

DECIDEDLY CO-EQUAL: THE NEW JERSEY SUPREME COURT

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At the beginning of the twenty-first century, the New Jersey Supreme Court enjoys a stature and an independence that are the envy of most other state supreme courts. Commentators regularly rank the New Jersey Supreme Court as one of the nation's leading courts--indeed, one commentator in the mid-1980s described it as "the most innovative [court] in the country"¹--and other state supreme courts look for guidance to the Court's pioneering rulings.

These rulings have placed it in the center of--and frequently in the forefront of--a wide array of controversial issues. The New Jersey Court's rulings have reformed the state's system of school finance, prompting the enactment of a state income tax, and opened up New Jersey's suburbs to low-income housing. Other rulings have safeguarded abortion rights, outlawed surrogate motherhood, restricted the use of the death penalty, and transformed the rights of injured parties seeking to collect damages. When other state supreme courts have taken an activist stance, they have often encountered opposition in the form of constitutional amendments designed to overturn their rulings and campaigns for removing or replacing justices. In New Jersey, in contrast, the Court's rulings have not led to serious political repercussions. No governor has refused to reappoint sitting justices because of disagreements with their decisions, and even the Court's most controversial rulings have not been overturned by constitutional amendment.

What has led the New Jersey Supreme Court to play such an aggressive role in the political life of the state? And what has insulated the Court from political attack? To answer these questions, one must look back to the origins of a modern court system in New Jersey.

Court Reform in New Jersey

Prior to the adoption of the state's current constitution in 1947, New Jersey's courts had a dismal reputation. Seventeen separate classes of courts operated in the state, creating a jurisdictional maze for unwary litigants. A particular problem was New Jersey's separate systems of law courts and equity courts, an inheritance from England that most states had discarded early in the nineteenth century. The complexity of New Jersey's courts sometimes led litigants to file their cases in the wrong set of courts, only to discover their error after the statute of limitations had expired. Even when they filed in the "right" courts, they faced the prospect of piecemeal litigation. For example, suppose that a pedestrian was hit by an automobile, but a claims agent used fraudulent misrepresentations to induce the

pedestrian to accept a very small settlement and sign a release. Prior to 1947, in order to overturn this result, the pedestrian first would have to sue in equity court alleging fraud, seeking a judicial ruling canceling the settlement and the release. If he succeeded, he then would have to sue a second time in the law court to recover damages for the injuries he suffered from the accident.

Needless to say, this "hydraheaded monster of confusion for litigants" frustrated the efficient administration of justice.²

Atop this complex court system stood the Court of Errors and Appeals, an unwieldy body of sixteen members, including six lay judges. This court, aptly described as "a little larger than a jury, a little smaller than a mob," failed to attract the state's best legal talent. Instead, political connections dominated the selection of judges. For example, when Governor A. Harry Moore appointed Frank Hague, Jr., the son of Jersey City's powerful mayor, to the Court of Errors and Appeals in 1939, he candidly admitted his motive: "I knew it would please his daddy."³ In sum, outdated legal processes, an incoherent institutional design, and undistinguished judges combined to make "Jersey justice" a national disgrace. Indeed, the American Judicature Society, the nation's preeminent proponent of court reform, labeled New Jersey's "the nation's worst court system."⁴

Efforts to change the New Jersey court system were inaugurated in the 1920s. Initially, this campaign foundered in the face of opposition from judges and from local bar associations, whose members benefitted from the legal complexity. However, tireless educational efforts by the New Jersey League of Women Voters and by other reform groups eventually convinced the public that a poor justice system affected ordinary citizens. When the New Jersey Constitution was revised in 1947, court reform was a key concern, and the new constitution completely transformed the state's courts.

Gone--and unlamented--was the Court of Errors and Appeals, replaced by a reconstituted seven-member Supreme Court modeled on the United States Supreme Court. Gone too was the system's complexity and incoherence in institutional design, including the separate courts of law and equity, replaced by a thoroughly modernized structure presided over by the Chief Justice. And filling the office of Chief Justice was Arthur Vanderbilt, former president of the American Bar Association, dean of New York University Law School, and--in conjunction with Governor Alfred E. Driscoll--the primary architect of New Jersey's court reform.⁵ Vanderbilt's efforts catapulted the New Jersey courts to national prominence--in a striking turnaround, the American Judicature Society proclaimed the reformed judicial system as "the nation's best". His reforms also increased the attractiveness of serving on the state's high court, a fact reflected in the high caliber of judges recruited since 1947. Finally, his reforms created an expectation that the New Jersey Supreme Court would play a national leadership role. Thus, by the time of his death in 1957, Chief Justice Vanderbilt had given a new stature and a new direction to the New Jersey Supreme Court.

