

Journal of Civil Rights and Economic Development

Volume 16
Issue 3 *Volume 16, Fall 2002, Issue 3*

Article 10

September 2002

The New Jersey Supreme Court: New Directions?

Gerald J. Russello

Follow this and additional works at: <https://scholarship.law.stjohns.edu/jcred>

Recommended Citation

Russello, Gerald J. (2002) "The New Jersey Supreme Court: New Directions?," *Journal of Civil Rights and Economic Development*. Vol. 16 : Iss. 3 , Article 10.

Available at: <https://scholarship.law.stjohns.edu/jcred/vol16/iss3/10>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in Journal of Civil Rights and Economic Development by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

ARTICLE

THE NEW JERSEY SUPREME COURT: NEW DIRECTIONS?

GERALD J. RUSSELLO¹

INTRODUCTION: THE NEW JERSEY SUPREME COURT.

The New Jersey Supreme Court has built a reputation as an intellectually rigorous and forcefully progressive state supreme court. The Court, especially during the seventeen years (1979-96) it was led by the dominating presence of its late Chief Justice, Robert Wilentz, represented to some the best answer to Justice William Brennan's call for a "new federalism" that

¹ Litigation Associate, Covington & Burling. B.A., Georgetown University, 1992; J.D., New York University School of Law, 1996. Clerk, Hon. Daniel J. O'Hern, Supreme Court of New Jersey; Clerk Hon. Leonard I. Garth, United States Court of Appeals of the Third Circuit. The opinions expressed herein are those of the author only and not Covington & Burling. An earlier version of this paper was presented at the Northeastern Political Science Association, 32nd Annual Conference in November 2000. I would like to thank Professors Robert F. Williams and G. Alan Tarr, and Kevin Walsh, Mara Zazzali and Michael Carton for their comments and assistance. I would also like to thank Greta Boeringer of the Covington & Burling library and the New Jersey Administrative Office of the Courts.

encouraged the state judiciaries to expand on the basic structure of individual rights within their particular state constitutional frameworks.² In a famous article abridged from a lecture given to the New Jersey Bar Association, Justice Brennan stated that “[o]ur states are not mere provinces of an all powerful central government,” and contended that the state courts should reach into their own constitutional histories in order to decide cases. Since that time, a number of state Supreme Courts have done just that, basing their decisions on the individual state constitutions, particularly in areas such as individual rights. This judicial revolution has been accompanied by an explosion in legal and social science commentary examining the decisions of state courts and their “policy making” role in the political process of the states.³

Chief Justice Wilentz resigned from the Court in 1996. Deborah Poritz, who at the time was serving as Republican Governor Christine Todd Whitman’s Attorney General, replaced him. Wilentz’ departure as Chief Justice has been only the most dramatic of a number of personnel changes. With the appointment in early 2000 of James R. Zazzali to replace retiring Daniel J. O’Hern, six of the seven current Justices have been appointed by Governor Whitman. Justice Gary Stein, appointed by Governor Brendan Byrne, now remains the sole non-Whitman appointee. Despite this fact, however, only three of the Justices

² See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 489 (1977) (urging states against complacency once they ensure citizens’ constitutional rights); see also Norman Dorsen, *A Tribute To Justice William J. Brennan, Jr.*, 104 HARV. L. REV. 15, 17-18 (1990) (illustrating Justice Brennan’s extensive successes and failures in civil liberty cases); Stewart G. Pollock, *Robert N. Wilentz: Defender of Judicial Independence*, 7 SETON HALL CONST. L.J. 327 (1997); Robert F. Williams, *Justice Brennan, The New Jersey Supreme Court, and State Constitutions: The Evolution of a State Constitutional Consciousness*, 29 RUTGERS L.J. 763, 763 (1998) (describing Brennan’s impact on development of state constitutional law).

³ See James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1183 (2000) (discussing quantitative investigations of new judicial federalism); Daniel A. Farber, *The Constitution’s Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 615 (1995) (analyzing recent pro-Federalism constitutional decisions against different framers’ intents); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 761 (1992) (suggesting lack of focus on state constitutions stems from few communities debating them); G. Alan Tarr, *Understanding State Constitutions* 65 TEMP. L. REV. 1169, 1176-78 (1992) (highlighting state constitutions’ specific addressing of issues like livestock health, environment and public schooling); see also Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871 (1999) (using states’ marriage rights to illustrate how judicial interpretation and democratic norms of majority rule shape state constitutionalism); G. Alan Tarr, *Understanding State Constitutions* (1998).

are Republicans, Deborah Poritz, Peter Verniero and Stein, with James H. Coleman. Virginia Long and James R. Zazzali being registered Democrats, Justice LaVecchia's party affiliation is unknown. While analysis of the effect of party affiliation on judicial opinions through political party affiliation has produced results of some correlation, as studies of the federal bench have shown, the effects should not be exaggerated.⁴ In Ashenfelter's large study of civil rights cases three federal district courts revealed no significant differences in outcomes between Democratic and Republican judges.⁵

This rapid change in the Court's membership may have lasting effects on the Court's jurisprudence, which may in turn affect other state courts for which the New Jersey Supreme Court has been a model. This paper will examine key decisions since 1996 to determine whether this significant shift in membership has caused a substantive shift in the Court's approach to the controversial issues that has made it a leader in state supreme courts. In particular, we will examine selected decisions in the areas of individual rights, intra-state relations and federalism, and the rights of plaintiffs, especially in the employment context.

