ARTICLES

AN INDEPENDENT JUDICIARY: THE LIFE AND WRITINGS OF ROBERT N.C. NIX, JR.

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INTRODUCTION

Justice Nix’s career as a judge spanned twenty-four, often tumultuous, years of service on the Pennsylvania courts. His writings as well as his professional career reveal that he was a man conscious of the challenges he faced as an African American and elected judge. This Essay offers a brief account of some of the experiences and challenges that he faced that most likely shaped his jurisprudence. Additionally, this Essay reviews some of the cases that most vividly reflect his pragmatic, deliberate effort to define the judicial decision-making role and the Pennsylvania courts’ relationship to the political branches.

Justice Nix was concerned about social justice, yet very conscious of the limited role that courts could play if the integrity and independence of the court and its judges were to be preserved. He strived to ensure order and discipline in a court whose integrity had been badly shaken in fights among the justices and disputes with other branches of government. During Justice Nix’s tenure as an elected state judge, skepticism grew nationally about the ability of elected courts to escape politicization because of campaign financing and political control of the courts’ appropriations. When Justice Nix began his tenure on the Pennsylvania Supreme Court, many states had some form of an elected judiciary and today the states are about equally divided between those that appoint their judges and those that elect them.1 Although there is controversy regarding whether an elected system can truly be independent, even advocates of an elected selection process are concerned about the implications of a judiciary that is dependent on the political backing and on campaigns financed in substantial part by the bar that argues cases before it. Yet we have also grown increasingly skeptical of the appointed judicial process and its inevitable politicization, particularly in light of recent ideologically driven debates about federal court

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appointments and evidence of an ideologically driven, activist Supreme Court.

Even as Pennsylvanians continue to grapple with these issues, dramatic evidence of the risks related to efforts to compromise the independence of courts emerged in the Terri Schiavo controversy. A retrospective consideration of Justice Nix's tenure and his jurisprudence provides some insight into the difficult task of delineating law and politics and the appropriate judicial role in defining justice. For this African American judge, the challenges were even more pronounced by race.

I. Mapping Justice Nix's Tenure as a Judge

Justice Nix's service on the Pennsylvania Supreme Court was path-breaking and his rise to the position of chief justice was undoubtedly impressive. He began his judicial career in the Court of Common Pleas of Philadelphia County in 1968, after practicing for ten years in a small family-established firm engaged in general practice and working for two years as Deputy Attorney General for Pennsylvania from 1956-58. Justice Nix was elected associate justice in 1972, an extraordinary feat given the racial composition of the Commonwealth and the dearth of elected or appointed black judges on courts of last resort at the time. Justice Nix was the first African American male to serve on the Pennsylvania Supreme Court. Twelve years later, after having survived a bitterly contested retention vote, Justice Nix became the first African American jurist to head any state supreme court.

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2. E.g., Marcia Gelbart, Senators Seek to Change Judicial-Selection Process, PHILA. INQUIRER, June 25, 2005, at B01, available at 2005 WLNR 10022385 (Westlaw) (reporting that Philadelphians from a variety of non-profit and legal organizations joined senators seeking change from the current electoral process).


8. Nase, supra note 5, at 383.
A. Attaining a Position on the Bench: Race Matters

When Robert N.C. Nix, Jr. was sworn in as chief justice, Ronald Davenport, the Dean of Duquesne Law School, observed: “Our time has come. [T]oday your time has come.”9 These race-conscious, celebratory comments should be understood in the context in which they were uttered. The investiture of the chief justice was held during the same month as the swearing in of Philadelphia’s first African American mayor, Wilson Goode.10 When Dean Davenport made the observation, he was the first African American dean of a legal educational institution that was not part of a historically black university.11 The ascension to power for each of these men certainly had great significance, suggesting an opening up of opportunities and access for African Americans and other under-represented groups in public and private institutions. As important, their presence also provided role models for others coming through these institutions and created the perception of fairness in decisionmaking.12

These laudable possibilities of change leading to fair access and equal participation are important to acknowledge but do not provide the full picture. In the context of Justice Nix’s ascension to power it is notable that he won the retention election despite contention and amidst allegations that some of his colleagues and the public were bitterly hostile toward his success.13 Indeed, a highly publicized and racialized anti-retention campaign was waged against Justice Nix and there were allegations that then Justice Rolf Larsen, a bitter foe on the bench and contender for the chief justice position, was one of the leaders of the effort to unseat Justice Nix.14 Justice Larsen allegedly threatened to publicly “expose” Nix’s racial identity and consequently discourage those in


10. Id.

11. See id. (noting Davenport was “the first black to be dean of Duquesne University”).


other parts of the state who did not know his race from supporting him.\textsuperscript{15} Around the same time, some politicians engaged in less vitriolic efforts to change the procedures for determining who would replace the retiring Chief Justice.\textsuperscript{16} Less blatant but suspicious efforts to undermine Justice Nix's election were prevalent. Racial stereotypes were used in the campaign to unseat the justice, including allegations that he was lazy, incompetent, and lacking the temperament for chief judge.\textsuperscript{17} Justice Nix's opinions and what we know of his administrative skill during the contentious times following his ascension as chief justice contradict these disparaging allegations.\textsuperscript{18}