THE JUSTICES

Like many other states, New Jersey has a seven-member supreme court. The Chief Justice (with a salary of \$138,000) and the Associate Justices (with a salary of \$132,250) are appointed by the Governor, with the advice and consent of the Senate. Indeed, appointment is the mode of selection for all New Jersey judges--the state has never elected its judiciary. Once appointed, judges serve a term of seven years and, if reappointed and confirmed again by the Senate, remain on the bench until the mandatory retirement age of seventy. Both the mode of selection and the judges' term of office (far longer than that in most other states) promote judicial independence. Equally important in ensuring independence is the state's tradition of bipartisan appointment. Mindful of how narrow partisanship had compromised the reputation of the state's courts prior to 1947, New Jersey governors in the latter half of the twentieth century have eschewed short-term political advantage in selecting justices. Instead, they have honored an unwritten understanding that a 4/3 split between the parties be maintained on the Court (with four justices from the Governor's political party), even if that has meant selecting justices from the opposing party. Republican Governor William Cahill, for example, named his Democratic predecessor as governor, Richard J. Hughes, to the chief justiceship when it became vacant in 1973. This bipartisanship--or nonpartisanship--has carried over to Court decisions. Although the Court has announced many controversial rulings, in most of these cases the justices have been unanimous, and divisions on the Court have not tracked party affiliations. As a result, the Court has maintained a reputation for nonpartisanship even as it has thrust itself into the policy arena.⁶

As the Hughes appointment suggests, the tradition of bipartisanship has not precluded selection of justices with extensive political experience. In fact, most justices have served in the executive branch of state government before their appointment to the high court. For example, the state's current Chief Justice, Deborah Poritz, was Chief Counsel to Governor Kean from 1989-1990 and Attorney General under Governor Whitman from 1994-1996. Three Associate Justices on the Court in 1999--Justices Alan Handler, Daniel O'Hern, and Stewart Pollock--had also served as Chief Counsel to a Governor prior to their appointment; Justice Peter Verniero, who succeeded Pollock, had served as Attorney General; and Justice Gary Stein had directed the governor's Office of Policy and Planning. Only Justices Marie Garibaldi, the first woman appointed to the Court, and Justice James H. Coleman, Jr., the Court's first African-American, had not served in the Governor's office or in the cabinet. As discussed later in the chapter, the Court has favored gubernatorial claims in interbranch disputes, and it is possible that the justices' executive-branch experience may have increased their understanding of the gubernatorial perspective.

Perhaps the most important contribution to the success of the

New Jersey Supreme Court has been the strong leadership that the Court has enjoyed. This is particularly important because under New Jersey's modern court structure, the Chief Justice not only leads the Court in its decisionmaking responsibilities but also serves as the administrative head of the entire judicial system. Altogether, in over half a century, only five chief justices have led the Court: Arthur Vanderbilt (1947-1957), Joseph Weintraub (1957-1973), Richard Hughes (1973-1979), Robert Wilentz (1979-1996), and Deborah Poritz (since 1996).⁷ The crucial event in institutionalizing judicial independence and strong leadership on the Court was the reappointment and confirmation of Chief Justice Wilentz in 1986. Wilentz had earned the enmity of Governor Thomas Kean and most members of the State Senate with several unpopular decisions, especially the Court's rulings on exclusionary zoning (the famous *Mount Laurel* cases, which will be discussed shortly). Despite this, when the Chief Justice's first term expired, Governor Kean reappointed him, and the Senate by a bare minimum vote of 21-19 confirmed him. Even those senators who opposed Wilentz's reappointment were reluctant to challenge the Court's rulings openly, preferring instead to base their public opposition on the claim that the Chief Justice actually resided in New York. Reflecting on the controversy, Governor Kean acknowledged his disagreements with the Chief Justice but insisted that they were no reason to deny reappointment. If judges cannot make decisions without worrying about their effect on their tenure in office, he argued, then the independence of the New Jersey judiciary would be compromised.

POLICY INITIATIVES

The New Jersey Supreme Court has been willing--at times, eager--to address controversial issues and entertain novel legal claims.

As a former justice acknowledged, "there is no thicket too political for us."⁸ School finance, exclusionary zoning, the right to die, tort law reform, abortion funding, capital punishment--the litany of judicial intervention goes on and on. Let us look at some of the Court's initiatives in detail.

School Finance

For over a quarter of a century, from 1973-1998, the New Jersey Supreme Court was intimately involved in supervising the funding of the state's public schools. The Court first addressed school finance in *Robinson v. Cahill* (1973), ruling that the state had failed to meet its obligation under the New Jersey Constitution to provide a "thorough and efficient system of education" for all children. *Robinson I*, as the ruling came to be known, had dramatic effects beyond the state's borders. The litigation that spawned *Robinson I* was part of a nationwide campaign to reduce interdistrict disparities in funding for public education. School-finance reformers had argued that the inequalities in funding produced by a heavy reliance on local property taxes violated the

equal protection clause of the U. S. Constitution. However, the U.S. Supreme Court in *San Antonio Independent School District v. Rodriguez* (1973) disagreed, upholding a system of school finance very similar to New Jersey's. Coming only thirteen days after *Rodriguez*, *Robinson I* redirected the reform movement by showing that defeat in the Supreme Court did not preclude legal challenges to school finance. As the attorney in Connecticut's later school-finance case put it, "*Robinson* fired my imagination."⁹ The consequences were dramatic: using the approach pioneered in *Robinson*, challenges in state courts based on state constitutions, reformers have succeeded in overturning systems of school finance and achieving court-ordered improvements in fifteen other states.