First, some numbers. The New Jersey Supreme Court, in the 1995 term, the last full term of the Wilentz Court, decided seventy-seven signed opinions. In 1996-97, the Court issued ninety-seven signed majority opinions, and 19 *per curiam* opinions. From 1996-1997 through the 2000-2001 terms, the Poritz Court has issued an average of 85 majority opinions and 26 *per curiam* opinions.⁶ The dissent rate has remained

⁴ See Michael Heise, Gregory C. Sisk, & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1388-89 (1998) (noting that political affiliation of judges is not always determinative of voting behavior) [hereinafter "*Charting*"]; see also Neil D. McFeeley, Book Review, 1984 DUKE L.J. 621, 621 *passim* (1984) (reviewing ROBERT CARP & C.K. ROWLAND, POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS (1983)); Jackson Williams, *Irreconcilable Principles: Law, Politics, and the Illinois Supreme Court*, 18 N. ILL. U. L. REV. 267, 327 (1998) (noting appearance of judicial partisanship "may be eroding the legitimacy of the court as an institution").

⁵ See Orley Ashenfelter, Theodore Eisenberg & Steven J. Schwab, *Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes*, 24 J. LEGAL STUD. 257, 281 (1995) (concluding individual judge characteristics do not forecast civil rights case results) [hereinafter "*Ashenfelter*"]. But see Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1719 (1997) (concluding that political ideology plays significant role in judicial decision-making in D.C. Circuit). See generally Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. OF POLITICS 427 (1992).

⁶ Administrative Office of the Courts, Opinion Reports for stated terms. (on file with

relatively consistent, from approximately thirty percent in the Poritz Court's first term (33 out of 97 opinions), to 38 percent in the 2000-01 term (29 out of 76 opinions).

A Legacy of Reform

As professors G. Alan Tarr and Mary Porter have noted, since World War II "the New Jersey Supreme Court has assumed a role of leadership in the development of legal doctrine, thereby earning for itself a national reputation for activism and liberal reformism."⁷ That was not always the case. Prior to the 1947 reforms, the New Jersey court system was long renowned for its Dickensian procedures and backwardness. "If you want to see the common law in all its picturesque formality, with its fictions and fads, its delays and uncertainties, the place to look for them . . . is in New Jersey."⁸ In 1947, the state's voters approved a constitutional convention and the selection of delegates by the legislature; the new constitution was ratified later that year.⁹

The structural reforms stemming from the 1947 Constitution enabled the Court to take a more "activist" role in deciding its cases. These reforms included greater control of the Court, and particularly the Chief Justice, over the legal profession and the judiciary, the method of appointment of the justices and the absence of initiative and referendum.¹⁰ For example, Article VI.

editors).

⁷ G. Alan Tarr & Mary Cornelia Aldis Porter, *State Supreme Courts in State and Nation* 184 (1984). See Kevin M. Mulcahey, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn*, 40 SANTA CLARA L. REV. 863 (2000) (examining range of New Jersey cases). See generally Alan B. Handler, *Judging Public Policy*, 31 RUTGERS L.J. 301 (2000) (exploring role of public policy in judicial decision-making).

⁸ DENNIS W. BROGAN, *THE ENGLISH PEOPLE: IMPRESSIONS AND OBSERVATIONS* 108 (Hamish Hamilton 1943). See John A. Boyle, *Returning To Its Roots: An Examination of the 1998 Amendments to the Entire Controversy Doctrine*, 30 SETON HALL L. REV. 310, 314-17 (1999) (illustrating one of procedural problems of New Jersey court system prior to 1947); John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS-CAM L.J. 701, 711 (1998) (noting criticism regarding New Jersey court system prior to 1947).

⁹ See ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE* 13-17 (Reference Guides to the State Constitutions of the United States, Number 1) (G. Alan Tarr, ed., 1990).

¹⁰ See *id.* at 16 (depicting judicial streamlining as product of one hundred years of attempted reform). See generally Mulcahey, *supra* note 7, at 863 (praising New Jersey Supreme Court as leader of activism); Justice Daniel J. O'Hern, *The New Jersey Constitution: A Charter to be Cherished*, 7 SETON HALL CONST. L.J. 827, 827 (1997) (voicing admiration for Constitution and discouraging its alteration); Justice Stewart G. Pollock, *Celebrating Fifty Years of Judicial Reform Under the 1947 New Jersey*

Section II, paragraph 3 of the state Constitution provides that the Court has the power to “make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts.”¹¹ In a major decision, *Winberry v. Salisbury*, the Court interpreted this provision as prohibiting the state legislature from enacting any rules regarding practice or procedure, and placing rule-making in that area solely within the Court’s power.¹²

Under the current state Constitution, the governor nominates and appoints the Justices, with the advice and consent of the state Senate.¹³ After seven years, each Justice is subject to reappointment; if reappointed the Justice serves during good behavior until the mandatory retirement age of seventy, or earlier retirement.¹⁴

These structural reforms have included unstated or unanticipated practices, such as the maintenance of a balance on the Court between members of the two major political parties, the generally moderate political position of the Governors during this period, and the competence and long tenures of the justices.¹⁵ While not dispositive, the increasing use of an “institutional” analysis of judicial decision-making should take

Constitution, 29 RUTGERS L.J. 675, 675 (1998) (paying tribute to New Jersey Constitution and those who developed it).

¹¹ See N.J. CONST. art. VI, § 7, para. 1 (West Publishing 1971) (appointing Chief Justice as administrative head of state court system).

¹² See Williams, *supra* note 9, at 96-97 (outlining court’s broad and narrow uses of rule making powers); see also *Winberry v. Salisbury*, 74 A.2d 406, 406 (N.J. 1950) (finding state’s supreme court rule-making power not subject to legislative override, but rather based on court’s practices and procedures), *cert. denied*, 340 U.S. 877 (1950). See generally Note, *Some Observations on the Tenth Anniversary of Winberry v. Salisbury: Quo Vadimus?*, 14 RUTGERS L. REV. 608, 608 (1960) (commenting New Jersey Supreme Court has plenary rule-making power).