B. Attaining a Position on the Bench: Politics Matter

Justice Nix's judicial career was necessarily shaped by the political reality of his upbringing\textsuperscript{19} and his own professional development. Justice Nix's father was the first African American elected to Congress from Pennsylvania.\textsuperscript{20} Robert N.C. Nix, Sr. was well-positioned because of his tenure and political connections within Democratic party politics in the Commonwealth.\textsuperscript{21} After successfully being elected to the Court of Common Pleas in Philadelphia, Justice Nix began to deliberately forge connections among other jurists in Allegheny County and developed a state-wide network.\textsuperscript{22} Justice Nix's successful statewide election, despite the fact that, outside of Philadelphia and Allegheny Counties, there were few areas that had a critical mass of blacks or other persons of color likely to support African American candidates, was carefully orchestrated through the political process of election.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{15} Id. See supra note 14 explaining that former Justice Larsen denied these allegations and was cleared of charges by a judicial review board but was later removed from the bench.
\item \textsuperscript{16} See, e.g., Election Controversy Shakes Pennsylvania Justices, supra note 7, at 72 (describing Justice Larsen's motivation to have Justice Nix defeated in the upcoming election to make way for himself to be the next Chief Justice); see generally William Robbins, Judicial Appointive Plan Polarizes Pennsylvania, N.Y. Times, Jan. 4, 1984, at A12, available at 1984 WLNR 479861 (Westlaw) (discussing possible changes in Pennsylvania judicial electoral process).
\item \textsuperscript{17} Election Controversy Shakes Pennsylvania, supra note 7, at 72; Johnson, supra note 13.
\item \textsuperscript{18} See infra notes 33-39 and accompanying text for a discussion of how Justice Nix helped to restore judicial integrity amidst allegations of city corruption and judicial misconduct.
\item \textsuperscript{19} See Robbins, Man in the News; First Black Chief Justice of a State, supra note 9, at 17 and accompanying text for the explanation that Justice Nix was raised in and professionally inhabited a world of decision-making elites. While it may be said that Justice Nix's family was privileged, the reality of the times and racial politics leave it indisputable that as a young politician and professional Nix was dependent on the support of the African American community.
\item \textsuperscript{20} Robbins, Man in the News; First Black Chief Justice of a State, supra note 9, at 17.
\item \textsuperscript{21} See id. (noting that by virtue of his father's position, Justice Nix came into contact with Democratic leaders).
\item \textsuperscript{22} Johnson, supra note 13.
\item \textsuperscript{23} Notably the collective wisdom in the period was that African Americans (and women) were not likely to succeed in being elected to statewide judicial positions without first coming to office through a gubernatorial appointment. Professor Nase has asserted, however, that the data do not support this view. Nase, supra note 5, at 432. The reality is, however, that though there were blacks elected to appellate judicial positions in numbers roughly proportionate to the statewide numbers of minorities in the state, Philadelphia, which has continued to have a significantly large minority population does not succeed in carrying significant numbers of minority candidates statewide. There
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At the time Justice Nix succeeded in becoming elected there were already deep divisions in views about the elected judicial process. Many states had moved to an appointive process by the eighties, and the Committee of Seventy and other groups sought public support for a merit selection process of election in Pennsylvania. Some minority and political leaders, particularly in Philadelphia, argued forcefully against the appointive process, contending that African Americans fared better in elections where the politics were “transparent.” Others argued that the political process assured that minority interests would be better protected than an appointive process of selecting candidates: neither white nor black judges could ignore the minority interests if their votes depended on them. These arguments seemed less meaningful outside of Philadelphia but reflected the sense that the judicial selection process was likely to be racial in focus and inevitably “political.”

Coincident with Justice Nix’s retention fight, a well-defined movement favoring judicial appointments emerged, leading to a compromise proposal to replace elected with appointed judges but only at the appellate level. The principal argument favoring appointment was that the exposure of candidates to the political process of selection and statewide campaign financing mortally compromised the ability of judges to maintain integrity and independence. The compromise was never put into practice, but in the midst of this debate Justice Nix took over as chief justice.

have been two minority supreme court justices; one of them, Juanita Kidd Stout, was appointed by the governor. Id. at 386 (documenting and describing, in-depth, the geographical, racial, and gender breakdown of Pennsylvania appellate judges serving from 1969-1994 and describing the selection process).

24. See Robbins, Judicial Appointive Plan Polarizes Pennsylvania, supra note 16 and accompanying text for a description of the appointive systems of New York, New Jersey and sixteen other states and for support for creating an analogous system in Pennsylvania. See also The Committee of Seventy, Judicial Reform, http://www.seventy.org/reform/judicial/ (last visited Dec. 21, 2005) (describing how the Committee of Seventy historically has supported a merit selection for Pennsylvanian judges).

25. See id. (presenting view of the Pennsylvania Trial Lawyers Association, which criticized the appointment of judges as a system governed by “the politics of the few rather than the politics of the many”).


28. See Robbins, Judicial Appointive Plan Polarizes Pennsylvania, supra note 16 and accompanying text for a discussion on how the judicial position often went to “the highest bidder.”
II. Challenges to the Institutional Integrity of the Court

Although Justice Nix survived the racially and politically controversial environment in which he waged the battle for retention, challenges to his leadership continued. It is not hyperbole to state that the institutional integrity of the court was ultimately at stake, and as chief justice, the buck stopped at Nix’s seat on the bench. As a consequence, his efforts to secure authority and foster stability and civility on the bench no doubt affected his judicial perspective. During much of the eighties and early nineties, the Pennsylvania Supreme Court was embroiled in rancorous and bitter infighting among the justices.29

Media publication of the clashes among some of the members of the bench underscored this sense of crisis.30 Claiming that The Philadelphia Inquirer had defamed them, Justices Larsen and McDermott filed libel suits against the publishers of The Inquirer, and the newspaper, in turn, sought to have the entire bench recuse itself from disposition of the case.31 Justice Nix rejected this effort to cast the entire bench as biased and complicit in any wrongdoing.32

Reports of judicial misconduct arose and negatively affected the appearance of the court’s integrity, and, in an extraordinary number of cases, reports also surfaced regarding the reality of widespread corruption.33 In 1987, the City of Philadelphia faced litigation that exposed that its prisons were severely overcrowded in violation of the civil rights of the prisoners.34 The overcrowding was in part a consequence of twenty-four judicial vacancies on the court of common pleas, leaving the courts in Philadelphia nearly paralyzed by the criminal caseload before them.35 Fifteen of the twenty-four vacancies36 were the


30. See, e.g., id. (discussing the dispute among the bench and concurrent efforts to alleviate the problem).


32. Id. Justice Nix’s view of recusal, articulated in a case unrelated to The Inquirer’s suit, balanced the interest in preserving the appearance of impartiality against the need for judges to be available for decision making. See Goodheart v. Casey, 565 A.2d 757, 764 (Pa. 1989) (finding that the need for recusal must be balanced against need for full complement of supreme court justices to decide cases). In Goodheart, the Chief Justice reasoned that the diversity of the Commonwealth required that an effective appellate disposition be enriched by the variety of perspectives included among the justices. 565 A.2d at 763.

33. 15 of Philadelphia's Judges Suspended Pending Inquiry, N.Y. TIMES, Feb. 6, 1987, at A17, available at 1987 WLNR 974899 (Westlaw) (exposing the suspensions of many judges and others for charges of widespread corruption); Lindsay Gruson, Philadelphia Courts Face Quandary, N.Y. TIMES, Feb. 9, 1987, at A16, available at 1987 WLNR 986001 (Westlaw) (revealing that the courts were overloaded due to the suspensions).

34. See, e.g., Harris v. Pennsley, 755 F.2d 338 (3d Cir. 1985) (reversing dismissal of class action filed on behalf of prisoners at Philadelphia's Holmesberg Prison alleging violations of the inmates' Eighth and Fourteenth Amendment rights due to overcrowding, violent attacks, and sexual assault).

