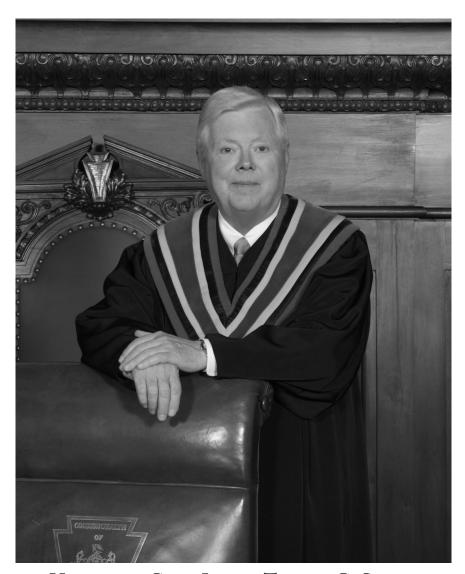


Retirement Ceremony The Honorable Chief Justice Thomas G. Saylor

Chief Justice Max Baer
Justice Thomas G. Saylor
Justice Debra Todd
Justice Christine Donohue
Justice Kevin M. Dougherty
Justice David N. Wecht
Justice Sally Updyke Mundy

September 22, 2021, 3:00 P.M. Supreme Court Courtroom Main Capitol Building Harrisburg, Pennsylvania



Honorable Chief Justice Thomas G. Saylor

Proceedings

CHIEF JUSTICE BAER: Good afternoon, I'm Max Baer, and it's my honor and privilege to sit in the Chief Justice chair and wear the Chief Justice collar. Only because my dear friend and esteemed colleague, former Chief Justice Tom Saylor, made the personal decision to step down a year early and to remain on the Court in my right-hand seat that by all rights would be mine and this would be his. This is because it was his observation, over his twenty-plus year career on the Court, that the Chief is best served by having at least a couple of years in the seat rather than one year, as I would have had if he had not stepped down early.

I have expressed often and continuously, not just my appreciation for that, but my great admiration for Chief Justice Saylor, who is the finest of men, the finest of colleagues, and the finest of leaders. And I'm in my eighteenth year on this Court, and I served for an additional twelve years on the trial bench before that, and in the preceding thirteen years I was practicing law. This Court has never been in better shape, and I don't think this Court has ever been more esteemed or acknowledged statewide and even nationally, and that's all because of the leadership of Chief Justice Saylor over all those years. So, he has the unending admiration, not just from for me, but from all of our colleagues, who will be able to express that at the end of today's ceremony. And we are so pleased to be here today to honor Chief Justice Saylor with all of you. And we appreciate you all being here.

We have a few speakers today, distinguished members of the Pennsylvania bar who wanted to speak in honor of Chief Justice Saylor. So, let me first call to the podium President Ken Gormley of Duquesne University, again a distinguished scholar on his own behalf, a good friend of the Chief, and a good friend of all of ours.

PRESIDENT KEN GORMLEY: Thank you, Chief Justice Baer. Chief Justice Saylor and distinguished members of this Honorable Court.

It's a great honor to stand before you this afternoon. I have been studying, and writing about, Constitutional law, the courts, and Pennsylvania Constitutional Law for nearly four decades — since I began my career in the law. I've had the privilege of knowing most of the Justices on this Court during that time. And, as I've tried to reflect in my writing, I have enormous respect and admiration for this Court and the jurists who have served on it —and I still maintain it is the oldest court in North America. Debates over historical fine-points aside, however, it certainly remains one of the greatest judicial bodies in the history of the United States.

In looking at the extraordinary list of luminaries who have served in this chamber, Chief Justice Saylor undoubtedly ranks at the very top of that list. And although Chief Justice Max Baer, our distinguished Duquesne Law alum, has taken over the reins as Chief Justice, I hope you'll permit me — for the purposes of this special ceremony today — to treat it as if there are two Chief Justices in the chamber, as we honor the outgoing Chief today.

One of my areas of scholarly interest since 1985 — at a time when few people cared about state constitutional law — has been the Pennsylvania Constitution,

that predated the U.S. Constitution, and the rich jurisprudence that has grown up around that fundamental state charter.

As a result, I have carefully followed Chief Justice Saylor's contributions in this area, commonly referred to as "new judicial federalism." In fact, in a law review article I wrote 16 years ago — called "The Forgotten Supreme Court Justices," — I gave a thumbnail sketch of each of our Pennsylvania Supreme Court Justices serving at the time. I included a brief passage about then-Justice Saylor, who was then still relatively new to the High Court, and wrote this:

Justice Thomas G. Saylor is steadily gaining a reputation as one of the court's leading scholars. He has joined the select group of state supreme court justices who not only pen opinions relating to state constitutional law, but also author scholarly articles on the topic. 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.²

I believe Chief Justice Saylor still smokes a pipe as he works. So today, if I were to update that passage, I would change it in only one way: to note that Chief Justice Saylor's reputation as a leading scholar of state constitutional law and as an intellectual leader of the Court are now cemented. His opinions and articles — in that area and others — are highly influential, recognized as authoritative, and cited by jurists and scholars alike, across the United States.

Dating back to the LLM degree he earned in the early 2000s at the University of Virginia Law School, he brought a depth and erudition to his work that was unmatched. And he has played an indispensable role in building Pennsylvania's body of state constitutional jurisprudence, which itself has been a major contribution.

