McLinko*, 270 A.3d at 1273. For the sake of simplicity, we refer to his position as the dissent.

[14] Article VII, Section 6 provides the following:

> All laws regulating the holding of elections by the citizens, or for the registration of electors, shall be uniform throughout the State, except that laws regulating and requiring the registration of electors may be enacted to apply to cities only, provided that such laws be uniform for cities of the same class, and except further, that the General Assembly shall, by general law, permit the use of voting machines, or other mechanical devices for registering or recording and computing the vote, at all elections or primaries, in any county, city, borough, incorporated town or township of the

the only way to construe Sections 1, 4, and 14 together while giving effect to all provisions is to read Article 4's "such other method as may be prescribed by law" language as empowering the General Assembly to "provide a distinct method of casting a ballot for those electors who are present in their municipality" during an election. *Id.* at 1278. The dissent also observed that Section 11 of Act 77 contains a "poison pill" provision, such that the finding of unconstitutionality as to the mail-in voting provisions renders all of Act 77's provisions void. *Id.* (citing 25 P.S. § 2602, Note ("Section 11 of [Act 77] provides that 'Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are non-severable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.'")). Parties on both sides appealed.

D. Arguments of the Parties

The Secretary challenges the Commonwealth Court's finding that the universal mail-in voting provisions of Act 77 are unconstitutional and urges this Court to distinguish or overrule the *Chase* and *Lancaster City* decisions. *See* Secretary's Brief at 4;

> Commonwealth, at the option of the electors of such county, city, borough, incorporated town or township, without being obliged to require the use of such voting machines or mechanical devices in any other county, city, borough, incorporated town or township, under such regulations with reference thereto as the General Assembly may from time to time prescribe. The General Assembly may, from time to time, prescribe the number and duties of election officers in any political subdivision of the Commonwealth in which voting machines or other mechanical devices authorized by this section may be used.

PA. CONST. art. VII, § 6

Democratic Intervenors' Brief at 4-5. The Secretary also contests the determination that Appellees' claims were not foreclosed as untimely pursuant to Section 13 of Act 77. In their cross appeal, the Bonner Appellees and the Republican Intervenors argue that the Commonwealth Court erred by failing to award relief for the claims it raised under federal law. *See* Bonner's Brief at 2; Republican Intervenor's Brief at 2.[15]

The Secretary reiterates her challenge to the Commonwealth Court's jurisdiction to hear the issues raised by the Appellees. As she did before the Commonwealth Court, the Secretary points to Sections 13(2) and (3) of Act 77 to argue that this Court possesses exclusive jurisdiction over constitutional challenges to the universal mail-in voting provisions of Act 77, and that all such challenges were required to be raised within 180 days of Act 77's enactment. *See* Secretary's Brief at 24-26. She supports her position with comments made by members of the General Assembly during Act 77's inception indicating the intent behind Section 13 was to ensure that certain challenges would be brought within 180 days of enactment so that all such issues would be settled before Act 77 would become effective. *Id.* at 27-28. It would be absurd, she argues, for the General Assembly to vest this Court with jurisdiction to hear these challenges initially, but to then "pass the jurisdictional baton" to the Commonwealth Court following the passage of time. *Id*. at 28. The Secretary recognizes that in *Delisle v. Boockvar*, 234 A.3d 410 (Pa. 2020)

[15] On behalf of the Secretary, amicus briefs were filed by the Pennsylvania House and Senate Democratic Caucuses, the Philadelphia County Board of Election, and the Pennsylvania American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"). Additionally, a number of individuals and Disability Rights Pennsylvania filed amicus briefs on behalf of the Secretary. On behalf of the Appellees, amicus briefs were filed by American First Policy Institute, Landmark Legal Foundation, Citizens United, and Honest Elections Project. In large part, the amici on both sides reiterate the arguments made by the parties.

(per curiam), this Court transferred a constitutional challenge to Act 77 to the Commonwealth Court for disposition because it was filed more than 180 days after the date of Act 77's enactment. She argues that *Delisle* is not binding because the challenge there was an as-applied, not a facial, constitutional challenge.[16] This distinction is critical, she contends, because the various bases that could give rise to an as-applied challenge cannot be pre-determined, but the bases for a facial challenge are ascertainable upon the enactment of the legislation. As such, it is reasonable for the General Assembly to set a period during which all readily ascertainable facial constitutional challenges may be brought; in this case, 180 days from the date of enactment. *Id.* at 33-34. Further, the Secretary emphasizes that the per curiam order issued in *Delisle* lacks the force of precedent, and in that manner, suggests that the Court is free to disregard it entirely. *Id.* at 34 (citing *Commonwealth v. Thompson*, 985 A.2d 928, 937 (Pa. 2007)).

Appellees respond that the Commonwealth Court's interpretation of Section 13 was correct. Noting that its decision on this front was unanimous, McLinko asserts that a 180-day limitation to bring constitutional challenges would itself be unconstitutional, and that the *Delisle* order established that the 180-day period was merely a "window of exclusive jurisdiction." McLinko's Brief at 46-47. Bonner agrees that *Delisle* is instructive and posits that it reveals this Court's understanding that Section 13(3) is nothing but a limitation on this Court's exclusive jurisdiction. Bonner's Brief at 21-22 (quoting *Delisle*, 234 A.3d at 411 (Wecht, J., concurring)). He argues that it is "absurd" to suggest that the

[16] A facial challenge to the constitutionality of a statute is a claim alleging that a statute suffers an "ineluctable constitutional deficiency." *Clifton v. Allegheny Cnty.,* 969 A.2d 1197, 1229 (Pa. 2009). An as-applied challenge to the constitutionality of a statute is one asserting that the statute, even though it may generally operate constitutionally, is unconstitutional in a challenger's particular circumstances. *See id.* at 1224.

General Assembly could preclude challenges to the constitutionality of a statute, as such a measure would violate the separation of powers by limiting the judiciary's ability to conduct judicial review. *Id.* at 20, 24-25.

The Secretary further challenges the Commonwealth's Court's finding that the universal mail-in voting provisions of Act 77 violated Article VII, Section 1. She emphasizes that Section 1's exclusive purpose is to establish the qualifications for an elector, and she identifies four discrete qualifications therein: the elector must have (1) obtained twenty-one years of age; (2) been a United States citizen for at least one month prior to the election; (3) resided in the Commonwealth for ninety days prior to the election; and (4) resided in the election district in which the elector seeks to vote for sixty days prior to the election. Secretary's Brief at 40. She draws our attention to both the repeated use of the elector's residence (both within the Commonwealth and within a particular election district) as a benchmark qualification within these criteria and the omission of an explicit requirement for physical presence at the time of the election. *Id.* In her view, the language of Section 1 in no way establishes voting in propria persona as a qualification.

The Secretary advances multiple arguments against the conclusion that "offer to vote" references a method of voting. First, she directs our attention to Section 4, the very existence of which the Secretary contends precludes the Commonwealth Court's (and Appellees') interpretation of Section 1. *Id*. at 43. The exceedingly broad language of Section 4, according to the Secretary, vitiates the Commonwealth Court's supposition that the "methods" mentioned therein was referring only to the use of voting machines. *Id.* at 43-44. The Secretary finds further support for her position in Section 14, which provides that the General Assembly must provide "qualified electors" a manner by which to vote

when not present in their election districts. *Id.* at 45. She argues that the Commonwealth Court's conclusion that in-person voting is itself a qualification that must be met to be deemed a "qualified voter" is in irreconcilable conflict with this language. *Id.*

Taking a closer look at the phrase itself, the Secretary points out that "offer to vote" made its initial appearance in the 1838 Constitution as part of a revision that created the first residency requirement dictating where an elector could cast his ballot. The Secretary points to historical records establishing that the purpose of the residency requirement was to promote election integrity and reduce election fraud, and that it was not contemplated as a measure that would impact the General Assembly's authority to establish methods of voting. *Id.* at 49-50. The Secretary reports that other jurisdictions that adopted the same "offer to vote" language into their constitutions when creating residency requirements have determined that this verbiage does not preclude the enactment of legislation that permits mail-in voting. North Carolina provides a succinct example in its explanation that "an offer to vote may be made in writing, and that is what the absent voter does when he selects his ballots and attaches his signature to the form and mails the sealed envelope to proper officials." *Id.* at 51 (quoting *Jenkins v. State Bd. Of Elections*, 104 S.E. 346, 349 (N.C. 1920)). Virginia and Montana also rejected the interpretation adopted by the Commonwealth Court, opining instead that it is contrary to the fundamental rules of construction and the very "rudiments of English" to presume that where there are separate provisions for qualifications and methods, the drafters intermixed those considerations. *Id.* at 52 (quoting *Moore v. Pulliem*, 142 S.E. 415, 421-22 (Va. 1928); *Goodell v. Judith Basin Cnty.*, 224 P. 1110, 1114 (Mont. 1924)). The Secretary rebuffs the notion, urged by Appellees in the court below, that if Section 1 does

not contain an "in-person" voting requirement, there was no need for the enactment of Section 14 because Section 14 does not merely permit the General Assembly to devise a method of absentee voting for certain voters, but it requires it to do so. *Id.* at 54. The Secretary argues that a directive requiring the General Assembly to make absentee voting available to certain voters in no way prohibits it from extending a similar method of voting to others. The Secretary stresses that the Constitution previously provided that the General Assembly "may" devise absentee voting, but that it was changed to "shall" in 1967, "underscore[ing] that [Section] 14 sets a floor for when absentee voting must be allowed; it does not establish a ceiling defining when it is forbidden." *Id.* Thus, rather than rendering Section 14 superfluous, the Secretary argues that her interpretation gives Section 14 an essential purpose by providing for the exercise of a constitutional right by particular categories of voters which the General Assembly "must respect and may not take away." *Id.* at 55 n.15.

Finally, the Secretary challenges the Commonwealth Court's reliance on the *Chase* and *Lancaster City* opinions. Concerning *Chase*, the Secretary emphasizes the vast difference between the "secure, confidential" mail-in ballot procedures established by Act 77 and the out-of-state, battlefront election districts that were permitted by that statute under review in *Chase*. *Id.* at 57-58. She argues that the Commonwealth Court failed to consider *Chase* in context, choosing instead to isolate its discussion regarding "offer to vote" as used in the 1838 Constitution (which lacked a provision giving the General Assembly discretion to prescribe methods of voting and which does not resemble the Constitution under which Act 77 was devised), and consider the phrase in a vacuum. *Id.* at 58-59. Because the Commonwealth Court failed to appreciate the material

differences between the Constitution as it exists today and the Constitution as it existed at the time of *Chase*, the Secretary maintains that no value can be placed on *Chase*'s pronouncement regarding "offer to vote."

The Secretary finds related fault in the *Lancaster City* decision. Although *Lancaster City* was decided under the 1924 Constitution, which included a provision giving the General Assembly broad authority to authorize methods of voting, the Secretary argues that to the extent the *Lancaster City* Court considered this provision at all, it incorrectly interpreted it to mean that the General Assembly could only prescribe different methods for the return of ballots from election districts to county officials, while the "offer to vote" must still take place in the election district. *Id.* at 60 (citing *Lancaster City*, 126 A. at 201). Once again, the Secretary points to the changes in the Constitution that followed *Lancaster City*, particularly the 1967 constitutional amendment that required the General Assembly to expand the class of electors who could place absentee votes (the change in Section 14 from "may" to "shall') to support her argument. *Id.* at 61-63. She argues that this amendment, the purpose of which was to make voting more accessible, occurred at the same time the General Assembly expanded the scope of voters permitted to vote by absentee ballot beyond the categories provided for in Section 14. The Secretary paints these actions as "entirely consistent with the General Assembly's constitutional power to enact the mail-in voting provisions of Act 77." *Id.* at 63.

If this Court were to conclude that *Chase* and *Lancaster City* are on point, the Secretary urges the Court to overrule both decisions. *Chase*, she argues, cannot withstand scrutiny today, as it was "expressly informed by the anti-democratic sentiments

of its era" that restricted voting to white men; a restriction that the *Chase* Court embraced and celebrated. *Id.* at 64. Additionally, she contends that *Chase*'s consideration of "offer to vote" and the residency requirements is unsupported by any analysis of the text, structure or history of the 1838 Constitution.[17] The Secretary faults the *Chase* Court for failing to engage in such analysis in favor of "prioritiz[ing] the Court's own policy views regarding how elections ought to be administered" and then summarily asserting that the

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[17] Article III of the 1838 Constitution provided as follows:

> Election franchise.
> Section I. In elections by the citizens, every white freeman of the age of twenty-one years, having resided in the State one year, and in the election district where he offers to vote, ten days immediately proceeding such election, and within two years paid a State or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector. But a citizen of the United States who had previously been a qualified voter of this State, and removed therefrom and returned, and who shall have resided in the election district, and paid taxes, as aforesaid, shall be entitled to vote after residing in the State six months: Provided, That white freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the State one year and in the election district ten days, as aforesaid, shall be entitled to vote, although they shall not have paid taxes.
>
> Elections.
> Section II. All elections shall be by ballot, except those by persons in their representative capacities, who shall vote viva voce.
>
> Electors privilege.
> Section III. Electors shall, in all cases except treason, felony, and breach or surety of the peace, be privileged from arrest during their attendance on elections, and in going and returning from them.

PA. CONST. art. III (1838).

Constitution reflects the same beliefs. *Id.* at 65.[18] *Lancaster City* extended *Chase*'s infirmities by adopting its pronouncements. For these reasons, the Secretary calls upon the Court to invoke our sparingly used prerogative to overrule these cases and deny them the force and effect of stare decisis. *Id.* She reminds us of this Court's explanation that our "faithfulness to precedent is not sufficient justification to buttress … decisions proven wrong on principle" and that "stare decisis is not a vehicle for perpetuating error, but a legal concept which responds to the demands of justice[.]" *Id.* at 66 (quoting *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 352 (Pa. 2014)).

The Appellees find no fault in the Commonwealth Court's interpretation of "offer to vote," or its reliance on the *Chase* and *Lancaster City* decisions. Concerning Section 1, Bonner argues that its qualifications speak not only to who may vote, but also where a voter may vote, and for that reason, "offer to vote" has always been understood as meaning "to present oneself in propria persona." Bonner's Brief at 34. Act 77's universal mail-in voting conflicts with these constitutional requirements by allowing a voter to mail a ballot from anywhere to a county board of election, nullifying both requirements that the vote be made in person and in a particularly designated election district.[19] *Id.* It is Bonner's position that the only exceptions to the requirement that a vote be cast in person are found in Section 14's absentee voting provision. He emphasizes that even in the absentee context, Section 14 requires the General Assembly to provide both a time and place for absentee votes to be cast. *Id.* at 36 (quoting PA. CONST. art VII, § 14). Bonner

[18] Again, the Secretary draws our attention to jurisdictions that have rejected the *Chase* interpretation of "offer to vote" as support for her position that its interpretation is flawed. *See* Secretary's Brief at 65.

[19] As discussed infra, the laws governing absentee voting permit this very procedure.

argues that because Act 77's mail-in provisions lack designated times and places for the casting of a ballot, they unconstitutionally expand the scope of absentee voting. *Id.*

Bonner's argument for the proposition that the "offer to vote" must be made in person absent an exception named in the Constitution is built on *Chase* and *Lancaster City*.[20] He emphasizes that in *Lancaster City*, which "reaffirmed" *Chase*, the Court struck down a statute that purported to extend absentee voting to certain civilians when the only constitutional allowance for absentee voting belonged to those in active military service. Bonner identifies two underlying principles for this holding: the presumption that constitutional amendment allowing for absentee voting was made deliberately and that designating a particular class of electors (those on active military duty) excludes all

[20] Appellees bolster their argument with discussion of the 1944 New Mexico case of *Chase v. Lujan*, 149 P.2d 1003 (N.M. 1944), as an example of another jurisdiction that relied on *Chase*'s interpretation of "offer to vote" in its constitution. *See* Bonner's Brief at 43. 45 n.8. At issue in *Lujan* was the interpretation of "offer to vote" as the heart of a challenge to a statute that permitted absentee voting for those voters engaged in active United States military or naval service. Rejecting the challenge, the New Mexico Supreme Court pointed to two prior decisions that interpreted "offer to vote" as requiring in-person voting, *Thompson v. Scheier*, 57 P.2d 293 (N.M. 1936), and *Baca v. Ortiz*, 61 P.2d 320 (N.M. 1936). Appellees are correct that the *Lujan* court detailed how, in *Thompson*, the New Mexico Supreme Court validated its interpretation with citation to two cases from "sister states" that had reached the same conclusion, including *Chase*. *See Lujan*, 149 P.2d at 1006-7. However, the *Lujan* Court referenced *Chase* and the other state's interpretations as collateral support to its own analysis, which focused heavily on New Mexico's jurisprudential history. The *Lujan* Court considered that at the time New Mexico adopted its constitution, a long-standing territorial law explicitly required the presence of the voter at the polls; it provided, "All votes shall be by ballot, each voter being required to deliver his own vote in person." *Lujan*, 149 P.2d at 1004 (quoting L. 1851, p. 196, Code 1915, § 1999)). It further recognized multiple other territorial statutes in effect at the time of the constitution's adoption that used the phrase "offer to vote." *Id.* at 1004-05. It is impossible not to conclude that the law requiring the in-person delivery of a ballot and the statutes already in existence that used "offer to vote" were the bases for the *Lujan* Court's interpretation.

others. *Id.* at 38-39. He urges this Court to follow *Chase* and *Lancaster City* and to apply their holdings in this case, as it involves substantially similar facts and constitutional provisions. *Id.* at 40. He contends that the text of Sections 1 and 4 have remained the same in all relevant ways since the time of *Lancaster City*, so there is no basis upon which to depart from it at this juncture. *Id.* at 42-43. Bonner rejects the notion that because the General Assembly changed the language of Section 14 from "may" to "shall," Section 14 provides a floor for when absentee voting must be permitted. Where the Secretary found significance in the use of "shall" in Section 14, Bonner points to the language of Section 1, which provides that limitations are subject to "laws requiring and regulating the registration of electors as the General Assembly may enact," and argues that "an affirmative 'shall' cannot give the legislation more discretion than 'may.' " *Id.* at 48 (quoting PA. CONST. art VII, § 1). He also cautions that the Secretary's "floor/ceiling" argument would lead to the conclusion that the amendments to Section 14 that occurred during the twentieth century to expand the categories of absentee voters were unnecessary because the General Assembly could have simply allowed mail-in voting "for any reason, or for no reason at all." *Id.* at 49. In essence, Bonner argues that the use of constitutional amendment to expand exceptions to in-person voting in the past proves that all such expansions must be accomplished by constitutional amendment. See *id.* at 50-53.[21]

Like Bonner, McLinko argues for adherence to *Chase* and *Lancaster City*. He cautions that this Court should not cast aside this "settled law[,] [e]ven if there were doubts

[21] *See also* McLinko's Brief at 23 ("If [the Secretary's] interpretation of Article VII is correct, [expansion of absentee voting by constitutional amendment] was a colossal waste of time: [t]he General Assembly possessed the power to expand absentee voting all along.").

about the correctness of their holdings[.]" McLinko's Brief at 15. He contends that the in-person voting requirement first recognized in *Chase* and later endorsed in *Lancaster City* should stand because it is easily understood, easily applied and workable. McLinko argues that the Secretary's request to overrule these cases simply in favor of a " 'modern' interpretation of the Constitution" is not a sufficient basis upon which to do so. *Id.* at 16-17. This is particularly so, McLinko argues, because the *Chase* and *Lancaster City* Courts rejected arguments analogous to those advanced by the Secretary presently, as they refused to be swayed by sympathy for the disenfranchised soldiers in favor of hewing to the polestar of dispassionate constitutional interpretation. *Id.* at 18. He cautions that precedent should not be overturned simply because it would satisfy desired policy objectives. *Id.* at 24-25.

McLinko also mirrors Bonner's argument that the only exceptions to Section 1's in-person voting requirement are found in Section 14, and that the change in that section from "may" to "shall" did not transform Section 14 into a "floor" for absentee voting, thereby freeing the General Assembly's hands to enact Act 77. *See id.* at 26-35. Rather, McLinko contends that the more reasonable interpretation is to presume that amending Section 14 while leaving Section 1 in place demonstrates the intent to not upset the settled interpretation of Section 1. *Id.* at 34-36. In his view, Section 4 does not grant the General Assembly "unlimited authority to prescribe election procedures[;]" rather, McLinko argues that the phrase "by ballot or such other method … concerns the **medium** by which voters may indicate their selections." *Id.* at 38 (emphasis in original). Like Bonner, he argues that a contrary reading would obviate the need for Section 14. *See id.* at 38-40, 45 ("[Section] 4 is limited to allowing voters to indicate their preference through media other

than paper ballots."). He further faults the Secretary's proposed interpretation as inserting language into Section 14 that is not there; specifically, language allowing the General Assembly to "further provide for absentee voting by such other voters as the Legislature shall determine." *Id.* at 41

Finally, McLinko argues that the reference in Article VII, Section 6 to voting machines does not support the Secretary's argument. The purpose of Section 6, he posits, is to establish uniform election and voter registration laws and to provide narrow exceptions to the required uniformity. The "natural and plain meaning" thereof, as far as our inquiry here is concerned, is that the General Assembly must permit the use of different voting equipment in different parts of the Commonwealth, notwithstanding its general requirement for uniformity of election laws. *Id.* at 44. Thus, McLinko argues, Sections 4 and 6 have separate purposes (methods of voting and uniformity of election laws, respectively), and so no conflict exists.

E. The Historical Development of the Implicated Constitutional Provisions

Article VII, Sections 1 ("Qualifications of electors"), 4 ("Methods of elections; secrecy in voting"), and 14 ("Absentee voting") of our Constitution are central players in this contest. The genesis of these provisions and their evolution over time is pertinent to our resolution.

1. Qualifications of Electors & Method of Elections

Provisions governing voter qualifications and methods of voting, found today in Sections 1 and 4, have been a part of the fabric of Pennsylvania elections since colonial times. When Pennsylvania was established as a colony, the Royal Charter of 1681 conferred upon William Penn and his successors the power to enact laws "by and with

the advice, assent, and approbation of the freemen of the province, or the greater part of them, or of their delegates or deputies." Charles R. Buckalew, AN EXAMINATION OF THE CONSTITUTION OF PENNSYLVANIA, 191 (1883) (quoting Charter of 1681, § 4). In accordance with this grant of power, the Charter of 1682, §§ 1, 2, 14, 16, 23, authorized the election of members of the Executive Council and Representatives by "freemen" of the province of Pennsylvania. Buckalew, supra, at 191. Those qualified to vote in elections and to run for office at that time, or "freemen," were defined as follows:

> That every inhabitant in the said province that is or shall be a purchaser of one hundred acres of land or upwards, his heirs and assigns, and every person who shall have paid his passage and taken up one hundred acres of land at one penny an acre, and have cultivated ten acres thereof, and every person that hath been a servant or bondsman and is free by his service, that shall have taken up his fifty acres of land and cultivated twenty acres thereof, and every inhabitant, artifices, or other resident in the said province that pays scot and lot to the government, shall be deemed and accounted a freeman of the said province, and every such person shall and may be capable of electing or being elected representatives of the people in Provincial Council or General Assembly in the said province.