35. See, e.g., 15 of Philadelphia's Judges Suspended Pending Inquiry, supra note 33, at A17.
result of judges on the court of common pleas being suspended by the chief justice because they were suspected of taking illegal cash gifts. Some of the other vacancies came from the ongoing political disputes between the governor and the legislature, which resulted in delayed selection of candidates to fill open positions. To impose discipline and restore some semblance of judicial integrity, Chief Justice Nix ordered the work schedule of the judges on the court of common pleas to be increased to meet the outstanding caseload and created a pre-trial screening framework for faster disposition and settlement of civil suits.

While exercising the requisite leadership to manage these crises in his administrative role, Chief Justice Nix also carefully constructed opinions offering the appearance that the integrity of the court was intact. Written in the midst of turmoil, his opinions offer a conception of both institutional and decisional independence of the court that can withstand the test of time and offer insights useful for our consideration as we face new challenges to judicial independence.

III. A Decade Reaffirming the Importance of Judicial Independence

It bears noting that our understanding of what it means for a court to reflect institutional as well as decisional independence in its decisionmaking has deepened in the years following Justice Nix's tenure. Most notably, former Chief Justice William H. Rehnquist of the United States Supreme Court continually admonished the public and the profession to defend judicial independence from political pressures and from the erosion of public trust in both federal and state courts, even as that Court engaged in decisionmaking (finding that Justice Nix issued emergency measures to resolve cases through civil settlement and lengthened the judges' work-day). At the time, Chief Justice Nix imposed the suspensions of two of the fifteen judges that had been criminally charged with misusing their office, along with twenty officials of United Slate Tile and Composition Roofers, Damp and Waterproof Workers Association Local 30 and Residential Roofers Union Local 30B. Id. Noting that, as a result of the backlog of cases caused by the court vacancies, inmates unable to post bail routinely remain in jail for more than a year waiting to go on trial, District Attorney (now Supreme Court Justice) Ronald D. Castille observed that "the wheels of justice are grinding to a halt." Gruson, supra note 33, at A16. The city also faced two lower court-imposed deadlines to reduce prison overcrowding; however, the Chief Justice responded to the city's request for relief by lifting the immediate deadline, but ordering the construction of new facilities and upgrading of older ones. See Around the Nation; Philadelphia Wins Time to Cut Back on Inmates, N.Y. TIMES, Oct. 18, 1984, at A18, available at 1984 WLNR 529339 (Westlaw) (explaining that Philadelphia's overcrowding of inmates was considered unconstitutional and measures had been attempted without success to lessen it).

36. 15 of Philadelphia's Judges Suspended Pending Inquiry, supra note 33 and accompanying text. See also Nase, supra note 5, at 384-87 (noting a time gap in replacing judges).

37. National news reported that the municipal court system was "mired in a crisis that could force the city to start releasing inmates from jail." Gruson, supra note 33, at A16. Responding to a Grand Jury's report on the court system's corruption, Chief Justice Nix said, "Our worst fears have been realized." Id.

38. See generally Nase, supra note 5, at 384-88 (showing delay in finding new judges to replace those suspended).

39. 15 of Philadelphia's Judges Suspended Pending Inquiry, supra note 33, at A16 (calling for panel for pre-trial screening and settlement of civil cases to lighten the caseload).

suggested that political ideology, rather than principle, determined some controversies. \(^{41}\) Chief Justice Rehnquist emphasized that the distinguishing feature of the American judiciary is its historic, longstanding protection from the influence of the political branches, which extended the constitutional provisions for separation of powers and checks and balances. He credits the acceptance of the power of the courts to overrule decisions of the legislature and executive and the courts' willingness to conduct themselves to protect the integrity of the rule of law as equally important. \(^{42}\) Rehnquist argued that judicial independence is "the most essential characteristic of a free society." \(^{43}\) The longstanding acceptance by citizens, as well as by the other branches of government, of the courts' ability to protect the rights of citizens and ensure the continuation of the rule of law depends on the courts' ability to render decisions without being affected by political favors or fear of reprisals. \(^{44}\)

A decade after Justice Nix's tenure ended, former Chief Justice Rehnquist and other members of the United States Supreme Court, as well as a Commission of the American Bar Association, \(^{45}\) continued to raise concerns about independence. Their fears were perhaps most poignantly raised by the


\(^{42}\) Greenhouse, \textit{supra} note 40, at A10.

\(^{43}\) \textit{REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, AN INDEPENDENT JUDICIARY} at Overview (1997) [hereinafter ABA], http://www.abanet.org/govaffairs/judiciary/report.html. The Commission was established in 1996 and included academicians, practicing lawyers, and congressional staff. \textit{Id.} at The Commission. It gathered information, including written and oral testimony from judges, academicians, and administrators of nonprofit organizations promoting work of the judiciary, among others. \textit{Id.} at Overview. Among the concerns that the Commission studied and found to be affecting both state and federal courts today are highly critical remarks by the President and congressional leaders including calls for impeachment or resignation for opinions by judges that were at odds with the position of the critics; intensified legislative inquiry into the judiciary's governance, particularly concerning appropriations; and increasingly strident public criticism of judges and courts characterizing them as activist. \textit{Id.} Although the investigation principally addressed problems in the federal courts, the commission noted that there were unique problems connected with some state courts, including the threat to independence rooted in an election process of selection, especially the problem of campaign financing. \textit{Id.} In its Findings, Conclusions and Recommendations, the Commission noted robust criticism of judicial decision is fully protected by the First Amendment and indispensable to the well-being of a democracy. ABA, \textit{supra}. Thus, at least for federal judges' tenure during good behavior, a compensation that can not be diminished and a thick skin are all that is available to weather most criticism. \textit{Id.} at Findings, Conclusions, and Recommendations. It also recommended a commitment to the spirit of restraint under which all branches should operate. \textit{Id.}

\(^{44}\) ABA, \textit{supra} note 43, at Overview; Greenhouse, \textit{supra} note 40, at A10 (describing Rehnquist's book about the Senate not impeaching Justice Samuel Chase because they did not believe that impeachment was appropriate for a judge simply exercising his judicial power).