There are several qualities that make Chief Justice Saylor's opinions and other pronouncements on the Pennsylvania Constitution so distinctive and impressive. None of these opinions rubber-stamp one perspective or another. There is not even a hint of political or ideological predisposition in them. They do not routinely defer to federal precedent; nor do they habitually hold that our state charter requires a departure from federal law. These opinions are thoughtful, deliberative, rigorous, and measured. And they reflect what Chief Justice Saylor set out as his own lofty goal as a jurist, when he wrote pieces in law journals, including the NYU Annual Survey of American Law, published in 2003. He stated that the work of a court, foremost, is to issue opinions and rulings that "stand the test of time." He also said that judges, including himself, should adhere to the same admonition that applies to practitioners of medicine in taking the Hippocratic oath. *Primum non nocere*. Or, "First, do no harm."

Every year, when this Court came to Pittsburgh for its fall or spring sitting, I would take my state constitutional law class from Duquesne Law School to

¹ Ken Gormley, The Forgotten Supreme Court Justices, 68 Alb. L. Rev. 295 (2005).

² Id. at 301–02.

³ Thomas G. Saylor, Fourth Amendment Departures and Sustainability in State Constitutionalism, 22 Widener L. J. 1, 4, 27 (2012).

⁴ Thomas G. Saylor, *Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule*, 59 N. Y. U. Ann. Surv. Am. L. 283 (2003) (citing Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 Harv. L. Rev. 56, 113-14 (1997)).

attend oral arguments. I'd call the Prothonotary and ask if one of the Justices could address the students at the end of the arguments to make it even more special. At first, Chief Justice Ralph Cappy — for whom I'd served as a Special Clerk — would oblige and meet with us. But after a couple of years, Chief Justice Cappy said, "You really ought to have Tom Saylor do this. He's the real expert here." Thus began the tradition whereby Justice Saylor, and later Chief Justice Saylor, would sit in a chair with my students gathered around, after oral arguments, and captivate them with extemporaneous reflections on the history of the Pennsylvania Constitution; the Pennsylvania Supreme Court itself, and its sacred duty to interpret that document; and the Court's place in the broader American legal system. Inevitably, students told me this was the best day of the year.

And as a writer on subjects dealing with Pennsylvania Constitutional jurisprudence, I was one of the people reading all of these decisions each year. Chief Justice Saylor's written words were just as eloquent, powerful and meaningful — which is why they have contributed, so greatly, to a lasting body of jurisprudence.

Given the depth of the analysis in Chief Justice Saylor's judicial decisions, they're not susceptible to sound-bites or blurbs. To do them justice would take the entire afternoon. But I wanted to select several that are emblematic of his masterful work — sometimes in a low-key, quiet way — which of course has been the hallmark of Chief Justice Saylor's leadership on the bench, overall.

In 2012, in connection with the upcoming presidential election — the election between incumbent Democratic President Barack Obama and Republican challenger, former Governor Mitt Romney — the Editor-in-Chief of the Legal Intelligencer commented on a blockbuster decision by the Court, as follows:

"The [Pennsylvania Supreme] Court was handed the legal equivalent of a lit stick of dynamite amidst the vitriol of a hotly-contested presidential election. And despite being a court split evenly along party lines, the justices managed to craft a decision that was careful, practical and fair to all the parties involved . . .

Given his questions during oral arguments, and the tone of the *per curiam* order, I'm guessing that Justice Thomas Saylor wrote it. That's a view shared by others I've spoken with[.]"⁵

The decision the Editor was talking about was an order issued in *Applewhite v. Commonwealth*. It concerned Act 18, the law enacted by the Pennsylvania Legislature in March 2012, requiring registered voters to produce a photo identification in order to cast their ballots in the upcoming November election, and all elections thereafter.

In 2008, the U.S. Supreme Court had upheld a similar legislative measure, finding that Indiana's voter ID law did not burden the right to vote under the Fourteenth Amendment of the U.S. Constitution.

In Applewhite, several voters sued in the Commonwealth Court to enjoin the Act's enforcement, claiming that it disenfranchised or severely burdened the

 $^{^{5}\,}$ Hank Grezlak, Voter ID Decision Was One of Pa. Supreme Court's Finer Moments, The Legal Intelligencer (Sept. 25, 2012).

⁶ Applewhite v. Commonwealth, 54 A.3d 1 (Pa. 2012) (per curiam).

rights of voters, especially the elderly, the disabled and the financially disadvantaged, in violation of the Free and Equal Elections Clause and the implicit equal protection guarantees of the Pennsylvania Constitution.

The Commonwealth Court had denied the request for an injunction. This Court, however, reached a different result, one that represented a careful and balanced approach to a complex issue. In a per curiam order, which did indeed reflect Chief Justice Saylor's stated concerns from the bench during oral argument, the Court concluded that even though a voter identification requirement was not constitutionally defective in and of itself, the implementation of Act 18 by the Commonwealth was not, despite its good faith efforts, progressing in accordance with the Act's requirements. Therefore, the Court vacated the Commonwealth Court's order and returned the matter for the Commonwealth Court to determine whether the Act could be implemented in some way without causing voter disenfranchisement in the upcoming election. On remand, heeding the Supreme Court's instructions, the Commonwealth Court determined that the requirements could not be implemented appropriately and enjoined the Act's enforcement, at least for that election.

Another case worth noting is Chief Justice Saylor's opinion in *In re Fortieth Statewide Investigating Grand Jury*. This ordered redactions to a grand jury report that concerned clergy sexual abuse, which gained widespread attention and praise for reinvigorating the Pennsylvania Constitution's guarantee of reputational rights. At first, the opinion was met with some skepticism, especially among those in law enforcement. Even Chief Justice Saylor's colleague on the Court, former Chief Justice Ronald Castille, stated in an editorial in *The Philadelphia Inquirer*: "As a 20-year veteran prosecutor and with 21 years on the court itself, I questioned the action of the Supreme Court in halting dissemination of [a] Grand Jury Report." But, on further reflection, Chief Justice Castille found himself agreeing that the grand jury's procedures deserved the Court's consideration — because they posed a real risk to individual reputational rights. ¹⁰

In this 2016 case, Pennsylvania's Attorney General had conducted secret grand jury proceedings to investigate allegations of child sexual abuse by individuals associated with the Roman Catholic Church. The grand jury submitted a report in which individuals, many of them members of the clergy, were identified by name as having engaged in criminal and/or morally reprehensible conduct.

