The Forgotten Supreme Court Justice

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THE FORGOTTEN SUPREME COURT JUSTICES

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When lawyers, law students, and academic commentators discuss Justices of the United States Supreme Court, they typically display a detailed understanding of the person, personality and jurisprudence of the Justice in question. Entire books are written about Supreme Court Justices, past and present. Creating character sketches of these public figures and anticipating their instincts on the bench tends to come easily.

A general, informed portrait of the current United States Supreme Court might look something like this: Chief Justice William H. Rehnquist, the no-nonsense chief, appointed in 1972 by President Richard M. Nixon, is a steady conservative who believes in states' rights, favors bright-line rules for police, and yet adheres to principles of stare decisis even in some areas (such as involving the Miranda rule) where he openly disagrees with the existing precedent. Justice Sandra Day O'Connor, the first woman Justice on the Court, appointed by President Ronald Reagan in 1981, is frequently described as a critical swing vote on the Court. Her plain-spoken voice that developed its cadence on the Lazy-B Ranch in Arizona where she spent her childhood, and later gained its

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1 See, e.g., WILLIAM D. BADER & ROY M. MERSKY, THE FIRST ONE HUNDRED EIGHT JUSTICES (2004) (compiling biographies, information and statistics relating to all Supreme Court Justices in American history, as well as information concerning individuals who were nominated, but never served on the Court).


4 See STARR, supra note 2, at 21.


6 See SANDRA DAY O'CONNOR & H. ALAN DAY, LAZY B: GROWING UP ON A CATTLE RANCH IN THE AMERICAN SOUTHWEST xi, 315 (2002); see also, STARR, supra note 2, at 32.

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strength and confidence as Senate Majority Leader in Arizona, has allowed her to forge coalitions that have made her—in the words of The New York Times—"the most influential member of the most powerful unelected court in the world."  

Even the Justices who maintain a lower profile are familiar to us. Justice David Souter is the quiet, reclusive native of New Hampshire, who disclosed at the time of his Senate confirmation that he did not own a color television. He was appointed by President George H. W. Bush, yet has evolved into an independent and even liberal voice on the Court—he sided with the dissenters in the controversial 2000 election case of Bush v. Gore, effectively voting against the son of the man who appointed him. Justice Anthony Kennedy, who formerly served on the Ninth Circuit Court of Appeals in California, is a strong free speech advocate who often plays a central role in controversial cases; yet, he has increasingly diverged from voting in lockstep with his traditional ally, Justice O'Connor. Justice Clarence Thomas has a reputation for voting regularly with his jurisprudential mentor, Justice Antonin Scalia, yet he is far less aggressive during oral arguments and rarely asks a question from the bench. A quiet, but unyielding strict constructionist, Justice Thomas is widely becoming viewed as one of the leading conservative forces on the Court. However, Justice Scalia, the Italian-American jurist who writes with a lively pencil sharpened by years of teaching at Chicago Law School, still dominates as the Court’s most conservative member. He rarely holds back in a dissent, even when disagreeing with his closest

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9 See Jerome Cramer, Mr. Souter Comes To Town, TIME, Oct. 15, 1990, at 67.
13 See Starr, supra note 2, at 42.
friends on the Court. 16

Justice John Paul Stevens, the Court's oldest Justice with distinguished white hair and gentle demeanor, is the sole appointee of Republican President Gerald R. Ford, who sides most frequently with his colleagues who are Democratic appointees. 17 A Warren Court moderate who turned into a Rehnquist Court liberal, he stays fit at age 84 by playing tennis and wears a trademark bow tie on the bench. 18 Justice Ruth Bader Ginsburg, a former gender discrimination scholar who argued Frontiero v. Richardson 19 in the Supreme Court, continues to play a leading role as a liberal voice, especially when issues of gender and equal protection face the Court. 20 And Justice Stephen Breyer, a former Harvard Law School Professor and former Special Counsel to the Senate Judiciary Committee, whom President Bill Clinton passed up in 1993 before naming him to the Court in 1994, enjoys laboring through intellectual puzzles, head propped in hands, rubbing vigorously at his temple during oral arguments. 21

We, as lawyers and scholarly commentators, know plenty about our United States Supreme Court Justices. We construct personality sketches and use them to anticipate their decisions, to devise strategies in crafting briefs and arguments before the Court, and to frame our critiques of their opinions in voluminous law review articles.