Id. (quoting Charter of 1682, § 2). In a separate provision, the Charter of 1682 provided that "all elections of members, or representatives of the people … shall be resolved and determined by the ballot."[22] Charter of 1682, § 20.

In 1696, Governor William Markham set forth further eligibility requirements for "freemen" to be able to vote in elections:

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[22] While the early Pennsylvania charters required the use of some form of paper ballot, there has been some suggestion that at that time "paper ballots were not generally used, beans and viva voce voting being used instead." Joseph P. Harris, ELECTION ADMINISTRATION IN THE UNITED STATES, 16 (1934). However, by "1706 a statute was adopted in Pennsylvania which rigidly required the use of paper ballots." *Id.*

> And, to the end it may be known who those are, in this province and territories, who ought to have right of, or to be deemed freemen to choose, or be chosen, to serve in Council and Assembly, as aforesaid, Be it enacted by the authority aforesaid, That no inhabitant of this province or territories, shall have right of electing, or being elected as aforesaid, unless they be free denizens of this government, and are of the age of twenty-one years, or upwards, and have fifty acres of land, ten acres whereof being seated and cleared, or be otherwise worth fifty pounds, lawful money of this government, clear estate, and have been resident within this government for the space of two years next before such election.

Buckalew, supra, at 191-92 (quoting Frame of Government of the Province of Pennsylvania of 1696). Five years later, the General Assembly approved the Charter of Privileges of 1701, which "continued to be the fundamental law of the province until the Declaration of Independence and substitution therefor of the Constitution of 1776." *Id.* at 192. Through the 1701 Charter it was provided that

> no inhabitants of the province shall have right of election or being elected unless he or they be native-born subjects of Great Britain, or be naturalized in England or in this province, and unless such person or persons be of the age of twenty-one years or upwards, and be a freeholder or freeholders in this province, have fifty acres of land, or more, well settled, and twelve acres thereof cleared and improved, or be otherwise worth forty pounds lawful money of the province, clear estate, and have been resident therein for the space of two years before such election.

Id. at 192-93.[23] Thus, throughout colonial times, Pennsylvania's governing charters meticulously detailed the qualifications necessary to be eligible to vote, disconnected from any requirements concerning the method or manner of voting.

[23] The Charter of Privileges of 1701 did not contain this language; but rather stated "[t]hat the qualifications of electors and elected … shall be and remain as by a law of this government, made at New Castle, in the year 1700, entitled 'An Act to ascertain the

Following the colonies' declaration of their independence from Great Britain, Pennsylvania adopted its first Constitution, the Constitution of 1776, which provided therein:

> Every freeman of the full age of twenty-one years, having resided in this state for the space of one whole year next before the day of election for representatives, and paid public taxes during that time, shall enjoy the right of an elector: Provided always, That sons of freeholders of the age of twenty-one years shall be entitled to vote, although they have not paid taxes.

PA. CONST. ch. II, § 6 (1776). In a separate provision, the 1776 Constitution provided that "[a]ll elections … shall be by ballot, free and voluntary[.]" *Id.* ch. II, § 32. With the adoption of the 1790 Pennsylvania Constitution,[24] the drafters for the first time created a standalone article governing elections. Article III of the 1790 Constitution was untitled and contained three provisions. *See* PA. CONST. art. III, §§ 1-3 (1790). The first set forth the qualifications of eligible voters as follows:

> In elections by the citizens, every freeman of the age of twenty-one years, having resided in the state two years next before the election, and within that time paid a state or county tax, which shall have been assessed at least six months before the election, shall enjoy the rights of an elector: Provided, that the sons of persons qualified as aforesaid, between the ages of twenty-one and twenty-two years, shall be entitled to vote, although they shall not have paid taxes.

PA. CONST. art. III, § 1 (1790). The second provision, once again separate from the qualifications of voters, required that "[a]ll elections shall be by ballot, except those by

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number of members of Assembly and to regulate elections.'" Buckalew, supra, at 192 (quoting Charter of Privileges of 1701). Buckalew's historical analysis led him to conclude that the Charter was referencing the language cited above. *Id.* at 192-93.

[24] Constitutional Conventions resulted in the Constitutions of 1790, 1838, 1874, and 1968.

persons in their representative capacities, who shall vote viva voce." *Id.* § 2. The third exempted voters from arrest while voting. *Id.* § 3.

The next amendments occurred following the Constitutional Convention of 1837 (giving rise to what is commonly referred to as the Constitution of 1838), and it was here that the phrase "offer to vote" made its first appearance. The phrase was suggested by Emmanuel Reigart, a delegate from Lancaster County, during the Convention. Reigart proposed amending the language of Article III, Section 1 of the 1790 Constitution by inserting the phrase, "and shall have resided in the district in which he shall offer to vote, at least ten days immediately preceding such election" after the words "before the elections." 9 John Agg, PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AT HARRISBURG, ON THE SECOND DAY OF MAY 1837, 296 (1838). This proposal marked the first election district residency requirement, as all previous iterations of Pennsylvania's governing charter only required that a qualified elector reside in the state or, prior thereto, the colony. *See* Charter of 1682, § 2; Frame of Government of the Province of Pennsylvania of 1696; Charter of Privileges of 1701; PA. CONST. ch. II, § 6 (1776); PA. CONST. art. III, § 1 (1790). As a result, until the amendment that arose from the 1837 Constitutional Convention, there was no restriction limiting where in the Commonwealth an elector could vote. Records from the Constitutional Convention reveal that one purpose underlying the proposed election district residency requirement was the belief that "[t]hose who resided in a particular district[] were the persons who ought alone to be entitled to vote in that district, because they were the persons to be affected by the

election in that district." 9 Agg, at 309 (quoting Delegate James Biddle). Delegate Reigart viewed his proposed language as "settl[ing] the difficulty as to residence." *Id.* at 296.

As a result of Delegate Reigart's proposal, Article III, Section 1 of the 1838 Constitution was amended to provide the following with respect to voter qualifications:

> In elections by the citizens, every white freeman of the age of twenty-one years, having resided in the State one year, and in the election district where he offers to vote, ten days immediately proceeding such election, and within two years paid a State or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector. But a citizen of the United States who had previously been a qualified voter of this State, and removed therefrom and returned, and who shall have resided in the election district, and paid taxes, as aforesaid, shall be entitled to vote after residing in the State six months: Provided, That white freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the State one year and in the election district ten days, as aforesaid, shall be entitled to vote, although they shall not have paid taxes.

PA. CONST. art III, § 1 (1838). The title of this section was "Election franchise." *Id.* Thus, the recorded history establishes that the sole reason for the inclusion of the phrase "offer to vote" was to capture the election district residency requirement. Article III, Section 2 remained unchanged, providing that "[a]ll elections shall be by ballot" except for those voting in representative capacities. PA. CONST. art III, § 2 (1838). Consistent with colonial charters and Commonwealth constitutional history, nothing in the recorded procedures of the constitutional convention resulting in the 1838 Constitution suggests the intent to intermingle qualifications of voters with the method of voting.

In 1874, Article III was renumbered to Article VIII, and the number of its provisions expanded exponentially. *See* PA. CONST. art. VIII, §§ 1-17 (1874). The three provisions (establishing voter qualifications, providing that voting be done by ballot, and prohibiting

the arrest of electors while voting) that had sufficed since 1790 to govern elections grew to include, inter alia, provisions establishing that those in actual military service may vote absentee in the manner "as are or shall be prescribed by law[;]"[25] that election laws are to be uniform but that no elector shall be deprived of the privilege of voting for failing to register;[26] and that political subdivisions shall be formed or divided into election districts.[27] Each provision within the new Article VIII was titled, with the sections regarding qualifications and voting methods being labeled respectively, "Qualifications of voters," and "Elections by ballot." PA. CONST. art VIII, §§ 1, 4 (1874). The article housing these provisions was given the title "Of Suffrage and Elections." PA. CONST. art VIII (1874).

Further amendments were made in 1901, three of which are particularly significant for our present purposes. The first modified then-Article VIII, Section 4 from stating that elections "shall be by ballot" to providing that "[a]ll elections by the citizens shall be by ballot **or by such other method as may be prescribed by law**: Provided, That secrecy in voting be preserved." PA. CONST. art. VIII, § 4 (1874) (amended in 1901) (emphasis added). By its terms, this amendment of Section 4 gave the General Assembly the authority to devise methods of voting, subject to secrecy requirements. The second and third relevant amendments, found in Sections 1 and 7, subjected qualified electors to registration laws and required that laws regulating the registration of electors must be uniform. PA. CONST. art. VIII, §§ 1, 7 (1874) (amended in 1901). In fact, however, a proliferation of registration laws predated the constitutional amendment requiring such

[25] PA. CONST. art. VIII, § 6 (1874).

[26] PA. CONST. art. VIII, § 7 (1874).

[27] PA. CONST. art. VIII, § 11 (1874).

laws. The Registry Act of 1869 set forth requirements for voter registration, allowing electors to prove their qualifications prior to Election Day, thereby having their information entered onto a voter registration list. *See* Act of April 17, 1869, No. 38, P.L. 49. While this requirement was not a part of the Constitution at that time, this Court in *Patterson v. Barlow*, 60 Pa. 54 (1869), found the Registry Act of 1869 to be constitutional. In so doing, the *Patterson* Court reasoned that registration laws that allowed electors to demonstrate that they were qualified prior to Election Day were fully within the legislature's powers "to prescribe the evidence of the identity and the qualifications of the voters." *Id.* at 83. "The essential purpose of a registration law is that the qualifications of electors may be determined at some period in advance of the election, and that a list of such electors may be made, which shall be binding upon the election officers upon election day." Thomas Raeburn White, COMMENTARIES ON THE CONSTITUTION OF PENNSYLVANIA, 356 (1907).

2. Absentee Voting

Constitutionally permitted absentee voting in Pennsylvania dates to 1864.[28] This first iteration of absentee voting, which was available only to active-duty military voters

[28] The constitutional amendment provided as follows:

> Whenever any of the qualified electors of this commonwealth shall be in any actual military service under a requisition from the President of the United States or by the authority of this commonwealth, such electors may exercise the right of suffrage in all elections by the citizens, **under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual place of election.**

PA. CONST. art. III, § 4 (1838) (amended in 1864) (emphasis added). As the bolded language demonstrates, and as will be discussed further in this Opinion, this amendment remedied what the *Chase* Court identified as the fatal defect in the statute under its review by ensuring that the General Assembly, not military commanders, established all regulations related to the military absentee vote.

who were absent from their election districts, *see* Act of August 25, 1864, No. 871, P.L. 990, involved an intricate procedure. A captain's or officer's quarters would be designated as the voting location, where the soldier would appear before the judge of election. At that location, the election judge would examine the soldier's qualifications to vote within the district for which he sought to vote. If satisfied, the soldier would fill out his "ticket" and return it to the judge of election before Election Day, who would deposit it into the ballot box. With the vote thus cast, the election judge would record the voter's information, including his election district, in the corresponding poll book. Once the poll closed, the election judge and his clerks would open the ballot box and tally the votes by hand. The election judges would then mail each poll book and the "tickets" recorded to each election district.

There was an exception for soldiers whose duties made it impossible for them to appear at their designated military poll on the designated day. These soldiers could, before Election Day, seal their completed ballot in an envelope and provide a written statement containing their names and election districts, and designating a fellow qualified voter within their election district to cast their ballot. On Election Day, this designated representative would bring the envelope and written grant of authority to cast the absentee ballot to the election district's polling location, where an election official would open the envelope in view of the election board and the representative would swear an oath that he had not tampered with the ballot.

In 1951, this procedure was radically altered and permitted absentee voters to return ballots by mail.[29] By this time, absentee voting was an option available to active military and disabled or injured veterans. The absentee voter applied to the Secretary of the Commonwealth for an absentee ballot. This application could be made by mail at any time preceding Election Day, but the ballot was required to be completed prior to Election Day. Once the voter received the ballot, he would appear before any person authorized to administer oaths under state, federal, or military law in order to complete the ballot. The voter first would display the ballot to this person to establish that it was unmarked. The voter would then fill out the ballot in the presence of this official, but in such a way that the official could not see the voter's selections. The voter then folded the absentee ballot and placed it in an envelope marked "Official Military Ballot" before sealing it in a second envelope. The second envelope bore an affidavit on the outside, which the voter and the oath-administrator executed. The voter then mailed their ballot to their county board of elections. If voters were in active military service but present in their election districts on Election Day, they would follow this procedure but had the option to deliver the completed ballot, in its sealed envelopes, to the district's judge of elections.

In 1963, when the absentee vote had been expanded to include people who would be absent from their election districts because of their "duty, business, or occupation," or unable to appear at their polling location because of physical disability or illness, this

[29] Although the General Assembly had previously attempted to create a mail-in voting procedure in 1923 to include non-military civilians absent from their districts on Election Day due to their duties, business or occupations, *see* Act of May 22, 1923, No. 201, P.L. 313, this Court invalidated that system in *Lancaster City*, which will be addressed in further detail later in this Opinion. It was in 1951 that the General Assembly first created a mail-in voting procedure for those absentee voters expressly enumerated in the Constitution. *See* Act of March 6, 1951, No. 1, P.L. 11-12, 16-17.

procedure was again refined. *See* Act of April 29, 1963, No. 379, P.L. 738. Absentee voters would still apply for their ballots prior to Election Day, but the General Assembly eliminated the requirement to appear before an oath taker to complete the ballot. In its place, the General Assembly provided that the voter complete the ballot in secret before sealing it in an envelope marked "Official Absentee Ballot." This envelope was then placed in a second envelope that had a declaration on the front with the voter's information. The absentee voter could return the envelope through the mail or in person at the county board of election. This method of absentee voting has remained in place since that time.

As noted above, prior to 1963, absentee voting was available to those engaged in active military service, disabled veterans, those who would be absent from their election districts because of their "duties, business or occupation," and "illness or physical disability." PA. CONST. art. VIII, § 18 (1874) (amended in 1949); PA. CONST. art. VIII, § 19 (1874) (amended in 1957).[30] In 1963, the General Assembly expanded these categories to include the spouses of those in military service by legislative enactment. Act of August

[30] The constitutional provision addressing absentee voting has been amended several times. In 1967, there were three such amendments. First, the constitutional amendments authorizing active military members and injured military veterans to vote absentee were both repealed. Second, the article governing elections had been renumbered from Article VIII to Article VII, moving the absentee voting provision to its current place in Article VII, Section 14. Third, the provision was amended to change the operative verb from "may" to "shall," requiring the legislature to provide a method of voting for those enumerated categories of absentee voters. Article VII, Section 14 was then further amended to extend absentee voting to those who could not vote in person due to a religious holiday or Election Day duties. PA. CONST. art. VII, § 14 (1968) (amended in 1985). Lastly, in 1997, Section 14 was amended to change "State or county" to "municipality" and added subsection (b) defining "municipality." PA. CONST. art. VII, § 14 (1968) (amended in 1997).

13, 1963, P.L. 707, § 20, effective Jan. 1, 1964; *see also* 25 P.S. § 3146.1(b). In 1968, the General Assembly further expanded the use of voting by mail by extending it to those vacationing on Election Day and their spouses, as well as the spouses of the persons absent because of their duties, business or occupation.[31] Act of December 11, 1968, P.L. 1183, No. 375, §§ 1 to 3; 25 P.S. § 2602(z.3).

F. Analysis

1. Timeliness of the Constitutional Challenge

The Secretary's assertion that Section 13 is a statutory time bar that precludes this challenge to the constitutionality of Act 77 presents a matter of statutory interpretation, over which our standard of review is de novo and our scope of review is plenary. *O'Donnell v. Allegheny Cnty. North Tax Collection Comm.*, 266 A.3d 2, 16 (Pa. 2021). "The paramount goal of statutory interpretation is to give effect to the intentions of the General Assembly." *Commonwealth by Shapiro v. Golden Gate Nat'l Senior Care LLC*, 194 A.3d 1010, 1027 (Pa. 2018) (citing 1 Pa.C.S. § 1921(a)). Regarding any duly enacted legislation, we presume that the General Assembly does not intend to violate the Pennsylvania Constitution, nor intend an absurd or unreasonable result. 1 Pa.C.S. § 1922(3); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 943 (Pa. 2013).

Section 13 provides as follows:

> (1) This section applies to the amendment or addition of the following provisions of the act:
>
> (i) Section 102.
> (ii) Section 1003(a).
> (iii) Section 1007(b).
> (iv) Section 1107.
> (v) Section 1110.

[31] The Appellees do not challenge these legislative enactments as unconstitutional.

(vi) Section 1107–A.
(vii) Section 1109–A.
(viii) Section 1112–A(a).
(ix) Section 1216(d).
(x) Section 1222(a) and (b).
(xi) Section 1223.
(xii) Section 1231.
(xiii) Section 1232.
(xiv) Section 1233.
(xv) Section 1302.
(xvi) Section 1302.1.
(xvii) Section 1302.2.
(xviii) Section 1305.
(xix) Section 1306.
(xx) Section 1308.
(xxi) Article XIII–D.

(2) The Pennsylvania Supreme Court has exclusive jurisdiction to hear a challenge to or to render a declaratory judgment concerning the constitutionality of a provision referred to in paragraph (1). The Supreme Court may take action it deems appropriate, consistent with the Supreme Court retaining jurisdiction over the matter, to find facts or to expedite a final judgment in connection with such a challenge or request for declaratory relief.

(3) An action under paragraph (2) must be commenced within 180 days of the effective date of this section.

Act of October 31, 2019, P.L. 552, No. 77, § 13.

As the parties' competing interpretations establish, there is arguable ambiguity in Section 13. Yet, reading Section 13 in a manner that would result in the insulation of the sections of Act 77 listed in Section 13(1) from judicial review following the expiration of the 180-day period set forth in Section 13(3) contravenes the rules of statutory construction, as such an interpretation leads to the conclusion that the provision is unconstitutional; a result that is to be avoided. *See* 1 Pa.C.S. § 1922(3); *Working Fams. Party v. Commonwealth*, 209 A.3d 270, 279 (Pa. 2019) ("[S]tatutes are to be construed whenever possible to uphold their constitutionality."). Precluding review in this manner

would violate the separation of powers, as "[i]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts." *Robinson Twp.*, 83 A.3d at 927 (internal quotations omitted); *see also William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 418 (Pa. 2017) (finding that the legislature cannot "conclusively determine for the people and for the courts that what it enacts in the form of law … is consistent with the fundamental law"). If Section 13 were intended to foreclose judicial review, the General Assembly would be barring this Court from considering constitutional challenges to legislation pursuant to its King's Bench or extraordinary jurisdiction powers. *See* 42 Pa.C.S. § 726. The General Assembly has no constitutional authority to bar this Court from exercising its jurisdiction in such circumstances. Construing this section in the manner proposed by the Secretary would render Section 13 unconstitutional.

Moreover, this question was implicitly decided in *Kelly*, as that facial challenge was brought outside of the timeframe specified in Section 13(3). Our decision was based on the doctrine of laches and not a statutory bar to our jurisdiction. A lack of jurisdiction would have prohibited this Court's consideration of the matter, and as such, would have required the sua sponte application of the bar and dismissal. *See Bisher v. Lehigh Valley Health Network, Inc.,* 265 A.3d 383, 399 (Pa. 2021) (explaining that subject matter jurisdiction may be raised at any time, even by a court sua sponte if necessary); *Burger v. Sch. Bd. of McGuffey Sch. Dist.*, 923 A.2d 1155, 1161 (Pa. 2007) ("A jurisdictional challenge is typically a threshold question, with review of the substantive issues following a jurisdictional question only if the court is found to possess jurisdiction.").

The Secretary's argument that Section 13 applies only to facial challenges, as opposed to as-applied constitutional challenges, is not supported by the language of that provision. *See* Secretary's Brief at 22-31. Facial and as-applied constitutional challenges are distinct animals, and their differences often mean that they are subject to different standards and principles. *See Lehman v. Pa. State Police,* 839 A.2d 265, 275 (Pa. 2003) (distinguishing between as-applied and facial constitutional challenges when applying exhaustion of administrative remedies doctrine); *Kepple v. Fairman Drilling Co.*, 615 A.2d 1298, 1303 & n.3 (Pa. 1992) (distinguishing between facial and as-applied constitutional challenges for purposes of providing notification to Attorney General pursuant to Pa.R.A.P. 521(a)); *Commonwealth v. Noel,* 857 A.2d 1283, 1288 (Pa. 2004) (Saylor, J., concurring) (discussing difference between as-applied and facial void-for-vagueness claims under First Amendment of U.S. Constitution). However, here, we need not look any further than the plain language of the statute, which offers no distinction between facial and as-applied constitutional challenges. It merely states that this Court had jurisdiction to "hear **a challenge** to or to render a declaratory judgment concerning the constitutionality of a provision" enumerated therein. Act of October 31, 2019, P.L. 552, No. 77, § 13(2) (emphasis added). We may not disregard the plain language of the statute, and we may not read language into it that was not included by the General Assembly.

As intimated by the *Delisle* per curiam order and our consideration of *Kelly*, we find that a holistic reading of Section 13 compels the conclusion that Section 13(3) is not a time bar, but rather, that it – in conjunction with Section 13(2) – vested exclusive original jurisdiction in this Court to hear challenges to the provisions enumerated in subsection

(1) for the first 180 days after enactment, and that thereafter, original jurisdiction over all such challenges reverted to the Commonwealth Court, pursuant to 42 Pa.C.S. § 761(a)(1). *See Delisle v. Boockvar*, 234 A.3d 410, 411 (Pa. 2020) (per curiam). Under this construction, the Appellees timely filed their petitions in the Commonwealth Court's original jurisdiction, and following the Secretary's appeal, the action is properly within this Court's jurisdiction pursuant to 42 Pa.C.S. § 723(a).

2. Constitutionality of Act 77's Universal Mail-In Voting Provisions

The substantive question before this Court is whether the Commonwealth Court erred in concluding that Act 77's universal mail-in voting provisions are unconstitutional. Acts passed by the General Assembly enjoy a strong presumption of constitutionality, and a challenging party bears a very heavy burden of persuasion. *Stilp v. Commonwealth, Gen. Assembly*, 974 A.2d 491, 495 (Pa. 2009). A statute must violate an express or clearly implied prohibition in the Constitution before it will be held unconstitutional. *Russ v. Commonwealth*, 60 A. 169, 172 (Pa. 1905); *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 164 (1853) (explaining that legislation is void "only when it violates the constitution clearly, palpably, plainly; and in such manner as to leave no doubt or hesitation on our minds."). If any doubt arises, it is resolved in favor of the constitutionality of the legislation. *Russ*, 60 A.at 172.