When the supervising judge signaled that the report would be released publicly, several named individuals challenged the report as false and objected to its release as written, on the grounds that it would impair their reputations in violation of their rights under the Pennsylvania Constitution. The supervising judge rejected their objections.

Here too, Chief Justice Saylor made certain that the Court reached a balanced result, and one that fairly addressed the concerns of all involved. While

⁷ Id. at 570-71.

⁸ In re Fortieth Statewide Investigating Grand Jury, 190 A.3d 560 (Pa. 2018).

⁹ Editorial by Hon. Ronald D. Castille, Releasing Catholic Clergy Abuse Report Risks Violating Constitutional Rights, Philadelphia Inquirer (Aug. 6, 2018).

 $^{^{10}}$ Id.

Chief Justice Saylor acknowledged that the function of the grand jury to bring misconduct to light was extremely important, he also emphasized that the right of Pennsylvania citizens to security in their reputations — embodied in Article 1, Section 1 — was a "fundamental constitutional entitlement" that dated back to our Constitution of 1790. In his view, because the Pennsylvania Constitution placed reputational interests on the same high plane as those rights pertaining to life, liberty, and property, the Grand Jury Act did not provide them with a meaningful way to respond to the 900 page report and counter the charges that could do permanent damage to their lives and reputations. Therefore, Chief Justice Saylor concluded that the Court needed to assess whether additional measures to protect reputational rights were available. In the meantime, his opinion ordered the public release of a report in which references to named individuals were temporarily redacted.

As I noted earlier, however, Chief Justice Saylor could never be pigeonholed as liberal or conservative, or as lavish or narrow-minded, in analyzing and reaching conclusions under the distinct provisions of the Pennsylvania Constitution.

In *Commonwealth v. Strickler*, ¹⁴ for instance, the Court tackled a particularly thorny question of great relevance to law enforcement and the driving public: Should Pennsylvania adopt a bright-line rule that required police officers to advise motorists who had been stopped that they were "free to go," before they were asked to consent to a search of their vehicles? The U.S. Supreme Court had rejected such a rule under the Fourth Amendment, opting instead for a "totality-of-the-circumstances" approach to deciding whether a motorist's consent to a vehicle search had been voluntary. ¹⁵

In the opinion authored by Chief Justice Saylor, in *Strickler*, the Court concluded that the federal totality-of-the circumstances test was applicable in Pennsylvania. The opinion carefully explained how the federal approach, as opposed to a bright-line rule, was more closely aligned with the Court's prior decisions by which Pennsylvania law had mirrored Fourth Amendment standards in this area. That said, the Chief did not sign on to the U.S. Supreme Court's view that a reasonable person subject to a completed traffic stop would typically feel free to leave without reservation. Rather, as a practical matter, he recognized that since the dynamic in police-motorist encounters can take on a coercive quality, this fact should not be disregarded. Accordingly, such cases required a "careful" consideration of relevant circumstances. He then reviewed those circumstances in meticulous detail, in the *Strickler* case, instructing the lower courts to take the psychological dynamic of authority as between an officer and a motorist into account as part of their totality assessment.

¹¹ Grand Jury, 190 A.3d at 572-73.

¹² *Id.* at 573-75.

¹³ Id. at 577-78.

¹⁴ Commonwealth v. Strickler, 757 A.2d 884 (Pa. 2000).

¹⁵ See Ohio v. Robinette, 519 U.S. 33, 39 (1996).

¹⁶ Id. at 896.

¹⁷ Id. at 900-01.

¹⁸ Id. at 901-02. The Strickler opinion also reflected Chief Justice Saylor's well-

I first got to know Chief Justice Saylor over 20 years ago, when Chief Justice Cappy appointed me to a fledgling Committee aimed at providing meaningful and interesting judicial education courses and programs to judges across the Commonwealth. The jurist he assigned to the Committee to lead that effort was the relatively new Justice, Tom Saylor. Since that time, I've been privileged to work with Chief Justice Saylor on many initiatives — symposiums, book projects, programs for law schools and students, programs for judges, and tributes to other prominent Justices on this Honorable Court. He was instrumental in helping me visualize and shape the Thomas R. Kline Center for Judicial Education at Duquesne Law School, which is now in its fourth year and works with AOPC and the other six law schools in this Commonwealth to deliver high-quality judicial education, as a form of service to the profession, and (now) as a model for other states seeking to emulate this model. Once again, his work has bettered our profession and our system of laws and justice.

So, how does one sum up Chief Justice Thomas Saylor's contributions during his nearly 30 years on the appellate bench? His deep, abiding love of the law and his reverence for this judicial body — and the absolute indispensability of its work — has shaped every day of his service as a Superior Court Judge, as a Supreme Court Justice, and most recently as a Chief Justice. As many of you know, I had the honor of writing the biography of Archibald Cox, my Constitutional Law Professor (at Harvard Law School) for whom I served as a Teaching Assistant. Well, like Archibald Cox and his mentor, the legendary Judge Learned Hand who served with distinction on the federal district and circuit courts in New York, Tom Saylor is a lawyer's lawyer, and a judge's judge. His service on this Court, and the gentle, gracious, dignified tone he has set in carrying out his judicial work is a model for all who aspire to public service, and to each of us privileged to learn from his example.