\(^{45}\) See Greenhouse, \textit{supra} note 40 and accompanying text for an expression of concern over the beating the courts had taken on issues such as Defense of Marriage Act (DOMA) and challenges to the words "under God" in the pledge of allegiance. See also ABA, \textit{supra} note 43, at Origins of the Current Tensions: An Overview of the Judicial Independence-Accountability Debate for a discussion of the tension between judicial independence and judicial accountability.
Terri Schiavo controversy in 2005 and the political rhetoric that it prompted.\(^{46}\) This controversy was a culmination of growing political reaction to state and federal court decisions, engendering relentless criticism of judges and courts, including threats of impeachment and even violence.\(^{47}\)

Although Chief Justice Rehnquist and the ABA Commission recognized that threats compromise the legitimacy of both state and federal courts,\(^{48}\) much of the attention has been on the federal courts. Though the federal judges are insulated from some pressure through life tenure and protection against undiminished compensation,\(^{49}\) appointed and elected state judges often lack such safeguards; elected jurists depend on popular (or political) approval for election and may be subject to retention votes.\(^{50}\) However, all courts depend on the public’s respect for their decision-making authority and acceptance of their ability to countermand political decisions if required to maintain the rule of law. Public criticism of court dispositions as the product of activist or political judges or judges outside the mainstream of majority decision-making affects the integrity of all courts. Neither the federal nor the state judiciary is immune from these characterizations of their decisionmaking. Although threats of impeachment have been made by politicians since the American Revolution and constitutional framing, recent criticism of individual judges’ decisionmaking and of the courts as institutions seems particularly vitriolic and raises concerns about

\(^{46}\) See e.g., The Courts Grapple with Tragedies, supra note 3 (compiling commentary on the political assault on federal judiciary during the spring of 2005).

\(^{47}\) ABA, supra note 43, at Findings, Conclusions and Recommendations; Findings, Conclusions, and Recommendations Addressing Federal Judicial Independence Problems; 1. Threats of Impeachment and Removal. The ABA Commission’s report also includes concerns about state and federal political branches’ intrusion into the operations of the courts, including taking steps to affect the appropriations of the courts in retaliation for judicial decision-making with which they disagree. Id. at 2b. Political Branch Control Over the Judiciary’s Appropriations: the Line-Item Veto.

\(^{48}\) See Greenhouse, supra note 40 for the unease created by threats to impeach judges who issue decisions out of the mainstream. See also ABA, supra note 43, at Federal Judicial Independence: A Review of Recent Issues and Arguments; 1. Decisional Independence Issues, for a discussion of critical remarks by the President and Congress.

\(^{49}\) U.S. Const. art. III, § 1; see also ABA, supra note 43, at Findings, Conclusions and Recommendations; 1. Threats of Impeachment and Removal (interpreting the Constitution and its affect on the judiciary’s present-day actions). Seven federal judges have been impeached; three were impeached and convicted in the 1980’s: Aloe Lamar Hastings, Walter L. Nixon, and Harry Eugene Claiborne. Richard Delgado, Rodrigo’s Committee Assignments: A Skeptical Look at Judicial Independence, 72 S. Cal. L. Rev. 425, 431 n.13 (1999). The failed impeachment effort against Judge Samuel Chase solidified the notion that however disagreeable life-tenured judges’ decisions are, they should not serve as the basis for impeachment. Chief Justice William Rehnquist, Supreme Court Chief Justice, Remarks at University of Richmond T.C. Williams School of Law Symposium on Judicial Independence (Mar. 21, 2003), http://www.supremecourts.gov/publicinfo/speeches/sp_03-21-03.html.

\(^{50}\) There is no singular election or appointment process; each state has worked out its own method of selection. See ABA, supra note 43, at State Judicial Independence: A Review of Recent Issues and Arguments; Judicial Elections Generally (noting selection process for judges differ). Although the vast majority has some form of popular election for selection or retention, only eight states select judges through partisan elections. Id. Thirteen do so through nonpartisan elections and of the remaining twenty nine states, the Governor or the legislature makes the initial appointments in six states. Id. There is some form of merit selection in the remaining twenty-three states. Id.
erosion of authority.\textsuperscript{51}

It is critically important for state courts—and judges—to be given the scrutiny and attention that has been focused on the federal Judiciary. Some argue that the best protection of the judiciary has been the courts' decisional conduct, emphasizing the value of deference to the legislature as part of its faithfulness to democracy and the rule of law.\textsuperscript{52} The reality is, however, that courts, both federal and state, are deeply involved in the disposition of cases that involve highly controversial policies and about which there is heated disagreement about how justice is served. Race and persistent social inequalities render that reality even more complex. The meaning of judicial independence must be interrogated in light of this complex reality.

\section*{IV. A Critical Response: Rodrigo's Critique of Judicial Independence}

Richard Delgado encourages us to think more deeply than we often have in the past about considerations of justice in our understanding of judicial independence in one of his many Rodrigo tales.\textsuperscript{53} Through Rodrigo's ruminations with a colleague and a former student, Delgado challenges the notion that judicial independence has enabled judges to promote justice, emphasizing that the judiciary itself has lacked diversity and as a consequence, has had a narrow perspective on what is socially just.\textsuperscript{54} The reality is that the older white men who continue to dominate the judiciary (both federal and state) have narrower perspectives about justice than would be likely available if the composition of the judiciary had become more diverse, reflecting the experiences of those who have been privileged as well as disadvantaged by institutional and societal bias.\textsuperscript{55}

\textsuperscript{51} See Delgado, supra note 49, at 431 for use of threats of impeachment by other branches of government to sway the judiciary.

\textsuperscript{52} See, e.g., Alexander M. Bickel, \textit{The Least Dangerous Branch: The Supreme Court at the Bar of Politics} 35-45 (Yale Univ. Press 1986) (1962) (exploring the extents and limits of the Supreme Court of the United States); Herbert Wechsler, \textit{Toward Neutral Principles of Constitutional Law}, 73 Harv. L. Rev. 1, 1 (1959) (arguing, contrary to Judge Learned Hand, that courts should and must review any jurisdictionally or procedurally proper case, with a focus on sound analysis—not the immediate effect of the decision); see also David Luban, \textit{Justice Holmes and the Metaphysics of Judicial Restraint}, 44 Duke L.J. 449, 456-61 (1994) (critiquing some of the assumptions underlying the classical view of judicial restraint).

\textsuperscript{53} See Delgado, supra note 49, at 435 (discussing critical legal theory and the idea that judicial independence both enhances and inhibits the judiciary).

\textsuperscript{54} Id. at 434, 446-49. A similar observation of missing perspective is briefly explored in the comments of Judge Edwards of the Court of Appeals for the D.C. Circuit. Judge Edwards emphasizes that the inclusion of blacks and other minorities and women does not lead to representation of a group-based view; rather, exclusion of such groups leaves some perspectives that are the product of minority experiences, missing from deliberation. See Edwards, supra note 12, at 327-29 for a discussion that diversity brings life experiences to the table and, without it, perspectives are missing. See also J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 133-34 (1994) (noting exclusion of women from juries results in missing perspectives).