The overarching basis for this constitutional challenge is the *Chase* Court's interpretation of the term "offer to vote," which it interpreted to mean that a vote must be cast in person. *Chase*, 41 Pa. at 419 ("To 'offer to vote' by ballot, is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot[.]"). The phrase has appeared in all iterations of the elections article of our

Charter since 1838 including its current version. We must determine whether the current version of Article VII mandates the imposition of the *Chase* Court's definition of "offer to vote."

a. The *Chase* and *Lancaster City* Decisions

Chase, decided in 1862, involved a contested election for the district attorney of Luzerne County. After counting what the return judges deemed to be "legal votes," the election was called for Chase. Thereafter, twenty electors filed a complaint alleging not only that a large number of votes within the county were fraudulent, but also that the return judges wrongfully excluded votes that were cast by qualified voters fighting in the Civil War, as permitted by Section 43 of the Military Absentee Act of 1839 ("Section 43").[32] This provision provided:

> Whenever any of the citizens of this Commonwealth, qualified as hereinbefore provided, shall be in any actual military service in any detachment of the militia or corps of volunteers under a requisition from the President of the United States, or by the authority of this Commonwealth, on the day of the general election, such citizens may exercise the right of suffrage at such place as may be appointed by the commanding officer of the troop or company to which they shall respectively belong, as fully as if they were present at the usual place of election: Provided, That no member of any such troop or company shall be permitted to vote at the place so appointed, if at the time of such election he shall be within ten miles of the place at which he would be entitled to vote if not in the service aforesaid.

Chase, 41 Pa. at 416 (quoting Act of July 2, 1839, No. 192, P.L. 528, § 43). The excluded "army vote," as the opinion refers to it, was outcome determinative because while the votes cast within the county placed Chase ahead of Miller, after the 420 votes received

[32] Act of July 2, 1839, P.L. 770. The 1839 act was "virtually a reprint" of the Military Absentee Act of 1813, Act of March 29, 1813, 6 Smith's Laws. *Chase*, 41 Pa. at 416.

from active-duty soldiers were counted, Miller finished ahead of Chase by 139 votes. *Id.* at 415. Beyond its grievance that the "army vote" was excluded, the complaint contained no details about these military ballots, such as the names of the military voters or the locations in which the votes were cast. *Id.* at 414.

Chase asserted that the election officials would be wrong to count the ballots cast pursuant to Section 43. *Id.* at 414. Before the lower court, the parties stipulated to the following facts to serve as the basis for the court's decision:

> Admitted that of the votes polled within the county of Luzerne, Ezra B. Chase received 5811 votes, and that Jerome G. Miller received 5646, and that the said number of votes by each received be counted by the court as legal votes. That of the votes polled by the volunteers in the army, Ezra B. Chase received 58 votes, Jerome G. Miller received 362 votes. But the legality of the votes polled by the volunteers in the army not being admitted, the question as to the legal effect thereof is submitted as a matter of law for the court. If the court should be of opinion that the army vote is constitutional and legal, the same to be allowed by the court, and added to the vote cast in the county for the party or parties in whose favour they may be, and then the court to decree in favour of the party having the greatest number of votes. If no part of the army vote is received, the decree to be in favour of Mr. Chase, the army vote being taken as above stated, the objections to it being all waived, except as to its constitutionality.

Id. at 414-15. The lower court determined, on these facts alone, that the army vote was legal and all such ballots should be counted. *Id.* at 415.[33]

[33] On review, the *Chase* Court refused to rule based on the stipulated facts. Rather, the Court noted that these facts, even when read in conjunction with the allegations in the complaint, were insufficient to support the lower court's determination because they failed to establish who the "army vote" electors were; whether they were residents of Luzerne County serving in military detachments; where they voted; and whether the voting locations were within ten miles of their customary voting location. *Id.* at 415-16. The Court concluded that even when reading the complaint and the stipulated facts together, "we cannot learn in what state the votes were cast[,]" and that the "reasonable

The Court addressed the genesis of Section 43, explaining that it was "virtually a reprint" of the Act of March 29, 1813, which permitted electors in active military service who were two miles from their customary voting location to vote elsewhere. The Court opined that in neither Section 43 nor its predecessor did the General Assembly intend to authorize voting beyond the Commonwealth's borders, but rather, that it "probably meant" to allow only the elector who is in active military service within the state an opportunity to vote. This absentee voting within the Commonwealth was permissible under the Constitution of 1790 (which was in effect at the time of the 1813 Act) because the Constitution of 1790 contained no election district residency requirement. *Id.* at 417. The Court observed that the Military Absentee Act was drafted during this time period but languished for five years. The Military Absentee Act was ultimately passed after the changes to the Constitution in 1838, but without consideration of the effect of the amendments made thereto. *Id.* The Court then took up the question that the General Assembly failed to consider: whether the provision of the Military Absentee Act that authorized military commanders to appoint "places" at which qualified voters in acting military service may exercise their right to vote could be reconciled with Article III, Section 1 of the Constitution of 1838. *Id.* at 418.

The Court's exhaustive discussion of Article III of the 1838 Constitution focused on the requirement that voting occur within an election district. *See id.* at 418-20. At the time of *Chase*, Article III, Section 1 provided the following:

> In elections by the citizens, every white freeman of the age of twenty-one years, having resided in the State one year, and in the election district where he **offers to vote**, ten days

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presumption" was that votes were cast "partly within and partly without" the Commonwealth. *Id.* at 416.

> immediately preceding such election, and within two years paid a State or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector. But a citizen of the United States who had previously been a qualified voter of this State, and removed therefrom and returned, and who shall have resided in the election district, and paid taxes, as aforesaid, **shall be entitled to vote** after residing in the State six months: Provided, That white freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in the State one year and in the election district ten days, as aforesaid, **shall be entitled to vote**, although they shall not have paid taxes.

PA. CONST. art. III, § 1 (1838) (emphasis added).

The Court emphasized that this provision differed from its forebearer in three ways: "The word 'white' was introduced before 'freemen,' excluding thereby negro suffrage, which had prevailed to a slight extent. The state residence was reduced from two years to one, and the words requiring a residence in the election district where he offers to vote, were added." *Chase*, 41 Pa. at 418. The sole purpose of the amendment, according to the *Chase* Court, was to prevent fraud in voting, *see id.* at 419,[34] and the balance of the Court's efforts are thereafter directed at explaining how the election district residency requirement served that end. The Court addressed the "offer to vote" language in conjunction with then-Article III, Section 2:[35]

[34] The record reflects an additional reason was to require electors to exercise the franchise where the vote would make a difference to their lives. *See* supra pp. 34-35.

[35] At the time *Chase* was decided, Article III, Section 2 provided as follows:

> All elections shall be by ballot, except those by persons in their representative capacities, who shall vote viva voce.

PA. CONST. art. III, § 2 (1838).

> [T]he citizen, possessing the other requisite qualification, is to have a ten days' residence in an election district, and is to offer his ballot in that district. The second section of this article requires all popular elections to be by ballot. To "offer to vote" by ballot is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it.

Id. Personal appearance was critical, the Court reasoned, because it provided the mechanism by which to validate a voter's qualifications:

> The ballot cannot be sent by mail or express,[36] nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicil. We cannot be persuaded that the constitution ever contemplated any such mode of voting, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. The constitution meant, rather, that the voter, in propria persona, should offer his vote in an appropriate election district, in order that his neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.

[36] During the Civil War, Americans had come to depend on the postal service to hear news from those fighting on the frontlines, *see* UNITED STATES POSTAL SERVICE, *The United States Postal Service: An American History*, at 28 (2020), https://about.usps.com/publications/pub100.pdf ("USPS"). Although many soldiers were at war in their own backyards, they naturally could not return to their homes while the fighting ensued. Mail became a "treasured link between camps and battlefields and 'back home.'" *Id.* at 18. While the Pennsylvania legislature had made a method of absentee voting available to soldiers since 1813, it was during the Civil War era that challenges to absentee voting had become more prevalent throughout the country, as other states had begun enacting their own absentee voting laws so that soldiers were not disenfranchised by serving in the military. *See Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001) ("Absentee voting began during the Civil War as a means of providing soldiers the ability to vote."). Thus, a moderately reliable postal service was a recent phenomenon during the Civil War, when *Chase* was decided. However, even at that time, the mail was not reaching significant portions of the population, as the postal service would not begin free rural mail delivery for another thirty years after *Chase*. USPS, supra at 7, 31.

Id. This underlying rationale echoes throughout the opinion. *See id.* at 424 (rejecting Section 43 because, inter alia, "it invites soldiers to vote where the evidence of their qualifications is not at hand"); *id.* at 427 (explaining "to secure purity of election, [the Constitution] would have its voters in the place where they are best known on election day"). The authoring Justice's interpretation of "offer to vote" and the conclusions drawn from it failed to take into account that Article III, Section 1 twice used the phrase "entitled to vote" and not "entitled to offer to vote" when referring to the exceptions to the residency qualifications.

Although it expounded on the meaning of "offer to vote," the clear target of the Court's attention in *Chase* was that the Military Absentee Act permitted voting in locations other than in duly created legislative election districts.[37] This is evident upon consideration of the opinion as a whole, which focuses on the amendment of Article III, Section I requiring that an elector vote in his election district. Its ultimate conclusion regarding Section 1 makes this point:

> The meaning of the constitutional clause under consideration may, therefore, on the whole, be stated thus--every white freeman, twenty-one years of age, having "resided" according to the primary meaning of that word, or according to legislative definition of it, in any "election district" created by or under the authority of the legislature, for ten days preceding the election, shall be permitted to offer his ballot in that district.

[37] One of the faults the *Chase* Court found with Section 43 was that it purported to authorize military commanders to establish de facto election districts. The Court explained that as the Constitution assigned the creation of election districts to the legislature, the designation of election districts is a matter of civil administration, which cannot be delegated to the military. *Chase*, 41 Pa. at 422. To do so would "confound the first principles" of our government found in the Constitution, which sharply divide the civil and military powers and command that "the military shall, in all cases and at all times, be in strict subordination to the civil power[.]" *Id.* Because a military commander cannot create an election district, and the Constitution required voting to occur in an voter's election district, none of the votes cast pursuant to Section 43 were valid. *Id.*

Id. at 421. Having settled the requirements of Section 1, the Court invalidated Section 43 of the Military Absentee Act on the basis that it impermissibly authorized voting in locations other than an elector's designated election district. *See id.* at 421-22.

It is evident that the binding *Chase* holding is concerned with constitutional residency requirements, not constitutional parameters on the method of casting a vote. Nothing in the language of Section 43 implicated the method by which a vote would be cast. Further, its interpretation of "offer to vote" was unnecessary to the dispositive holding of the case that voting can only take place in a voter's election district created by or under the authority of the legislature. The *Chase* Court's incidental interpretation of "offer to vote" is dicta. *See Castellani v. Scranton Times, L.P.*, 124 A.3d 1229, 1243 (Pa. 2015) (explaining that dicta is an opinion by the Court on an issue that is not essential to the decision).

Thus, the *Chase* Court's interpretation of "offer to vote," standing alone, has no precedential value. However, sixty-two years later and addressing a fundamentally different Constitution, this Court decided *Lancaster City*, and squarely relied on *Chase* in doing so. In 1923, the General Assembly passed the Absentee Voting Act, which extended the absentee vote to non-military civilians who were absent from their election districts on election day due to their "duties, business, or occupation." The *Lancaster City* Court recognized that "[w]hether such legislation can be sustained … depends on the wording of our Constitution, in the interpretation of which we are aided by consideration of what has been decided previous to its adoption." *Lancaster City*, 126 A. at 200. The Court turned to *Chase*'s interpretation of Article III, Section 1 of the 1838 Constitution and its resulting rejection of the Military Absentee Act as unconstitutional. It reasoned that

"the adverse determination then made is controlling now, unless there has been some change in the fundamental law which makes necessary a different conclusion." *Id.*

Within this framework, the Court began with *Chase's* interpretation of "offer to vote" before considering the "change[s] in the fundamental law" since that time. It started with the 1864 constitutional amendment, made in response to the *Chase* decision, that allowed military absentee voting. It acknowledged that this Court reaffirmed the right of the General Assembly to regulate the "places, mode and manner, and whatever else may be required, to insure [the] full and free exercise" of the right to vote shortly thereafter in connection with a challenge to the Registry Act of 1869. *Id.* (discussing *Page v. Allen*, 58 Pa. 338, 347 (1868)). However, the Court also took note that in *Page*, the Court explained that this ability to regulate the exercise of the right to vote is distinct from the enjoyment of the right, upon which the General Assembly is powerless to regulate. In other words,

> no constitutional qualification of an elector can in the least be abridged, added to, or altered, by legislation or the pretence of legislation. Any such action would necessarily be absolutely void and of no effect. We hold, therefore, what indeed was not expressly denied, that no regulation can be valid which would have the effect to increase the district, or state residence, prior to the time of an offer to exercise the right of an elector, or which would impose other or additional taxation or assessments, than those provided in the constitution.

Id. at 201 (quoting *Page*, 58 Pa. at 347).[38] This analysis of the constitutionality of the Registry Act involved a provision that added ten days to the residency requirement to qualify to vote and, as such, blatantly violated Section 1.

[38] Ironically, the *Page* Court when quoting Article I, Section III of the 1838 Constitution misquoted the residency requirement contained therein as providing that an individual is only qualified to be an elector "where he **intends to vote**[,]" rather than where he "offers to vote[.]" *Page*, 58 Pa. at 346 (emphasis added). While this was apparently a clerical

Turning to the relevant amendments that occurred in 1901,[39] the *Lancaster City* Court stated that the Article VIII, Section 1 provision addressing the qualification of voters was "practically the same" as its predecessor. *Id.* It acknowledged the establishment of

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error, it reflects the logical meaning of the description of the election district residency requirement, i.e., it merely describes the appropriate election district where the elector intends to exercise his right to vote.

[39] As discussed above, in 1901, Sections 1 and 7 were amended as follows:

> Every male citizen twenty-one years of age, possessing the following qualifications, shall be entitled to vote at all elections, subject however to such laws requiring and regulating the registration of electors as the General Assembly may enact:
>
> 1. He shall have been a citizen of the United States at least one month.
>
> 2. He shall have resided in the State one year (or, having previously been a qualified elector or native born citizen of the State, he shall have removed therefrom and returned, then six months) immediately preceding the election.
>
> 3. He shall have resided in the election district where he shall offer to vote at least two months immediately preceding the election.
>
> 4. If twenty-two years of age and upwards, he shall have paid within two years a State or county tax, which shall have been assessed at least two months and paid at least one month before the election.
>
> * * * * *
>
> All laws regulating the holding of elections by the citizens or for the registration of electors shall be uniform throughout the State, but laws regulating and requiring the registration of electors may be enacted to apply to cities only, provided that such laws be uniform for cities of the same class.

PA. CONST. art. VIII, §§ 1, 7 (1874) (amended in 1901).

registration requirements and also recognized that Section 4 was amended to provide that all elections "shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved." *Id.* (quoting PA. CONST. art. VIII, § 4 (1874) (amended in 1901)). Yet, the Court prioritized the "offer to vote" language contained in Section 1's establishment of residency requirements, allowing it to guide its interpretation without consideration as to how the registration requirement or the amendment of Section 4 impacted the reasoning underlying *Chase*'s rationale that relied, in part, on the requirement in Section 2 of the 1838 Constitution that elections shall be by ballot. The Court emphasized that the Constitution retained the language that had been interpreted as requiring a voter to "offer to vote" within a designated election district and that the only exception allowed in the Charter is for the military absentee vote. *Chase*'s interpretation of "offer to vote" and the fact that the military absentee vote had since been singled out in Section 6 was determinative of the Court's ultimate conclusion:

> The Legislature can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed. *McCafferty v. Guyer*, 59 Pa. 109. The latter has determined those who, absent from the district, may vote other than by personal presentation of the ballot, but those so permitted are specifically named in section 6 of article 8. The old principle that the expression of an intent to include one class excludes another has full application here.

Id.

Despite the constitutional amendments requiring pre-verification of qualifications pursuant to registration laws, and granting broad authority to the General Assembly to determine the method of voting, the *Lancaster City* Court found that because Section 1 retained the "offer to vote" language, the Constitution continued to require voting in propria persona. Although it acknowledged that the amendment of Section 4 provided

that elections shall be by ballot "or such other method as may be prescribed by law[,]" the Court discussed Section 4 only to acknowledge that an argument could be made that the legislation under review violated Section 4's secrecy requirement, but it dismissed this concern, reasoning that because of its disposition, it need not address it. *Id*. The Court ventured that the secrecy requirement was "likely added in view of the suggestion of the use of voting machines[.]" *Id.* Thus, when the Court did contemplate Section 4, it was only with regard to the newly added secrecy requirement, not the grant of authority to the General Assembly to devise methods of voting. In so doing, the Court failed to consider the entirety of this constitutional provision. *See Commonwealth v. Russo*, 131 A.2d 83, 88 (Pa. 1957) ("We have no right to disregard … or distort any provision of the Constitution."). Similarly, although it mentioned its existence, the Court did not consider the Registry Act of 1869, which was enacted after *Chase* and allowed voters' qualifications to be established prior to the election. Nor did it address the amended Section 1, which subjected the qualification to vote to compliance with registration laws which were constitutionally required to be uniform pursuant to Section 7.

The *Lancaster City* Court, faced with a newly amended Constitution, failed to grapple with any of the fundamental changes therein.[40] First, it failed to consider what effect the uniform registration laws and the constitutionally required compliance with those

[40] The Constitutional provision addressing absentee voting, now and at the time of *Lancaster City*, makes clear by its very terms that one is a qualified elector without regard to how a vote is cast. Present-day Section 14 begins by stating that "[t]he Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors" who are absent from the municipality of their residence on Election Day, for certain enumerated reasons, "may vote." PA. CONST. art. VII, § 14(a). The absentee voting provision at the time of *Lancaster City* was found in Article VIII, Section 6, and it provided for absentee voting "[w]henever any of the qualified electors of this Commonwealth shall be in actual military service[.]" PA. CONST. art. VIII, § 6 (1874).

laws had on the practice of demonstrating one's qualifications in person. The underlying rationale for the *Chase* Court's interpretation of "offer to vote" as a requirement to vote in person was "in order that his neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful." *Chase*, 41 Pa. at 419. If "offer to vote" in fact had the independent meaning to vote in person for the reasons stated in *Chase*, then the amendment of Section 1 requiring compliance with registration laws eliminated any reliance on that interpretation. Second, to the extent the *Chase* Court drew on the requirement that elections were required to be by ballot and the custom that ballots be cast in person, *Lancaster City* failed to account for the amendment that authorized the legislatures to prescribe other methods by which elections could take place.

Despite the *Lancaster City* Court's acknowledgment that it was required to review the challenged legislation "in light of the controlling constitutional provisions[,]" *Lancaster City*, 126 A. at 200, it failed to do so and instead rested its decision on an interpretation made in a case decided more than half a century before, under a prior version of the Constitution that had been amended multiple times since, and for a proposition that was unquestionably dicta. The interpretation of Section 1 underlying *Lancaster City*, which elevated dicta from *Chase*, is palpably incomplete.

The question thus arises as to whether we are bound to the interpretation of "offer to vote" designed by *Chase* and perpetuated in *Lancaster City* when, by any rules of constitutional construction recognized at the time of those decisions or now, the interpretation is patently flawed. The answer is that we are not. *See William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 457 (Pa. 2017) ("When presented with a case

that hinges upon our interpretation and application of prior case law, the validity of that case law always is subject to consideration, and we follow the exercise of our interpretive function wherever it leads."); *Commonwealth v. Doughty*, 126 A.3d 951, 955 (Pa. 2015) ("While the doctrine of *stare decisis* is important, it does not demand unseeing allegiance to things past.") ("It is … revolting if the grounds upon which [a rule of law] was laid down have vanished long since, and the rule simply persists from blind imitation of the past.") (quoting O.W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897)); *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 352 (Pa. 2014) ("[W]e have long recognized that the doctrine of *stare decisis* is not a vehicle for perpetuating error, but a legal concept which responds to the demands of justice, and thus, permits the orderly growth processes of the law to flourish.") (internal citations omitted); *Olin Mathieson Chem. Corp. v. White Cross Stores, Inc., No. 6*, 199 A.2d 266, 268 (Pa. 1964) ("[T]he courts should not perpetrate error solely for the reason that a previous decision although erroneous, has been rendered on a given question.").

Compared to the federal Constitution, our Pennsylvania Charter has been amended on a frequent basis[41] to reflect, inter alia, changes in the Commonwealth itself. Changes to our Charter's provisions regarding elections are reflective of the symbiotic

[41] Since the Twentieth Century, more than 150 substantive amendments were made to our Constitution. *See* Duquesne University School of Law*, Texts of the Constitution,* https://www.paconstitution.org/texts-of-the-constitution/ (last visited July 11, 2022); Pa. General Assembly*, Legislation Enacted, Joint Resolutions (Amendments to the Constitution) passed,* https://www.legis.state.pa.us/cfdocs/legis/CL/Public/cl_view_action1.cfm?sess_yr=&sess_ind=0&cl_typ=JR&cl_nbr= (last visited July 11, 2022); *Ballotpedia, List of Pennsylvania Ballot Measures,* https://ballotpedia.org/List_of_Pennsylvania_ballot_measures (last visited July 11, 2022). In contrast, the federal Constitution has been amended only twenty-seven times. *See* U.S. CONST. amends. I-XXVII.

relationship between advancements and changes in the Commonwealth's society and recognizing them by way of Constitutional amendment. We have an obligation to give amendments to our Charter meaning.

b. Article VII, Section 1

The meaning ascribed by the *Chase* and *Lancaster City* Courts to the phrase "offer to vote" cannot be reconciled with the text of Article VII, Section 1, which at the time of the passage of Act 77 provided:

Section 1, Qualification of Electors, provides:

> **Qualifications of Electors**
>
> Every citizen 21 years of age, possessing the following qualifications, shall be **entitled to vote** at all elections subject, however, to such laws requiring and regulating the registration of electors as the General Assembly may enact.
>
> 1. He or she shall have been a citizen of the United States at least one month.
>
> 2. He or she shall have resided in the State 90 days immediately preceding the election.
>
> 3. He or she shall have resided in the election district where he or she shall **offer to vote** at least 60 days immediately preceding the election, except that if qualified **to vote** in an election district prior to removal of residence, he or she may, if a resident of Pennsylvania, **vote** in the election district from which he or she removed his or her residence within 60 days preceding the election.

PA. CONST. art. VII, § 1. (emphasis added)

The word "vote" is used four times in Section 1. Section 1 refers to an elector being "entitled to vote" and "qualified to vote," and once provides than an elector "may … vote." The two most pertinent instances of the use of "vote" for our analysis appear in the third subsection, which is the same subsection in which "offer to vote" appears. While the

elector "shall have resided in the election district where he or she shall offer to vote" at least sixty days immediately preceding the election, this same subsection creates a sixty-day lookback period for electors who move their residence within the bounds of the Commonwealth. Such electors who are qualified "to vote" in an election district sixty days prior to relocating their residence may "vote" in the election district from which they moved. It is relevant that neither of these instances within the third subsection repeat the use of "offer to vote," just as it is relevant to our interpretation that the first paragraph of Section 1 states that citizens with the proper qualifications shall be entitled "to vote," not entitled "to offer to vote."