I am extremely proud to call Tom Saylor my friend. And I'm grateful for his extraordinary contributions that will be recorded in the history of this Court as an exemplar of that which will ensure its preeminence, for centuries yet to come.

Thank you for the honor of addressing you, on this very special occasion.

CHIEF JUSTICE BAER: Thank you for the eloquent words. Our next speaker is Professor Jules Epstein, a lawyer who's appeared before us on many occasions, and is a director of the advocacy programs at Temple. Jules, it's nice to see you, but I would not want to follow Ken.

Professor Jules Epstein: That's my problem, and I was going to complain about that, but I'll get to that in moment. Mr. Chief Justice, members of the Court and honored guests.

Let me begin with greetings from Temple University, Greg Mandel, our former Law Dean, now University Provost, and Rachel Rebouché, our new interim Dean. Dean Rebouché asked me to begin my remarks with the single word — thanks.

founded insistence on compliance with the Court's directive in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), that a litigant who contends that the Pennsylvania Constitution requires a departure from federal law must brief the issue according to the four-factor test the Court announced in *Edmunds*. Since the defendant had offered nothing that would have distinguished the protections available under the Pennsylvania Constitution from those available under the Fourth Amendment, Chief Justice Saylor declined to use the Court's resources to undertake an analysis of the *Edmunds* factors in the first instance. *See Strickler*, 757 A.2d at 902.

Thanks for what you have done for the law. Thanks what you have done for justice. Thanks for what you have done for law schools in Pennsylvania.

There's a bag next to your chair with a little Temple swag. We got a shirt and a cup, and we hope you enjoy it.

So, yes, that was a tough act to follow, and what can you say after that? So bear with me. I want to talk about the great rock group Pink Floyd. In 1971, I had fifth-row center seats for Pink Floyd, and I see some heads nodding very jealously. Since then I've grown slightly older, a lot older, perhaps a little wiser, and now I like to talk about the fact that, for the last decade or so, I've had front row seats with Tom Saylor. I've gotten to argue in front of Justice Saylor. I've gotten to appear in front of a court that he has masterfully led. I've gotten to read his opinions. I've had the honor of collaborating with him on his judicial education project. And, I've had the distinct privilege of the time we had that first meeting in your chambers. You said, "Jules, come on in my office." We just went in there and talked about books. So now I can say fifth row Pink Floyd, first row here.

Let me go on a little bit more seriously, although equally sincerely, and I want to talk about three other things. One is the law of evidence, one is a little bit more about judicial education, and one is the Chief's work in the area that I've been concentrating my time on since 1993, capital punishment and the death penalty.

I'm saying this, I actually have no cases before you, so I'm not trying to ingratiate myself too much. This is a terrific court, this is a hot court, and there are so many folks here who write opinions where now, when I go around and train lawyers and judges, I say, read Justice Dougherty's opinion about X. Justice Donohue and, right, whoever it is. But, I have to tell you for a long time, and still to today, when I train judges in this Commonwealth, when I train lawyers here, and when I travel outside of the state, I say make sure you read the dissent or the concurrence of Chief Justice Saylor. And I'm going to come back to that when I talk to you about his work in capital punishment law.

The thing about judicial education, to follow up on what was said, and I hope I say it right — it was under Chief Justice Saylor that we developed mandatory, continuing judicial legal education. This was not without some groans from certain folks who will remain unmentioned, but it is now tremendously appreciated. And the Chief Justice brought folks from every law school in the state and said, come to my chambers, because what I want is each law school to contribute to that and not just have law professors talk, but make it multidisciplinary. Have people from your Psychology Department, or your Medical Division, or whatever. I've been honored to work with your administrative office and Steve Feiler and his team. I'm actually working through them now with Michigan's court, because they came to Pennsylvania to say, "How did you do it? We need your help." What a tremendous gift to the judiciary.

Let me talk about the death penalty. I haven't figured you out yet, sir. So, what do I mean? You're not an ideologue. You're not a partisan, but you write in the area where we train lawyers in what we call the brain surgery of criminal law. That most complex and fraught of areas. I had a student — this is the great thing whenever you're a law professor — I said, "student, go read some cases, and give me an Excel spreadsheet." And, he read through ninety-three of the capital punishment opinions. These were the majority, concurring, and dissenting opinions written by Justice, and then Chief Justice Saylor, just from 2002 to 2013. Of those ninety-three, twenty-four were concurrences, nine were dissents, and two more concur and dissent.

What was going on? So I'm going to call it a demand for precision. My favorite of all of the student's notes to me, he said that the Justice wrote: "I concur on everything except footnote four." Right, I'm not letting anything get by me. I concur, except as to the treatment of a hearsay issue, state-of-mind hearsay, which we finally revisited and addressed much more conclusively this year. I concur, except you're not providing fair money for experts for indigents. I concur, except the lawyer should have presented a case to save this person's life — what we call in the death-penalty arena mitigation. I find harmless error, but I'm still going to identify the error, because it's important that we not repeat it again. He was deciding not just this case, but recognizing that the decisions guided all future ones.

And most important, and extraordinarily rare, I'm going to call out the system where I see it is broken. Justice Saylor's words: "[W]here serious deficiencies in the rendition of attorney services are present, we should not enforce guiding presumptions woodenly or in a way which masks actual stewardship failures."²⁴ Or these, where he writes of his "continuing concern regarding the many cases in which we are seeing a clear failure, on the part of counsel, to provide professional services necessary to secure appellate review on the merits of a capital defendant's or petitioner's claims."²⁵ No one else was doing that, or not many. I want to make sure people can be heard when we deal with this very complex issue that the Court has dealt with again and again, which we call layered effectiveness.²⁶ This is a quote that was remarkable: "I am unable to agree with the suggestion that the presumption of effectiveness by and large reflects the actual state of capital defense representation in Pennsylvania"²⁷

So, what's my conclusion? Remember that student who did all this so-called grunt work for me? So, I wrote him an email thanking him and asking a few follow-up questions, and he wrote me back the following: "I gained a great respect for Justice Saylor. In so many opinions, his goal was to state the law the correct way, not necessarily changing the outcome. I really admire that he took the extra effort to ensure that everyone had a proper hearing in court."