¹³ See N.J. CONST. art. VI, § 6, para. 1 (West Publishing 1971) (granting governor power to appoint state court justices with state senate confirmation); see also Williams, *supra* note 9, at 101 (relating that New Jersey has never had elected judiciary).

¹⁴ See N.J. CONST. art. VI § 6, para. 3; see also *Lloyd v. Vermeulen*, 40 N.J. Super. 151, 166-68 (1956), *aff’d*, 40 N.J. Super. 301, *aff’d*, 22 N.J. 200 (ruling that tenure acquired only after receiving reappointment after initial seven year term). See generally Williams, *supra* note 9, at 101-102 (noting that while New Jersey Supreme Court has appointed judiciary, state does not follow federal model of single lifetime appointment for judges).

¹⁵ See Wefing, *supra* note 8, at 710; see also Mulcahey, *supra* note 7, at 897-900 (positing that New Jersey’s strong judiciary results from constitutional foundation that restructured courts into unified judiciary with powerful Chief Justice and with wide discretion for judicial review which provided for tenure of justices free from political process). See generally Tarr & Porter *supra* note 7, at 184.

these institutional arrangements into account.¹⁶

The Court gained its modern reputation through groundbreaking rulings in a number of areas.¹⁷ The *Mount Laurel* decision altered the face of housing policy in New Jersey directly and, by example, across the nation.¹⁸ *Robinson v. Cahill* and the *Abbott* cases have fleshed out the meaning of the New Jersey Constitution's "thorough and efficient education" clause¹⁹ and provided a model for state constitutional interpretation.²⁰ These cases found that funding education through local property taxes violated the "thorough and efficient" education clause. The cases articulated and developed the right to a thorough and efficient public school education despite residence in a poor district.

Further, the Court has continued to struggle with the State's endorsement of capital punishment, establishing and monitoring a range of procedures, most significantly that of proportionality

¹⁶ James L. Gibson, *Decision Making in Appellate Courts*, in THE AMERICAN COURTS: A CRITICAL ASSESSMENT 255 (John B. Gates & Charles A. Johnson, ed., 1991) [hereinafter "GATES & JOHNSON"]. See generally Robert C. Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238 (1981) (discussing how interdisciplinary study of legal education seeks to explain how legal changes affect legal institutions). Compare C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES*, 1937-1947 (1948).

¹⁷ See, e.g., *Hakimoglu v. Trump Taj Mahal Assoc.*, 876 F. Supp. 625, 636 (D.N.J. 1994) ("Certainly one must recognize that the New Jersey Supreme Court has been and remains a national leader among the states in developing and refining the common law . . ."); see also Wefing *supra* note 8, at 702 n.3 (citing language in *Hakimoglu* indicating that New Jersey courts have been active court in expanding concept of tort liability). See generally Mulcahey, *supra* note 7, at 864 (characterizing New Jersey Supreme Court as activist in nature).

¹⁸ *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975) (finding land use regulations unlawful because excluded low and moderate income families). See DAVID KIRP, *OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA* (1995) (discussing case); Wefing, *supra* note 8, at 704 (commenting on case as exemplary of Court's liberal and activist stance).

¹⁹ N.J. CONST. art. VIII, § 4 ("The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of five and eighteen years.").

²⁰ See *Robinson v. Cahill*, 360 A.2d 400 (N.J. 1976); *Robinson v. Cahill*, 358 A.2d 457 (N.J. 1976); *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976); *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975); *Robinson v. Cahill*, 335 A.2d 6 (N.J. 1975); *Robinson v. Cahill*, 306 A.2d 65 (N.J. 1973); *Robinson v. Cahill*, 303 A.2d 273 (1973).

See G. Alan Tarr, *Robinson v. Cahill and the New Judicial Federalism*, 59 ALB. L. REV. 1753, 1753-1755; Wefing, *supra* note 8, at 703-704; see also *Abbott v. Burke*, 751 A.2d 1032 (N.J. 2000); *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994) and *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990). This line of cases continued the Court's activist educational policy by finding Governor Whitman's funding statutes unconstitutional and ordering that the state spend hundreds of millions of dollars on its poorer urban districts. Tarr, *supra* note 20, at 1755.

review, designed to ensure a fair and uniform treatment of capital cases.²¹ This oversight has resulted in not one execution since the reinstatement of capital punishment by the other two branches twenty years ago.²² In ruling against surrogate mother contracts in the *Baby M* case, the Court (speaking through Chief Justice Wilentz) famously stated that “[t]here are, in a civilized society, some things that money cannot buy.”²³

What is just as remarkable as the decisions themselves is the fact that the Court has not hesitated to retain control over these issues, sometimes for years, in a continued effort of oversight and supervision to enforce its constitutional vision. The first school-funding case, for example, was decided in 1973; the most recent, in 2000. Beginning with *Doe v. Poritz*,²⁴ the Court has taken a similar track with cases interpreting a statute requiring community notification of convicted sex offenders, the so-called “Megan’s Law.”²⁵ While the Court upheld the law and acknowledged a social value in protecting victims, the Court still softened what it thought were the law’s harsh features. The New Jersey experience has confirmed the conclusion of political science research, as Charles Sheldon and Nicholas Lovrich point out, that “[c]ourts make public policy and, consequently, are

²¹ See Handler, *supra* note 7, at 318-21 (explaining New Jersey’s proportionality review process); see also Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons From New Jersey)*, 64 ALB. L. REV. 1161, 1164 (stating that New Jersey Supreme Court is committed to most quantitative proportionality review in United States). *But cf.* Karen L. Folster, *High Court Studies: The New Jersey Supreme Court in the 1990s: Independence is Only Skin Deep*, 62 ALB. L. REV. 1501, 1504-1505 (1999) (arguing against independence of New Jersey Supreme Court as revealed by record of death penalty cases).