But what do we know of our state supreme court justices who occupy a parallel position of importance in our highest state courts? In most cases, not much. These justices typically move through life anonymously, in part because we take no time to shine the light of scholarly inquiry upon them. In much of our writing as academics, and as commentators in the popular press, we tend to refer to state appellate judges as inanimate objects who possess neither identities nor judicial personalities. Often we treat these justices, male and

17 See STARR, supra note 2, at 43; see generally Symposium, Perspectives on Justice John Paul Stevens, 27 RUTGERS L.J. 521 (1996).
18 See STARR, supra note 2, at 43.
female, old and young, alive or dead, as interchangeable pieces of wood. As a result, those who read our writings form no picture of state jurists in their minds’ eyes. Nor do they develop a sense of the jurisprudence of individual state court justices when it comes to state constitutional law or any other topic.

Even within that small clique of scholars and commentators who have earned a living following developments relating to New Judicial Federalism, since the 1980s, we tend to recognize only a smattering of the leading jurists from the state appellate courts. Those of us who have traveled the speaking circuit over the years, as nascent state constitutional scholars, are familiar with a few of the all-stars: Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court; retired Justice (now Professor) Hans Linde of Oregon (who was a pioneer in New Judicial Federalism); Chief Justice Judith Kaye of the New York Court of Appeals; and Chief Justice Christine Durham of Utah. All of these individual jurists have stood out in the national arena as gifted opinion-writers and jurisprudential leaders. But other than with respect to a handful of luminaries, what have we done to remove the bushel baskets that have obscured the lights shining from state appellate judges throughout the United States? There are a total of 330 state supreme court justices in the fifty states. Why, as scholars committed to assisting in the development of this crucial area of jurisprudence, have we done such a lackluster job in bringing those jurists to life?

The best place to start is with the judges who populate, teach, and write in the states where we live. If scholars and commentators in Massachusetts, New York, Pennsylvania, Florida, Nebraska, New Mexico and California make a concerted effort to develop and

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22 See Ken Gormley, The Silver Anniversary of New Judicial Federalism, 66 ALB. L. REV. 797 (2003) (discussing the history and evolution of New Judicial Federalism, a jurisprudential philosophy originally expounded by Justice Brennan that advocates "an increased emphasis upon state constitutional jurisprudence in order to safeguard individual rights and liberties").

23 See generally Justice Shirley S. Abrahamson, Divided We Stand: State Constitutions In a More Perfect Union, 18 HASTINGS CONST. L.Q. 723 (1991).


27 This figure was compiled by searching each state’s highest court at http://www.courts.com.


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disseminate objective and insightful pictures of the jurists in their own highest state courts, a national portrait will emerge of the people who make state constitutional law work. This will, in turn, enhance the understanding of, and respect for, those jurists who are just as important as the nine United States Supreme Court Justices.

In Pennsylvania, where I have taught state constitutional law for two decades, and where I recently edited a treatise on the Pennsylvania Constitution, the story is no different than anywhere else. Seven justices make up the high court. Yet few lawyers or scholars could even name them. As a starting point, and as an example of how a simple biographical/jurisprudential sketch of a state high court could be created, let me offer the following picture of the Pennsylvania Supreme Court, which is the oldest appellate court in North America. This is a work in progress, at best. It integrates a word or two about the justices' philosophies concerning Pennsylvania constitutional law, along with a sliver of personal background. But even an initial thumbnail sketch can help scholars, lawyers, and jurists, who are committed to the healthy development of New Judicial Federalism, begin constructing similar sketches in all fifty states. Eventually, a full (and deservedly rich) portrait may take shape.

Chief Justice Ralph J. Cappy, a former athlete who served as Public Defender in Allegheny County and distinguished himself as a trial judge with a knack for tough administrative assignments, took his seat on the Pennsylvania Supreme Court in 1990 and swiftly became a leader in New Judicial Federalism. In 1991, he authored the landmark decision of Commonwealth v. Edmunds, which established a four-part protocol that lawyers and litigants were strongly urged to follow in every criminal or civil case raising a constitutional issue, in order to flesh out state constitutional questions. Chief Justice Cappy, who spends summers riding a

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31 Pennsylvania’s Unified Judicial System, supra note 29, at “The Honorable Ralph J. Cappy”.
33 Id. at 895.