\textsuperscript{55} See Edwards, supra note 12, at 327-29 and accompanying text for a discussion that the lack of diversity affects the perspective taken by courts. See also Delgado, supra note 49, at 434 for a discussion on the composition of the judiciary.
A romanticized notion of independence resulting in federal judges fearlessly meting justice emerged from the litigation model associated with Brown v. Board of Education.\textsuperscript{56} Delgado argues, however, that there remain discriminatory judicial rulings that appear to be a result of the reality that the judges rendering the decisions fail to see the connection between inequality and structural or other forms of bias.\textsuperscript{57} Through Rodrigo's ruminations, Delgado forces us to interrogate and reconsider why we associate collateral qualities of judging with qualities of independence like accountability, restraint, strict construction, and deference to the "will of the people."\textsuperscript{58} Indeed, he argues, these qualities may in fact discourage judges from some freedom-promoting efforts.\textsuperscript{59} While it may be the case that in a given context the judge must face the choice of enforcing the rule of law against his own sense of right, he should confront the consequences of such a choice without an overblown emphasis on these collateral-limiting qualities that can sometimes work injustice.\textsuperscript{60} Delgado argues, moreover, that judicial independence (in the sense that it encourages restraint) has not been of great assistance to blacks and other subordinated groups whose experiences suggest they need to pressure judges to look more aggressively for evidence of bias.\textsuperscript{61} In this Rodrigo story, Delgado observes that it is the exceptional case that gives us the opportunity to say the judicial system is fair and just, connecting this conclusion to the independent judiciary.\textsuperscript{62}

These ruminations posit that we should rethink the definition of independence, emphasizing courage to act and decisionmaking aimed at considering the social justice implications of inaction even as we insist that judges follow the rule of law. These thought-provoking observations may lead us also to pause and consider under what circumstances the kind of courage

\textsuperscript{56} 347 U.S. 483 (1954).


\textsuperscript{58} Delgado, supra note 49, at 439.

\textsuperscript{59} Id. at 438-46.

\textsuperscript{60} Id. at 442.

\textsuperscript{61} Id. at 443-44.

\textsuperscript{62} Id. at 443-49. Delgado, via his alter ego Rodrigo, notes three cases that favor inaction: (1) fear that if he takes a courageous stand the judge won't get appointed, elected or even confirmed; (2) fear that he will get reversed on appeal; and (3) continued lack of diversity of the judiciary, which means that the life experiences of others that might "cause some decision makers to pull at the margins" are still under represented or absent from the bench. Delgado, supra note 49, at 443-49.
Delgado describes is defined by and balanced against other considerations confronting a judge like Justice Nix. As some of the recusal cases suggest, African American judges and other judges of color often act with courage in defending their decisional integrity against assumptions of bias. Couraging, in fact, is defined by context. As will be discussed below, Justice Nix faced internal and external conflicts that often required courage and made judicial restraint rather than activism a logical posture for him to assume.

V. Can Elected Judges (and Courts) Avoid the Risk of Being Political?

A truly independent judiciary is one that issues decisions and renders judgments that are respected and accepted by the legislature and executive decisions, which appear to be appropriately judicial their disposition. An independent judiciary receives adequate appropriations to ensure that its decisional integrity is subject to no authority but the law so that it is free of the need to grant favors or fear reprisals for its actions. Additionally, an independent judiciary is not compromised by politically-inspired attempts to undermine its impartiality. Although some commentators have argued that “independence” and “elected judges” are contradictory terms, for some, an assessment of independence can be less harsh. Ultimately the court’s integrity is dependent on respect for its institutional competence, reasonable restraint, and a clear understanding of the doctrine of separation of powers.

A sense of independence can be gleaning from the judicial opinions and comportment of the Pennsylvania Supreme Court under Chief Justice Nix. This Essay has already reviewed some of Justice Nix’s efforts to preserve the court’s integrity during a period of both personal and institutional controversy and turmoil. It now argues that Justice Nix’s opinions similarly reflect overarching concern for preserving the court’s independence. These opinions include a strong sense of respect for the rule of law as the guiding authority, even as they delineate the function of the judiciary as a separate branch of government with its own integrity and decision-making role. The opinions also reflect Justice Nix’s overarching respect for the competing roles of the other branches of government and judicial restraint.

63. See Frank M. McClellan, Judicial Impartiality & Recusal: Reflections on the Vexing Issue of Racial Bias, Nix Symposium, 78 Temp. L. Rev. 351, 374 (2005) (discussing instances where the fairness of minority judges was questioned); Sherrilyn A. Ifill, Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts, 39 B.C. L. Rev. 95, 96 (1997) (stating: “Those gains--directly attributable to the Voting Rights Act’s removal of the structural impediments to meaningful electoral participation by minority voters--have not been mirrored in judicial fora.”).

64. See Part IV.A-B for a discussion of jurisprudence during Justice Nix’s term.

65. Proponents of the elected judiciary, and those who are judges in such systems, have argued that independence can be maintained despite campaign financing and other pressures. Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court observes: “[J]udicial independence is a matter of the character of the individual judge…. [T]he quality of the individual, not necessarily the selection process, determines the independence.” 1996 Hearings of the ABA Commission on Separation of Powers and Judicial Independence 88, 101 (Dec. 13, 1996) (testimony of Shirley Abrahamson), quoted in ABA, supra note 43, at State Judicial Independence: A Review of Recent Issues and Arguments.
A. The Jurisprudence of Justice Nix: Decisional Independence

A sampling of some of Justice Nix's well-known majority opinions and dissents expose him to be consciously engaged in decisionmaking that appears judicial and concerned about the considerations of independence that have been discussed above. Two areas where these considerations are most visible are in Justice Nix's discussion of tort law and his responses to the question of abrogating the doctrine of sovereign immunity. In these areas, courts may feel hobbled if the circumstances give rise to compelling claims for plaintiffs because the legislature has not provided a clear direction or its direction seems at odds with prevailing mores. The decision to do nothing, believing that the legislature should act or more creatively respond to the controversy, largely lies with the court.66 Because tort law often involves accidental injuries, as Professor Peck has pointed out, it may be less likely that the need for certainty and desire to meet settled expectations of the parties is pressing on the court than in other areas of law, like contracts or property.67 In addition, there may not be the kind of movement among tort plaintiffs, who are often the victims of disparate injuries, after the fact of injury to seek legislative reform which will benefit others.68 Moreover, defendants in these claims may already be organized for other purposes and can pressure the legislature to maintain the status quo.69 For example, automobile accident victims or victims of work-related product injuries may see their misadventures as unique or idiosyncratic and will not easily be engaged in a reform-promoting movement. In contrast, insurance companies and employers are likely to be better organized to protect their interests before legislatures and administrative agencies who may consider changes in the law that will protect this kind of plaintiff from harm in the future.70 Professor Peck has reasoned that judges may draw on their creativity in addressing claims of wrongdoing in such circumstances and that creative effort may be appropriate.71 In several areas of torts, Justice Nix forthrightly confronts the question whether this creative impulse is justified in his judicial role.72 His reasoning, principally preferring restraint to activism even in these cases, is insightful.