²² See Andrea E. Girolamo, *Punishment or Politics? New York State’s Death Penalty*, 7 B.U. PUB. INT. L.J. 117, 135 (1998) (discussing that New Jersey, where death penalty has been legal since 1982, has yet to execute one person).

²³ In re *Baby M*, 537 A.2d 1227, 1249 (N.J. 1988). See Lynn Mather, *Policy Making in State Trial Courts*, in GATES & JOHNSON, *supra* note 16, at 137-38 (explaining that New Jersey courts were forced to invent new law because case involved problem not contemplated by existing laws); Michael E. Solimine, Book Review, *Activism and Politics on State Supreme Courts: State Supreme Courts in State and Nation*, 57 U. CIN. L. REV. 987, 992-993 (indicating that *Baby M* was important in overall transformation of New Jersey court system).

²⁴ 662 A.2d 367 (N.J. 1995) (citing statute commonly referred to as “Megan’s Law”).

²⁵ See N.J. STAT. § 2C:7-1 (Bender 2000) (requiring registration of sex offenders who have acted against children); see also Elga A. Goodman, *Megan’s Law: The New Jersey Supreme Court Navigates Uncharted Waters*, 26 SETON HALL L. REV. 764, 798 (1996) (explaining how law operates and remains within constitutional bounds); Jonathan Simon, *Megan’s Law: Crime and Democracy in Late Modern America*, 25 LAW & SOC. INQUIRY 1111, 1134-42 (2000) (defining Megan’s Law as law on new model giving power through knowledge to community instead of vesting power in judge or other state official).

clearly among those actors in society who wield the government sword."²⁶

The New Court.

Almost immediately upon her arrival at the Court, there was speculation as to how Poritz' leadership would compare with the legacy of Wilentz.²⁷ Poritz was thought to be more conservative than her predecessor and would lead the Court away from the activism and innovative legal thinking that had defined the Wilentz years. In New Jersey, the heavy administrative burdens placed on the Chief Justices reduce their opinion output, and they traditionally have issued fewer opinions. The opinions of the Chief have accordingly tended to deal with issues having major public policy implications.²⁸ This pattern has held true for Poritz, as she produced only three opinions from the arguments in her first term. Since she has been on the Supreme Court bench, Poritz has maintained that pace, producing a total of seventeen opinions for the Court through the 2000-01 term, and only five dissents, one each in the last two terms. This number compares favorably with Wilentz, who authored forty-seven majority opinions in his tenure, an average of 2.76 per term. Additionally, in his term as Chief, Wilentz authored only a dozen dissents.

Poritz's first three opinions have perhaps foreshadowed the direction she would take the Court. In *State v. J.G.*²⁹ and *New Jersey Transit PBA Local 304 v. New Jersey Transit*,³⁰ both decided unanimously and issued on the same day, the Court

²⁶ See Charles H. Sheldon and Nicholas P. Lovrich, Jr., *State Judicial Recruitment*, in GATES & JOHNSON, *supra* note 16, at 162; see also Stanley H. Friedelbaum, *Judicial Federalism: Current Trends and Long-Term Prospects*, 19 FLA. ST. U. L. REV. 1053, 1084-1089 (1992) (envisioning expanded role for state appellate courts in formulating creative solutions for nascent problems in society). See generally Robert W. Malmshamer and Donald W. Floyd, *Fishing Rights in Nontidal, Navigable New York State Rivers: A Historical and Contemporary Perspective*, 62 ALB. L. REV. 147, 173 (explaining how courts make public policy differently than their legislative and executive counterparts).

²⁷ Henry Gottlieb, "The Wilentz Court Evolves Under Poritz," 151 N.J.L.J. 217 (1998).

²⁸ See Wefing, *supra*, note 8, at 724-25 (noting competence and extraordinary powers of Chief Justices over past fifty years); see also *State v. P.Z.*, 703 A.2d 901, 901 (N.J. 1997) (showing Poritz writing opinion in Fifth Amendment Miranda warnings case); Stuart Taylor Jr., *Boy Scouts Should Admit Gays - But Not by Fiat*, NAT'L J., Aug. 14, 1999, at 2348 (contending Poritz opinion banning homosexuals from Boy Scouts was bigotry).

²⁹ 701 A.2d 1260 (N.J. 1997).

³⁰ 701 A.2d 1243 (N.J. 1997).

upheld government policies against challenges based on the search and seizure provisions of the federal and state constitutions.³¹ In *J.G.* the Court upheld HIV testing of persons convicted of, indicted for or formally charged with a sexual offense when the victim requested the test.³² In *PBA Local*, the Court approved random drug testing for members of the state's transit police.³³

In both cases, the Court adopted the "special needs" approach set out in two 1989 cases by the United States Supreme Court for analyzing warrantless searches under the Federal Constitution.³⁴ These cases, *Skinner v. Railway Labor Executives Association*³⁵ and *National Treasury Employees Union v. von Raab*,³⁶ established a "balancing test" to determine whether under the particular facts presented, the government could show a need "beyond the normal need of law enforcement" sufficient to overcome the usual requirements of a warrant or individualized suspicion.³⁷ The New Jersey Court considered this procedure worth adapting to its own constitutional analysis and found that the challenged policies were justified by special exceptions from the general rule that a search without a warrant is per se unreasonable. In doing so, the Court rejected earlier state appellate precedent that the state Constitutions did not condone such an approach.³⁸ Although Chief Justice Poritz explicitly

³¹ See *J.G.*, 701 A.2d at 1274 (holding statutes do not impinge on state and federal constitutions and uphold governmental practices); *PBA Local 304*, 701 A.2d at 1260 (holding testing transit officers is constitutional).