I couldn't say it better. Thank you, Chief Justice Saylor.

CHIEF JUSTICE BAER: Professor Epstein, that was beautifully said and was absolutely the equal of President Gormley and sets an extraordinarily high bar for our final speaker, Robert Heim, a partner at Dechert and a frequent advocate before our Court and a good friend of all of ours.

¹⁹ See Commonwealth v. Ramos, 83 A.3d 86, 94 (Pa. 2013) (Saylor, J., concurring).

²⁰ See Commonwealth v. Fitzpatrick, 255 A.3d 452 (Pa. 2021).

 $^{^{21}}$ See, e.g., Commonwealth v. King, 57 A.3d 607, 636 (Pa. 2012) (Saylor, J., concurring specially).

 $^{^{22}}$ See, e.g., Commonwealth v. Sepulveda, 55 A.3d 1108, 1152-57 (2012) (Saylor, J., concurring).

 $^{^{23}\,}$ See, e.g., Commonwealth v. Housman, 986 A.2d 822, 844 (Pa. 2009) (Saylor, J., concurring and dissenting).

²⁴ King, 57 A.3d at 634 (Saylor, J., concurring specially).

²⁵ Commonwealth v. Johnson, 985 A.2d 915, 928 (Pa. 2009) (Saylor, J., concurring).

 $^{^{26}}$ See, e.g., Commonwealth v. Harris, 852 A.2d 1168, 1181 (Pa. 2004) (Saylor, J., concurring).

²⁷ King, 57 A.3d at 636 (Saylor, J., concurring specially).

ROBERT HEIM, ESQUIRE: It's a bar that I will reach for, but it will be very hard to attain. Thank you Mr. Chief Justice Baer and Justices of the Supreme Court and especially Justice Saylor, may it please the Court.

In an article written for the Widener Law Journal, entitled "On the Nature of Judging," Justice Saylor quoted Socrates on the essential qualities of a good judge. Socrates observed that "four things belong to a judge: to hear courteously, to answer wisely, to consider soberly and to decide impartially." Justice Saylor then added, I think somewhat wistfully, "If only it were that simple." 29

And, of course, as your honors all recognize, it is not that simple. But among the qualities not enumerated by Socrates — qualities that make for an exemplary jurist — are courage, humility and what my friend and colleague Chip Becker calls "a jurisprudential orientation" — a devotion to the process of lawmaking and a quiet persistence to knitting the fabric of the law. Knitting is a craft, and Justice Saylor has proven to be a master craftsman.

Let me give you just a few examples of that quiet yet persistent effort to knit the fabric of the law.

In 1978, the Court decided a design defect case known as *Azzarello*.³⁰ Although many of the Court's prior opinions stated that negligence concepts had no place in strict liability jurisprudence, there was massive confusion around that topic. The *Azzarello* decision itself seemed to point in the other direction. The lower courts were confused, and the bar was equally confused. Something had to be done.

Justice Saylor set out to deal with the confusion head on through a number of concurring and dissenting opinions. As an example, in the Bugosh case in 2009,31 he wrote in dissent that Azzarello should be overruled to "permit the modernization of Pennsylvania products liability jurisprudence to progress at long last."32 And, as your honors know, the Court did finally overrule Azzarello in Tincher in 2014,33 but while the Court's decision cleared up much of the confusion, it also left much unanswered, as commentators since have frequently noted. And typical of Justice Saylor's quiet persistence, he pressed on with a concurring and dissenting opinion in *Tincher*, another characteristic of his jurisprudence. He wrote: "If this Court's protracted experience with Azzarello, its progeny and the associated no-negligence-in-strict-liability rubric demonstrates anything, it is that the adjudicative process is very poorly suited to unstructured substantive lawmaking ventures such as ensued in Azzarello's wake."34 He went on to note that he favored the approach taken in the Third Restatement of Torts, but its adoption would be subject to the prerogative of the General Assembly which "in my view, bears the primary responsibility — and is in a far superior

²⁸ Hon. Thomas G. Saylor, *On the Nature of Judging*, 20 Widener L. J. 681, 682 (2011) (quoting Hoyt's New Cyclopedia of Practical Quotations 411 (Kate Louise Roberts ed. 1940)).

²⁹ *Id*.

³⁰ See Azarello v. Black Bros. Co., 391 A.2d 1020 (1978).

³¹ Bugosh v. I. U. N. Am., Inc., 971 A.2d 1228 (Pa. 2009) (per curiam).

³² Id. at 1244 (Saylor, J., dissenting).

³³ See Tincher v. Omega Flex, Inc., 104 A.3d 328 (Pa. 2014).

³⁴ See id. at 410-11 (Saylor, J., concurring and dissenting).

position to make the social policy judgments essential to substantive lawmaking."³⁵

As you all know, the Court did not go on to adopt the Third Restatement. But what matters here is Justice Saylor's gentle but insistent push for the Court to address difficult issues, even when it meant reevaluating a large body of law. This fearless dedication to tackling hard questions is typical of Justice Saylor. His dedication has become part of the culture of the Court. It is an enduring and happy legacy.