Within New Jersey, the New Jersey Supreme Court's combination of activism and restraint in *Robinson* virtually guaranteed a prolonged struggle over school finance. By ruling that the existing system of school finance violated the New Jersey Constitution and setting a deadline for corrective action, the Court placed school finance atop the policy agenda for both the Governor and the New Jersey Legislature. But by declining in the first instance to prescribe a remedy for the constitutional violation, the Court left it to those other branches to devise a new system of school finance that ensured an adequate education for all students, including those in poor districts. This the Legislature was reluctant to do, at least until the Court's later threat in *Robinson IV* to redistribute state tax revenues spurred begrudging action. When the legislators subsequently refused to fund the plan they had created, the Court in *Robinson VI* issued an injunction, forbidding the operation of an unconstitutional school system after July 1, 1976. Nine days after the injunction went into effect, the Legislature capitulated, enacting New Jersey's first income tax to fund its plan, and the Court lifted its injunction.

Resolution of *Robinson v. Cahill* brought only a temporary respite. Five years later, in 1981, litigants challenged New Jersey's new system of school finance, insisting that it likewise failed to provide a thorough and efficient system of education for all students. In 1990 the New Jersey Supreme Court in *Abbott v. Burke* (*Abbott II*) agreed, "hold[ing] the Act unconstitutional as applied to poorer urban districts" and giving the state five years to implement a system that would raise funding in those districts to match that in the state's wealthiest districts. In doing so, the Court made clear that its concern was not simple equality of funding for all districts but rather funding adequate to ensure a quality education for students in poorer districts. When Christine Todd Whitman became Governor, she sought to reframe the education debate, insisting that educational reform and not funding shifts were the key to providing a thorough and efficient education. Although the Court applauded the Governor's education initiatives, it rejected efforts to use them as a substitute for funding equalization and adequacy, striking down state funding plans in 1994 and again in 1997. Only when the Governor and the New Jersey Legislature fashioned and funded a comprehensive reform plan

addressed to the needs of poorer districts did the Court in *Abbott V* (1998)--its twelfth school-finance ruling--terminate its involvement.

Exclusionary Zoning

The most striking change in New Jersey during the last half century has been its transformation into a suburban state, albeit one with a higher population density than any other state. Suburbanization has exacerbated the racial and class segregation in New Jersey. According to some critics, this housing segregation reflects more than market forces and consumer choice. They insist that zoning policies in the suburbs, such as minimum lot sizes and the like, have had the effect (and perhaps even the intent) of preventing the construction of low-cost housing and thus have served to exclude the poor and members of racial minorities. When these critics challenged such "exclusionary zoning" regulations before the New Jersey Supreme Court in 1975, the justices agreed. In *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel I)*, the Court unanimously ruled that because the zoning power was a state power (albeit one delegated to municipalities), it had to be exercised in pursuance of the general welfare. The Court therefore concluded that zoning ordinances designed to provide advantages to residents at the expense of state citizens beyond the municipality's borders violated the state constitution. This meant that municipalities were obliged to provide their "fair share" of the "regional need" for "low and moderate income housing."

If *Mount Laurel I* sought to put zoning reform on the political agenda of New Jersey suburbs, it failed miserably. In part, this failure reflected the ruling's lack of clarity about local governments' obligations. How, after all, would one define a "regional need" or a municipality's "fair share"? Even more important, however, was the suburbs' adamant refusal to reconsider their land-use policies. This noncompliance led in 1983 to *Mount Laurel II*.

The Court in *Mount Laurel II* emphatically reaffirmed the constitutional principles enunciated in its earlier ruling. It depicted that ruling as rooted in "the underlying concepts of fundamental fairness in the exercise of governmental power" and insisted that the State "cannot favor rich over poor." Decrying the inaction that had greeted its earlier ruling, the Court announced itself "more firmly committed than ever" to ensuring that *Mount Laurel* provide "a realistic opportunity for housing, not litigation." In order to achieve this goal, the Court designated special judges to determine the "fair share" housing obligations for various localities. The ruling also endorsed "builders' remedies" for developers who successfully challenged exclusionary ordinances, thereby encouraging private litigation to vindicate constitutional requirements by permitting judges to order approval of particular applications for the construction of low-cost

housing.

Mount Laurel II was unpopular with most local officials. They resented their loss of control over land-use policy, and they feared that the ruling--particularly the endorsement of builders' remedies--could lead to ill-advised, uncontrolled growth. Their concerns about judicially imposed housing policy spurred the New Jersey Legislature to act. In 1985, in response to *Mount Laurel II*, the Legislature adopted the Fair Housing Act. The Act acknowledged the state's responsibility to meet the housing needs of the poor and created an administrative agency, the Fair Housing Council, to superintend the reform of local zoning ordinances. Although the Act did not fully meet the Court's standards--for example, it reduced dramatically the number of low-cost housing units that municipalities were obliged to provide--the New Jersey Supreme Court unanimously upheld the legislators' plan in *Hills Development Co. v. Bernards* (1986). Indeed, the Court claimed that promoting legislative action had been its aim from the outset, that *Mount Laurel II* was "the strongest possible entreaty to the Legislature, asking for legislation on the subject." In the wake of *Bernards*, the Court has left the issue of exclusionary zoning to the Fair Housing Council and to the lower courts.