We must reconcile, in the context of Article VII, Section 1 of our current Charter, this repeated use of the word "vote" with the singular use of the phrase "offer to vote," which is found in the paragraph requiring votes to be cast in particular election districts. And the location of this phrase is key. Section 1 sets forth the qualifications that a citizen must establish in order to be "entitled to vote." To be "entitled to vote," the citizen must be at least twenty-one years old[42] and must possess the "following qualifications," which are enumerated in three subsections. The first subsection requires United States citizenship, and the second subsection requires Pennsylvania residency. The third subsection requires election district residency as a qualification to cast a vote in a particular election district. It is in service of defining this election district residency requirement that we find the lone use of "offer to vote." The phrase "where he or she shall

[42] In 1971, the twenty-sixth amendment to the United States Constitution lowered the voting age to eighteen.

offer to vote" is a descriptive clause[43] that modifies the object of the prepositional phrase "in the election district." It does no more than identify the district in which the elector is eligible to vote, which is the interpretation supported by the recorded history. Given the clear intent of Section 1 to set forth the qualification to vote, this is the most natural reading of the third subsection of Section 1. *See League of Women Voters*, 178 A.3d at 802.

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[43] In dissent, Justice Mundy, without any reference to the extensive recorded history of the Constitutional Convention that first introduced this amendment, *see* supra pp. 34-35; Concurring Op. at 10-14 (Wecht, J.), opines that the phrase "offer to vote" contemplates that some in-person action must be taken in the election district. Dissenting Op. at 17-18 (Mundy, J.). Although we disagree that anything other than residency in the district is required, it remains a mystery as to how the dissent (or the *Chase* Court) transforms "**offer**" into "appear in person." *Id.*

It may be that the Court in *Page* got the meaning right when it inadvertently translated "offer to vote" to "intends to vote" when quoting the election district residency requirement. *See* supra note 38. Contrary to the dissent's assertion that we suggest "offer" signifies a subjective intent, we do not. Our reference to the *Page* Court's inadvertent translation of "offer to vote" to "intends to vote" does not inform our analysis, but merely highlights the oddity of the drafters' use of the phrase "offer to vote" in the section of the elections article establishing voter qualifications.

The nineteenth century dictionary definitions, to which the dissent refers, do not support the proposition that "appear in person" flows from "offer to vote." *See* Concurring Op. at 15 & nn. 13, 14 (Wecht, J.). Acting as a transitive verb, the word "offer" was defined as "to bring to or before; … to present for acceptance or rejection," "to present in words; to proffer; to make a proposal to," "to bid," "to present to the view or to the mind[.]" *Offer*, WEBSTER'S DICTIONARY OF 1828. None of these definitions impute the necessity of a personal appearance. Likewise, the word "offer" serving as an intransitive verb, as the dissent suggests the *Chase* Court understood the term, is also defined in several ways, which, again, do not require physical presence. *Offer*, WEBSTER'S DICTIONARY OF 1828; *see also* Dissenting Op. at 18-19 (Mundy, J). For example, "offer" was defined as "to declare a willingness" and "[t]o make an attempt." *Offer*, WEBSTER'S DICTIONARY OF 1828. Like its transitive verb counterpart, nothing in these definitions suggest the requirement of a personal presence. The dissent asserts that "offer" was defined as "to be present, to be at hand, to present oneself," *see* Dissenting Op. at 19. The actual definition reads: "[t]o present itself; to be at hand." *Offer*, WEBSTER'S DICTIONARY OF 1828. Suffice it to say, one need not be present to present.

There is no indication in Section 1 as a whole or in its third subsection that it establishes the manner in which a vote must be cast.

There is no rule of construction that allows us to add the words "offer to" in three different places (including the overarching opening paragraph) where the anomalous terminology "offer to vote" can be explained based on clear historical records as the descriptive syntax that was chosen to define an election district residency qualification. Moreover, any interpretation of Section 1 requires a uniform interpretation of "vote" because a contrary conclusion is not sustainable. If, as Appellees contend, "offer to vote" possesses a particular meaning, then we can neither ignore its omission or read it into the instances in Section 1 that use "vote" unencumbered by "offer to." Thus, an elector who relocates within the Commonwealth within the sixty-day window prescribed in the third subsection is not required to vote in person (as it does not say "offer to vote") while an elector who has consistently resided in the election district must appear in person to vote in that district. This is an absurd result. Our clear rule of constitutional interpretation mandates that we reject such a reading. 1 Pa.C.S. § 1922.

Moreover, the rationale for the *Chase* Court's imposition of an in-person voting requirement was the need for other voters in a voting district to verify the bona fides of an individual appearing to cast a ballot. *See Chase*, 41 Pa. at 419 ("The constitution meant, rather, that the voter, in propria persona, should offer his vote in an appropriate election district, in order that his neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful."). The Constitution it was interpreting was drafted at a time when there were no voter registration laws and, arguably, the only way to verify an individual's qualifications to vote in an election district was to allow his

neighbors to identify him as qualified. This lack of verifiable qualifications to vote ended with the passage of registration laws. Critically, in 1901, the elections article of the Constitution was amended to subject an otherwise qualified elector to "such laws requiring and regulating the registration of electors as the General Assembly may enact." PA. CONST. art. VIII, § 1 (1874) (amended in 1901). The registration compliance requirement also appears in the current Article VII, Section 1.

Since the enactment of the Election Code in 1937, voters are required to prove their identities and qualifications prior to casting a vote. Act of June 3, 1937, P.L. 1333, art. VII, § 701. The Commonwealth relies on the Statewide Uniform Registry of Electors ("SURE"), which is "a single, uniform integrated computer system" that "[c]ontain[s] a database of all registered electors in this Commonwealth." 25 Pa.C.S. § 1222(c)(1)-(2). In order to register, voters submit to the Department of State their personal information, including their name, address, party affiliation, part of their Social Security number, and driver's license or state ID number. *See* PA. DEP'T OF STATE, *Online Voter Registration Application*, https://www.pavoterservices.pa.gov/Pages/VoterRegistrationApplication.aspx (last visited July 11, 2022). These voters' signatures are also submitted, and, as an additional way to verify identity, these signatures are available to be matched with those on the outside of universal mail-in (and absentee ballots) before being tabulated. *See id.*; *see also In re November 3, 2020 General Election*, 240 A.3d 591, 596-97 (Pa. 2020). Consequently, the rationale supporting the *Chase* Court's questionable interpretation of

offer to vote ceased to exist in 1901.[44] While the *Lancaster City* Court did not reconcile the basis of the *Chase* Court's interpretation of "offer to vote" with the amended Constitution before it in 1924, it is our obligation to do so in interpreting our current Constitution.

We therefore conclude that neither *Chase* nor *Lancaster City* support the conclusion that "offer to vote" creates in-person ballot-casting as a voter qualification in Article VII, Section 1 of the Pennsylvania Constitution in effect when Act 77 was enacted. Rather, the phrase "offer to vote" is a descriptive term, used to define the election district residency requirement found in Article VII, Section 1(3).[45]

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[44] The Commonwealth Court expressed its view that "[m]ail-in ballots present particular challenges with respect to 'safeguards of honest suffrage.'" *McLinko*, 270 A.3d at 1252 n.12. Its only support for this statement was a decades-old case, *Marks v. Stinson*, 19 F.3d 873, 887 (3d Cir. 1994). As the Third Circuit recently explained, the unique facts of that case "were a far cry from" a normal election and do not establish that mail-in voting is inherently more susceptible to fraud than other forms of voting. *Donald J. Trump for President, Inc. v. Sec'y of Pa.*, 830 F. App'x 377, 388-89 (3d Cir. 2020).

Justice Mundy likewise cites to *Marks* without the critical qualification provided in *Donald J. Trump for President, Inc.* Dissenting Op. at 6 (Mundy, J.). Despite disclaiming policy considerations, *see id.* at 22, the Dissent further asserts that "it is self-evident that the **integrity** of elector actions becomes more difficult to verify when they are undertaken at a distance and outside of public scrutiny." *Id.* at 7 (emphasis in original). Presumably the Dissent is referring to universal mail-in voting, although her citations are to articles concerning the potential or possibility for fraud or error in absentee voting. *Id.* at 7 n.1. We are unaware of **any** evidence to call into question the integrity of any elections in this Commonwealth since the enactment of Act 77, including those in 2021, in which appellate court jurists at all levels were elected and subsequently seated.

[45] The dissenting Justices complain that our decision here violates a historical reliance on the *Chase* Court's interpretation of "offer to vote" as requiring in-person voting, subject only to exceptions created by way of constitutional amendment. *See* Dissenting Op. at 16 (Mundy, J.); Dissenting Op. at 4 n.6 (Brobson, J.). It is certainly not true that our General Assembly has historically relied on the *Chase* Court's in-person voting

c. Article VII, Section 4

Having established that Section 1 does not require electors to submit their ballots in person at their polling location, it remains that submitting a ballot in person is a method by which electors may vote. The *Lancaster City* Court had the first opportunity to interpret the language and scope of what is now Article VII, Section 4, which addresses the "method" of voting. However, it failed to do so because of its slavish adherence to *Chase*'s dicta. This was a critical omission because *Chase* referenced the requirement in the 1838 Constitution that elections shall be by ballot in formulating its conclusion that voters must appear in person to cast a vote. *Chase*, 41 Pa. at 419. As a result of the *Lancaster City* Court's incomplete analysis, Section 4's meaning was left unresolved. Accordingly, we undertake an examination of this constitutional provision and its relevance to the current question. Section 4, unchanged since 1901, provides:

> Method of Elections; Secrecy in Voting.
> Section 4.

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requirement or *Lancaster City*'s adoption of it. In 1963, the legislature provided that all aspects of absentee voting could be done by mail. *See* Act of April 29, 1963, No. 379, P.L. 738. In that same year, our General Assembly passed legislation allowing spouses of those in military service to vote by mail. *See* Act of August 13, 1963, P.L. 707, § 20, effective Jan. 1, 1964; *see also* 25 P.S. § 3146.1(b). Then, again by legislative enactment in 1968 (the same year the Constitution was amended to revamp Article VII, Section 14), additional categories of voters were permitted to vote by mail. Specifically, persons absent from their election district because of their "duties, occupation or business." This was broadly defined to include vacations, sabbatical leaves or leaves of absence for teaching or education. It also included an elector's spouse who accompanies the elector during absences associated with their "duties, occupation or business." 25 P.S. § 2602(z.3).

Although the legislature referred to the extended category of voters as absentee voters, the effect of the legislation was to extend mail-in voting to categories of electors not designated in Section 14. Justice Mundy's suggestion that it was always understood that the expansion of mail-in voting can only be accomplished by an amendment to the Constitution is belied by this record. *See* Dissenting Op. at 16 (Mundy, J.).

> All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved.

PA. CONST. art. VII, § 4. It is plain that Section 4 endows the General Assembly with the authority to enact methods of voting subject only to the requirement of secrecy. There is scant legislative history related to the amendment of this provision, but comments made by Governor William Stone to the Senate regarding this proposed amendment suggest that the purpose of the amendment was "the substitution of voting machines for [the] present system of balloting." Journal of the Pennsylvania Senate, Session of 1901, Vol. 2, at 1543 (statement of Governor William Stone). This statement reveals that at the time, voting by ballot and by machine were viewed as alternative methods of casting a vote. Viewed in this context, the conclusion follows that "method" as used in Section 4 refers to the way a vote is cast. This conclusion is further supported by the meaning of the term "method" as it was understood at the time of Section 4's amendment, as well as today.

When interpreting constitutional language, we are mindful that the language of the Constitution controls and that it must be interpreted "in its popular sense, as understood by the people when they voted on its adoption." *Pa. Env't Def. Found. v. Commonwealth*, 161 A.3d 911, 929 (Pa. 2017). In ascertaining the meaning of a word in accordance with its common and approved usage, this Court has found it helpful to consult dictionaries. *Greenwood Gaming & Entertainment, Inc. v. Commonwealth*, 263 A.3d 611, 620 (Pa. 2021) (citing *Bruno v. Erie Ins. Co.*, 106 A.3d 48, 75 (Pa. 2014)). Around the time that the section addressing methods of election was first amended, "method" had been defined as "[a] general or established way or order of doing or proceeding in anything, or the means or manner by which such way is presented or inculcated[.]" *Method*, Standard

Dictionary of the English Language, Vol. II (M to Z), 1117 (1895). Our modern definition of "method" has diverged little, and provides, as relevant here, "a procedure or process for attaining an object: such as … a way, technique, or process of or for doing something." *Method*, MERRIAM-WEBSTER ONLINE DICTIONARY (last visited July 11, 2022); *see also Method*, BLACK'S LAW DICTIONARY, 1187 (11th ed. 2019) (defining "method" as "[a] mode of organizing, operating, or performing something, esp. to achieve a goal <method of election>").

Based on the use of such broad language, the General Assembly is authorized, pursuant to Section 4, to prescribe any process by which electors may vote. The amendment did not limit the relevant methods of casting a vote to ballot or voting machine, as were relevant at the time of its passage, but instead provided that the General Assembly could enact laws establishing "other methods" for elections by citizens, subject only to the requirement that the method preserve secrecy in voting. Maintaining the secrecy of an elector's vote is supported by a fairly straightforward rationale, namely, that "[a] citizen in secret is a free man; otherwise he is subject to pressure and, perhaps, control." *In re Second Legislative District Election*, 4 Pa. D. & C. 2d 93, 95 (C.C.P. Luzerne 1956). Such secrecy has historically served as a bastion to the integrity of the election franchise.[46] However, the requirement that secrecy must be preserved cannot

[46] Initially, the Constitution of 1874 provided an early method for maintaining secrecy in voting in Section 4:

> All elections by the citizens shall be by ballot. Every ballot voted shall be numbered in the order in which it shall be received, and the number recorded by the election officers on the list of voters, opposite the name of the elector who presents the ballot. Any elector may write his name upon his

alone inform the legislature as to what methods it may prescribe, only that those methods must maintain this secrecy. This was, and continues to be, the sole restriction found in Section 4.

The lack of restriction other than the maintenance of secrecy has overarching significance. The only restrictions on the power of our General Assembly to enact legislation are found within the Constitution, and any such restrictions must be explicit. *See Stilp*, 974 A.2d at 494-95 (explaining that courts must narrowly construe constitutional provisions that place limitations on the General Assembly's power because "unlike the federal Constitution, the powers not expressly withheld from the General Assembly inhere in it"). It is well established that "[t]he test of legislative power is constitutional restriction. What the people have not said in the organic law their representatives shall not do, they may do." *Russ*, 60 A. at 172. The courts are bound to

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> ticket or cause the same to be written thereon and attested by a citizen of the district. **The election officers shall be sworn or affirmed not to disclose how any elector shall have voted unless required to do so as witnesses in a judicial proceeding.**

PA. CONST. art. VIII, § 4 (1874) (emphasis added). Pursuant to the 1874 provision, it was required that the election officers were not to disclose voters' selections, whereas the legislature was not constitutionally mandated to establish voting methods which inherently maintained secrecy. Throughout the remainder of the nineteenth century, there were other election reforms that sought to preserve secrecy in the actual voting methods, most notably the Ballot Reform Act of 1891. Act of June 19, 1891, No. 289, P.L. 358. Through this legislation, counties were required to provide a "sufficient number of voting shelves or compartments at or in which voters may conveniently mark their ballots, so that in marking thereof they may be screened from the observation of others." *Id.* Moreover, the Ballot Reform Act further prohibited anyone from "electioneer[ing] or solicit[ing] votes for any party or candidate[.]" *Id.* With the 1901 amendment, maintaining secrecy in the voting method itself was enshrined in the Constitution. *See* PA. CONST. art. VIII, § 4 (1874) (amended in 1901).

respect the breadth of power given to our legislative branch, and we reject any challenge to a law that is not based on a prohibition in the Constitution. *Russ* illustrates this point, as the Court refused to invalidate a law for any reason less than a showing of constitutional prohibition, even in the face of a charge of corruption and the abuse of legislative power:

> 'Nothing but a clear violation of the Constitution—a clear usurpation of power prohibited—will justify the judicial department in pronouncing an act of the legislative department unconstitutional and void.' *Pennsylvania Railroad Company v. Riblet*, 66 Pa. 164, 5 Am. Rep. 360. 'To justify a court in pronouncing an act of the Legislature unconstitutional and void, either in whole or in part, it must be able to vouch some exception or prohibition clearly expressed or necessarily implied. To doubt is to be resolved in favor of the constitutionality of the act. This rule of construction is so well settled by authority that it is entirely unnecessary to cite the cases.'

Id. at 172-73.

Like the Court in *Russ*, we are scrupulously mindful that it is not the place of this Court to opine as to the wisdom or purpose underlying the law. To be a restraint on the General Assembly's law-making authority, it must be explicitly set forth or necessarily implied in the Constitution. There is no restriction – other than the maintenance of secrecy – in Section 4 on the methods of election the General Assembly may establish. The reading adopted by the Commonwealth Court that "such other method" refers only to "the use of mechanical devices at the polling place[,]" *McLinko,* 270 A.3d at 1262, is unsupported by the language of Section 4. The Commonwealth Court's supposition contravenes the maxim that when interpreting constitutional provisions, a court may not disregard the plain language of a statute in favor of "a supposed intent." *League of Women Voters*, 178 A.3d at 802. Nor can a court impose a restraint on legislative

authority that is not contained in the Constitution. Moreover, the Commonwealth Court minimized the constitutional amendment specifically permitting the use of voting machines that was enacted in 1928. *See* PA. CONST. art. VIII, § 7 (1874) (amended in 1928). Its construction that "such other methods" only refers to voting machines renders Section 4 as surplusage given the express constitutional recognition of voting by machine which now appears as Article VII, Section 6.

The determination of alternative procedures for conducting an election was vested in the legislature by Article VII, Section 4. It can be inferred from the Commonwealth Court's thorough historical background discussion[47] that when the *Chase* Court discussed the requirement that elections be "by ballot" in conjunction with its conclusion that voters must appear in person, it may have drawn from the method by which elections were then conducted, where a written ballot or ticket was completed by a voter who would then personally present it at a polling place.

Assuming that this was the established method of voting, the amendment to Section 4 clearly authorizes alternative methods. And although the recorded history of the amendment reflects that the drafters envisioned the legislative allowance of voting machines, the legislature's authority was conspicuously not limited to that one other method.

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[47] *See McLinko*, 270 A.3d at 1254-56. Although it provides thorough explication of the history of the use of ballots as a method of voting, we take some exception to the Commonwealth Court's notion that Pennsylvania voters during the entirety of the colonial era voted viva voce. *See id.* at 1254. While some colonies practiced viva voce voting, many others, including Pennsylvania, used ballots. David Clark*, Law Reform as a Legal Transplant: The South Australian Ballot in Australia and in America*, FLINDERS J. OF L. REFORM, Vol. 11, Issue 2, at 312 (2009).

Act 77 prescribed another method for elections. By application, universal mail-in voters pre-qualify to cast a ballot in their election district and request mail-in ballots, *see* 25 P.S. § 3150.12, and return the completed slip to their respective county board of elections for canvassing, *see* 25 P.S. §§ 3150.16, 3146.8. Nothing in Article VII, Section 4 dictates how an elector must deliver their vote for canvassing and nothing in Article VII, Section 1 requires a qualified elector to deliver a vote in person, i.e., to manually deliver the ballot to a designated official. The Constitution does not restrain the legislature from designing a method of voting in which votes can be delivered by mail by qualified electors for canvassing.[48] It is beyond dispute that "[f]or the orderly exercise of the right [to vote] resulting from these qualifications, it is admitted that the legislature must prescribe necessary regulations, as to the places, mode and manner, and whatever else may be required, to insure its full exercise." *Robinson Twp.*, 83 A.3d at 944 n.31 (quoting *Page*, 58 Pa. at 347). Thus, pursuant to Section 4, the legislature has the authority to provide that votes can be cast by mail by all qualified electors. The only restraint on the legislature's design of a method of voting is that it must maintain the secrecy of the vote.[49]

[48] In contrast to the postal system as it existed when *Chase* was decided, *see* supra note 36, our postal service has become increasingly more sophisticated. By the 1960s, the advent of Zoning Improvement Plan ("ZIP") Codes and letter sorting machines enabled more efficient and effective organization of mail, increasing productivity and reliability. USPS, supra, at 54-59. This automation in postal sorting and delivery continued to advance throughout the decades, particularly with the development of computer technology. *Id.* at 68-74.

[49] The Election Code provides for secrecy in universal mail-in voting by requiring the use of both an inner envelope marked only as "Official Election Ballot," and a larger envelope. *See* 25 P.S. § 3150.14. Once a universal mail-in voter receives an official mail-in ballot, they are required to mark the ballot in secret and seal it in the envelope marked "Official Election Ballot," and then they must secure the secrecy envelope inside the larger envelope. *Id.* § 3150.16. If there is any identifying information on any of the envelopes,

Act 77 ensures such secrecy in the same manner as it did with the design of the procedure for absentee voting by mail which has been a part of our election methodology since 1963.

Appellees argue that Act 77 impermissibly eliminates the requirement that electors must cast their ballots in person in preordained locations. *See* Bonner's Brief at 43. Likewise, the underpinning of the Commonwealth Court's reasons for invalidating universal mail-in voting was that "it ignores the in-person place requirement that was made part of our fundamental law in 1838." *McLinko*, 270 A.3d at 1263. We have rejected that interpretation in the context of the Constitution in effect at the time Act 77 was enacted. Rather, the controlling principles are that Section 4 broadly authorizes the legislature to prescribe alternative methods of voting and the Constitution does not otherwise prohibit the General Assembly from enacting universal mail-in voting. Thus, the General Assembly possesses the power to do so. *See Stilp*, 974 A.2d at 499 ("Consistent with our guiding principles of Pennsylvania Constitutional analysis, the General Assembly has the ability to act, absent some prohibition.").

d. Article VII, Section 14

Appellees argue that an interpretation of Section 4 that permits the enactment of universal mail-in voting renders Section 14 mere surplusage, as there would be no need for a separate constitutional provision establishing absentee voting for certain categories of voters if the General Assembly could effectuate the same through legislation. This is incorrect. Section 14 establishes the categories of qualified electors that are entitled to

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it is required that the envelopes and ballots must be set aside and declared void. *Id.* § 3146.8. This process is virtually identical to the process absentee voters have used since 1963. *See* Act of August 13, 1963, No. 379, P.L. 738.

avail themselves of absentee voting and guarantees those categories of voters **a** method of casting an absentee vote.

Section 14 provides, in relevant part, the following:

> **§ 14. Absentee voting**
>
> (a) The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. art. VII, § 14(a) (1968 as amended).

The history of the inclusion in our Constitution of a provision for qualified electors to vote if they are absent from their election district on Election Day is relevant to our analysis. Our Charter was amended in 1864 in response to *Chase* to allow qualified electors in active military service to exercise their right of suffrage in a manner prescribed by law as if they were present in their usual place of election. PA. CONST. art. III, § 4 (1838) (amended in 1864). The amendment addressed the *Chase* court's concern that the legislature, not military authority, is required to set the parameters for exercising the right to vote. More directly, it established that a qualified voter in active military service had the ability to cast a vote from outside of his designated election district.