This deference to the Legislature's role in policymaking is another hallmark of Justice Saylor's jurisprudence. Some of my colleagues have described the Justice as a "conservative" but my strong sense is that an analysis of his body of work — some 400 main opinions and over 700 responsive ones — will likely be seen to reflect a thoughtful, considered approach untethered to ideology. Put another way, his ideology, if one needs to have one, is to see that the law, as applied to given facts, reflects sound values and common understanding. So, while the Justice in interpreting statutes has stressed that the judicial undertaking in the first instance entails discovering the intent of the General Assembly, in some instances that is only the starting point, and when the intent is ambiguous, the Court of necessity is required to examine the policies underlying the statute.

I think Justice Saylor and perhaps each member of the Court would agree that discerning the intent and so ruling, or for that matter applying settled law to a difficult set of facts, can lead to a conclusion that a judge or justice does not personally like. I expect that your honors have all had that experience and would agree with the remarks of Justice Scalia, who said, "If you are going to be a good and faithful judge, you have to resign yourself to the fact that you are not always going to like the conclusions you reach. If you like them all the time, you are probably doing something wrong."³⁶

Justice Saylor's view of constitutional interpretation is similar to his view of statutory construction. First look for the plain intent. But he has acknowledged that the Court often is required to make difficult choices and, even more, to explain those choices. It is not easy. In his law review article, Justice Saylor noted with approval the decision by the United States Supreme Court interpreting the Sixth Amendment to the United States Constitution. Delving deeply into its history, one could only conclude that the Framers likely intended to provide that an accused had the right to the assistance of counsel, if he had counsel. But the Court extended it by interpretation to require that Court-appointed counsel be provided for indigent defendants. He quoted Professor Alexander Bickel who wrote, "The original undertaking forms the starting link in the chain of continuity which is the source of the Court's authority [W]hat is relevant is not alone the origin of constitutional provisions but also the 'line of their growth,' the further links in the chain of continuity."

³⁵ *Id.* at 411.

Justice Antonin Scalia, Madison Lecture at the Chapman University School of Law (Aug. 29, 2005), quoted in Hon. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 Case W. Reserve L. Rev. 905, 906 (2016).

Nature of Judging, supra note 28, at 687 (quoting Alexander M. Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 4-6 (1955)

As you can see, Justice Saylor cannot be pigeonholed as a conservative or a liberal or with some other ideological label. His writings show him to be a gifted thinker, modest, and fully aware of the complexity of the law. He would acknowledge that there frequently are competing reasonable outcomes and takes pain to explain why he has nonetheless come to the decision he has made.

Former Chief Justice Castille has said that he assigned some of the Court's most difficult decisions to Justice Saylor,³⁸ likely for this very reason. Another retired Supreme Court Justice, the Honorable Jane Greenspan, put it another way. She noted that Chief Justice Castille frequently turned to Justice Saylor for the affirmation of an idea — a trial balloon so to speak — for seeking judicial consensus. "He was the quiet and thoughtful wise man of the Court," she said, "he seemed to be always in deep thought but never imposed himself on others."

In 2013, there was a meeting of the Institute for the Advancement of the American Legal System. Around the table were judges known as conservative thinkers and others thought to be liberal. What they agreed on is that a good judge does not prejudge cases on the merits, demonstrates appropriate judicial humility and a commitment to fairness apparent from an ability to convey to the parties that they have been heard.³⁹

Before concluding, I will ask the Court's indulgence for a matter of personal privilege, recognizing that while these thoughts are mine, I also represent in some ways the many appellate lawyers who have appeared before Justice Saylor. When you appear before the Court and are delivering your argument, you can see the Justice's mind working. You know he has mastered the record. And if there is a question coming, it is likely the question you least wanted to hear. And when, as Chief Justice, Justice Saylor, with a small smile, would say, "I think we have heard enough, counsel, thank you very much," you would retire hoping for the outcome desired by your client, but whether that would happen or not, you knew you had been heard.

Lawyer-turned-poet Archibald MacLeish had his own way of looking at the nature of judging. He put it this way: "The business of the law" he said, "is to make sense of the confusion of what we call human life — to reduce it to order but at the same time to give it possibility, scope, even dignity." In his life on the bench, Justice Saylor has done that for all of us.

Chief Justice Baer: I think I speak for all of my colleagues and indeed this prestigious audience. As I look around, I see notable after notable after notable to the point where it'd just be impossible to introduce them all. I do not think I've ever heard three more erudite, thoughtful, considerate addresses and, as importantly, addresses that so capture the essence of the extraordinary man — Tom Saylor, the extraordinary colleague that he is.

So, thank you for your time and for being with us today, we're all the better for it and, again, the individual we're honoring is well honored by your remarks.

⁽quoting, in turn, Gompers v. U.S., 233 U.S. 604, 610 (1914))).

³⁸ Mark Scolforo, *Pennsylvania's New Chief Justice Scholarly, Collegial*, Associated Press (2014).

³⁹ See IAALS, An Uncommon Dialogue: What Do We Want In Our Judges & How Do We Get There? 4-6 (Aug. 2013), available at https://iaals.du.edu/sites/default/files/documents/publications/an_uncommon_dialogue.pdf (last visited Oct. 1, 2021).

⁴⁰ Archibald MacLeish, *Apologia*, 85 Harv. L. Rev. 1505, 1508 (1972).

One of the wonderful traditions of our Court, which we've not been able to do in some time and is I think lovely for the general public, is the opportunity for us to, on the bench in open court is to express our congratulations to a colleague in this kind of situation. And everything on our Court is done by a tradition.