Unlike the New Jersey Supreme Court's school-finance rulings, *Mount Laurel* did not launch a nationwide reform movement--in fact, no other state court has followed the Jersey justices' lead. Within the state, *Mount Laurel* remains unpopular in many circles. Yet despite its unpopularity, the Court's apparent threat to impose unacceptable changes in local zoning policies did stimulate legislative action that at least in part addressed the concerns identified in *Mount Laurel II*. Moreover, the continuing supervision of zoning policy by the Fair Housing Council and the low-cost housing built as a result of *Mount Laurel* demonstrate that the Court's intervention has had some effect. Thus, *Mount Laurel* once again demonstrates the Court's ability to bring a sensitive issue to public attention and to participate in crafting, but not dictating, the solution.

Criminal Justice

As our discussions of school finance and exclusionary zoning have shown, the New Jersey Supreme Court has at times interpreted the New Jersey Constitution as securing broader protections for rights than are available under the Federal Constitution. Another important example of this "new judicial federalism", as it has been called, involves the rights of defendants, particularly the right against unreasonable search and seizure. In *State v. Hempele* (1990), the New Jersey justices ruled that police required a search warrant to inspect the contents of plastic garbage bags left at a residential curbside. In *State v. Hunt* (1982), they held that police needed a search warrant in order to obtain toll billing records held by a telephone company. And in *State v. Novembrino* (1987), they imposed exacting standards regarding the weight magistrates should give to informants' tips in issuing search

warrants.¹⁰

In dealing with constitutional challenges to criminal penalties themselves, however, the Court has accorded substantial deference to the legislative branch, consistently upholding even severe punishments decreed by the Legislature. Illustrative of this tendency are *State v. Ramseur* (1987), in which the justices rejected several state constitutional challenges to the death penalty, and *State v. Des Marets* (1983), in which they upheld the Graves Act, which requires a mandatory minimum sentence for crimes committed while using a firearm.

Reproduction and Rights

The U.S. Supreme Court's controversial ruling in *Roe v. Wade* (1973), together with advances in medical technology, has led to a proliferation of court cases involving reproductive rights. The New Jersey Supreme Court twice has been called upon to deal with these sensitive issues. In the wake of *Roe*, a key concern was whether government was obliged to provide funding for indigent women seeking abortions. In 1980, the U.S. Supreme Court held that an enactment that restricted the use of Medicaid funds for abortions did not violate the Federal Constitution (*Harris v. McRae* [1980]). This ruling, however, did not address whether a state government might be obliged by its state constitution to provide such funding; and as in its school-finance rulings, the New Jersey Supreme Court concluded that the New Jersey Constitution offered protections unavailable under the Federal Constitution. In *Right to Choose v. Byrne* (1982), the Court ruled that if the state provided funding for childbirth, then the state constitution's equality guarantee mandated that the state pay for medically necessary abortions as well.

Another ground-breaking ruling involved the issue of surrogate motherhood. Mary Beth Whitehead entered into a contract with an infertile couple under which she agreed to conceive a child through artificial insemination using the sperm of the husband, carry the child until birth, and then surrender the child to the couple. But when the child was born, Whitehead changed her mind and refused to give up the child, claiming that the contract was legally unenforceable. In *Matter of Baby M* (1988), the New Jersey Supreme Court agreed, concluding that surrogate motherhood contracts were invalid because they conflicted with state statutes dealing with adoption and the termination of parental rights and because they violated public policy. This did not resolve the issue, however, because the Court noted that custody of the child would have to be governed by the statutory standard of "the best interests of the child." In light of those interests, the Court awarded custody to the infertile couple.

Statutory Interpretation

As the *Baby M* case illustrated, judges are typically involved in enforcing legislative mandates rather than in invalidating them.

Thus, most of the New Jersey Supreme Court's workload involves the interpretation and application of the enactments of the Legislature. This responsibility might seem to offer little opportunity for judicial policymaking--after all, most such disputes are of interest only to the litigants themselves, and even when a dispute has broader significance, the legislature has provided the standard for resolving it by enacting the statute. But generally worded statutes often require judicial interpretation when they are applied to specific, sometimes unanticipated, situations. As in its interpretation of the state constitution and the common law, the New Jersey Supreme Court has been active and creative in its interpretation of statutes.