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motorcycle cross-country, defies easy categorization as liberal or conservative; nonetheless, he has remained a consistent voice in favor of independent analysis under the state constitution. He has authored an impressive collection of opinions rooted firmly in the Pennsylvania Constitution and has used his bully pulpit as chief justice to advocate the careful development of state constitutional jurisprudence by lawyers and judges throughout the commonwealth.

Justice Ronald D. Castille, a graduate of University of Virginia School of Law, served in the United States Marine Corps during the Vietnam War, sustained injuries from enemy gunfire, and received numerous awards for bravery, including two Purple Hearts. After serving as District Attorney in Philadelphia, he practiced as a litigator in the prestigious law firm of Reed Smith Shaw & McClay, before his election to the court in 1993. Drawing upon his tough prosecutorial background, he has consistently opposed expansion of state constitutional rights in cases pitting criminal defendants against police officers; yet, Justice Castille has maintained a fierce independence on the court. He has invoked Pennsylvania constitutional precedent to depart from the United States Supreme Court in several prominent cases, including PAP's A.M. v. City of Erie, in which the court rejected the U.S. Supreme Court's analysis under the First Amendment and concluded that nude dancing was a protected form of speech under article I, section 7 of the state constitution.

Justice Russell M. Nigro, the son of second-generation Italian immigrants, who put himself through Rutgers Law School and then established a sterling reputation on the Philadelphia County Court of Common Pleas, has emerged as a strong liberal voice on the

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35 See Ralph J. Cappy, Foreword to GORMLEY, supra note 28, at v.
36 See Pennsylvania's Unified Judicial System, supra note 29, at "The Honorable Ronald D. Castille."
37 Id.
40 See Pennsylvania's Unified Judicial System, supra note 29, at "The Honorable Russell
court. He has also gone on record as a vigorous advocate of examining the state constitution as a potential repository of individual rights. Justice Nigro has been a solid defender of procedural rights for all, including criminal defendants, and has found novel individual rights located in the state charter. Yet he has also authored opinions that stand up for the government such as Commonwealth v. Tharp, in which the court sustained a new state constitutional amendment that gave the Commonwealth a right to jury trial under Article I, Section 6 of the Pennsylvania Constitution.

Justice Sandra Schultz Newman, the first female justice elected to the Pennsylvania Supreme Court in its 282-year history, has indicated openness to independent state constitutional analysis, authoring a significant opinion in Commonwealth v. Efaw dealing with the novel question of whether a citizen has a reasonable expectation of privacy in his or her insurance records. Justice Newman has also dealt peripherally with the Pennsylvania Constitution in a case dealing with third party consent to search, and has explored the broader question of federalism in a sophisticated opinion that held the Pennsylvania Supreme Court was not bound by decisions of inferior federal courts.

Justice Thomas G. Saylor is steadily gaining a reputation as one of the court’s leading scholars. He attended Columbia Law School, worked as First Deputy Attorney General of Pennsylvania, and then earned a seat on the superior court before his election to the supreme court in 1997. Also the recipient of an LL.M. from the University of Virginia School of Law, Justice Saylor has joined the select group of state supreme court justices who not only pen

M. Nigro.

46 774 A.2d 735 (Pa. 2001); see also Boswell, 721 A.2d at 338 (Newman, J., opinion in support of affirmance) (discussing Article 1, Section 8 of the Pennsylvania Constitution).
49 See Pennsylvania’s Unified Judicial System, supra note 29, at “The Honorable Thomas G. Saylor.”

opinions relating to state constitutional law,\textsuperscript{50} but also author scholarly articles on the topic.\textsuperscript{51} A thoughtful jurist, who smokes a pipe as he works, Justice Saylor is quickly becoming recognized as an intellectual leader on the court and a scholar of New Judicial Federalism.\textsuperscript{52}

The most recently appointed justices, although newer to the field of state constitutional decision-making, are equally impressive and interesting public figures. Justice J. Michael Eakin, former District Attorney for Cumberland County and superior court jurist\textsuperscript{53} with a sharp wit, a talent for playing the harmonica, and a penchant for writing opinions in verse,\textsuperscript{54} has resisted using the state constitution to expand rights of the criminally accused (much like his colleague Justice Castille);\textsuperscript{55} yet, he has remained intellectually open to Pennsylvania constitutional debate.\textsuperscript{56}