³² *J.G.*, 701 A.2d at 1274 (noting probable cause must be present to believe there was possibility victim had been exposed to any HIV transmission).

³³ *PBA Local*, 701 A.2d at 1260 (holding transit officers have less expectation of privacy and therefore increase in state's interests make random testing constitutional).

³⁴ See *PBA Local*, 701 A.2d at 1255 (holding special needs test allows court to balance different factors in order to protect people from unreasonable searches and seizures); see also *J.G.*, 701 A.2d 1266 (holding special needs test must be applied because of federal precedent).

³⁵ 489 U.S. 602 (1989).

³⁶ 489 U.S. 656 (1989).

³⁷ See *PBA Local*, 701 A.2d at 1255 (holding special needs test is flexible in permitting courts to balance all factors in determining whether search is reasonable under Fourth Amendment); see also *J.G.*, 701 A.2d 1266 (noting balancing approach must be applied pursuant to federal precedent of Supreme Court).

³⁸ See *Fraternal Order of Police, Newark Lodge No. 10 v. City of Newark*, 524 A.2d 430, 437 (N.J. Super. Ct. App. Div. 1987) (holding random drug testing not permitted under state constitution); see also *State v. Young*, 432 A.2d 874, 879 (N.J. 1981) (noting any warrantless search, without exception, is prima facie invalid). *But see* N.J. Transit *PBA Local 304 v. N.J. Transit Corp.*, 701 A.2d 1243 (N.J. 1997), *overruled by*, *State v. Young*, 432 A.2d 874, 879 (N.J. 1981).

noted that the New Jersey Supreme Court has often expanded the protections affirmed under its search and seizure provision beyond those under the federal Constitution, the Court found

that the special needs test provides a useful analytical framework for considering the protections afforded by Article I, Paragraph 7 of the New Jersey Constitution and adopt this approach on our review of [the] drug testing program. This approach enables a court to take into account the complex factors relevant in each case and to balance those factors in such [a] manner as to ensure that the right against unreasonable searches and seizures is adequately protected.³⁹

Poritz went on to find in *J.G.* that the State's interest in respecting the rights of victims, and in *PBA Local* in promoting safety in the operation of New Jersey Transit's operations, each presented "special needs" sufficient to overcome the prima facie unconstitutionality of a warrantless search.⁴⁰

The final decision arising out of Poritz' first term, *State v. P.Z.*,⁴¹ evoked dissents from Justices Coleman and Pollock. The Court held that a Division of Youth and Family Services (DYFS) officer was not required to issue "*Miranda* warnings to a parent prior to a non-custodial interview related to a child abuse investigation."⁴² The defendant made an inculpatory statement during the interview, which was reported by the DYFS officer to the prosecutor. The Court found that the circumstances of the interview did not amount to a custodial situation sufficient to trigger *Miranda*.⁴³ Justice Pollock dissented, noting that the prosecutor had requested the DYFS officer to report the results of

³⁹ *PBA Local*, 701 A.2d at 1255-56.

⁴⁰ See *PBA Local*, 701 A.2d at 1255 (noting this is first time court has deemed special needs test to apply although test has been recognized in past); see also *J.G.*, 701 A.2d at 1266 (holding search reasonable after applying special needs test).

⁴¹ 703 A.2d 901 (N.J. 1997).

⁴² *Id.* at 904 (holding there is no basis to require *Miranda* warnings be issued by caseworkers).

⁴³ See *State v. P.Z.*, 703 A.2d at 918-19 (finding no basis to require DYFS caseworkers to give *Miranda* warnings or afford right to counsel during non-coercive, non-custodial interviews of parents subject to Title Nine investigations); see also *G.S. v. Dep't of Human Servs.*, 723 A.2d 612, 621 (N.J. 1999) (noting State's *parens patriae* power to protect children from acts negatively impacting upon them); *State v. Timmendequas*, 737 A.2d 55, 151-152 (N.J. 1999) (stating *Miranda* requirement is triggered by "custodial interrogation").

the conversation and that both the DYFS officer and the prosecutor knew the defendant was represented by counsel at the time of the interview.⁴⁴ These decisions led some observers to conclude that the Court was beginning to shift to the right and that its decisions were beginning to reflect lesser protections of individual rights.

In keeping with the Chief's prerogative, Poritz reserved some of the more controversial and significant decisions for herself. In her first terms, she authored major opinions in *Planned Parenthood v. Farmer*,⁴⁵ which struck down an abortion parental notification bill on the basis of the state Constitution; *In re Proportionality Review Project II*,⁴⁶ which generally upheld the proportionality review processes enacted to ensure fairness in death penalty cases; *Abbott v. Burke VI*,⁴⁷ which was concerned primarily with aspects of the Department of Education's proposals to implement the Court's earlier *Abbott* decisions at the preschool level; and *Dale v. Boy Scouts of America*,⁴⁸ which declared the Boy Scouts' anti-homosexual policy a violation of the New Jersey Law Against Discrimination. Two of these decisions, *Dale* and *Abbott*, were issued without dissent, although the United States Supreme Court reversed the New Jersey Court in *Dale*. In this regard, at least, Poritz has been able to maintain the unity of the Court in major cases, which was long a hallmark of New Jersey's tradition of a strong Chief Justice.⁴⁹