President Gormley mentioned the dispute as to whether we or a court in Boston is the oldest court in United States. At the Conference of Chief Justices, I actually had a good natured dispute with the Chief Justice of Massachusetts over that. William Penn began the Provincial Court of Pennsylvania in 1684, I believe. And a trial court in Massachusetts began in 1688. The Pennsylvania Supreme Court will celebrate its 300th anniversary next May and we're going to celebrate that. It was formed by the Judiciary Act of May 22nd 1722. So, if you count us from 1684, when we were the Provincial Court of Pennsylvania, we've operated continuously since then, and we are the oldest court in the Western Hemisphere. If you count from 1722, however, we're the second oldest, and I leave that for all of you to ponder as you try to fall asleep this evening.

With that, we will turn to our wonderful tradition of having the Justices say a few words to our esteemed colleagues, and in accord with our tradition, we'll begin with the most junior Justice on the Court. Justice Mundy.

JUSTICE MUNDY: Chief Justice Saylor, I want to thank you for your trustworthy counsel, the strength of your leadership, but most of all, the generosity and kindness of your friendship. Thank you.

CHIEF JUSTICE BAER: Justice Wecht.

JUSTICE WECHT: Thank you, Chief Justice Baer.

When I joined the Court, I knew all of these colleagues from prior work and knew Chief Justice Saylor least of all. Just a nodding acquaintance to say hello at judicial conferences. And it has been one of the most valuable experiences of my life, in the last six or whatever years it is, to get to know and work with Tom Saylor and to appreciate the contributions he's made to our Commonwealth, to our law, to our Court, and to all of our citizens, past, present, and in the future. And Blackstone and Penn and Marshall and others are smiling down on him, and all of you know he has to be the most humble person in the room. I'm sure if it were up to him this whole convocation would not be occurring, and it's no secret also that in addition to his immense and admirable humility, Chief Justice Saylor restored the stability and decorum and perhaps image of this Court after a time of turbulence. It's his quiet and effective leadership, I think, to which all Pennsylvanians owe that. He is a jurisprudential scholar.

You can all ask yourself, how many people would send you law review articles and legal treatises and then talk about them with you. It's been a delight for me to do that with Chief Justice Saylor and to learn from him and talk with him about these writings over the last several years. I consider him a model, not only in terms of all the traits I've mentioned, but also, in terms of the elegance of his writing, the fluidity of his prose, and the way that he can capture a legal insight so concisely and so effectively.

I know that all of us on the bench have had the experience, when talking about cases and arguments, of having Chief Justice Saylor in a nutshell, just in a few words, by citing a case or precept, reorient us to the crux of the matter. In serving as such a model jurist, so quietly and humbly and effectively, I think he's not only taught us all a lot about judging and about how we can all do it better, but also served all Pennsylvanians in terms of advancing the rule of law

and the independence of the judiciary. Those are principles, indeed a fundamental paradigm of ordered liberty that can never be taken for granted. And I believe that in his service, Chief Justice Saylor has not been equaled and that the mark he has made in that area will be remembered for very long time. I'm going to greatly miss him when he takes his mandatory retirement and hope that he will continue to send law review articles and legal treatises and that I could sometimes do the same.

CHIEF JUSTICE BAER: Justice Dougherty.

JUSTICE DOUGHERTY: I want to speak about a Chief that most people don't see, and that's when we go back and he takes off his robe and you get to see the true Tom Saylor.

For those who do know him, he has a phenomenal intellect and insatiable appetite for reading. He'll quote things and you want to just write them down because they're so beautiful. He also knows scripture. It's interesting, the Proverb says where there is no vision, the people perish.⁴¹

He took the helm of this Court, as Justice Wecht just said, when it went through a horrible period. When Justice Donohue, Wecht, and I were privileged enough to become members of this Court, the off-the-bench Chief Justice invited us to his chamber and shared with us that which we wanted - anything you could eat or drink. But what he really did share with us was an opportunity to develop who we are and how we will be on this bench. He has always insisted that he will rule by consensus and not by strong will. He has been an extremely phenomenal counselor, guide, mentor, and more importantly, a friend.

Similar to Justice Wecht, I knew the Chief least amongst my colleagues. What most people never realized, is that my friendship with him only blossomed and to this day I would stand here with great pride and share with you that I consider Chief Justice Tom Saylor now part of my family. There's not a time I will step foot into Harrisburg when I will not come to his door, not as a Justice, but as little Kevin Doc, wanting to be educated from Tom Saylor. He has guided me and helped me in so many ways as he has all of us. We've been blessed to have his leadership and we're going to be blessed to the very last day he walks this Earth. So, Chief, from the bottom of my heart — you're my friend, you're my buddy, and I'm going to miss you.

CHIEF JUSTICE BAER: Justice Donohue.

JUSTICE DONOHUE: This is very sad for me. When I came on to the Supreme Court, I expected many things. Of these things, I really did not expect to find the deep friendship that we've developed between myself and Tom Saylor.

He is a gentle, kind man and to the best of my knowledge he has no ego. There has never been a time in my service, under his tutelage, that I have seen anything other than his desire to make certain that this Court was the best that it could be, and more importantly, that I could be the best that I could be. I have learned so much from him, about not only how to be a Justice, but how to be certain that, as a Justice, I have first and foremost in my mind the best interest of the people of the Commonwealth of Pennsylvania and this Supreme Court of Pennsylvania.

Most of you know that when Justice Dougherty, Justice Wecht, and I came on to this Court, those of you who know the three of us know that he had his

⁴¹ See Proverbs 29:18 (King James version).

hands full. Not one of us was shy or retiring. He allowed us to vent when we needed to vent, he allowed us to talk things through aloud. He allowed us to realize that we honestly didn't have many of the answers and certainly not all of them. The fact that he has no agenda, and I mean that sincerely, in terms of advancing his own personal cause on anything is truly an understatement. But I really, I want to conclude by saying that, again, he is a kind, gentle man and a friend.