Justice Max Baer, the newest member of the court, who had established himself as a national leader as head of the Family Division in the Allegheny County Court of Common Pleas before joining the supreme court in 2004,\textsuperscript{57} has not yet waded into the thicket of state constitutional decision-making in Pennsylvania.\textsuperscript{58} A tough, intellectual jurist, who ran his campaign as "the fighting judge,"\textsuperscript{59} Justice Baer has nonetheless spoken publicly about the importance of vigorous state constitutional discourse.\textsuperscript{60} A prodigious worker who has described himself as an

\textsuperscript{50} See, e.g., Commonwealth v. Zahir, 751 A.2d 1153 (Pa. 2000).
\textsuperscript{52} See, e.g., id.
\textsuperscript{53} See Pennsylvania's Unified Judicial System, supra note 29, at "The Honorable J. Michael Eakin."
\textsuperscript{57} See Pennsylvania's Unified Judicial System, supra note 29, at "The Honorable Max Baer."
\textsuperscript{58} Justice Baer, however, did join Justice Castille's concurrence in Commonwealth v. Rogers, 849 A.2d 1185, 1192 (Pa. 2003) (Castille, J., concurring), an opinion that discussed the issue of canine sniffs under Article I, Section 8 of the Pennsylvania Constitution.
\textsuperscript{59} MacKenzie Carpenter, There's No Middle Ground When It Comes to Judge Baer, PITTSBURGH POST-GAZETTE, Oct. 12, 2003, at A1.
\textsuperscript{60} Presentation by Justice Max Baer at Duquesne University School of Law on "Appellate Practice and Procedure," Nov. 3, 2004.
“administratively activist judge,” he will undoubtedly become a significant figure in this blossoming area of jurisprudence.

The above portrait is merely a quick snapshot, confined by the editor’s wise space limitations. However, if we are to begin to visualize and to understand the individuals who breathe life into our state constitutions, then we must begin constructing this sort of modest rendering for the benefit of the bench, the bar, and legal scholars who are committed to studying the state judiciary.

It is surprising, and even disappointing, that nearly three decades after New Judicial Federalism took hold in the United States, state supreme court justices remain largely one-dimensional cardboard cut-out characters. State supreme court jurists, like their federal counterparts in Washington, D.C., are creative, intelligent, and engaging human beings who labor over their opinions and bring unique sets of personal and professional qualifications to their work. They appreciate when positive attention is paid to their judicial opinions. They take note when commentators raise questions about, or criticize, the logic set forth in their rulings. As with each Justice on the United States Supreme Court, since the beginning of American history, each justice on the state supreme courts brings with him or her a set of life experiences and philosophies that become inextricably intertwined with the decisions and opinions he or she produces.

We as writers, teachers and commentators must undertake the responsibility of helping to paint a fuller portrait of state court jurists that will allow their judicial work to be understood at the highest level possible. If we expect lawyers and lower court judges to dissect state constitutional opinions with the care and detail that we expect when it comes to rigorous federal constitutional analysis, we must give them the tools to do the necessary work. Part of a sophisticated understanding of the written work product of any branch of government—whether executive, legislative, or judicial—is understanding the decision-makers themselves. A fortiori, this is true of the judicial branch in the American system of government. The work-product of judges, unlike that of more political creatures in the world of government, consists almost exclusively of written words reduced to paper.

If we expect to advance as scholars and students of state

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61 Geoff Yuda, New to the Court: Justice Max Baer, the Newest Member of Pennsylvania’s Supreme Court, Discusses the Electoral Process, What He Hopes to Accomplish and Life Off the Bench, PA. LAW. 40, 43 (May/June 2004).
constitutional jurisprudence in the United States, and to contribute to the vitality and permanency of that body of law, it is our responsibility to help bring its architects to life. We have done this with 113 Justices and Chief Justices of the United States Supreme Court throughout this country's history. The nation knows them intimately because we have provided a window into their lives. We should not fail to do the same with respect to those impressive, unique jurists who define our rights and liberties, even closer to home.

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