Justice Virginia Long was confirmed in July of 1999 to replace Justice Alan B. Handler. At the time of her appointment, Justice Long was a well-regarded member of the appellate bench, and her nomination raised little difficulty. In her first term (1999-2000), she wrote seven opinions, and twelve the following term.⁵⁰

⁴⁴ See *State v. P.Z.*, 703 A.2d at 919 (Pollock, J., dissenting) (arguing to allow introduction of defendant's uncounseled inculpatory statement made to DYFS caseworker would be "fundamentally unfair"); see also *In re J.W.*, 415 N.W.2d 879, 883 (Minn. 1987) (holding Fifth Amendment protected parents from court order compelling them to incriminate themselves as condition precedent to obtaining custody of their children); *Doe v. Poritz*, 662 A.2d 367, 421 (N.J. 1995) (explaining New Jersey's doctrine of fundamental fairness "serves to protect citizens generally against unjust and arbitrary governmental action . . .").

⁴⁵ 762 A.2d 620, 639 (N.J. 2000).

⁴⁶ 757 A.2d 168, 179 (N.J. 2000).

⁴⁷ 748 A.2d 82, 84-85 (N.J. 2000).

⁴⁸ 734 A.2d 1196, 1225 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000).

⁴⁹ Wefing, *supra* note 8, at 727.

⁵⁰ Administrative Office of the Courts, Opinion Reports (on file with editors).

Her dissents in capital cases appear to have staked out a position for Long on the left of the Court, a place formerly filled by Justice Handler. In *In re Proportionality Review*,⁵¹ for example, she dissented from the Court's requirement that a defendant present "relentless documentation"⁵² that race influenced the death sentence, concluding instead that the requirement appeared "out of the blue" and was without basis in "law or reason."⁵³ Long's progressive inclination is even more evident in *V.C. v. M.L.B.*, for which she wrote both the majority opinion and a separate concurrence. *V.C.* concerned "what legal standard applies to a third party's claim to joint custody and visitation of her former domestic partner's biological children, with whom she lived in a familial setting and in respect to whom she claimed to have functioned as a psychological parent."⁵⁴ The Court's majority opinion set out standards of "psychological parenthood" applicable to both straight and gay couples. The Court evoked its *parens patriae* powers to protect the interests of the children, which included an assessment of whether the third party had assumed the functions of a parent, separation from whom would harm the child.⁵⁵ However, in her separate concurrence Long elaborates on a progressive view of family life, stating that "the values attached to family life . . . can exist in [other] settings [than the nuclear family], including families created by unmarried couples regardless of their sexual orientation."⁵⁶ Long

⁵¹ 757 A.2d 168, 179-184 (N.J. 2000) (Long, J., dissenting).

⁵² *Id.* at 233 (Long, J., dissenting) (urging court to abandon "relentless documentation" by adopting less burdensome quantum of proof as standard defendant must meet in proving "substantial discriminatory effect"). See *State v. Martini*, 734 A.2d 257, 272 (N.J. 1999) (rejecting racial discrimination claim for lack of "relentless documentation"); *State v. Marshall*, 613 A.2d 1059, 1059 (N.J. 1992) (focusing on risk defendants will be sentenced to death either because of their race or victim's race).

⁵³ See 757 A.2d at 181 (Long, J., dissenting) (stating "[t]hen last term, out of the blue, we adopted the 'relentless documentation' standard.") (citation omitted); see also *State v. Chew*, 731 A.2d 1070, 1090-1092 (N.J. 1999) (citing as controlling precedent court's rejection of racial discrimination claim for lack of relentless documentation), *cert. denied*, 528 U.S. 1052 (1999); *State v. Harvey*, 731 A.2d 1121, 1143 (N.J. 1999) (stating same). In *State v. Koskovich*, 776 A.2d 144 (N.J. 2001), which produced six separate opinions, Long contended that the Court should review the constitutionality of the death penalty altogether.

⁵⁴ See *V.C. v. M.J.B.*, 748 A.2d 539, 541-42 (N.J. 2000) (holding that biological mother's former partner was her children's psychological parent and was thus entitled to visitation rights).

⁵⁵ See *id.* at 549 (stating that Court may intervene under exceptional circumstances under its *parens patriae* powers to protect welfare of children).

⁵⁶ *Id.* at 557-58 (O'Hern, Long, J.J., concurring). While O'Hern, J., wrote the concurring opinion, Long, J., was in agreement with its substance.

identified a number of factors that she said should be considered as defining a family rather than the exclusive equivalence of family with the “nuclear” family.⁵⁷

Of the recent appointees, Peter Verniero, who, like Poritz was serving as Attorney General at the time of appointment, has caused the most controversy. Despite working in both the private and public sectors, and having clerked for the well-respected retired Justice Robert Clifford, he was not considered to be experienced enough to fill the place of Justice Pollock. Indeed, a committee of the state bar association refused to qualify him for the post, an action that caused Governor Whitman to bypass the association’s approval in her subsequent appointments to the Court.⁵⁸ In his first term, however, Verniero, perhaps trying to overcome the image of him that was generated by his nomination process, authored ten opinions. He also dissented from the Court in two cases. The following term showed an increased output, with twelve majority opinions.⁵⁹

Justice Jaynee LaVecchia was nominated in December 1999, to replace Justice Marie Garibaldi. LaVecchia was serving as the Commissioner for Banking and Insurance at the time of her appointment. Prior to that position, LaVecchia served as Chief Administrative Law Judge for five years, where she gained a reputation for “meticulous” opinions.⁶⁰ In her first term, she was quite prolific, authoring five opinions in the few months left of the Court term in which she was able to take part. LaVecchia authored *Crews v. Crews*,⁶¹ where the Court held unanimously to allow a motion by a divorced wife to reconsider the alimony payments allowed in her divorce. The Court, affirming its earlier decision in *Lepis v. Lepis*,⁶² held that the standard for

⁵⁷ See *id.* at 557 (O’Hern, Long, J.J., concurring) (stating that bond which develops in family “is borne out of the daily toil parents engage in to keep their children healthy and safe from harm; out of the love and attention provided to the children; and out of the unconditional regard returned by the children to the parental figures”).