1. Sinn v. Burd

In Sinn v. Burd,73 a young girl's mother and sister witnessed her death, which was caused by an automobile driver's negligence.74 The tragic accident

66. See, e.g., Cornelius J. Peck, Comments on Judicial Creativity, 69 IOWA L. REV. 1, 1 (1983) (discussing the court's ability to assume a "law-making function more appropriately performed by a legislative body").
67. Id. at 12-13.
68. Id. at 13-14.
69. See id. at 16 (noting typical tort defendants often have well-established, organized lobbies that would heavily oppose legislation against their interests).
70. Id. at 11.
71. Peck, supra note 66, at 11.
72. Id. at 13-17.
73. 404 A.2d 672 (Pa. 1979).
74. Sinn, 404 A.2d at 674.
occurred in front of the family’s home while the girls were playing.\textsuperscript{75} Both the mother and sister claimed emotional distress, though neither was physically harmed by the accident and the mother was outside the zone of physical danger.\textsuperscript{76} Reviewing the state law in other jurisdictions where such a claim had been recognized, Justice Nix eschewed the mechanical zone of danger limitation which he concluded led to unjust results.\textsuperscript{77} This was so particularly in light of the advancements of science that enabled a better understanding of emotional trauma and our social understanding of the significance of this kind of harm.\textsuperscript{78} He led the majority in concluding that the mother had a viable claim if proved to the jury, observing: “Every cause of action, however, was once a novel claim.”\textsuperscript{79} Justice Nix refuted the dissenters’ charge that the court was engaged in inappropriate lawmaking in the absence of Pennsylvania authority recognizing such a claim, finding that the elimination of the zone of danger limitation was compelled by the “inherent humanitarianism of our judicial process.”\textsuperscript{80}

Justice Nix’s decision to recognize a cause of action in this case was founded on his conception of the judiciary’s responsibility to find a colorable claim for redress for every substantial wrong, affording the opportunity of the injured party to prove her case to the jury.\textsuperscript{81} Rejecting the floodgate argument,\textsuperscript{82} Justice

\textsuperscript{75} Id. at 672-73.
\textsuperscript{76} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id. at 679-80.
\textsuperscript{79} Sinn, 404 A.2d at 674 (quoting Papieves v. Lawrence, 263 A.2d 118, 120 (Pa. 1970)).
\textsuperscript{80} Id. at 676 (quoting Niederman v. Brodsky, 261 A.2d 84, 85 (Pa. 1970)).
\textsuperscript{81} Id. at 686. Notably, in a later case arising after he became Chief Justice, the court declined to extend the ability to recover to a close relative who is not present but learns of the accident from a third party. Mazzagatti v. Everingham, 516 A.2d 672, 679 (Pa. 1986). In another case, Justice Nix held that a compulsory nonsuit was appropriately entered in a case claiming intentional infliction of emotional distress because the evidence did not establish a right to recover under section 46 of the Restatement (Second) of Torts’ definition of outrage. Kozatsky v. King David Memorial Park, Inc., 527 A.2d 988, 990-91, 992, 995 (Pa. 1987) (finding that parents who brought action for intentional infliction of emotional distress in dispute concerning maintenance of the grave sites of their deceased children failed to prove existence of distress through competent medical evidence). The court “le[t] for another day the question of the viability of section 46 in this Commonwealth.” Id. at 989. In recent years Pennsylvania courts have continued along this “restrained” approach in addressing the extension of claims recognizing emotional harm. E.g., Taylor v. Albert Einstein Medical Center, 754 A.2d 650, 653 (2000) (reversing the lower court and refusing to allow a cause of action for intentional infliction of emotional distress where the plaintiff did not personally witness the conduct). One commentator has observed that this approach of requiring actual presence at the scene in order to permit recovery for infliction of emotional distress “clearly benefits the defense.” Candy B. Heimbach, Pennsylvania Supreme Court Rules on Intentional Infliction of Emotional Distress Tort: Plaintiff Must Witness Alleged Outrageous Conduct, 2 LAW. J. 6, 6 (2000).
\textsuperscript{82} The argument that courts should not recognize motive-based injuries because the number of claims will proliferate has been rebutted in many law review articles, and some commentators have suggested that the willingness to marginalize these kinds of injuries out of concern for the floodgates or out of concern for fraud is inconsistent with the treatment of other claims, exposing a gendered hierarchy of preferred claims. See, e.g., Elizabeth Andsley, Mental Injury Occasioned by Harm to Another: A Feminist Critique, 14 LAW & INEQ. J. 391, 436 (1996) (discussing the “floodgates” argument); Nancy Levitt, Ethereal Torts, 61 GEO. WASH. L. REV. 136, 172 (1992) (discussing the suspicion of motive-based injuries).
Nix admonished his colleagues to assume their judicial role, observing: "We obviously do not accept the 'too much work to do' rationale. We place the responsibility... on the judicial machinery of the Commonwealth to fulfill its obligation to make itself available to litigants."\(^{83}\) Most important for our consideration of independence, Justice Nix also articulated his view of the judicial power to determine whether a claim exists. Whereas he asserted in *Sinn* that "[i]n the end the court will decide whether there is a duty,"\(^{84}\) he added that the court must be "guided by its evaluation whether policy objectives are served by confirming whether the decision is consistent with the 'mores of the community.'"\(^{85}\)

2. *Azzarello v. Black Brothers Co.*

A year earlier, in *Azzarello v. Black Brothers Co.*,\(^{86}\) Justice Nix, interpreting the significance of the "unreasonably dangerous" language set out in the Restatement (Second) of Torts section 402A,\(^{87}\) led Pennsylvania along a distinctive path in defining whether a product was defective.\(^{88}\) Justice Nix