You know over the course of the past five and a half years that we have all been together as a Court, we have had many public, controversial cases that have come before us. We work through them all collegially. We never walked away from a decision with any personal animosity, and it's a tribute to Chief Justice Tom Saylor that that was the case.

Through all of this Tom took the time last summer to help me find a puppy, to replace the dog that I lost during the pandemic. I say this and it really brings tears to my eyes. I mean, he literally found me a puppy. He found the litter, he went with me to help me pick out the puppy, and he made sure it got into my car. And so my dear dog, Miss Archie, is the result of Tom Saylor, and I shared that with you, because it just says everything about him as a person and the friends that he's allowed us to become. My dear friend, I am going to miss you mightily.

CHIEF JUSTICE BAER: Beautiful. Justice Todd.

JUSTICE TODD: This is bittersweet for me. I'm happy to join in the celebration of such a distinguished career, but I am sad knowing that Chief Justice Saylor will be retiring at the end of this year. And I congratulate you sincerely on your upcoming retirement and this celebration of your years of service. And I want to thank your family for sharing you with us all of these years.

I first got to know Chief Justice Saylor when we were classmates at the University of Virginia working on our LLM, and it was *startling* to me how smart he was. He is intimidating in his intellect. He is truly a legal scholar and a historian, and yet, he is so humble and so kind. He is calm. He has a steady hand. He is a leader that we've all looked up to and respected during our service on the Court with him. My fourteen years with you, Tom, have truly been a joy.

We have lived through times of turmoil and times of tranquility — I prefer the times of tranquility — and through it all Chief Justice Saylor has demonstrated that calm, even leadership that we have come to expect from him. You are not only a colleague, I consider you a dear friend, and it has been my privilege to serve with you Chief Justice Saylor.

JUSTICE SAYLOR: Thank you.

CHIEF JUSTICE BAER: We have only speaker left, who is our honoree today.

Everything that's been said is accurate. I speak on behalf of the whole Court that enthusiastically and unanimously agreed, and we were very pleased when Tom agreed to accept the appellation of Chief Justice Emeritus, beginning January of next year, when he'll remain involved with the Court in a small part, doing judicial education and always being my counselor and my confidant. But effective next year, I think probably for the first time in the history of our Court, he will be Chief Justice Emeritus.

And you all know Chief Justice Saylor, but apropos of his personality, he had to think about that for a while, whether he was willing to accept that, and we're

grateful that he did. So, we will hold our final applause, deserved applause, until we're done, but Justice Saylor is entitled to fair response. Although there's not much that he needs to respond to. Tom.

JUSTICE SAYLOR: Thank you, Chief Justice Baer and colleagues on the Court. Your remarks were profoundly meaningful to me, as is the emeritus designation. I am humbled as well by the gracious remarks of President Gormley, Jules Epstein, and Bob Heim, and most appreciative of them taking time from their busy schedules to be here today.

On a somewhat similar occasion, Justice Holmes observed that his only part was to sit in silence,⁴² but perhaps I might mention several thoughts that occurred to me as a "listener-in."⁴³ I have been extremely fortunate to sit for almost a quarter of a century on this, the oldest Supreme Court in the United States.

I was also privileged to serve as Chief Justice for over six years, and the highlight in my tenure was the friendship, support, and collegiality of my fellow Justices here today.

Whatever small measure I have been able to achieve is due not to my efforts alone but those of the legal and administrative staff which has supported me every step of the way during those many years. First, and foremost, my administrative clerk John Witherow working with Peter Stein and Chris Hanley, as well as Diane Frazier, Holly Mishkin, Alexis Cantando and my judicial aide, Greg Krupski.

A state Supreme Court is a fascinating venue to spend one's career within our framework of government: a system comprised of dual sovereigns, state and national, each supreme in its own sphere yet interlocking to form what James Madison called "the compound republic of America" or the "federal republic of the United States."

It is worth noting the remarkable fact that after 230 years, and notwithstanding the explosive expansion of the national government following World War II, the vast body of our standing law is still reposed in the states. The law of contracts, torts, real property and decedent's estates is, for the most part, the subject of state statutory and common law superintended by our state judiciaries.

As I recently wrote in the foreword to the second edition of President Gormley's magisterial treatise on rights and liberties, many state courts — including the Pennsylvania State Supreme Court — have departed from interpretive rulings of the Supreme Court of the United States. ⁴⁵ The authority to do so stems from the principle that states may afford greater individual rights

⁴² Oliver Wendell Holmes, Jr., *The Race Is Over, Radio Address to the Nation* (Motion Picture and Sound Recordings Division, The National Archives, Washington, D.C. Mar. 8, 1931). Justice Holmes's hand-written manuscript of his radio address is reproduced opposite page 178 in The Occasional Speeches of Justice Oliver Wendell Holmes (Mark DeWolfe ed. 1962).

Id

The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961).

⁴⁵ Foreword, Ken Gormley & Joy G. McNally, The Pennsylvania Constitution: A Treatise on Rights and Liberties vii-viii (2d ed. 2020).

and liberties to citizens than the federal government, and that it is the responsibility of state courts to determine the scope of those rights, particularly when they are reflected in state constitutions.

It is also interesting to observe that some of the core rights set forth in the amendatory provisions of the United States Constitution known as the Bill of Rights, for example the First Amendment, are couched as restraints of legislative power. The analog provisions of the Pennsylvania Constitution, however, directly proclaim affirmative rights for individuals. This material distinction has enhanced the perception of a rich, independent state constitutional jurisprudence in this Commonwealth.

The opinions which we offer are of course memorialized in writing where they remain for the readers of the future. But I prefer to think of the body of a court's work as a chorus — a chorus comprised of the individual voices of the judges who have come before, serve presently, and will follow. And it is this blended chorus which forms the fabric of the law of this Commonwealth.

Thank you very much.

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