⁵⁸ See Michael Booth & Tim O’Brien, *Verniero Review Fractures Bar, Tests Compact*, 156 N.J.L.J. 169 (1999).

⁵⁹ Administrative Office of the Courts, Opinion Reports (on file with editors).

⁶⁰ See Wendy Davis, *LaVecchia as ALJ: Meticulous Fact Finder with a Sympathetic Ear*, 159 N.J.L.J. 93, (2000).

⁶¹ 751 A.2d 524, 531-33 (N.J. 2000) (setting forth standards for use by trial courts in determining whether modification of alimony payments is warranted because of changed circumstances).

⁶² 416 A.2d 45, 47 & 51 (N.J. 1980) (holding that supporting spouse’s alimony payments depends mainly on quality of life achieved during marriage).

determining or modifying a proper alimony payment, which should be determined at the time of the divorce, is whether "the supported spouse can maintain a lifestyle reasonably comparable to the standard of living enjoyed during the marriage." This determination should initially be made at the time of divorce, if not, a modified alimony award is appropriate.

In May 2000, Justice Daniel J. O'Hern retired and was replaced by James Zazzali, the most recent appointee to the Court. He is still largely a judicial unknown. He worked with both Democrats and Republicans in his long career in New Jersey legal and political positions, and is generally considered a moderate. He served as prosecutor for Essex County and as Governor Brendan Byrne's Attorney General. In private practice, he became well known as a labor lawyer and appellate advocate.

A SURVEY OF RECENT CASES

To determine whether any recognizable shift has occurred in the Court's jurisprudence or in its perception of its role in the state's constitutional structure, this paper shall concentrate on a selection of cases from the following areas: (1) intra-state relations and state-federal relations, what have been called "horizontal" and "vertical" federalisms; (2) the elaboration of individual rights; and (3) rights of plaintiffs. While constituting only a portion of the Court's docket, the issues that these cases consistently raise may provide a glimpse as to the change, if any, in the Court's reasoning.⁶³

In each instance, drawing upon the Court's own precedent, we can chart a rough ideological direction. In category (1), we would expect a liberal or progressive Court to favor the state over the locality, and the nation over the state; in category (2), we would expect a progressive Court to expand individual rights based on its state Constitution beyond those available under the federal Constitution; and in (3), we would expect a progressive Court to protect and extend the rights of plaintiffs in litigation, including, in the employment context, to enforce the plaintiff's rights in

⁶³ See Folster, *supra* note 21, at 1503-04 (reviewing different set of cases involving death penalty, Megan's law, freedom of expression, hate crime legislation, mandatory HIV testing of sex offenders, and random employee drug testing).

order to vindicate public benefits.

Federalism.

As long ago as 1973, the Court, in the first *Robinson v. Cahill* decision, warned that federalism and separation of powers arguments that may have a place in federal litigation have a lesser, if any, role to play in a state Supreme Court's analysis. "The question whether the equal protection demand of our State Constitution is offended remains for us to decide. Conceivably a State Constitution could be more demanding. For one thing, there is absent the principle of federalism which cautions against too expansive a view of a federal constitutional limitation upon the power and opportunity of the several States to cope with their own problems in the light of their own circumstances."⁶⁴ The frequent recourse to state supreme courts for more directly "day-to-day political issues" necessitates that they become "interdependent members of state government."⁶⁵ They are therefore less likely to engage in the practice of judicial restraint customary among federal judges. And Tarr has contended that, despite the strong New Jersey tradition of "home rule" and attachment to locality, the Court has effected a shift toward a more state-centered governing and policy system. Indeed, in reviewing the cases decided from the adoption of the New Jersey Constitution of 1947 through the 1980s, Tarr and Porter concluded that "[w]hen conflicts have arisen between the state and local governments, the New Jersey Supreme Court has characteristically favored the claims of the state."⁶⁶ Therefore, we should expect that over the last five years, in contests between the state and local governments, the Court will tend to favor the state. And in contests between the state and federal government, we should expect the federal government to prevail.

The current Court is composed almost entirely of former state-

⁶⁴ See *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973) (holding New Jersey's local property taxation scheme for support of public schools unconstitutional because it leads to great inequities in education).

⁶⁵ Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1113, 1156 (1999).