Subsequent amendments to the absentee voting provision of the Constitution made accommodations for qualified voters unable to vote in their district due to their

"unavoidable" absence because of their duties, occupation or business or because of illness or physical disability, *see* PA. CONST. art. VIII, § 19 (1874) (amended in 1957), and later, eliminated the "unavoidable" nature of the absence for work-related absence and added the additional classification of absentee voters that appears in our current Constitution.

While it is accurate that Act 77's provision of universal mail-in voting provides a way for designated absentee voters to cast their vote without resorting to the absentee voting provisions of the Election Code,[50] this current ability to do so does not render Section 14 of Article VII surplusage. As discussed, nothing in Article VII prohibits the legislature from eliminating the ability of qualified voters to cast their votes by mail, just as nothing in the Constitution required it to do so. By recently enacting Act 77, the legislature made a policy decision, based on the authority afforded it by our Charter, to afford all qualified voters the convenience of casting their votes by mail. However, acts of the legislature are not guaranteed to be permanent.

Article VII, Section 14 guarantees[51] that regardless of the legislature's exercise of its authority to determine the way that votes may be cast, those classes of absentee

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[50] *See* 25 P.S. §§ 2602(z.6), 3150.11, 3150.12.

[51] The guaranty to be free from legislatively imposed, in-person voting requirements to the classes of voters enumerated in Section 14 was established by the Constitution of 1968. The predecessor section provided as follows:

> The Legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who may, on the occurrence of any election, be unavoidably absent from the State or county of their residence because of their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are

voters designated within it will be guaranteed the ability to participate in the electoral process. Whether or not Act 77's universal mail-in provisions survive future legislatures, Article 14 guarantees the constitutionally designated qualified voters a way to exercise their franchise regardless of their location on Election Day.

G. Conclusion

Section 13 of Act 77 is not a bar to our consideration of the universal mail-in voting provisions of the Act. The Commonwealth Court's declaration that the universal mail-in voting provisions of Act 77 were unconstitutional was premised on its conclusion that it was bound by the definition of "offer to vote" in Article VII, Section 1 of our Constitution as construed in the *Chase* and *Lancaster City* decisions. For the reasons we have explained, the pronouncements in those cases do not control our interpretation of the Constitution in effect when Act 77 became law. Based upon our analysis of Article VII, Section 1 of our Constitution, we conclude that the phrase "offer to vote" does not establish in-person voting as an elector qualification or otherwise mandate in-person voting. We reiterate that our General Assembly is endowed with great legislative power,

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> unable to attend at their proper polling places because of illness or physical disability, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. art. VIII, § 19 (1874) (amended in 1957).

In 1968, the directory "may" became the mandatory "shall" that continues to appear in Section 14. *See Lorino v. Workers' Comp. Appeal Bd.*, 266 A.3d 487, 493 (Pa. 2021) ("The term 'shall' establishes a mandatory duty, whereas the term 'may' connotates an act that is permissive, but not mandated or required."); *see also Zimmerman v. O'Bannon*, 442 A.2d 674, 677 (Pa. 1982) (refusing "to ignore the mandatory connotation usually attributed to the word 'shall'").

subject only to express restrictions in the Constitution. We find no restriction in our Constitution on the General Assembly's ability to create universal mail-in voting.[52] The order of the Commonwealth Court is affirmed as to the reviewability of the challenged statutory provisions. Otherwise, the decision is reversed.[53]

Chief Justice Baer and Justices Todd and Dougherty join the opinion.

Justice Wecht joins the opinion, except for its determination that Act 77 prescribed an "other method" of voting, pursuant to Article VII, Section 4 of our Constitution.

Justice Wecht files a concurring opinion.

Justice Mundy files a dissenting opinion in which Justice Brobson joins.

Justice Brobson files a dissenting opinion in which Justice Mundy joins.

[52] It bears repeating that Act 77's universal mail-in voting extends a method of voting to the entire electorate that our General Assembly has made available to voters it legislatively deemed to be absentee voters in 1963 and 1968. *See* supra pp. 40-41.

[53] Our conclusion in this regard defeats Bonner's federal claims, as the viability of those claims requires a finding that the universal mail in provisions of Act 77 are unconstitutional under the Pennsylvania Constitution. *See* Bonner's Brief at 15-16 (explaining that his claims that Act 77 violate federal law and the U.S. Constitution as based on the premise that the General Assembly violated the Pennsylvania Constitution when it enacted it). As we have found no constitutional infirmity in Act 77's universal mail in voting provisions, there is no foundation for Bonner's claims.

[J-18A-2022, J-18B-2022, J-18C-2022, J-18D-2022 and J-18E-2022]
[MO: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DOUG MCLINKO, Appellee v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE; AND LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, Appellants	:	No. 14 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 244 MD 2021 dated January 28, 2022. ARGUED: March 8, 2022
TIMOTHY R. BONNER, P. MICHAEL JONES, DAVID H. ZIMMERMAN, BARRY J. JOZWIAK, KATHY L. RAPP, DAVID MALONEY, BARBARA GLEIM, ROBERT BROOKS, AARON J. BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W. KEEFER, DAN MOUL, FRANCIS X. RYAN, AND DONALD "BUD" COOK, Appellees v. LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, Appellants	:	No. 15 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 293 MD 2021 dated January 28, 2022. ARGUED: March 8, 2022

DOUG MCLINKO	:	No. 17 MAP 2022
	:	
	:	Appeal from the Order of the
v.	:	Commonwealth Court at No. 244
	:	MD 2021 dated January 28, 2022.
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE; AND LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA	:	ARGUED: March 8, 2022
	:	
CROSS APPEAL OF: YORK COUNTY REPUBLICAN COMMITTEE, WASHINGTON COUNTY REPUBLICAN COMMITTEE, BUTLER COUNTY REPUBLICAN COMMITTEE	:	
	:	
TIMOTHY R. BONNER, P. MICHAEL JONES, DAVID H. ZIMMERMAN, BARRY J. JOZWIAK, KATHY L. RAPP, DAVID MALONEY, BARBARA GLEIM, ROBERT BROOKS, AARON J. BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W. KEEFER, DAN MOUL, FRANCIS X. RYAN, AND DONALD "BUD" COOK	:	No. 18 MAP 2022
	:	
	:	Appeal from the Order of the
	:	Commonwealth Court at No. 293
	:	MD 2021 dated January 28, 2022.
	:	
	:	ARGUED: March 8, 2022
	:	
v.	:	
	:	
LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE	:	
	:	
CROSS APPEAL OF: YORK COUNTY REPUBLICAN COMMITTEE, WASHINGTON COUNTY REPUBLICAN COMMITTEE, BUTLER COUNTY REPUBLICAN COMMITTEE	:	

TIMOTHY R. BONNER, P. MICHAEL JONES, DAVID H. ZIMMERMAN, BARRY J. JOZWIAK, KATHY L. RAPP, DAVID MALONEY, BARBARA GLEIM, ROBERT BROOKS, AARON J. BERNSTINE, TIMOTHY F. TWARDZIK, DAWN W. KEEFER, DAN MOUL, FRANCIS X. RYAN, AND DONALD "BUD" COOK, Cross Appellants v. LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, AND COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE, Appellees	:	No. 19 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 293 MD 2021 dated January 28, 2022. ARGUED: March 8, 2022

CONCURRING OPINION

JUSTICE WECHT **DECIDED: August 2, 2022**

I join the learned Majority in full, except for its determination that Act 77 prescribed an "other method" of voting, pursuant to Article VII, Section 4 of our Constitution.

As this Court enters its fourth century of service to the Commonwealth, this appeal illustrates the simple truth that a great deal of our function as expositors of the Constitution of Pennsylvania boils down to how we treat our earlier decisions. This case raises fundamental questions about legislative power, with particular focus on the exercise of the elective franchise. Article VII, Section 1 of our organic charter sets forth the qualifications of Pennsylvania's electors. It provides, *inter alia*, that an elector "shall have resided in the election district where he or she shall offer to vote at least 60 days

immediately preceding the election." PA. CONST. art. VII, § 1. In 1862, the Court confronted a challenge to an act of the General Assembly providing for absentee voting by certain electors then engaged in military service too far away from their established election districts to vote in person. Invalidating that law, the Court declared that "[t]o 'offer to vote' by ballot, is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it." *Chase v. Miller*, 41 Pa. 403, 419 (1862). And so it has been the general rule in Pennsylvania that voters cast their ballots in person. *See id.*

The Commonwealth Court discerned "nothing fusty" about that precedent. *McLinko v. Dep't of State*, 270 A.3d 1243, 1261 (Pa. Cmwlth. 2022). Following *Chase* to the letter, the lower court concluded that the General Assembly exceeded its power when it provided for universal, no-excuse mail-in voting via Act 77 of 2019.[1] *Id.* at 1273. Conversely, the Majority today dismisses the *Chase* Court's construction of "offer to vote" as non-binding *dicta*, both "incidental" and "unnecessary" to that holding. *See* Maj. Op. at 52. Finding that Article VII, Section 1 places no such limitation upon the General Assembly's plenary authority to extend remote voting to the electorate as a whole by statute, the Court upholds Act 77 as a valid exercise of legislative power. *Id.* at 74.

While I join the learned Majority in full with respect to its analysis of Section 13 of Act 77, *see id.* at 41-45, and similarly find no constitutional impediment to the General Assembly legislating universal mail-in voting, I write separately to underscore *Chase*'s infirmities relative to both its constitutional era and ours. *Obiter dictum* cannot compel an outcome in later disputes, but it may nonetheless retain some degree of persuasive

[1] Act of Oct. 31, 2019, P.L. 552, No. 77.

value.[2] While I do not necessarily disagree with the assertion that *Chase*'s treatment of "offer to vote" constitutes *dicta*,[3] its role in today's constitutional analysis merits further close examination here.

The Constitution "must be interpreted in its popular sense, as understood by the people when they voted on its adoption." *Ieropoli v. AC&S Corp.*, 842 A.2d 919, 925 (Pa. 2004). What existed as Article III, Section 1 at the time of *Chase*, *see* PA. CONST. (1838) art. III, § 1, and now occupies Article VII, Section 1, has survived two significant moments of constitutional revision. We therefore must consider the possibility that, when the people engaged in broad-spectrum revisions that culminated in the Constitutions of 1874 and 1968, they deliberately re-ratified this "offer to vote" provision as *Chase* understood it. In other words, even if the in-person requirement *Chase* gleaned from the Constitution was inessential to its ruling, what began as commentary with dubious legal effect might have *become* law when the citizenry preserved the same terminology that *Chase* had so described.

The value of consistency in constitutional interpretation militates in favor of preserving and faithfully applying this Court's past interpretations of our Constitution. *See Stilp v. Commonwealth*, 905 A.2d 918, 967 (Pa. 2006) ("The doctrine of *stare decisis* maintains that for purposes of certainty and stability in the law, a conclusion reached in

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[2] "A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive)." *Obiter dictum*, BLACK'S LAW DICTIONARY 1240 (10th ed. 2014). *See also Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935) (describing *dicta* as expressions "which may be followed if sufficiently persuasive[,] but which are not controlling").

[3] *See* Maj. Op. at 51 ("[T]he clear target of the Court's attention in *Chase* was that the Military Absentee Act permitted voting in locations other than in duly created legislative election districts."). I discuss the elements of *Chase* that retain precedential merit in greater detail *infra*, at 16-18.

one case should be applied to those which follow, if the facts are substantially the same, even though the parties may be different.") (cleaned up). Still, though, our respect for precedent can go only so far, especially in the constitutional arena, where we have held that blind adherence thereto is no excuse "for perpetuating error." *See id*. at 967 (quoting *Mayle v. Pa. Dep't of Highways*, 388 A.2d 709, 720 (Pa. 1978) ("[T]he doctrine of *stare decisis* is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice and, thus, permits the orderly growth processes of the law to flourish.")). Whatever deference is owed, reviewing courts must always bow to the "force of better reasoning," *see Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 408 (1932) (Brandeis, J., dissenting), and our "ultimate touchstone" is the text of the Constitution itself. *Firing v. Kephart*, 353 A.2d 833, 835-36 (Pa. 1976). So, while I am cautious not to hastily discount the persuasive value of *dicta*, I nonetheless reject the path of unquestioning adherence to *Chase*. *See McLinko*, 270 A.3d at 1273. The provisions that govern the franchise and its exercise have changed dramatically since 1862.[4] It would therefore disserve the foregoing principles to kick the proverbial tires of *Chase* and award it some perfunctory approval based upon a colorable theory of acquiescence. The contest between a requirement that may have been sewn into the fabric of the Constitution by the function of time or consistent legislative action and the document's plain language is no contest at all.

[4] *Compare* PA. CONST. (1838) art. III, § 2 ("All elections shall be by ballot, except those by persons in their representative capacities, who shall vote *viva voce*."), *with* PA. CONST., art. VII, § 4 ("All elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved."). Beyond this clear expansion of legislative authority over the manner of holding elections, Article VII now also includes Section 14, which establishes a right to absentee voting for several enumerated populations. *See* PA. CONST. art VII, § 14. I discuss the function of Section 14 in more detail *infra*, at 20-24.

Upon closer examination, Justice Woodward's treatment of "offer to vote" represents precisely the sort of *ipse dixit* that exceeds this Court's constitutional prerogative. Judicial review is not an exercise in consulting oracles whose proclamations hold water by virtue of some inherent authority. Rather, it represents the deliberative and analytical work of courts effectuating the will of the people, from whom all power flows, *see* PA. CONST. art. I, § 2,[5] as they have expressed it in writing. The *Chase* Court's construction of "offer to vote" finds no basis in the text or structure of Article VII. It neither aligns with the meaning of those words—presently or at the time of their inclusion in our Constitution—nor does it reflect the apparent intent of the democratic body that adopted them. In my view, these deficiencies preclude us from following *Chase* today.

The 1862 Court's analysis suffers mightily from the outset. The Court began by observing that the General Assembly had drafted the Military Absentee Act of 1839—which was "virtually a reprint of" the Military Absentee Act of 1813—five years before its enactment. *Chase*, 41 Pa. at 416. From the bare fact that "the legislature passed [the 1839 Act] pretty much in the words submitted," the Court deduced that the General Assembly failed to recognize "the changes which . . . had taken place in our fundamental law" over the interim—*i.e.*, the revision of the Constitution of 1790. *Id.* at 417. "We are not to wonder at this," Justice Woodward relates, "for instances of even more careless legislation are not uncommon." *Id.* To wit, since the Legislature "did not hesitate to retain the substance of the Act of 1813[,]" the *Chase* Court theorized that it irresponsibly overlooked the ratification of the 1838 Constitution and the introduction of "offer to vote" between 1834 and 1839. *Id.*

[5] "All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. . . ."

But this Court presumes neither carelessness nor ignorance from our General Assembly. Rather, the Legislature's acts "enjoy a strong presumption of validity, and will only be declared void if they violate the Constitution clearly, palpably, and plainly." *Commonwealth v. Bullock*, 913 A.2d 207, 211 (Pa. 2006) (cleaned up); *see Sharpless v. Mayor of Phila.*, 21 Pa. 147, 164 (1853) (opinion of Black, C.J.) ("[W]e can declare an Act of Assembly void, only when it violates the constitution *clearly, palpably, plainly*; and in such manner as to leave *no doubt* or hesitation on our minds.") (emphasis in original). To succeed in challenging a statute's constitutionality is to bear a "very heavy burden," and we must resolve any doubt in favor of the constitutionality of legislative action. *Bullock*, 913 A.2d at 212 (quoting *Payne v. Commonwealth, Dep't of Corr.*, 871 A.2d 795, 800 (Pa. 2005)). By presuming unscrupulous action from a coequal branch of our Commonwealth's government, the *Chase* Court began its analysis on the wrong foot, in derogation of the separation of powers.

The parade of infirmities does not end there, though. As both the Majority and the Acting Secretary observe, the constitutional provision in which "offer to vote" appeared in 1838 concerned the *qualifications* of voters; the *method* of voting was prescribed elsewhere in Article III. *See* Maj. Op. at 30-35; Acting Secretary Br. at 39-46. Recognizing that drafters do not ordinarily "hide elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), this distinction alone led several peer courts interpreting virtually identical "offer to vote" provisions to expressly reject *Chase*'s logic.[6] That its reading assumed the interpolation of a substantive constitutional

[6] *See, e.g.*, *Moore v. Pullem*, 142 S.E. 415, 421-22 (Va. 1928) ("To suppose that the draftsmen of the Constitution paused in the writing of these elaborate provisions relating to these different subjects and interrupted the sequence of thought to digress and to interpolate the requirement that the voter must be personally present to tender his ballot on the day of election, and that in this unusual way and by this equivocal language they intended to inhibit the General Assembly from passing such a statute, appears to us to

ignore fundamental rules of construction. The method of voting is elsewhere . . . specifically and unequivocally committed to the legislative discretion."); *Goodell v. Judith Basin Cty.*, 224 P. 1110, 1114 (Mont. 1924) ("In order . . . to hold that the clause 'at which he offers to vote' was intended to . . . describe the manner of voting, we must assume that the learned men who drafted [that provision] stopped short in the very midst of defining the qualifications of an elector and injected an idea of an entirely different character; but no one familiar with the rudiments of English would undertake to define . . . manner of voting, by the use of the language employed in [the voter qualifications provision]."); *Jenkins v. State Bd. of Elections of N.C.*, 104 S.E. 346, 349 (N.C. 1920) ("[T]he context of article 6 [of the North Carolina Constitution] indicates that the personal presence of the voter is not required in order to cast his ballot. An offer to vote may be made in writing, and that is what the absent voter does when he selects his ballots and attaches his signature to the form and mails the sealed envelope to [the] proper official. The section requires only that he must make that offer in the precinct where he has resided . . . ."); *Straughan v. Meyers*, 187 S.W. 1159, 1162 (Mo. 1916) ("It is clear that this section does not undertake to prescribe the manner in which a choice shall be expressed, or a vote cast, . . . but merely the qualifications on the voters. It is true, under this provision, a person can only vote in the place of his residence, but this constitutes no inhibition against any particular method the Legislature may provide to enable him to so vote."); *accord Lemons v. Noller*, 63 P.2d 177, 185 (Kan. 1936); *Bullington v. Grabow*, 298 P. 1059, 1059-60 (Colo. 1931). Other jurisdictions have rejected similar efforts to conflate voting methods with voter qualifications. *See Jones v. Smith*, 264 S.W. 950, 950-51 (Ark. 1924) (holding that voter qualifications provision of state constitution attaching the phrase "where he may propose to vote" to various residency requirements did not preclude absentee voting); *Morrison v. Springer*, 15 Iowa 304, 345-47 (1863) (same, where voter qualifications provision required sixty days' residency in "the county in which he claims his vote").

Eliding these precedents, Bonner relies heavily upon three decisions from the Supreme Court of New Mexico that credited *Chase*'s conclusion that "offer to vote" required manual delivery of one's ballot. *See* Bonner's Br. at 43-47 & n.8 (citing *Chase v. Lujan*, 149 P.2d 1003 (N.M. 1944); *Baca v. Ortiz*, 61 P.2d 320 (N.M. 1936); *Thompson v. Scheier*, 57 P.2d 293 (N.M. 1936). While those cases *did* invoke our 1862 decision and those of the divided high courts of California and Michigan, *see Bourland v. Hildreth*, 26 Cal. 161 (1864); *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127 (1865) (*seriatim*), the Majority aptly observes that what drove the New Mexico Supreme Court's decision was a long-standing statutory command, dating to the State's territorial days, that, "All votes shall be by ballot, each voter being required to deliver his own vote in person." *See* Maj. Op. at 27 n.20 (quoting L. 1851, p. 196, Code 1915, § 1999); *see Thompson*, 57 P.2d at 295-96, 301; *see also Lujan*, 149 P.2d at 1004-06 (identifying several other territorial-era election statutes containing "offer to" language, still in force when New Mexico attained statehood, requiring in-person participation for various purposes, including registering to vote). But the *Chase* Court had no such Pennsylvania legacy

requirement in a section that concerns an entirely distinct subject may not, by itself, prove fatal to *Chase*. It does, however, serve to fan the flames of skepticism.

Justice Woodward, himself a delegate to the 1837 constitutional convention, might also have grounded his analysis in the intent and aims of the men who chose to introduce "offer to vote" into the constitutional text. But he did not, and with good reason: any examination of that project would have yielded results that undermined his conclusion. Pages and pages of convention proceedings reveal a body preoccupied with the switch from at-large voting to precinct voting, with no mention whatsoever of any in-person voting requirement.

The most substantial discussion of the proposed Article III, Section 1 took place on Wednesday, January 17, 1838. In its initial draft, the provision did not use the phrase "offer to vote," nor did it require residence in a particular "election district."[7] In this respect, the draft language largely tracked that of the 1790 Constitution.[8] Delegate Emanuel C.

upon which to rely. Thus, New Mexico's experience provides little support for Bonner's contention.

[7] When debate began on January 17, the provision read as follows:

> SECTION 1. In elections by the citizens, every freeman of the age of twenty-one years, having resided in the state one year, and, if he had previously been a qualified elector of this state, six months, and within two years paid a state or county tax, which shall have been assessed at least ten days before the election, shall enjoy the rights of an elector. Provided that freemen, citizens of the United States, between the ages of twenty-one and twenty-two years, and having resided in this state one year before the election, shall be entitled to vote, although they shall not have paid taxes.

9 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA TO PROPOSE AMENDMENTS TO THE CONSTITUTION, COMMENCED AT HARRISBURG, MAY 2, 1837, 296 (Packer, Barrett, & Parke, pubs., 1839) ("PROCEEDINGS").

[8] *See* PA. CONST. (1790) art. III, § 1:

> In elections by the citizens, every freeman of the age of twenty-one years, having resided in the State two years next before the elections, and within

Reigart of Lancaster County then proposed inserting the words "and shall have resided in the district in which he shall offer to vote, at least ten days immediately preceding such election." 9 PROCEEDINGS, at 296. Ten days, according to Reigart, was a "sufficient time . . . for [an elector] to be assessed. A residence was obtained by the payment of a tax." *Id.* Another delegate, believing "that a residence of ten days was too long, as an absolute qualification," indicated his willingness to support "five, or seven days," *id.* at 303; yet another proposed "fifteen days," *id.* at 314. And after Reigart apparently acquiesced to a shorter timeframe, a third delegate proposed reverting to the original suggestion of ten days. *See id.* Other delegates fretted about which taxes might empower an individual to vote within a given election district. Proposals to include school taxes, poor taxes, and municipal corporation taxes failed by a vote of fifty-five to fifty-four. *Id.* at 313.[9] The convention eventually settled on state and county taxes, leaving that part of the provision unchanged from the 1790 Constitution. *Id.* at 316.

> that time paid a State or county tax, which shall have been assessed at least six months before the election, shall enjoy the rights of an elector: Provided, That the sons of persons qualified as aforesaid, between the age of twenty-one and twenty-two years, shall be entitled to vote, although they shall not have paid taxes.