What most characterizes the Court's interpretation of statutes is a careful weighing of alternative outcomes and an unwillingness simply to rely on "rules of thumb" or canons of statutory interpretation in order to reach decisions. Illustrative of the Court's approach is a 1990 case (*In re Commitment of Edward S.*), in which the justices were faced with interpreting a statute governing hearings for those found not guilty by reason of insanity. The applicable statute included a cross-reference to another law concerning those who were civilly committed. This latter law was subsequently amended to require closed hearings for decisions on whether to release civilly committed persons, most likely without consideration of the possible effects on those found not guilty by reason of insanity. Under established canons of statutory interpretation, the amendment to the cross-referenced law would have also operated to require closed hearings for those found not guilty by reason of insanity. The New Jersey Supreme Court, however, in an opinion by Chief Justice Wilentz, declined to follow this "rule of thumb." Instead, it focused on the policy question of whether hearings leading to the release of those found not guilty by reason of insanity should be open or closed and on what the legislature would have intended. Based on this inquiry (and contrary to the standard canon of interpretation), it concluded that hearings for those found not guilty by reason of insanity should remain open.

The Court has also demonstrated a willingness to work with the New Jersey Legislature in its interpretation of statutes, particularly when the statutes have raised constitutional problems.

In such circumstances, the Court might simply have declared the statutes unconstitutional and returned the entire matter to the legislature. However, the Court has opted for a more accommodationist tack. One example of the Court's approach is found in its interpretation of Megan's Law, a popular enactment that required former sex offenders to register with local law enforcement authorities and directed those officials to notify residents of the sex offenders' presence among them. In *Doe v. Poritz* (1995), the Court recognized that Megan's Law might infringe the state constitutional right to privacy, if the registration requirement was imposed on offenders who posed no danger to the community. Rather than striking down the law, the Court crafted its own solution to the constitutional problem, mandating the

development of a set of criteria and procedures for differentiating between those offenders who posed a danger and those who did not. With this proviso, the Court upheld Megan's Law.

Another example of the Court's approach is found in *State v. Lagares* (1992). At issue in *Lagares* was a mandatory sentencing scheme that only permitted the prosecutor to request a waiver of the mandatory sentence. Seeking to save the statute, the Court on its own created a judicial supervision process that cured the separation-of-powers problems posed by the statute. This might seem like judicial activism, but it is activism of a peculiar sort.

It is not activism seeking to overturn statutes but activism seeking to preserve them by supplying judicial solutions for the constitutional problems they raise.

The Right to Die

Among the New Jersey Supreme Court's most heralded rulings is *In re Quinlan* (1976), the first judicial recognition of the "right to die." Karen Ann Quinlan had suffered extensive brain damage, leaving her comatose and dependent on life-support systems with no hope of recovery. Her father sought appointment as her guardian, including the power to terminate use of the life-support systems. In *Quinlan* the New Jersey Supreme Court ruled that the state constitutional right to privacy encompasses the right of a comatose patient--or in this case, her appointed guardian--to terminate life-support systems. Subsequent rulings, such as *In re Conroy* (1985), expanded the right of terminally ill patients to include refusal of nourishment and hydration.

The Court's approach to the right-to-die cases over more than a generation reflects a subtle modification of its active involvement in such policy-oriented areas. In its initial "right to die" rulings, beginning with the famous *Quinlan* decision, it had relied on a constitutional basis for its decision. To the extent that a judicial ruling is based on the constitution, it cannot be changed by the legislature. In the Court's more recent "right to die" rulings, such as *In re Conroy* and *In re Farrell* (1987), it has receded from the constitutional underpinnings and relied rather on common law reasoning. This change in the basis for its rulings preserves a role for the legislature, because common-law rulings can be changed or modified by statute.

Injuries and Remedies

The common law involves the judicial enunciation and application of legal standards in the absence of legislative or administrative action. This body of law was imported into the American colonies from England, where it originated, and became part of American law following independence. Historically, state supreme courts have elaborated the common law in the course of resolving disputes between litigants. During the latter half of the twentieth century, state judges introduced dramatic changes in the common law, particularly in tort law, which deals with civil

wrongs (other than breach of contract) that result in death, personal injury, or property damage, for which a person can sue to recover damages. The New Jersey Supreme Court has been in the forefront of these reform efforts. Its rulings have radically altered the legal relationship between manufacturer and consumer in New Jersey by redefining the standard for determining liability, eliminating barriers to recovery, and restricting various defenses traditionally employed to avoid liability. A study of tort law reform, for example, ranked the New Jersey Supreme Court first in the nation, while a study of citation patterns found it the third most frequently cited state supreme court.¹¹

Henningsen v. Bloomfield Motors (1960) exemplifies the Court's assertiveness in tort law reform. The facts of the case were undisputed: Mrs. Henningsen, whose husband had recently purchased a car from Bloomfield Motors, suffered injuries in a crash caused by a failure in the car's steering. Yet if the New Jersey Supreme Court applied established common law principles, she was barred from recovering damages. The dealer was not liable because his liability extended only to his own negligence, and the automobile manufacturer was liable only for injuries to parties with whom it had a direct contractual relationship, and it had no such relationship with the Henningsens.

Recognizing the manifest injustice of such a result, the New Jersey Supreme Court in *Henningsen* repudiated both the requirement of a direct contractual relationship and the negligence standard for liability. This landmark ruling became the catalyst for tort-law reform. On the national level, the Court's rejection of the requirement of a contractual relationship for liability prompted, in the words of one expert, "the most rapid and altogether spectacular overturn of an established rule in the entire history of torts," as other supreme courts quickly followed New Jersey's lead.¹² And the New Jersey Court's repudiation of the negligence standard led directly to the adoption in most states of strict liability, under which manufacturers became liable for injuries caused by defects in their products.