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83. *Sinn*, 404 A.2d at 681.
84. *Id.* at 681 (quoting William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 14-15 (1953)).
85. *Id.*
86. 391 A.2d 1020 (Pa. 1978).
87. Section 402A of the Restatement (Second) of Torts provides in relevant part: "[O]ne who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property... although... the seller has exercised all possible care in the preparation and sale of his product..." Restatement (Second) of Torts § 402A (2005).
88. *Azzarello*, 391 A.2d at 1024. No other state has adopted the *Azzarello* approach to strict products liability for design defects. Most jurisdictions have recognized that assessment of foreseeability and the reasonableness of manufacturer design choices are central to design defect cases. Section 2 of the Restatement (Third) of Torts: Product Liability reflects this position, adopting a reasonableness standard for design defect cases and requiring plaintiffs in most circumstances to provide evidence of a reasonable alternative design in design defect cases. RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 (2005). This is a far cry from the Pennsylvania court's characterization of the product manufacturer and seller as the "guarantor" of the product's safety. See Merriweather v. E. W. Bliss Co., 636 F.2d 42, 46 (Pa. 1980) (referring to its opinion in *Azzarello* to reinforce "the concept of the manufacturer as the guarantor of his product"). Since the introduction of the Restatement (Third) of Torts: Product Liability, the Pennsylvania Supreme Court has undertaken a reexamination of *Azzarello*. See Phillips v. Cricket Lighters, 841 A.2d 1000, 1009 (Pa. 2003) (finding by plurality that unintended users who were "reasonably foreseeable," like children, can recover in strict liability); Davis v. Berwind Corp., 690 A.2d 186, 192 (Pa. 1997) (rejecting the argument that under *Azzarello* foreseeability was not a proper consideration, that the court held that the intentional disabling of safety device not foreseeable as a matter of law). On April 12, 2005, the Supreme Court of Pennsylvania heard argument in *Straub v. Cherne Indus.*, in which the plaintiff appealed the superior court's reversal of the plaintiff's four million dollar jury verdict for injury stemming from an allegedly defective industrial pipe plug. 880 A.2d 561 (Pa. 2005). The jury concluded that the defendant was negligent, but rejected the plaintiff's strict liability design defect claim. *Id.* at 564-65. The defendant sought rejection of *Azzarello*'s distinction between negligence and strict liability, arguing that it is legally impossible to say there is no defect but defendant's conduct is negligent. *Id.* at 567. Plaintiff sought a reaffirmation of the distinction made between strict liability and negligence claims in *Azzarello*. *Id.* While this case gave the Pennsylvania Supreme Court the opportunity to determine whether *Azzarello*
reasoned that it is the function of the judiciary rather than the jury to determine whether, under plaintiff's averment of facts, recovery is justified.\textsuperscript{89} Thus, before a jury is permitted to assess whether the facts in a case support a claim that a product is defective in design, the claim should first be subject to a judicial determination that the product is in a defective condition that is unreasonably dangerous.\textsuperscript{90} Reserving this assessment for the judge secures for the court a gate-keeping function that distinguishes Pennsylvania's treatment of products liability suits from that of other states.\textsuperscript{91} Despite controversy, Pennsylvania continues to espouse this position after more than two decades.\textsuperscript{92}

In both Sinn and Azzarello, Justice Nix took seriously the responsibility of the court to serve justice while delimiting its judicial role. To preserve the integrity and authority of the court, it must render opinions that are entitled to respect because they are consistent with the rule of law and mete justice. These rulings of Justice Nix expose his understanding of the common law court's obligation to remain faithful to the rule of law even as it is mindful of the impact of changing mores.\textsuperscript{93} Both reflect a commitment to the decisional independence of the court.\textsuperscript{94} These opinions are notable not only in terms of their precedent-setting, path-breaking, and controversial positions, but also because they reveal a jurisprudence that remains faithful to the rule of law while seeking to take account of the mores of a community that is ever changing.\textsuperscript{95}

3. Speck v. Finegold

An appreciation of complexity in Justice Nix's jurisprudence can flow from

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\item would remain the law in Pennsylvania, see id. (stating the position of plaintiffs), the court declined to rule on the distinction between strict liability and negligence claims by finding that the appellant failed to properly preserve his request for a judgment notwithstanding the verdict. Straub, 880 A.2d at 567. (Thanks to Thomas Watkinson, Temple Law '05, a former student of my course, Strict Liability-Products and Beyond, for his analytical insights on this evolving are of design defect law in Pennsylvania.)
\item Azzarello, 391 A.2d at 1024.
\item Id.
\item Id.
\item Phillips, 841 A.2d at 1016-17 (Saylor, J., concurring).
\item Azzarello, 301 A.2d at 1024. In Azzarello, as in other cases authored by him, Justice Nix is concerned about carefully delineating the relationship of judge and jury, perhaps further reflecting his interest in ensuring that the mores of the community are appropriately determined. See id. (discussing the role of judge and jury).
\item See ABA, supra note 43, at Overview (discussing the importance of judicial independence). In assessing decisional independence, this essay seeks to determine whether opinions of the court are faithful to the rule of law even as they seek to reflect the values of the community. Justice Nix's discussion of the interpretive role of the judge as well as a consideration of the judge's decision-making in relationship to jury fact-finding also bear on the question of decisional independence. Institutional independence, in contrast, is concerned with the clarity and discipline with which the court undertakes its work and is mindful of the functions and relationships of other branches of government. Id.
\item See supra note 93 and accompanying text for a discussion of how Justice Nix meets these commitments and noting that they are principally met by carefully delineating the interpretive role of the judge and the judge's relationship to the fact finder.
\end{itemize}
reading some of his dissents. In Speck v. Finegold, Justice Nix dissented from the majority's decision that parents could sue for the wrongful birth of a child because of the negligence of medical providers performing a vasectomy and abortion. In this case, Justice Nix asserted that the majority had engaged in improper judicial legislating in recognizing this controversial claim, being without constitutional mandate, legislative direction, or grounds for articulating public policy in these circumstances. In this setting, unlike in Sinn, Nix professed to be unpersuaded that the mores of the community clearly sustained the majority's position. "It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community . . ." Justice Nix clearly seems to be suggesting that the court's duty to find a cognizable claim for redress for every substantial wrong, outlined in elegant contours in Sinn, is extremely limited. He leaves to the legislature the responsibility for creating a right of action if there is any disagreement on issues of policy.

97. Speck, 439 A.2d at 118 (Nix, J., dissenting).
98. Id. at 119. The majority concluded that parents could sue for wrongful birth and were therefore able to recover expenses from the birth and for raising the child, as well as mental distress. Id. at 113-14 (majority). The child, however, could not sue for wrongful life. Id. at 113-16. See also Note, A Cause of Action for "Wrongful Life": [A Suggested Analysis], 55 MINN. L. REV. 58, 62-67 (1970) (discussing the tort and damages for wrongful life).
99. Speck, 439 A.2d at 121. Of course, the court's determination that its position is consistent with community consensus may be contestable; in a diverse society it is unlikely that there is such community agreement in many settings. Professor Peck argues that the fact that a court may have been mistaken in its assessment of the community's views is not as troublesome in settings where the claims are not built on constitutional foundations since the legislature can respond and defeat the court's disposition. Peck, supra note 66, at 132, 150. Significantly, some members of the panel assessing Justice Nix's jurisprudence at Symposium: The Pursuit of an Independent Judiciary: The Writings of Chief Justice Robert N.C. Nix, Jr. on May 11, 2005 hypothesized that his reticence to find a claim of wrongful birth was affected by a Catholic upbringing and pro-life stand.