[9] *See also* 3 PROCEEDINGS, at 92-95. Regarding a proposal that "free male citizens, qualified by age and residence . . . who shall, within two years next before the election, have paid any public tax required by law should also be entitled to vote in the district in which they reside," one delegate stated his motivations plainly:

> His object in introducing [the amendment] was to give the right of suffrage to every citizen who had paid a State, county, road, school, or poor tax. It had happened that a man had gone and presented his vote, with a receipt of his having paid the poor tax—when he was told by the election officer that he had not paid his county tax, and consequently he could not vote. Now, the object of [the] amendment was to extend the elective franchise, to the greatest possible limits. He would not be in favor of any tax, were it not for ascertaining a man's residence.

The great thrust of the debate, though, concerned whether the Constitution should include a residency requirement at all. Delegate John Cummin of Juniata County, among others, noted that

> many mechanics and laborers were in the habit of removing from place to place. They might, for instance, live in this township today, and tomorrow, go a mile or a mile and a half off. So that, although a man might be a citizen of the state, and in the habit of voting, yet, if this amendment should be adopted, he might probably be deprived of . . . the sacred and invaluable right of suffrage.

Id. at 297.[10] Delegate William Hiester acknowledged the "great difference of opinion as to what constituted a residence. In some places, sleeping a night; in others, a day's residence, or having some washing done, was a sufficient evidence of his right to vote. There was great vagueness and uncertainty, connected with the matter." *Id.* at 298. One delegate wondered whether "a man residing in the city of Philadelphia [whose] house [is] destroyed by a fire," forcing him to move just beyond the city lines to the county of Philadelphia in the days before an election, would "be deprived of the right of suffrage?" *Id.* at 307.

Id. at 92.

[10] Numerous other delegates expressed precisely the same concern. *See, e.g.*, *id.* at 298 ("It was well known that a great many hands were employed, and that they had continually to remove from one county to another, and from township to township. A citizen of one county might remove over to another, and this amendment would deprive him of the right of voting."); *id. at* 304-05 ("[T]he mechanical and laboring classes of society . . . frequent[ly] change [ ] residence[s] in order to suit their occupation. . . . If a man moves into a district the night before the election—if his removal be for the purpose of pursuing the regular business by which he lives—I say that, unless it can be shown that there was fraud, there is no reason why, by a constitutional enactment, we should deprive him of the right to vote. I repudiate the doctrine altogether."). Others attempted to quell those fears, asserting that "[t]here were very few voters . . . who did not reside in their respective districts, for at least ten days before the election." *Id.* at 301.

Interspersed in these discussions are several intimations of the amendment's fundamental purpose. Delegate Walter Craig opined that, if Reigart's proposal were not adopted,

> it will be seen that no residence will be required, to entitle a man to vote in any district, ward, or borough, where he may choose to exercise this privilege; that is to say, if an individual shall have resided in one part of the state for a given space of time, and shall have paid a state or county tax, he will be entitled, in the absence of such an amendment . . . to vote at elections in any other place. The object of the amendment is to prevent this amalgamation, so to speak, of electors from different parts of the state; *it is to keep [electors] within their own proper districts.*

Id. at 300 (emphasis added). Delegate James Biddle put it succinctly: "Those who resided in a particular district, were the persons who ought alone to be entitled to vote in that district, because they were the persons to be affected by the election in that district." *Id.* at 309.

A lengthy speech by Delegate James Dunlop carried the day. Dunlop began by calling attention to the fact that the General Assembly had enacted a local (or "district") residency requirement by statute in 1799,[11] though he quickly acknowledged that "it might be a question of some doubt, whether an act of assembly could enlarge or restrict the qualifications of electors" beyond those contemplated by the Constitution. *Id.* at 317-18. Although Dunlop believed "this [local residency] requirement . . . long had been held to be the law of the land," he conceded that "considerable doubt" remained as to "whether a man was bound to reside in the district in which he voted." *Id.* at 318. Intimating that "judges and inspectors of elections" might "infringe the present law" on that basis, he opined that "the experience of half a century had shown the necessity of requiring a residence of the voter," such that "a provision ought to be inserted" into the founding charter to quash any lingering questions about the act's propriety. *Id.*

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[11] *See* Act of Feb. 15, 1799, 3 Smith's Laws 340.

Raising the specter of "import[ed] voters from different parts of the country," Dunlop then related a story about two individuals in Baltimore who "had no particular place of residence" and, taking advantage of an omission in the law that required "no particular time" to establish residency for purposes of voting, allegedly "had voted together in every ward but one." *Id.* at 318-19. "Could there be any doubt that under the operation of such a law, many unfair practises [*sic*] were obtained?" *Id.* at 318. Undoubtedly, Philadelphia was no stranger to the practice of such "great frauds." *Id.* "In the city of Pittsburg[h]," he added, "men had been apprehended, charged with having voted where they had no right to vote." *Id.* at 318. With these fears in mind, he concluded:

> [I]f a man could change his residence three or four times a day, there could be no evidence to prove that he was entitled to a vote, but when a man was compelled to reside a certain time in one district, before being permitted to vote, then we fixed the *indicia* of his residence.

Id. at 319 (emphasis in original). The convention then adopted the amendment by a vote of sixty-four to sixty. *Id.* at 320.

Had the *Chase* Court searched for the impetus behind the convention's adoption of the "offer to vote" language, it would have found overwhelming evidence that the delegates were principally concerned with the change from at-large to precinct voting and carefully considered whether the imposition of a local residency requirement to establish one's *qualifications* as an elector could be sustained other than by constitutional amendment. The delegates wrestled with *where* an individual should be allowed to vote, with an eye toward the Commonwealth's ongoing westward expansion and the political rights of transient populations. They quibbled over the duration of the residency

requirement and what sorts of taxes would suffice. But I have found no evidence that delegates concerned themselves with *how* electors should vote.[12]

Even without support from the structure of then-Article III or the intentions that animated its drafting, an interpretation of "offer to vote" that incorporates an in-person requirement might still have prevailed today if it found traction in the plain meaning of those words. But here, too, *Chase*'s reading fails. Nothing about the verb "offer," as presently used or as employed in the nineteenth-century, mandates physical presence. Dictionaries of that era defined "to offer" as "to exhibit anything so as that it may be taken

[12] The *Chase* Court conceivably might have found a modicum of support for its view in the comments of a lone delegate. James Biddle opined that the Reigart amendment would "make it more difficult for persons disposed to give fraudulent votes, to accomplish their ends." 9 PROCEEDINGS, at 309. An individual who had resided in a district for ten days, he said, "will be known by some person, and frauds cannot be perpetrated as they now are, one voter giving in a vote at perhaps one or two wards in the city, in Southwark and the Northern Liberties on the same day." *Id.* By requiring voters to establish "fixed residences," Biddle suggested "it will be in the power of some one at the polls, to point out where another resides, and if he votes in an improper place, he may be punished for his fraud and crime." *Id.* While this discrete deterrence justification coheres with the Court's eventual analysis, *see Chase*, 41 Pa. at 419 ("[T]he voter, *in propria persona*, should offer his vote in an appropriate election district, in order that his neighbours might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful."), it stands alone in the historical record. Moreover, it reinforces the notion that the principal evil that concerned delegates was the circumstance in which electors fraudulently attempted to vote *in more than one election district*, not the particular form of their votes. In any event, the Election Code long has imposed various fraud-control measures—above and beyond anything envisioned by nineteenth-century voter-fraud prognosticators—to ensure that an elector is qualified to vote in a particular election district, that only a qualified elector may obtain an absentee (or, now, mail-in) ballot, and that no elector is able to cast more than one ballot, no matter the method he or she chooses to vote.

or received"; "to attempt; to commence; to propose";[13] or even "to declare a willingness."[14] Not one of these meanings supports Justice Woodward's narrower reading. McLinko concedes that "one might imagine someone sending a contractual 'offer' through the mail"—indeed, the average Pennsylvanian in 1838 or 1862 certainly would have been familiar with offers to buy, sell, contract, appear, prove, etc., by way of a letter, *see, e.g.*, *Slaymaker v. Irwin*, 4 Whart. 369 (Pa. 1839) (adjudicating breach of contract executed by mail)—but nonetheless maintains that offering to vote by mail would be "far less common." McLinko's Br. at 11. In doing so, he devastates his own argument. Faced with two uses of a given word or phrase in the Constitution, both of which would have been understood by the ratifying voter, the Court cannot simply cast one aside as illegitimate on mere conjecture.[15]

It is for these reasons that the Court is justified in discarding *Chase*'s construction of "offer to vote." The text, structure, intent, and original public meaning of that constitutional provision all run counter to its ultimate conclusion. Without any discernible resort to conventional tools of constitutional interpretation, the Court's opinion turned instead on policy considerations, not entirely convincing in their own right, that fall outside the purview of the judicial branch. The General Assembly, the Court alleged, had "open[ed] a wide door for [the] most odious frauds," enabling "political speculators, who prowled about the military camps watching for opportunities to destroy true ballots and

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[13] SAMUEL JOHNSON & JOHN WALKER, A DICTIONARY OF THE ENGLISH LANGUAGE 503 (1828 ed.); *cf.* 9 PROCEEDINGS, at 315 ("[H]e must prove that he has lived in some particular district for the last fifteen days prior to the election, at which he *purposes* [*sic*] to vote.") (emphasis added).

[14] NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 689 (1828).

[15] To do so, in fact, would contradict our mandate to resolve all doubts about constitutionality in favor of the Legislature. *Cf. Payne*, 871 A.2d at 800.

substitute false ones, to forge and falsify returns, and to cheat citizen and soldier alike out of the fair and equal election provided for by law." *Chase*, 41 Pa. at 425; *id.* ("And this is the great vice of [the Act]—that it creates the occasion and furnishes the opportunity for such abominable practices."). These considerations do not belong in the courts, but in the halls of the General Assembly, and their prominence in the *Chase* Court's analysis engenders still more suspicion as to the legitimacy and soundness of its interpretation of "offer to vote."

While the foregoing considerations establish why *Chase*'s reading of then-Article III (now-Article VII), Section 1 should be abrogated (to the extent they constitute binding precedent at all), other elements of that decision survive today's review. As the Majority recognizes, a great deal of the *Chase* Court's reasoning concerned the deputization of military commanders—who, in many cases, may not even have been Pennsylvanians—to create *ad hoc* election districts which may have fallen outside the Commonwealth's borders. Setting aside whether the General Assembly "could form a district *beyond* our territorial jurisdiction for the convenience of our own citizens," *id.* at 420 (emphasis in original), Justice Woodward, speaking for himself, granted that the General Assembly could "make a military camp in Pennsylvania an election district and declare that military sojourn and service therein for ten days should be equivalent to a constitutional residence for the purposes of election." *Id.* at 421.[16] But that is not what the Military Absentee Act of 1839 did. Rather, the Act delegated to "the commanding officer of the troop or company to which [the electors] belong" the authority to "appoint" "such place" at which the electors "may exercise the right of suffrage." *Id.* (quoting Section 43 of the Act).

[16] *See id.* ("I would be extremely loth to think such a law unconstitutional. These observations, however, . . . must not be considered as expressing the opinion of the court, but only my own.").

As the Court explained, "the legislature had no power to authorize a military commander to make an election district." *Id.* at 422.

> It is a part of the civil administration—this designating of election districts—and however it may be committed by one of the three co-ordinate departments of the government to another of those departments, as by the legislature to the judiciary, no civil functions of either department can be delegated to a military commander. This would be to confound the first principles of the government. If the legislature had said in the most express terms that the commander might declare his camp, wherever it might happen to be, an election district, it could have availed nothing, for the constitution, in referring to the legislature for election districts, recognized them as among the *civil* institutions of the state, to be created and controlled exclusively by the civil, as contradistinguished from the military power of the state. The constitution says "the military shall, in all cases and at all times, be in strict subordination to the civil power,[17] which is marking a distinction between the two powers with great emphasis. To the civil and not to the military power did the constitution intrust [*sic*] the formation of election districts, and therefore the civil cannot commit it to the military.
>
> If, then, the legislature did not and could not authorize the military commander to form an election district, how could there be any constitutional voting under [Section 43 of the Act]? Without an election district there can be no constitutional voting. [Section 43] provides for no election district, and no military commander can be empowered to form one—hence it follows, as an inevitable deduction, that the "place" referred to in that section is inconsistent with the constitutional requisition of an election district, and that whatever votes have been cast in pursuance of that section since the Constitution of 1838 came in, have been cast without authority of law.

Id. In this respect, the Court relied not upon conclusory pronouncements untethered from the constitutional text, but longstanding principles of constitutional democratic governance and the separation of powers. The discussion of "offer to vote" being entirely

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17 PA. CONST. (1838) art. IX, § 22 ("No standing army shall, in time of peace, be kept up without the consent of the Legislature; and the military shall, in all cases, and at all times, be in strict subordination to the civil power."), *since redesignated* PA. CONST. art. I, § 22.

severable from this more substantive and defensible analysis, *Chase* stands as good law insofar as it expounds principles of non-delegation vis-à-vis the military.[18]

Without *Chase*'s narrow construction of "offer to vote," McLinko and Bonner must find some other constitutional hook to establish that the General Assembly lacked authority to enact Act 77. But there is none to be found. Article VII, Section 4 requires that "[a]ll elections by the citizens shall be by ballot or by such other method as may be prescribed by law: Provided, That secrecy in voting be preserved." PA. CONST. art. VII, § 4. The Majority offers a persuasive account of the 1901 addition of "such other method" and the power that it confers upon the Legislature, *see* Maj. Op. at 64-69, but resort to that provision is wholly unnecessary to resolve this case. Mail-in ballots are ballots.[19] [20]

[18] To be clear, *Chase* did not question the General Assembly's authority to delegate the creation of election districts to other *civil* powers, including the courts. The Court noted that, from the adoption of the 1799 law, "we have had innumerable Acts of Assembly creating, dividing, and subdividing election districts, until the legislature grew tired of the subject, and, in 1854, turned it over to the Courts of Quarter Sessions, to fix election districts, 'so as to suit the convenience of the inhabitants thereof.'" *Chase*, 41 Pa. at 420 (quoting Purd. 1069). Nor, curiously, did Justice Woodward impugn the Legislature's power to "sanction" election practices that deviated from "the natural and obvious reading of" Article III. *Id.* at 424, 428; *see id.* at 424 (citing, for example, the fact "that voters in the township of [Wilkes-Barre] . . . are accustomed to vote in the borough of [Wilkes-Barre], which is a separate election district, and other similar instances [that] are said to exist in Luzerne County, where votes are actually cast in an election district adjacent to that in which the electors reside"); *id.* ("If this practice have the sanction of an Act of Assembly, it is defensible; if it have not, I know of no principle on which it can be excused except that of *communis error*."). At bottom, the Court's concern was for "legislative control of election districts." *Id.* Because the General Assembly could not dictate the actions of military commanders, its efforts to delegate the creation of *ad hoc* districts to those commanders in their absolute discretion ran afoul of the Constitution.

[19] For this reason, I do not join the Majority's analysis in the paragraph that begins on page 71.

[20] The Commonwealth Court opined that, "where language has been retained [from one version of the Constitution to the next], this has been done advisedly in order to retain the original meaning." *McLinko*, 270 A.3d at 1263. To refer to the "1968 Constitution" or the "1838 Constitution," it explained, is a misnomer. These are "designations for

convenience only," because our founding charter "has been amended, *not replaced and not readopted*, by the proposals of the last four conventions." *Id.* (citing ROBERT E. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 7 (1985) (Commonwealth Court's emphasis)). The Majority appears to credit this view. Maj. Op. at 33 n.24.

Interpreters might ask, though, if the Constitution is to be "interpreted in its popular sense, as understood by the people when they voted on its adoption," *Ieropoli*, 842 A.2d at 925, to which people and to which adoption do we refer? Following the Commonwealth Court's logic, it appears, our sole touchstone in determining the meaning of a term like "ballot" would be the 1776 constitution. *See* PA. CONST. (1776) ch. II, § 32 ("All elections . . . shall be by ballot . . . ."). We would assume that original meaning to have been intentionally retained in 1790, 1838, 1874, and 1968. But, as the lower court's own analysis demonstrates, what constitutes a "ballot" has evolved to no small degree. *See McLinko*, 270 A.3d at 1254-56. If the interpretive inquiry were limited to the popular sense of "ballot" in 1776, we might understand it to mean a "printed slate[ ] of candidate selections . . . that political parties distributed to their supporters and pressed upon others at the polls," to the exclusion of all other forms. *Id.* at 1255 (quoting *Minn. Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1882 (2018)). But the 1968 ratifying voter, accustomed to the Australian ballot—which only made its way into Pennsylvania law in 1891, *id.* (citing *De Walt v. Bartley*, 24 A. 185, 186-87 (Pa. 1892); *Working Families Party v. Commonwealth*, 209 A.3d 270, 293 n.11 (Pa. 2019) (Wecht, J., concurring and dissenting))—might not have viewed such pre-ordained selections as a true "ballot" at all. Taken to its logical extreme, this principle might preclude use of both state-generated paper ballots, as well as certain voting machines that "display an electronic ballot on a screen and allow an individual to vote using a button, dial, or touch screen," *Banfield v. Cortes*, 110 A.3d 155, 159 (Pa. 2015)—none of which would have been familiar to the eighteenth-century Pennsylvanian.

There can be no doubt that, where language is retained, its extant meaning and prior constructions are relevant to its present interpretation. I decline, however, to spin Judge Woodside's comment about "designations" (as opposed to "constitutions") into a broader principle of constitutional theory that would render sacrosanct the understanding of the men who promulgated our 1776 Constitution—which, like the Constitution of 1790, was never submitted to the people of Pennsylvania for ratification, *see* PA. CONST. (1776) Whereas cl.; *League of Women Voters v. Commonwealth*, 178 A.3d 737, 808 n.68 (Pa. 2018); *see generally* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 232-33, 307, 332-40, 438-46 (1998 ed.)—and would functionally ignore the likely understanding of the millions of Pennsylvanians who ratified our current governing charter in 1968. This Court has never passed upon whether our Commonwealth has had one moment of constitutional self-determination or five. We have, however, referred to the projects of 1790, 1838, 1874, and 1968 as culminating in "new" constitutions. *See Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 744 (Pa. 2012) ("[T]he new Constitution . . . was approved by Pennsylvania voters [in 1968]."); *Appeal of Long*, 87 Pa. 114, 116 (1878) ("since the adoption of the New Constitution of 1874"); *Kittanning*

And neither McLinko nor Bonner contends that existing provisions of the Election Code fail to ensure constitutionally-prescribed secrecy. Accordingly, Act 77 finds no impediment in Article VII, Section 4.

Appellees' remaining arguments, which derive from Article VII, Section 14,[21] are strained and unconvincing. They claim that, to permit the legislature to provide for universal mail-in voting by statute (rather than by constitutional amendment) would render that provision mere surplusage. *See* McLinko's Br. at 21-24; Bonner's Br. at 52. The Commonwealth Court agreed. *McLinko*, 270 A.3d at 1263. In that court's view, "Section 14 established the rules of absentee voting as both a floor and a ceiling." *Id.* at 1264. That is, by exclusively granting this privilege to the populations enumerated therein, the Constitution foreclosed its availability to all others. *See* Bonner's Br. at 27-31. But, as the Majority explains, this is incorrect. Section 14 "*guarantees* that regardless of the legislature's exercise of its authority to determine the way that votes may be cast, those classes of absentee voters designated within it" retain an enforceable right "to exercise

Coal Co. v. Commonwealth, 79 Pa. 100, 105 (1875) ("This power was possessed under the constitution of 1790 . . . and existed when the new constitution was framed and adopted."). Accordingly, the Commonwealth Court's commentary on the point should be recognized as nothing more than an expression of one available view among several, the selection of which could be quite consequential.

[21] Article VII, Section 14(a) provides:

> The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the municipality of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability or who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. art. VII, § 14(a).

their franchise regardless of their location on Election Day." Maj. Op. at 73-74 (footnote omitted; emphasis added).

Appellees' argument also neglects to address Section 14's use of "shall," rather than "may." Legislative power is not circumscribed by just *any* implication from the constitutional text, but only that which is *necessary* to the document's coherence. *Bailey v. Waters*, 162 A. 819, 820 (Pa. 1932) ("A long line of judicial pronouncements declare that the Legislature may be prohibited by *necessary* implication from doing things which are not expressly prohibited in the Constitution."); *Commonwealth ex rel. Brown v. Heck*, 95 A. 929, 930 (Pa. 1915) ("If such power does not exist, it is because the Constitution has expressly withheld it or forbidden it by *necessary* implication."); *Appeal of Lewis*, 67 Pa. 153, 165 (Pa. 1870) ("A prohibition may be implied even in a constitution, but the implication must be very plain and *necessary*. The legislature possess all legislative power except such as is prohibited by express words or *necessary* implication.") (all emphases added).

To illustrate the problem that this presents for Appellees' argument, imagine that a dog-owner hires a neighbor to check in on Fido while she is at work. She instructs the neighbor that he "shall" give Fido one cup of kibble in his bowl, fresh water, and a walk around the block. No reasonable interpretation of those requirements *necessarily* prohibits the neighbor from also playing fetch with Fido, or rubbing his belly, or giving him a treat. The neighbor would not need special dispensation to go above the bare minimum, and likely would not face adverse consequences as long as that bare minimum was met. Had the owner wished to set both a floor *and* a ceiling with respect to the neighbor's activity, she could have used "may" instead of "shall"—in which case a *necessary* implication of her omitting anything about fetch, belly rubs, or treats from the instructions is that they are beyond the neighbor's purview. *See, e.g.*, *Thompson v. Thompson*, 223

A.3d 1272, 1277 (Pa. 2020) ("Under the doctrine of *expressio unius est exclusio alterius*, the inclusion of a specific matter in a statute implies the exclusion of other matters.") (internal quotation marks omitted).

In an earlier era, Appellees' claims might have held water. Between 1949 and 1967, the Constitution was amended several times to permit—but not to require—the General Assembly to provide a means of absentee voting for certain "qualified war veteran voters,"[22] and, later, voters who might be "unavoidably absent from the State or county of their residence because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper

[22] Article VIII, Section 18 was added by amendment November 8, 1949. It provided:

> The General Assembly *may*, by general law, provide a manner in which, and the time and place at which, qualified war veteran voters, who may, on the occurrence of any election, be unavoidably absent from the State or county of their residence because of their being bedridden or hospitalized due to illness or physical disability contracted or suffered in connection with, or as a direct result of, their military service, may vote and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. (1874) art. VIII, § 18 (emphasis added); *see* 1949 Pa. Laws 2138. The circumstances covered by Section 18 were refined on November 3, 1953, but the permissive language was retained:

> The General Assembly may, by general law, provide a manner in which, and the time and place at which, qualified war veteran voters may vote, who are unable to attend at their proper polling places because of being bed-ridden or otherwise physically incapacitated, and may provide for the return and canvass of their votes in the election district in which they respectively reside. Positive proof of being bed-ridden or otherwise physically incapacitated shall be given by affidavit or by certification of a physician, hospital or other authenticated source.