Within the state, *Henningsen* committed the New Jersey Supreme Court to reevaluating common-law doctrines based on current conceptions of societal needs--indeed, this became the hallmark of the Court's common-law jurisprudence. The upshot was a succession of rulings reflecting a commitment toward facilitating recovery by injured plaintiffs. Thus, over time the Court extended strict liability standards to builders, service providers, sellers of used goods, and those leasing rather than selling goods. It expanded the responsibilities of landlords to tenants, doctors to patients, and social hosts to those injured by their guests. In addition, it allowed plaintiffs to pursue actions for new torts such as wrongful life, negligent invasion of consortium (loss of the companionship of a spouse who is injured), and prenatal injuries. Finally, the Court assisted plaintiffs by abrogating traditional immunities from tort liability, permitting suits against charitable institutions, government, family members, and spouses.

In announcing these rulings, the New Jersey Supreme Court

often acted earlier and reached farther than other state courts. The Court's initiatives in the development of the common law recall its innovative rulings dealing with school finance and exclusionary zoning. Indeed, the parallel extends beyond the mere fact of judicial assertiveness. After the Court abrogated charitable immunity, the New Jersey Legislature adopted legislation reinstating this doctrines in a limited set of cases. And after the Court's ruling extending liability to social hosts, the Legislature enacted a law immunizing them from suits in some circumstances. Yet such legislative involvement was not unexpected, and at times--for example, in eliminating sovereign immunity--the Court seemed to invite legislative action. Thus in the common law, as in the best of its constitutional jurisprudence, the New Jersey Supreme Court's initiatives encouraged dialogue rather than judicial dominance.

THE NEW JERSEY SUPREME COURT IN STATE GOVERNMENT

The New Jersey Supreme Court's reputation for activism derives largely from its rulings invalidating state enactments, placing items on the agenda of other branches of government, and enunciating its own policy guidelines. However, the Court's participation in state government extends beyond such policy leadership. The Court supervises the division of authority between state and local governments, a critical function in a state with a strong (though not constitutionally mandated) tradition of home rule. It is also involved in the day-to-day operations of state government, overseeing the actions of the state's administrative agencies, resolving disputes about the mechanics of governing, and umpiring interbranch conflicts. Finally, the Court through its rule-making authority governs the New Jersey court system and the state's legal profession.

State and Locality

In allocating power between state and local governments, the New Jersey Supreme Court has worked in some ways against the state's tradition of home rule and for an expansion of state-level authority. Although the Court has acknowledged that powers delegated to local governments should be interpreted broadly (e.g.,

Fanelli v. City of Trenton [1994]), it often has resolved conflicts between state and local governments in favor of the state or in ways that undermine the forces supporting localism. Chief among these were the Court's rulings (compelled by U. S. Supreme Court precedent) that required apportionment of the state legislature on a one-person, one-vote basis. Of particular significance was *Scrimminger v. Sherwin* (1972), which curtailed the power of county political organizations by mandating that county boundaries need not be considered in drawing up state legislative districts. The Court's rulings on exclusionary zoning and school finance (discussed previously) have also reduced local autonomy by requiring the state to meet constitutional responsibilities in these areas.

Effective State Government

The New Jersey Supreme Court has not only redistributed power from locality to state but has also, in the absence of rights claims, encouraged the vigorous exercise of state power by construing the state constitution and statutes so as to sustain the actions of state government. The justices' reluctance to impose obstacles to the effective exercise of power is reflected in their consistent support for broad delegations of power to the executive branch, despite an express state constitutional command that the separation of powers be maintained (e.g., *Communications Workers of America, AFL-CIO v. Florio* [1992]; *Brown v. Heyman* [1972]). It is likewise evident in the broad discretion that they have permitted to administrative agencies in the exercise of their responsibilities (e.g., *New Jersey Association on Correction v. Lau* [1979]). Finally, the concern for effective state government underlies the justices' narrow construction of collective bargaining statutes in order to safeguard the managerial prerogatives of the state.

The New Jersey Supreme Court's rulings on the delegation of powers and the authority of executive-branch agencies have also had implications for the distribution of power within state government.

Simply put, when interbranch conflicts have arisen, the Court has tended to side with the Governor, thereby augmenting the power of an already powerful chief executive. Thus the Court has sustained broad interpretations of such gubernatorial powers as the item veto (*Karcher v. Kean* [1984]), allowing the Governor not only to reduce or eliminate appropriations but also to delete policy prescriptions that the Legislature had inserted into appropriations acts. The Court has also protected the executive against legislative encroachments such as the legislative veto, whereby the legislature disapproves administrative rules by a resolution not presented to the governor (*General Assembly v. Byrne* [1982]). Finally, the Court has refused to interfere with political practices that have expanded gubernatorial power, such as the pocket veto, which allows governors to veto bills at the conclusion of a legislative session without the opportunity for legislative override of the veto (*Gilbert v. Gladden* [1981]). Although a constitutional amendment in 1992 overruled *Byrne* and authorized the legislative veto, while

another curtailed use of the pocket veto, the Court remains a durable ally of gubernatorial power, whatever the party affiliation of the chief executive.