The court's role in uncovering and following community mores, of course, is highly controversial and troublesome to commentators who are concerned about the dangers of judicial activism in light of diverse value preferences. A competing image of the justice "doing justice" by identifying well evolved mores of society is that of Justice Holmes, who was so committed to a majoritarian-supporting judicial philosophy of self-restraint that he once commented: "[I]f my fellow citizens want to go to Hell I will help them." David Luban, Justice Holmes and the Metaphysics of Judicial Restraint, 44 DUKE L.J. 449, 489 (1994) (quoting a letter written by Justice Holmes). This deeply thoughtful and thought-provoking study of the philosophical support for the jurisprudence of Justice Holmes explains that he was prepared to find majorities the dominant force, and concludes that dominant power itself was behind Justice Holmes' overriding commitment. See generally id. A contrasting view of another famous justice, Robert H. Jackson, who also wrote about his theory of judicial review, can be found in a short article by Graeme Barry, "The Gifted Judge": An Analysis of the Judicial Career of Robert H. Jackson, 38 ALBERTA L. REV. 880, 881-82 (2000). Jackson's more pragmatic approach to impartiality and independence, including his deep belief in the importance of judicial restraint, may be more in line with the jurisprudence of Justice Nix.

100. Speck, 439 A.2d at 120.
B. The Jurisprudence of Justice Nix: Institutional Independence

Institutional independence not only requires an assertion of the court’s own institutional competence to decide a case but also should reveal the court’s own understanding of its relationship to other decision-making institutions and their competencies. As is the case in an examination of Justice Nix’s opinions reflecting decisional independence, his opinions suggest a clear determination to safeguard institutional roles.\(^{101}\)

In several cases addressing the continued recognition of sovereign immunity, Justice Nix revealed his concern for institutional independence. In this area, Justice Nix continuously asserted his view that common law courts have the power to act when existing law is inconsistent with the needs of society. In *Biello v. Pennsylvania Liquor Control Board*,\(^ {102}\) the majority refused to abrogate the rule of sovereign immunity because it concluded that a provision in the Pennsylvania Constitution that permitted the legislature to direct the courts as to which suits against the Commonwealth would be litigated left the court powerless.\(^ {103}\) In dissent, Justice Nix reasoned that “this being a principle of common law rather than a constitutional prohibition, it cannot be questioned that the courts have the power to alter that principle when it is no longer consistent with the needs of the present society,”\(^ {104}\) and urged the court to abolish the anachronistic law.\(^ {105}\) In a later case, *Mayle v. Pennsylvania Department of Highways*,\(^ {106}\) the majority reconsidered and followed the advice of Justice Nix, abolishing sovereign immunity.\(^ {107}\) Yet in a subsequent case, *Bershefsky v. Commonwealth*,\(^ {108}\) Justice Nix, again dissenting, disagreed with the majority that it could allow a suit against the Department of Welfare, based on its abrogation of immunity in *Mayle*.\(^ {109}\) Noting that the legislature, reacting to the court’s earlier dispositions abolishing sovereign immunity, had passed a statute resurrecting immunity in circumstances like the one before the court,

\(^{101}\) In a criminal case, *Commonwealth v. Wharton*, a dissenting Justice Nix’s treatment of the procedural authority of the court vis-à-vis the law-making of the legislature is insightful. 435 A.2d 158, 169 (Pa. 1981) (Nix, J., dissenting). Nix rejected the majority’s position that the statute granting the Commonwealth the absolute right to trial by jury upon demand was unconstitutional because it conflicted with a Supreme Court rule authorizing the trial court to approve a defendant’s motion to waive a jury trial. *Wharton*, 435 A.2d at 169. The justice concluded that the court rule must bow to the statutory enactment because a procedural rule, even one vested in the judicial power by the Constitution, cannot be used to defeat a right subsequently conferred by the legislature. *Id.*


\(^{103}\) *Biello*, 301 A.2d at 851-52.

\(^{104}\) *Id.* at 854 (Nix, J., dissenting).

\(^{105}\) *Id.* at 853.


\(^{107}\) *Mayle*, 388 A.2d at 712.


\(^{109}\) *Bershefsky*, 418 A.2d at 1332 (Nix, J., dissenting).
Justice Nix argued that the legislature’s action and not the court’s ruling abolishing sovereign immunity could be applied retroactively and controlled in the case.\textsuperscript{110} In these sovereign immunity cases, Justice Nix seemed determined to defer to the legislative authority even as he recognized the law-making power of the common law court.\textsuperscript{111}

Deference to the legislative decisionmaking is also displayed in Justice Nix’s decision in \textit{Parker v. Children’s Hospital of Philadelphia},\textsuperscript{112} a challenge to legislation providing for pre-trial arbitration of medical malpractice claims.\textsuperscript{113} Justice Nix concluded that the arbitration provisions did not violate the litigant’s right to a jury trial.\textsuperscript{114} However, two years later, in \textit{Mattos v. Thompson},\textsuperscript{115} Justice Nix concluded that the constitutional right to a jury trial was violated where delay created by the arbitration procedure imposed an “oppressive burden upon the right.”\textsuperscript{116} These cases expose Nix’s pragmatic unwillingness to let a theoretical understanding of the legislative power leave him blind to the reality of practice.

**CONCLUDING THOUGHTS**

Justice Nix’s tenure as a judge spanned twenty-four years in an often contentious decision-making environment. Wrestling with controversies on the bench required Justice Nix to impose order and foster a sense that the Pennsylvania Supreme Court maintained the discipline and integrity to provide fair disposition of cases and to avoid a “crisis of confidence” that would threaten its independence. As in-fighting between the jurists and scandals suggesting corruption and impaired behavior of some judges became public, inevitable questions about the compromised judicial integrity of elected courts multiplied. In conduct and in decision-writing, Justice Nix attempted to respond to these challenges, revealing a jurisprudential posture that addressed both decisional and institutional independence concerns. This is all the more remarkable given the troubling and even chaotic times in which he toiled.

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\item \textsuperscript{110} \textit{Id.} at 1333.
\item \textsuperscript{111} It is tempting to suggest that Justice Nix’s willingness to defer to the legislature was not only a product of the Justice’s pragmatism, but also colored by his father’s influence as a long-serving member of Congress.
\item \textsuperscript{112} 394 A.2d 932 (Pa. 1978).
\item \textsuperscript{113} \textit{Parker}, 394 A.2d at 936.
\item \textsuperscript{114} \textit{Id.} at 941-43.
\item \textsuperscript{115} 421 A.2d 190 (Pa. 1980).
\item \textsuperscript{116} \textit{Mattos}, 421 A.2d at 191.
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