PA. CONST. (1874) art. VIII, § 18; *see* 1953 Pa. Laws 1496.

polling places because of illness or physical disability."[23] But that state of affairs changed significantly on May 16, 1967, when Section 18 was repealed and Section 19 was altered considerably. Renumbered Article VII, Section 14, the newly ratified provision commanded that:

> The Legislature *shall*, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the State or county of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. (1874) art. VII, § 14 (emphasis added); *see* 1967 Pa. Laws 1048. In 1985, the class of guaranteed absentee voters covered by Section 14 was expanded to include voters "who will not attend a polling place because of the observance of a religious holiday or who cannot vote because of election day duties, in the case of a county employee." PA. CONST. art. VII, § 14; *see* 1985 Pa. Laws 555.[24]

The electorate having amended the operative verb in Section 14 from the permissive "may" to the obligatory "shall" in 1967, this provision now functions as a

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[23] Article VIII, Section 19, added by amendment November 5, 1957, provided:

> The Legislature may, by general law, provide a manner in which, and the time and place at which, qualified voters who may, on the occurrence of any election, be unavoidably absent from the State or county of their residence because of their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability, may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

PA. CONST. (1874) art. VIII, § 19; *see* 1957 Pa. Laws 1019.

[24] The most recent amendment to this provision, replacing "State or county" with "municipality" and adding a new subsection containing a definition for the same, was ratified November 4, 1997. *See* 1997 Pa. Laws 636.

bulwark against the prospect of a temporal majority that might stand to benefit if the populations enumerated therein were excluded from the democratic process. Were that hypothetical antidemocratic majority to repeal the Election Code in its entirety, Section 14 guarantees those discrete classes of electors relief in the form of an absentee ballot. Any member of those enumerated populations could petition the courts to compel the General Assembly to fulfill its constitutional obligations to them. But the same cannot be said of those entitled to vote by mail without an excuse under Act 77. If the General Assembly were to repeal that statute tomorrow, the ordinary voter would have no constitutional claim to a no-excuse mail-in ballot; absent a constitutional *mandate*, the courts have no authority to compel the Legislature to extend such a forbearance beyond the protected classes of electors expressly identified. Thus, Section 14 and Act 77 accomplish fundamentally different ends, and the Majority's reading renders no part of the Constitution surplusage.

In announcing its decision today, the Court looks past the celebrated bipartisan nature of this law's passage; past the fact that several of the challengers in the instant suit voted for its adoption; past whatever reliance interests may have developed as millions of Pennsylvanians became accustomed to voting by mail these past several years; and even past the startlingly offensive, antidemocratic overtones[25] of the *Chase* Court's rationale. We consider only whether any defensible construction of the text of our Constitution mandates in-person voting. Having afforded *Chase* its proper scrutiny, I conclude that no such construction exists, and that Act 77 must stand.

[25] *See Chase*, 41 Pa. at 426 ("[The Pennsylvania Constitution of 1838] withholds [suffrage] altogether from about four-fifths of the population, however much property they may have to be taxed, or however competent in respect of prudence and patriotism, many of them may be to vote. And here let it be remarked, that all our successive constitutions have grown more and more astute on this subject.").

[J-18A-2022, J-18B-2022, J-18C-2022, J-18D-2022, and J-18E-2022]
[MO: Donohue, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

DOUG MCLINKO, Appellee v. COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF STATE; AND LEIGH M. CHAPMAN, IN HER OFFICIAL CAPACITY AS ACTING SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, Appellants	:	No. 14 MAP 2022 Appeal from the Order of the Commonwealth Court at No. 244 MD 2021 dated January 28, 2022. ARGUED: March 8, 2022
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DISSENTING OPINION

JUSTICE BROBSON **DECIDED: August 2, 2022**

I join the dissenting opinion of Justice Mundy in full.

Succinctly stated, the majority overrules 160 years of this Court's precedent to save a law that is not yet 3 years old. It does so not to right some egregiously wrong decision or to vindicate a fundamental constitutional right. This is not, as Justice Mundy observes, a *Brown v. Board of Education*[1] moment. Honoring our precedent and striking Act 77[2] as unconstitutional would not extinguish the right of people to vote in this

[1] Dissenting Op. at 11-12 (Mundy, J., dissenting).

[2] Act of October 31, 2019, P.L. 552, No. 77.

Commonwealth; rather, it would merely return us to where we were before the 2020 primary election.

Since this Court decided *Chase*[3] and reaffirmed *Chase*'s holding in *City of Lancaster*,[4] it has never been seriously debated that the phrase "offer to vote," as it has appeared in our Pennsylvania Constitution since 1838, embraces the historical preference in our Commonwealth for in-person voting at a polling place, whether "by ballot or by such other method as may be prescribed by law."[5] The phrase "offer to vote" as interpreted by *Chase* survived two constitutional conventions (1873 and 1968). Moreover, our current Pennsylvania Constitution—"the 1968 Constitution"—has been amended on several occasions. Yet, the phrase "offer to vote" remains. Under time-honored principles of statutory construction, this means that the delegates to our constitutional conventions and our citizens have accepted that precedent.[6]

[3] *Chase v. Miller*, 41 Pa. 403 (1862).

[4] *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924).

[5] As Justice Mundy notes at pages 4 and 5 of her dissenting opinion, properly construed, Article VII, Section 4 of the Pennsylvania Constitution (added by Joint Resolution No. 2, 1901, P.L. 882), on which the majority relies, authorizes methods of election "other" than by ballot. Act 77 does not authorize a method of election other than by ballot; rather, Act 77 authorizes a voter to execute a ballot and transmit that ballot by mail to a county election office in lieu of casting and submitting a ballot in person. Because Act 77 does not provide for a method of election "other" than by ballot, it does not follow that the General Assembly was authorized to enact Act 77 under its Article VII, Section 4 authority.

[6] *See* Dissenting Op. at 15-16 (Mundy, J., dissenting). Indeed, as Justice Mundy observes, both the General Assembly and Pennsylvania's voters have acted in reliance on this precedent, amending the Pennsylvania Constitution on several occasions to create *exceptions* for those who, through no fault of their own, are unable to vote at their polling places. *See* Pa. Const. art. VII, § 14.

Today, this Court upends the tradition and historic preference in this Commonwealth for in-person voting without the requisite "special justification"[7] and important reasons necessary to set aside long-standing precedent. Mere disagreement with that precedent is not enough.[8] Respectfully, I do not believe that the majority has mounted a persuasive case that *Chase* and *City of Lancaster* have proven unworkable or are badly reasoned. Instead, the majority has set forth a case as to why it merely disagrees with this Court's precedent.

Finally, I wish to highlight an argument raised by Appellants-Intervenors the Democrat National Committee and the Pennsylvania Democratic Party (collectively, DNC) relating to the nonseverability provision in Act 77.[9] In his dissenting opinion below, Judge Wojcik, citing the nonseverability provision, warned that "if the no-excuse mail-in provisions of Act 77 are found to be unconstitutional, all of Act 77's provisions are void."[10] Building on Judge Wojcik's observation, the DNC argues here that affirmance of the Commonwealth Court's decision below would lead to "serious confusion" that "will be compounded by Act 77's non-severability provision, which requires that nearly the entire Act—which includes a multitude of changes to the Pennsylvania election code—fall if

[7] *See Commonwealth v. Alexander*, 243 A.3d 177, 212 (Pa. 2020) (Dougherty, J., dissenting) (criticizing majority for overruling precedent without special justification).

[8] *Commonwealth v. Reid*, 235 A.3d 1124, 1126 (Pa. 2020). *Stare decisis* commands that we only overrule precedent involving constitutional interpretation if that precedent has "proven to be unworkable or badly reasoned." *Holt v. 2011 Legislative Reapportionment Comm'n*, 38 A.3d 711, 759 (Pa. 2012).

[9] *See* Section 11 of Act 77 ("Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. If any provision of this act or its application to any person or circumstance is held invalid, the remaining provisions or applications of this act are void.").

[10] *McLinko v. Dep't of State*, 270 A.3d 1243, 1277-78 (Pa. Cmwlth. 2022) (Wojcik, J., dissenting in part).

universal mail voting is deemed unconstitutional."[11] In other words, the DNC advances the nonseverability provision as a reason why this Court should reject the constitutional challenge to Act 77's mail-in ballot provisions and reverse the Commonwealth Court's order, because doing otherwise would trigger the nonseverability provision and render the entirety of Act 77 invalid.[12]

The majority opinion does not specifically address this argument, and thus it does not appear to have informed the majority's merits decision. Nonetheless, how the nonseverability provision operates in the event of a judicial decision impacting the application of the provisions within its scope is an interesting question. Given the majority's disposition here, however, that question now must wait for another day.

Justice Mundy joins this dissenting opinion.

[11] DNC Br. at 45.

[12] *See also* Bonner Petitioners' Br. at 11, 39 (arguing that entirety of Act 77 should be struck down because of nonseverability provision).

[J-18A-2022, J-18B-2022, J-18C-2022, J-18D-2022 and J-18E-2022]
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DISSENTING OPINION

JUSTICE MUNDY **DECIDED: August 2, 2022**

As I would affirm the order of the Commonwealth Court, I respectfully dissent. Notably, neither the majority nor the concurrence provides a convincing account of how our state Charter permits universal, no-excuse mail-in ballots, particularly in light of its specific authorization for absentee ballots for four defined groups of voters. The majority opinion in particular takes an approach that, if not ahistorical, is at best historically selective. Its most glaring omission is its failure to come to grips with the fact that the Pennsylvania Constitution's election-related provisions have been amended on numerous occasions in the 160 years since this Court first explained that by default it requires in-person voting, and in none of those instances have the people of this

Commonwealth sought to eliminate, alter, or clarify the textual basis for that ruling as it appears in our organic law. The majority also emphasizes the popularity of the legislation under review and the care with which it was debated, going so far as to recite the margin by which it was passed in each House of the General Assembly and the party affiliation of the legislators. *See* Majority Op. at 4-5. None of these observations has any relevance to the issue before this Court. Legislation inconsistent with our state Charter cannot gain validity through popular sentiment or careful drafting. The Constitution stands as a bulwark against contrary sentiment and the passions of the moment, and it can only be altered in the careful manner that it prescribes. *See* PA. CONST. art. XI, § 1.

To find authorization for universal no-excuse, mail-in balloting, the majority relies almost exclusively on Section 4 of Article VII. That provision indicates elections "shall be by ballot or by such other method as may be prescribed by law" so long as ballot secrecy is maintained. PA. CONST. art. VII, § 4. But that language does not speak to the issue before this Court, as there is no dispute that mail-in voting under Act 77 is "by ballot." The ballot is mailed in, rather than completed in person at the polling place, but it is still a ballot. *See* 25 P.S. §§3150.11(a) (giving qualified mail-in electors the right to "vote by an official mail-in ballot"), 3150.12(a) (relating to applications for mail-in ballots); Concurring Op. at 19 ("Mail-in ballots are ballots."); *In re Canvassing Observation*, 241 A.3d 339, 341 (Pa. 2020) (resolving a dispute relating to the canvassing of "mail-in and absentee ballots"). Given the meaning of the word "other," Section 4's reference to "other method[s]" plainly pertains to non-ballot methods – most notably when the provision was added to the Constitution in 1901, voting machines. *See In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199, 201 (Pa. 1924); *accord McLinko v. Dep't of State*, 270 A.3d 1243, 1257 (Pa. Cmwlth. 2022) (quoting Robert E. Woodside, PENNSYLVANIA CONSTITUTIONAL LAW 465 (1985)); *cf. People ex rel. Deister v. Wintermute*, 86 N.E. 818,

819 (N.Y. 1909) (stating that the same phrase – "such other method as may be prescribed by law" – which was added to the New York Constitution in 1895, was included "solely to enable the substitution of voting machines, if found practicable"). It is true, as the majority emphasizes, that this language is broad enough to encompass other methods besides voting machines, including methods not yet invented. My point here is that those other methods cannot include mail-in ballots because, as noted, they must be "other" than ballots. *Accord McLinko*, 270 A.3d at 1263 (observing that no-excuse mail-in voting "uses a paper ballot, and not some 'other method'"). As a consequence, Section 4's reference to "other methods" cannot accurately be understood the way the majority interprets it, as authorizing mail-in ballots. To the contrary, Section 4, standing alone, is neutral on the question of whether the ballots used in an election must be completed at the polling place, or whether they may instead be completed elsewhere and delivered by mail.

I also cannot support a reading of Article VII where everything that is not expressly prohibited is presumed to be permissible, and thereby treat all contrary authority from this Court as either *dicta* or insufficiently reasoned. Perhaps it is possible in some instances to say that an election-related constitutional provision which states the Legislature "shall" do something leaves open the possibility that it "may" do other things not mentioned, as the concurrence suggests by reference to a fanciful dog-sitting example. *See* Concurring Op. at 22. But that example is devoid of context, *i.e.*, information concerning the assumptions, the prior communications, and the prior course of conduct of the parties involved. More important, it does not align with the historical understanding of the Constitution's absentee-voting provisions, and it cannot be taken literally, as to do so would mean the Legislature, for example, has the authority to permit ten-year-old Nebraska residents to vote in Pennsylvania elections because it states Pennsylvania residents who are over 21 years old (now 18 years old by virtue of the United States

Constitution) "shall be entitled to vote," PA. CONST. art. VII, § 1, but it does not expressly prohibit younger persons or non-residents from voting.

To understand why "shall" in this context and others within Article VII often carries an implication of exclusivity, it is important to recognize the unique role voting plays in a viable democracy, and that individuals will sometimes seek to corrupt the electoral process for political ends. *See, e.g.*, *Marks v. Stinson*, 19 F.3d 873, 877 (3d Cir. 1994). It goes without saying that, without election integrity, democracy is no more than a façade, and a cynical one at that. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (recognizing the need for "substantial regulation of elections" to ensure electoral fairness and honesty). The very word democracy assumes both the availability of the franchise and its integrity, neither concept being more or less important than the other. As the Supreme Court has observed, the right to vote "is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992); *see also Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989) ("A State indisputably has a compelling interest in preserving the integrity of its election process."). Public confidence in the electoral system and trust in the outcome of every election are crucial to a functioning democracy. *See generally* CONFERENCE REPORT – THE CARTER-BAKER COMMISSION: 16 YEARS LATER, at 25 (Rice University's Baker Institute for Public Policy 2021) (indicating that "confidence in our election system, and always working to make it better, is the underpinning of our democracy").

On one side of the ledger, the right of suffrage in the United States has been fleshed out over our history through successive iterations of expansion, as a matter of both constitutional and statutory law, to include men and women of all races and socioeconomic statuses, and in all walks of life. Provisions such as the Fifteenth

Amendment, the Nineteenth Amendment, the Civil Rights Act of 1957, and the Voting Rights Act of 1965, stand out as milestones in that expansion. *See, e.g.*, U.S. CONST. amend. XV, § 1 (1870) ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."); *id*. amend. XIX (1920) ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."). These are all welcome developments. But on the other side of the ledger, it is self-evident that the *integrity* of electoral actions becomes more difficult to verify when they are undertaken at a distance and outside of public scrutiny: not only is fraud more difficult to detect, but the voter lacks contemporaneous assistance from election officials and so there is a greater chance for honest mistakes. *See Griffin v. Roupas*, 385 F.3d 1128, 1130-31 (7th Cir. 2004) (observing honest voting mistakes and voting fraud can both be facilitated by absentee voting).[1] Thus, the concept of mail-in ballots was virtually unknown during the early years of this Republic.

It is against this backdrop that our Court undertook over a century and a half ago to expound the meaning of the constitutional requirement that an elector must "offer to vote" in his district. Recognizing that its purpose was "to exclude disqualified pretenders and fraudulent voters of all sorts," *Chase v. Miller*, 41 Pa. 403, 418 (1862), the Court explained:

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[1] See John C. Fortier & Norman J. Ornstein, *The Absentee Ballot & the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 484-85 (2003) ("As casting ballots away from the polling place becomes more widespread, the possibilities for fraud and coercion expand[.]"); Adam Liptak, *Error and Fraud at Issue as Absentee Voting Rises*, NEW YORK TIMES, Oct. 6, 2012 (noting the trend toward voting by mail enhances the potential for fraud – for example through the practice of "granny farming" (tricking or coercing senior citizens) or through the buying and selling of votes – and will likely result in more uncounted votes), *reprinted in* Brief for Appellees at Exh. B.

> Construing the words according to their plain and literal import (and we must presume that the people of Pennsylvania construed them so when they adopted the amendment), they mean, undoubtedly, that the citizen, possessing the other requisite qualifications, is . . . to offer his ballot in that district. . . . *To "offer to vote" by ballot, is to present oneself, with proper qualifications, at the time and place appointed, and to make manual delivery of the ballot to the officers appointed by law to receive it. The ballot cannot be sent by mail or express*, nor can it be cast outside of all Pennsylvania election districts and certified into the county where the voter has his domicil. We cannot be persuaded that the constitution ever contemplated any such mode of voting, and we have abundant reason for thinking that to permit it would break down all the safeguards of honest suffrage. The constitution meant, rather, that the voter, *in propria persona*, should offer his vote in an appropriate election district, in order that his neighbors might be at hand to establish his right to vote if it were challenged, or to challenge if it were doubtful.
>
> The amendment so understood, introduced not only a new test of the right of suffrage, to wit, a district residence, but a rule of voting also. Place became an element of suffrage for a two-fold purpose. Without the district residence no man shall vote, but having had the district residence, the right it confers is to vote in that district. Such is the voice of the constitution. The test and the rule are equally obligatory. We have no power to dispense with either. Whoever would claim the franchise which the constitution grants, must exercise it in the manner the constitution prescribes.

Id. at 419 (emphasis added).

This interpretation is entirely reasonable. In Pennsylvania the concept of a defined place for voting has always had special prominence. The Constitution of 1776 contained a "Plan or Frame of Government" which prescribed that the Commonwealth would be governed by an assembly of freemen as well as a president and a twelve-man counsel holding executive power, *see* PA. CONST. §§ 1, 3 (1776), to be elected at the same "time and place" for electing representatives in the assembly. PA. CONST. § 19 (1776). Likewise, sheriffs and coroners were to be elected "at the same time and place appointed for the election of representatives." PA. CONST. § 31 (1776). This dual focus on both time and place was carried through into the 1790 and 1838 Constitutions, which specified that

the governor, state senators, and other officials such as sheriffs and coroners, were to be elected at the "same place" as state representatives. *See, e.g.*, PA. CONST. art. I, § V (1790); PA CONST. art II, § II (1838). The specification of a place of election was more than a formality, as one of Appellants' amici helpfully expounds:

> At the time of *Chase*, elections in Pennsylvania, as in most states, were community events. As one historian explains, "One did not simply 'vote,' in the nineteenth century; in the parlance of the times, one 'attended' or 'went to the election.'" John F. Reynolds, *Testing Democracy: Electoral Behavior and Progressive Reform in New Jersey, 1880-1920* 34 (1988). At the 1837 Pennsylvania Constitutional Convention, delegates were concerned with facilitating "the attendance" of voters, and spoke of large numbers of voters "assembled together" at elections. 2 Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania 24-25 (1837). The continuing communal quality of nineteenth-century elections is reflected in a speech at the convention by a delegate named George Woodard, who later joined this Court and wrote the *Chase* opinion. He explained he would hesitate to change the traditional day for elections – "a day on which the people had been accustomed from the days of the revolution, to meet and consult, and decide who should rule over them." *Id*. at 27.

Brief for Amicus Molly Mahon, *et al*., at 13-14. Although amicus recognizes times have changed, *see id*. at 14 (expressing that the above description "no longer resonates"), the constitutional language has not changed, and amicus's explanation lends credence to the *Chase* Court's understanding of what "offer to vote" meant at the time that provision was drafted and adopted by the citizens of Pennsylvania.

The majority recognizes as much, *see* Majority Op. at 62-63 (acknowledging that in the early nineteenth century it was important for a voter to appear in person so his qualifications could be verified by others within his district), but relies on advances in voter registration schemes to suggest this need no longer exists. *See id*. Even assuming the need for in-person verification is diminished or no longer exists, the originally intended meaning still applies unless and until the text has been repealed, amended, or clarified,

which it has not. "[I]n interpreting a constitutional provision, we view it as an expression of the popular will of the voters who adopted it, and, thus, construe its language in the manner in which it was understood *by those voters*." *Washington v. Dep't of Pub. Welfare*, 188 A.3d 1135, 1149 (Pa. 2018) (citing *Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006)) (emphasis added). If the phrase "offer to vote" were inserted into the Constitution for the first time today, we might interpret it differently. But it was inserted in 1838 and should be construed according to what it meant at that time. *See Yocum v. Pa. Gaming Control Bd.*, 161 A.3d 228, 239 (Pa. 2017) (indicating that constitutional language must be interpreted "as the average person would have understood it when it was adopted"); *accord* A. Scalia & B. Garner, READING THE LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012) (observing "words mean what they conveyed to reasonable people at the time they were written"). *Chase* was decided close in time to when the provision was first included in the Constitution, and the authoring Justice participated in the constitutional convention that adopted it. The relevant constitutional text remains unchanged, and the explanation in *Chase* is so clear, that the majority must resort to demoting it through disparaging language by referring to it as an "incidental interpretation" resulting in *dicta*, Majority Op. at 52, and criticizing a later decision which employed the established principle of *stare decisis* as having "slavishly" adhered to precedent. *Id*. at 65.

I cannot agree with the majority's suggestion that the above passage from *Chase* is either incidental or *dicta*. The Court concluded that "offer to vote" means the voter must show up in person to vote, and that conclusion logically decided the issue before the Court: whether the legislation permitting absentee voting by military personnel was constitutional. If that provision was also unconstitutional for a separate reason, that it authorized voting in an invalid election district, those two bases constituted alternative holdings and neither should be relegated to the status of *dicta*. *See Commonwealth v.*

Markman, 916 A.2d 586, 606 (Pa. 2007) (noting if two equally valid but separate grounds support the holding, neither "may be relegated to the inferior status of obiter dictum") (quoting *Commonwealth v. Swing*, 186 A.2d 24, 26 (Pa. 1962)). Moreover, that the constitutional provision also included the phrase, "entitled to vote" instead of "entitled to offer to vote," as the majority emphasizes, *see* Majority Op. at 51, 60, is of little consequence. Similar to the present Article VII, Section 1, the provision under review established both the constitutional entitlement and the constitutional prerequisites for voting, and the Majority's insistence that the Constitution was somehow required to use "offer to" with every new instance of the word "vote" is unreasonable. *See id*. at 60-62. As *Chase* recognized, to "offer to vote" meant to show up in person to vote. That the Constitution used the equivalent of "show up in person" in one instance where it mentioned "vote" does not mean it had to repeat that entire phrase everywhere it used the word "vote," particularly where it was referring to an entitlement to vote or to the qualifications needed for voting. Even where it again referenced the act of voting, it did not need to re-establish that the action took place in person, having established it already. In this regard, the majority overlooks that words are not read "in isolation, but with reference to the context in which they appear." *Commonwealth v. Smith*, 186 A.3d 397, 402 (Pa. 2018).[2]

[2] The majority also claims it would be an "absurd result" to read the Constitution in its present form as requiring electors who still reside in their voting district on election day, by default, to vote in person, while permitting electors who have recently moved away to vote remotely. Majority Op. at 62. But this result, whether absurd or not, is imaginary: it rests on the majority's reading of "'vote' unencumbered by 'offer to'" as permitting remote voting. *Id*. As explained, such a reading is unreasonable. And it is entirely logical to give electors who have moved away so recently as to preclude re-registering in a timely manner the option to vote in their old district, so long as they are willing to travel to do so. Contrary to the majority's implication, moreover, this innovation, *i.e.*, the 60-day window for recently-moved electors, did not exist at the time of the *Chase* decision.