Non-Decisional Powers

The powers of the New Jersey Supreme Court extend beyond merely deciding cases. Like most other state constitutions, the 1947 New Jersey Constitution grants to the state supreme court the authority to regulate the state's legal profession. The Constitution also empowers the Court to adopt rules of practice and procedure, thereby assigning it the responsibility of establishing the procedures that prevail in all New Jersey courts. Had the Constitution not assigned these powers to the New Jersey Supreme Court, presumably they would have been exercised by the State Legislature, as they had been prior to 1947.¹³

In *Winberry v. Salisbury* (1950), the Supreme Court signaled that it would take an expansive view of its non-decisional powers.

It ruled that the state constitution required that when rules of procedure conflicted with statutes, the court-initiated rules would govern. Although this was a dubious reading of the constitutional text, the State Legislature accepted the Court's claim of authority by rejecting a proposed constitutional amendment designed to overturn *Winberry*. A generation later, the Court further expanded its rule-making authority. In *Busik v. Levine* (1973), it ruled that it could require that interest be paid for the time leading up to court-awarded judgments, even though this requirement was not strictly procedural, because there was no conflicting statute. In its regulation of the legal profession, as in its common law rulings, the Court has been very "consumer oriented." Illustrative of this orientation is its requirement that contingent fees be graduated--that is, that attorneys charge a lower percentage as the size of the monetary judgment increases.

A Non-Political Judiciary

Another important reform contained in the 1947 constitution was a provision clearly separating the New Jersey courts and their judges from ordinary politics. This has grown from a constitutional requirement to a widely recognized and honored tradition of New Jersey's judiciary. The fact that New Jersey judges do not run for election has enabled them to distance themselves from political involvements. With direction and enforcement from the Chief Justice, New Jersey has developed an enviable record of judicial ethics, separating the courts from partisan politics and avoiding even the appearance of any political involvement by judges. This has been a very important hallmark of New Jersey's judiciary given the fact that the Supreme Court has been involved in so many highly controversial, politically charged, issues.

In addition, despite the claim by one Justice that "there is no thicket too political for us," the New Jersey Supreme Court has,

in fact, declined to enter a number of very controversial "political questions." For example, in *Gilbert v. Gladden* (1981) the Court declined to involve itself in a form of "pocket veto" that had arisen from a practice whereby the legislature would not present a bill it had passed to the Governor until he requested it.

If the Governor never requested the bill, it would die through this form of pocket veto. After the Court announced that it was a matter for political (rather than judicial) resolution, the problem was solved by an amendment to the state constitution.

The New Jersey Supreme Court also stayed out of the controversial matter of "Senatorial Courtesy" in *DeVesa v. Dorsey* in 1993. Senatorial courtesy is an arrangement whereby the Senate will not take up a gubernatorial appointment for confirmation if a single senator from the county of the appointee objects. As with the pocket veto, the Court concluded that senatorial courtesy was a matter for political rather than judicial resolution. Finally, and most recently, in 1997 in *Spadaro v. Whitman*, the New Jersey Supreme Court declined to rule on whether a major bond issue floated by the Whitman administration to pay off a large budget deficit could be adopted without a vote of the people. In all three of these cases, the Court resisted strong legal arguments in favor of its involvement, deciding rather to leave these matters to political resolution.

CONCLUSION

The New Jersey Supreme Court, having been originally modeled in 1947 on the United States Supreme Court, has engaged in a half century of conducting itself much like the United States Supreme Court. It maintains discretion over the relatively small number of cases it accepts for decision, targeting its resources on the most important legal and policy questions facing the state. It has developed a reputation as among the most scholarly of state supreme courts, and one whose opinions are read with interest, if not always followed, by those in other states. The Court has played a major role in state government since the time of its creation. It has made law through its rulings in common law and through its judicial rule-making. It has also utilized its power of constitutional interpretation to push a number of important policy areas, such as education finance, and exclusionary zoning, onto the agenda of the legislative and executive branches. In exercising its function as an interpreter of statutes, the Court has acted as a partner with the legislature in achieving well considered results, rather than simply acting as a "rubber stamp," regardless of consequences, for what statutory language seems to mean on its face. Finally, despite its general reputation for activism, a closer analysis of the New Jersey Supreme Court reveals a number of areas in which it has showed substantial deference to the other two branches of government, either in specific cases such as those concerning Megan's Law or mandatory sentencing, or in the evolution of doctrines over time, such as the Court's treatment of the right-to-die issue.

What does the future hold for the New Jersey Supreme Court? Some commentators have suggested that the Court's orientation is changing and its stature declining.¹⁴ They attribute this decline in part to the replacement in 1996 of Chief Justice Wilentz, who had pursued an activist course, by Chief Justice Poritz, who was Republican Governor Christine Todd Whitman's Attorney General before her appointment to the Court. This shift in leadership has been or will be accompanied by other personnel changes that will reconstitute the New Jersey Supreme Court. Whereas from 1984-1993, the Court's membership remained unchanged, as a result of retirements, two new justices were appointed in 1999, and at least one more will join the Court by 2001, and four more by 2004. In addition, the stark political divisions over the appointment of Peter Verniero as an associate justice in 1999 may signal that the Court will no longer enjoy its customary insulation from politics.

Finally, the Court has withdrawn from oversight over school finance and in recent years has undertaken no initiative comparable in importance to its rulings on school finance and exclusionary zoning. All of this, these critics suggest, indicate a Court that has lost its independence and direction and no longer plays a leadership role either within the state or nationally.

This assessment, however, seems unduly pessimistic. There is no reason to expect that the appointment of new justices will transform the Court; rather, history suggests that it is more likely that the Court's tradition of national leadership will transform the newly appointed justices. When the Court underwent major personnel changes in the past--for example, the replacement of Chief Justice Joseph Weintraub and five Associate Justices from 1971-1974--these occurred without significant shifts in the Court's orientation. Similarly, history suggests that the controversy over the Verniero nomination is not likely to have any enduring effect on the Court. The politically charged confirmation battles of the past, such as the Wilentz reconfirmation, have had no discernible effect on the Court or on its rulings. Moreover, Governor Whitman's subsequent appointment to the Supreme Court of the respected Appellate Division judge Virginia Long was warmly applauded by Democrats and Republicans alike, easing fears of a politicization of the appointment process. Indeed, the fact that the debate over the Verniero nomination focused on whether he was qualified to sit on such a prestigious court underscored the importance attached to continuing the Court's tradition of leadership.

Whether the New Jersey Supreme Court will in the future address itself to an issue of the magnitude of school finance or exclusionary zoning is more difficult to predict. However, one must remember that the Court's prominence both within New Jersey and nationally preceded its taking on such divisive issues. In sum, there is every reason to expect that the New Jersey Supreme Court will remain a major participant in New Jersey's system of government and a decidedly co-equal branch well into the twenty-first century.

NOTES

1. The characterization of the New Jersey Supreme Court as innovative is drawn from Professor Yale Kamisar of the University of Michigan Law School, quoted in Bruce S. Rosett, "A Bold Court Forges Ahead," *National Law Journal* (November 5, 1984), p. 38.

2. Carla Vivian Bello and Arthur T. Vanderbilt, II, *New Jersey's Judicial Revolution: A Political Miracle* (New Brunswick: New Jersey Institute for Continuing Legal Education, 1997), 19.

3. Arthur T. Vanderbilt II, *Changing Law: A Biography of Arthur T. Vanderbilt* (New Brunswick: Rutgers University Press, 1976), p. 72.

4. "New Jersey Goes to the Head of the Class," *Journal of the American Judicature Society* 31 (1948): 131.

5. See Voorhees Dunn, "Arthur T. Vanderbilt's Impact on Judicial Reform at the New Jersey Constitutional Convention of 1947," *Rutgers Law Journal* 29 (Summer 1998): 731-761.

6. For a discussion of other factors that have contributed to the independence of the New Jersey Supreme Court, see John B. Wefing, "The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism," *Rutgers Law Journal* 29 (Summer 1998): 701-730.

7. This list excludes Pierre Garven, who was appointed chief justice in 1973 but died within two months of taking office and had no influence on the jurisprudence of the Court.

8. The quotation by the former justice (unidentified) is found in Richard Lehne, *The Quest for Justice* (New York: Longman, 1978), p. 43.

9. Wesley W. Horton, "Memoirs of a Connecticut School Finance Lawyer," *Connecticut Law Review* 24 (Spring 1992): 706.

10. *Hempele* diverged from the United States Supreme Court's ruling in *California v. Greenwood*, 486 U.S. 35 (1988); *Hunt* from *Smith v. Maryland*, 442 U.S. 735 (1979); and *Novembrino* from *Illinois v. Gates*, 462 U.S. 213 (1983).

11. Bradley C. Canon and Lawrence Baum, "Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines," *American Political Science Review* 75 (December 1981): 978, table 2; and Gregory A. Caldeira, "On the Reputation of State Supreme Courts," *Political Behavior* 5 (1983): 89, table 1.

12. William J. Prosser, "The Fall of the Citadel," *Minnesota Law Review* 50 (April 1966): 793-94.

13. For a thorough overview of these powers and how the New Jersey Supreme Court has interacted with the Legislature in their exercise, see Stewart G. Pollock, "Celebrating Fifty Years of Judicial Reform Under the 1947 New Jersey Constitution," *Rutgers Law Journal* 29 (Summer 1998): 675-700.

14. See Laura Mansnerus, "The New Order in the Court," *New York Times*, March 14, 1999, Section 14, pp. 1 & 9-11; and, to some extent, Jo Astrid Gleding, "The Poritz Court: Under Construction," *New Jersey Reporter* 28 (February 1998): 28-39. For a range of perspectives on the future direction of the Poritz Court, see "21st Century Justice," June 20, 1999, Section 10, pp. 1 & 6.