It may be that this Court, if writing on a clean slate, would assign a different meaning to the constitutional phrase, "offer to vote." But we are not writing on a clean slate, we are writing on a slate marked by over a century of constitutional changes and judicial interpretation. Even if our modern sensibilities would have led us to decide *Chase* a different way, it was not so egregiously wrong as to present an exception to the doctrine of *stare decisis*, nor has it lost its precedential weight through the passage of time notwithstanding that a majority of this Court disapproves of the outcome. *See generally In re Burtt's Estate*, 44 A.2d 670, 677 (Pa. 1945) ("A statutory construction, once made and followed, should never be altered upon the changed views of new personnel of the court.").

Nor is this one of those rare moments in constitutional history when a reviewing court is called upon to correct precedent which is deeply repugnant to civic life and to the organic law itself. *See, e.g.*, *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (discarding the "separate but equal" doctrine under the Fourteenth Amendment and overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)); *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (abrogating *Korematsu v. United States*, 323 U.S. 214 (1944), and affirming that the forcible relocation of United States citizens to concentration camps on the basis of race lies outside the scope of the President's authority). The people of Pennsylvania have been voting in person since the earliest days of this Commonwealth notwithstanding that William Penn established our first post office in 1683, and the Second Continental Congress established the predecessor to the United States Postal Service in 1775. Now, all these years later, the majority suggests it has greater clarity than all who went before about the meaning of the constitutional phrase, "offer to vote" – greater clarity even than the Justices of this Court who lived through the era when it was incorporated into our charter and gave meaning to the language.

With the *Chase* decision in the books, the people of Pennsylvania amended the Constitution in 1864 to allow for absentee voting by soldiers. Notably, the people did not see fit to alter, delete, or clarify the phrase, "offer to vote"; instead, they added a section specifically giving soldiers the right to cast absentee ballots, a provision carried forward and retained in the Constitution of 1874:

> Whenever any of the qualified electors of this Commonwealth shall be in actual military service, under a requisition from the President of the United States or by the authority of this Commonwealth, such electors may exercise the right of suffrage in all elections by the citizens, under such regulations as are or shall be prescribed by law, as fully as if they were present at their usual place of election.

PA. CONST. art. VIII, § 6 (1874).

Our Court discussed this amendment in *In re Contested Election in Fifth Ward of Lancaster City*, 126 A. 199 (Pa. 1924), a decision in which *Chase*'s status as binding precedent was cemented. In *Lancaster City*, this Court addressed whether persons other than soldiers could constitutionally be permitted to vote absentee. The Court recognized, as a general precept, that the Constitution requires an elector to tender his or her vote in person, as set forth in *Chase*, and that this rule was consistent with the view taken in "many other states during the Civil War period, where like constitutional requirements existed." *Id*. at 200 (citing *Twitchell v. Blodgett*, 13 Mich. 127 (1865); *Bourland v. Hildreth*, 26 Cal. 161 (1864); *Day v. Jones*, 31 Cal. 261 (1866); *Opinion of the Judges*, 30 Conn. 591 (1862); *Opinion of the Judges*, 37 Vt. 665 (1864); *Opinion of the Justices*, 44 N. H. 633 (1863)); *cf. Morrison v. Springer*, 15 Iowa 304, 313 (1863) (construing a state constitutional provision that did not include the "offer to vote" terminology and expressly distinguishing *Chase* on that basis). The Court also recognized that subsequent rulings in other states had reached the same conclusion. *See id*. (citing *In re Opinion of Justices*,

113 A. 293 (N.H. 1921); *Clark v. Nash*, 234 S. W. 1 (Ky. App. 1921)). In terms of the amendment for military absentee voting, the Court explained:

> Certain alterations are made so that absent voting in the case of soldiers is permissible. *This is in itself significant of the fact that this privilege was to be extended to such only*.

Id. at 201 (emphasis added).

The *Lancaster City* Court emphasized that constitutional changes are judicially presumed to have been accomplished carefully and with full awareness of the range of alternatives, by reference to provisions from earlier constitutions and to other states' constitutions, which are "used as a guide." *Id*. (quoting *Commonwealth ex rel. Lafean v. Snyder*, 104 A. 494, 495 (Pa. 1918)). With that background, the Court noted that the constitutional amendment finally agreed upon is assumed to be "deliberate[]" and "not merely accidental." *Id*. (quoting *Snyder*, 104 A. at 495). The result is that, where absentee voting is permitted by the Constitution, the statutory construction principle denominated *expressio unius est exclusio alterius* has special force:

> The Legislature can confer the right to vote only upon those designated by the fundamental law, and subject to the limitations therein fixed. The latter has determined those who, absent from the district, may vote other than by personal presentation of the ballot, but those so permitted are specifically named in section 6 of article 8 [*i.e.*, the amendment which allowed soldiers to vote absentee]. *The old principle that the expression of an intent to include one class excludes another has full application here*.

Id. (emphasis added). Thus, as can be seen, *Lancaster City*'s adherence to the ruling concerning the meaning of "offer to vote" as expressed in *Chase* was neither "slavish" nor poorly reasoned. The Court applied the established precept of *stare decisis* together with accepted rules of statutory construction, and it noted that the meaning ascribed was in concert with rulings from other jurisdictions around the time *Chase* was decided and in the post-*Chase* timeframe.

Twenty-five years after *Lancaster City*, the people of this Commonwealth expanded the privilege of absentee voting to war veterans whose injuries made them unavoidably absent from their county of residence on election day. This time, instead of directly granting a right to such persons, the Constitution was amended to authorize the General Assembly to "provide a manner" for such voting, *see* PA. CONST. art. VIII, § 18 (1949), *quoted in McLinko*, 270 A.3d at 1258 n.22, and this provision was modified eight years later to include electors who could not vote in person due to illness or physical disability, *see* PA. CONST. art. VIII, § 18 (1957). Two years after that, Section 1 of Article VIII (which defined the right and qualifications of electors) was changed to permit residents to vote in their old election district if they had moved less than 60 days before the election. *See* PA. CONST. art. VIII, § 1 (1959).

Thereafter, at the 1967 Constitutional Convention, even more changes were made to the way the Pennsylvania Constitution regulates voting and elections. The relevant provisions were moved to Article VII. Section 1 of that article was changed so that the residency requirement was shortened from one year to 90 days, but notably, the "offer to vote" language was left unchanged. Absentee voting was placed in Section 14, and the military voting provisions – those relating both to active service and to war injuries – were replaced with more general language allowing for absences required by one's "occupation" or occasioned by "illness or physical disability." Additionally, the rights of those entitled to vote absentee were made more secure by affirmatively requiring the General Assembly to enact appropriate legislation instead of only permitting it to do so:

> The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors who may, on the occurrence of any election, be absent from the State or county of their residence, because their duties, occupation or business require them to be elsewhere or who, on the occurrence of any election, are unable to attend at their proper polling places because of illness or physical disability, may vote, and for the return

> and canvass of their votes in the election district in which they respectively reside.

PA CONST. art. VII, §14 (1967). A 1985 amendment kept Section 14 essentially the same but extended the right of absentee voting even further to persons who could not attend a polling place due to a religious observance, as well as to county employees who would be unable to vote that day due to election-day duties. *See* PA CONST. art. VII, §14 (1985), *quoted in McLinko*, 270 A.3d at 1259-60. The final change occurred in 1997 when "State or county" was replaced with "municipality," which made it even easier to qualify as an absentee voter. *See* PA. CONST. art. VII, § 14(b) (1997) (defining "municipality" as a city, borough, incorporated town, township, or any similar general purpose unit of government which may be created by the General Assembly).

As mentioned above, in making all of these changes – including changes to the language of Section 1 on four separate occasions (1901, 1933, 1959, and 1967) – the people of Pennsylvania chose not to eliminate or clarify the "offer to vote" terminology appearing in that provision, notwithstanding that it had been interpreted since 1862 to set forth a baseline requirement that, absent some specific constitutional provision to the contrary, voting had to be undertaken in person. It is an established interpretive precept that when this Court has construed statutory language, subsequent reenactments on the same topic are presumed to intend the construction judicially reached unless the language is changed. That precept is reflected in the Statutory Construction Act, *see* 1 Pa.C.S. § 1922(4), and in numerous decisions of this Court. We recently stated:

> We . . . may presume that when a court of last resort has construed the language used in a statute, the General Assembly in subsequent statutes on the same subject matter intends the same construction to be placed upon such language. *Commensurately, when the legislature declines to amend a statute in contravention of this Court's prior interpretation of the statute, we may presume that our prior interpretation was and remains consistent with legislative intent*.

PPL Elec. Utils. Corp. v. City of Lancaster, 214 A.3d 639, 647-48 (Pa. 2019) (cleaned up) (emphasis added); *accord Fonner v. Shandon, Inc.*, 724 A.2d 903, 906 (Pa. 1999) ("The failure of the General Assembly to change the law which has been interpreted by the courts creates a presumption that the interpretation was in accordance with the legislative intent; otherwise the General Assembly would have changed the law in a subsequent amendment."). This rule is based on straightforward logic, and although the Constitution is more difficult to change than legislative enactments, its rationale plainly applies to a constitutional provision such as Article VII, Section 1, where, as here, the electorate has revisited and amended that provision but has opted to retain the previously-interpreted language with no revisions.

The history of absentee voting in Pennsylvania as briefly sketched above confirms that the electorate has always understood that any expansion of the franchise on an absentee basis can only be accomplished through an amendment to the Constitution. In this latter regard, this Court has explained that in the absentee-voting arena, the "principle that the expression of an intent to include one class excludes another has full application[.]" *Lancaster City*, 126 A. at 201. The majority points to no constitutional amendment that negates that principle as a general policy or specifically alters the "offer to vote" language as it has been understood for 160 years and retained through multiple constitutional amendments, including amendments to the very provision containing the phrase. Instead, the majority overrules 160 years of precedent by finding authorization for Act 77's universal no-excuse mail-in balloting in a constitutional provision that only applies to voting methods *other than by ballot*. *See* PA. CONST. art. VII, §4. That provision has been in the Constitution since 1901. If its intended meaning was as the majority says, it is difficult to see why the people of Pennsylvania would have needed to make constitutional changes in 1949 and 1957 specifically authorizing the Legislature to provide

for absentee voting by additional named classes of individuals, instead of simply overturning *Lancaster City* by constitutional amendment and clarifying that Section 4 contains such authorization. The New Mexico court has cogently observed:

> The constitution makers were not unfamiliar with the controversial question as to absentee voting. They were familiar with the common law understanding that an offer to vote contemplated a personal appearance of the voter in connection with such offer. They knew of the mandatory requirement for voting in that manner which had been in force in New Mexico for approximately sixty years. They were familiar with the meaning which attended the phrase "offers to vote" in several separate sections of the territorial laws and employed the phrase in the face of such knowledge in this provision of our constitution without in any way qualifying that meaning. These considerations impress us that if it had been the desire of the convention to authorize absentee voting, it would have been an easy and simple manner to choose language making clear the intention to do so.

Chase v. Lujan, 149 P.2d 1003, 1010-11 (N.M. 1944). The above can properly be said of Pennsylvania's "constitution makers" in 1874 and 1967.

The majority also fails to explain what action it believes was signified by the phrase, "offer to vote," when it was placed in the Constitution. As used here, "offer" is a verb, and the phrase contemplates that *some* action will be taken in the election district. The majority sidesteps this difficulty by suggesting the phrase is descriptive of the election district residency qualification. *See* Majority Op. at 53 n.38, 61, 62, 64. I agree it is descriptive, but the description arises by reference to an action to be taken in the election district. When placed into the 1838 Constitution, the word "offer" signified more than merely having a subjective intent, as the majority presently suggests. *See id*. at 61 n.43. Oddly, the majority relies for this understanding on a case which it acknowledges *materially misquoted* the Constitution due to an apparent "clerical error" thirty years after the fact. *Id*. at 53 n.38. In my view, a sounder approach would be to consult contemporaneous historical sources. The dictionaries extant at that time – most notably

Noah Webster's and Samuel Johnson's – confirm that in the early nineteenth century a mere intention was not encompassed within the meaning of the verb "to offer." These dictionaries variously define offer, first, as a transitive verb meaning to present (something), to bring to or before (as in worship), to bid, or to propose. As an intransitive verb – and notably consistent with *Chase* – to "offer" meant to be present, to be at hand, or to present oneself. *See* WEBSTER'S DICTIONARY OF 1828, available at https://webstersdictionary1828.com/Dictionary/offer (last viewed August 2, 2022) (giving as an example "Th' occasion offers and the youth complies"); Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE 227 (6th ed. 1785), available at https://archive.org/details/dictionaryofengl02johnuoft/page/n227/mode/2up (last viewed August 2, 2022) (giving largely the same definitions and the same example).[3]

This solves the "mystery" of why the *Chase* Court would have understood "offer to vote" as meaning to appear in person to vote. Majority Op. at 61 n.43. It also undermines the majority's suggestion that such usage amounted to an "oddity" in that era. *Id*. While the phrase may sound odd to modern ears, that only reinforces the concept, evident from the *Chase* decision, that it had a particularized meaning when it was drafted, and consequently, that *Chase* did not err in providing an explanation consistent with that meaning. To my mind, what is more difficult to comprehend is how the majority can interpret being present, being at hand, and presenting oneself as not needing to be physically present, that is, not needing to do the very thing the verb actually means. *See id*. Even if in some strained, abstract sense, being present, being at hand, and presenting oneself could potentially include not being physically present (although I cannot see how),

[3] Insofar as the majority implies that "to be present" is not included in the intransitive definition, *see id*. ("The actual definition reads: '[t]o present itself; to be at hand.'"), this follows from the majority's failure to consult the Samuel Johnson dictionary referenced above, which contains that definition.

Chase's holding that, in this instance, it means being physically present was not so egregiously wrong as to implicate an exception to the rule of *stare decisis*. Regardless, one may wonder how it would have been possible *for a voter* to be at hand or present himself without being physically present.[4]

Under Act 77, a person can apply by mail for a mail-in ballot to the Secretary of the Commonwealth or the county board of elections – which, notably, may be situated outside of the voter's election district, *see* 25 P.S. § 3150.12(a) – and then mail the ballot in from anywhere in the world to the county board of elections, *see id*. § 3150.16(a). As the voter will not have taken any action at all in the election district, it follows that he or she cannot have "offered to vote" in that district. The majority's interpretation thus renders the phrase "offer to vote" of no practical effect, which is contrary both to long-established interpretive principles and to our precedent construing the same language. *See Commonwealth v. Russo*, 131 A.2d 83, 88 (Pa. 1957) (stating this Court may not disregard any aspect of the Constitution); *Commonwealth ex rel. Barratt v. McAfee*, 81 A. 85, 89 (Pa. 1911) ("In construing any part of the Constitution, we are not at liberty to disregard other applicable provisions . . .; nor can we ignore the authority of our own prior decisions.").

For its part, the concurrence recognizes the limitations of Section 4, *see* Concurring Op. at 19 (stating resort to Section 4 is "wholly unnecessary"), but it expresses

[4] The majority suggests this analysis is faulty because the records of the constitutional convention lack a substantive discussion of the meaning of the phrase, "offer to vote." *See id*. But arguments from silence cut both ways, and they form an especially weak foundation for overruling longstanding precedent. In all events, the lack of a substantive discussion may also follow from the phrase's intent being so well understood at the time that there was little need to debate it. *See generally Actus Fund, LLC v. Sauer Energy, Inc.*, 393 F. Supp. 3d 139, 141 (D. Mass. 2019) (observing courts are "chary to accept the absence of legislative history to rule that the legislature meant something other than what it said"); *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018) ("If the legislative text is clear, it needs no repetition in the legislative history; and if the text is ambiguous, silence in the legislative history cannot lend any clarity").

that a one-word change in Section 14, from "may" to "shall," so affected the meaning of the remainder of Article VII as a whole that that Article no longer requires in-person voting by default. Thus, in the concurrence's reading, when Section 14 stated that the General Assembly "may" provide for absentee voting for the defined classes of electors, it was not allowed to provide that same privilege for anyone else; now that it "must" provide for absentee voting for those same electors, it can do so for anyone and everyone.

It is certainly counterintuitive to suggest a change from "may" to "shall" was intended to give the General Assembly *more* discretion than it previously had and to bring about a tectonic shift whereby absentee voting for all is now constitutionally permitted – all by implication. A more natural understanding of that one-word change is that the framers wished to ensure that the absentee voting privilege as delineated in Section 14 was available to the identified classes of voters, and not leave it up to the General Assembly's discretion. *See* Brief for Commonwealth at 61 (indicating the legislative history of the 1967 amendment confirms that "the General Assembly changed 'may' to 'shall' precisely because it intended to convert what was formerly a limited grant of legislative discretion into a constitutional right that the legislature could not take away"). This is entirely consistent with the way the Constitution ordinarily guarantees civil rights: they are affirmatively protected against contrary legislation, *see, e.g., Pap's A.M. v. City of Erie*, 812 A.2d 591 (Pa. 2002), or the lack thereof, *see William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414 (Pa. 2017). During the Twentieth Century, via constitutional amendment the right to vote absentee was expanded to an ever wider class of individuals who had valid excuses for not showing up in person to vote. As these changes were put in place, giving the General Assembly discretion to provide or withhold the mechanism naturally began to appear anomalous; and so, that discretion was removed. It does not

follow that, in affirmatively guaranteeing the right, the Constitution *sub silentio* extended its permissive availability to everyone else.

Still, the concurrence notes that, besides changing "may" to "shall," other changes were made to the same provision at the same time. It thus characterizes the provision as having been "altered considerably." Concurring Op. at 24. But those other changes, consistent with the 1949 and 1957 amendments, simply added new groups of electors acknowledged to have a valid excuse for not voting in person. As previously explained, the framers also amended Section 1 but elected to retain the "offer to vote" terminology without amendment. It seems attenuated to argue that, in this context, the change from "may" to "shall" in Section 14 reflects the framers' intent that absentee voting could now be provided to everyone at the General Assembly's discretion.

The concurrence justifies this reading by reference to a hypothetical dog-sitting assignment. *See* Concurring Op. at 22. But instructions given to a dog sitter lack all the history and complexity of Article VII of the Pennsylvania Constitution as outlined above. Voting and dog sitting are nothing alike. As noted, the regulation of voting lies at the heart our political system, as without both its availability and integrity, the people of Pennsylvania have democracy in name only. Although absentee voting is less secure than in-person voting, the people have, over the years, decided that that difficulty should be balanced against others which arise for individual electors who, through no fault of their own, cannot attend their polling place on election day without undue hardship. *Accord* Brief for Appellees at 54 (noting convenience and vigilance against fraud are both legitimate concerns in a democratic electoral system). By a series of carefully-crafted constitutional amendments, the electorate has struck a balance so as to maintain security while at the same time guaranteeing, to the extent feasible, that everyone has a reasonable opportunity to vote.

When Article VII is viewed as a whole, within this context and in light of its history and the judicial construction of the phrase, "offer to vote" (which, as discussed, has been retained through many successive amendments), the naming of certain classes of electors who are given the right to vote absentee necessarily implies that those are the only electors who may do so. *Accord Lancaster City*, 106 A. at 201 ("The old principle that the expression of an intent to include one class excludes another has full application here."). It seems a stretch to conclude that the framers of the 1967 Constitution, in *guaranteeing* absentee voting to the identified classes, intended thereby to *cede control* over this delicate balance to the Legislature.[5]

[5] The legislative history of the bill which resulted in the constitutional change – Senate Bill 6 of 1967, *see* P.L. 1048, May 16, 1967 – contains no indication that such a major expansion was intended. Senate Bill 6 made a few changes to, *inter alia*, Section 1; and the text of Section 14 was altered in a handful of minor ways: "may" was changed to "shall," qualified "voters" was changed to qualified "electors," and the word "unavoidably" was removed from the phrase "unavoidably absent." When the bill was discussed in the House on its third reading, Representative Gallen, the only member to offer remarks, did not mention Section 14 at all, affirmatively stating that the "only major change" was embodied in a revision to Section 1 whereby the state residency period for qualified electors was reduced from one year to 90 days. *See* House Legis. Journal, Session of 1967, Vol. 1, No. 6, at 83-84 (Jan. 30, 1967).

In subsequent legislative sessions during the twentieth century, when the General Assembly wished to expand absentee voting privileges to additional classes of electors, they understood that legislation alone was insufficient, and a constitutional amendment was required. *See* House Legis. Journal, Session of 1983, No. 88, at 1711 (Oct. 26, 1983) (in seeking to expand absentee voting rights to individuals "who will not attend a polling place because of the observance of a religious holiday," discussing and approving the need to change an "Act" to a "Joint Resolution" to amend the constitution because simply amending the Election Code was insufficient to accomplish that goal); House Legis. Journal, Session of 1996, No. 31, at 840-41 (May 13, 1996) (in seeking to expand absentee voting rights to individuals who would be out of town on election day but still within their counties, recognizing that a constitutional amendment was required).

The 1983 and 1996 legislative bodies were much closer in time to the 1967 Constitutional Convention than the one which passed Act 77 in 2019.

If the electorate wishes to effectuate that end, the state Charter, as the majority emphasizes, is not overly difficult to amend. *See* Majority Op. at 58-59 & n.41 (indicating that in the Twentieth Century alone, over 150 substantive amendments were made to our organic law). The people can simply remove the "offer to vote" prerequisite or otherwise specify unambiguously that the Legislature is authorized to pass legislation such as Act 77. In fact, as recently as 2019 the Senate introduced a joint resolution proposing an amendment to do exactly that by changing Article VII, Section 14(a) to state:

> The Legislature shall, by general law, provide a manner in which, and the time and place at which, qualified electors may vote, and for the return and canvass of their votes in the election district in which they respectively reside. *A law under this subsection may not require a qualified elector to physically appear at a designated polling place on the day of the election*.

Senate Bill 413 of 2019 (passed by both Houses April 28, 2020; filed with the Secretary of the Commonwealth April 29, 2020) (emphasis added). That change, though proposed, was not adopted. If the majority were to follow precedent and invalidate Act 77, an amendment like this could easily be adopted assuming no-excuse mail-in voting has widespread popular appeal.

I express no opinion as to whether no-excuse mail-in voting reflects wise public policy. That is not my function as a member of this state's Judiciary. My function is to apply the text of the Pennsylvania Constitution, understood in light of its history and judicial precedent. In so doing, I would hold that that venerable document must be amended before any such policy can validly be enacted. Accordingly, I respectfully dissent.

Justice Brobson joins this dissenting opinion.