⁶⁶ See G. ALAN TARR & MARY CORNELIA PORTER, *STATE SUPREME COURTS IN STATE AND NATION*, 210-11 (Yale University Press 1988) (reviewing New Jersey Supreme Court's judicial activism since WWII); see also MARY CORNELIA PORTER & G. ALAN TARR, *STATE SUPREME COURTS POLICYMAKERS IN THE FEDERAL SYSTEM* (Greenwood Press 1982).

level officials: Poritz and Verniero served as Attorneys General, LaVecchia served as a state commissioner, and Stein served as Governor Byrne's Director of Policy and Planning. Zazzali also served in a number of executive posts, including a brief stint as Attorney General. This executive branch presence may preserve the Court's traditional deference toward that executive branch.⁶⁷

While there is a line of cases stating that state policies should take local sensibilities into account, nevertheless the case law confirms this foregoing hypothesis.⁶⁸ For example, for a unanimous court Justice Zazzali ruled against the Township of Franklin, which had alleged that defendant-farmers had violated local land-use ordinances, on the basis of the State Right to Farm Act.⁶⁹ While the Court stated that the agencies charged with applying the Act, the county agricultural boards and the State Agricultural Development Committee, should consider local land-use regulations, in *Hollander* the Court affirmed the Appellate Division's opinion and stated that such cases in the future would be fact-specific. The most important of these perhaps will prove to be *In re Charter School Application of Englewood*,⁷⁰ which upheld state legislation permitting charter schools against an array of constitutional and statutory challenges by the local school board. Charter schools, although public, are independent of the local school board and are managed by a separate board of trustees.⁷¹ The creation of these charter schools, as the Court noted, is a recent innovation and represents a shift away from the traditionally strong local control over public schools.⁷²

⁶⁷ G. Alan Tarr & Robert F. Williams, *Decidedly Co-Equal: The New Jersey Supreme Court*. Center for State Constitutional Studies at <http://www-camlaw.rutgers.edu/statecon/papers.html> (last visited Feb. 12, 2001).

⁶⁸ See, e.g., *Garden State Farms, Inc., v. Bay*, 390 A.2d 1177 (N.J. 1977) (holding failure to take local land use regulations into account in siting aviation facilities would constitute an abuse of discretion).

⁶⁹ *Township of Franklin v. Hollander*, 2002 WL 1009221 (N.J. May 20, 2002).

⁷⁰ 753 A.2d 687, 689 (N.J. 2000) *modifying* 744 A.2d 1206 (N.J. 1999) (modifying only its articulation of Commissioner of Education's responsibilities when reviewing financial and racial impacts that approval of charter school will have on public school districts).

⁷¹ See *id.* at 319-20 (defining charter schools); see also Kevin S. Hauffman, Note, *Charter Schools, Equal Protection Litigation and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1294 (1998) (discussing characteristics of charter schools).

⁷² See *Englewood*, 753 A.2d at 689-690 (stating movement toward charter schools started in 1991). See generally Ronald T. Hyman, *State-Operated Local School Districts in New Jersey*, 96 ED. L. REP. 915, 916 (1995) (stating "[W]ithin any given state, especially in New Jersey, the term 'local control' always refers to municipal control as opposed to state control").

Although the case was decided at an interim time in the Whitman appointments (two judges were designated from the appellate bench), all of the present permanent members of the Court (Poritz, Coleman, Long and LaVecchia) voted for the charter schools. The Court did impose a generalized obligation on the state to monitor the racial impact of the charter schools, but the important issue in *Englewood* was the preference expressed by the Court for the state interest over the localities. The Court stated at the outset of its opinion that “[t]he provision of public education in New Jersey is a state function,” arising from the state constitutional provision guaranteeing every student a “thorough and efficient” education.⁷³ The local school boards were given the burden of demonstrating that the constitutional provision of a thorough and efficient education cannot be met.⁷⁴ Stein wrote a brief concurrence to state only that the Court’s opinion did not endorse charter schools as a policy matter.⁷⁵

The localities also lost in *Board of Chosen Freeholders of Morris County v. State*,⁷⁶ where the Court unanimously found that the counties remain responsible for construction and renovation of judicial facilities, despite the enactment of a new constitutional amendment shifting some of these costs to the State. The Court found that the provision (Article VI, Section VIII para 1) which required that the state assume “certain” judicial costs, did not include within it a requirement that the state take on the costs associated with new judicial facilities, which had been borne by the counties.⁷⁷ An uncommon recent instance of the Court allowing a locality some advantage over the

⁷³ See *Englewood*, 753 A.2d at 689 (citing N.J. CONST. art. VIII, § 4, p. 1); see also *Robinson v. Cahill*, 303 A.2d 273, 291-292 (N.J. 1973) (holding that obligation to provide thorough and efficient system of free public schools is state’s constitutional responsibility).

⁷⁴ See *Englewood*, 753 A.2d at 691; see also *Robinson v. Cahill*, 303 A.2d at 291-292 (stating that determination to enlist local school districts to meet obligation is permissible so long as state ensures that means chosen to deliver educational services fulfills constitutional obligation).

⁷⁵ See *Englewood*, 753 A.2d at 700 (Stein J., concurring in result) (stating “. . . I read and understand the court’s opinion as neither expressing nor implying any view about the wisdom of that legislative choice”).

⁷⁶ 732 A.2d 1053, 1063 (N.J. 1999).

⁷⁷ See *id.*; see also N.J. CONST. art. VI, § 8 (defining “judicial costs” as costs incurred by county for funding judicial system, including but not limited to costs including salaries, health benefits and pension payments of all judicial employees, juror fees and library material costs).

state was in *Lacey Municipal Utilities Authority v. New Jersey Department of Environmental Protection*,⁷⁸ where the Court allowed a municipality to recover costs from the state-directed Spill Fund for an environmental clean up. The Court did this however, only because the regulations governing recovery were unclear at the time of the suit. Because the state Department of Environmental Protection, which oversees the Fund, had amended the relevant regulations during the pendency of the case, the Court was confident that such a case would not arise in the future.⁷⁹

The Supreme Court has, despite its prominence in the New Federalism debate, generally taken an expansive view in favor of federal preemption of state law. In *Village of Ridgefield Park v. New York Susquehanna & Western Railway Corp.*,⁸⁰ Stein, for a four-member majority, upheld the pre-emptive effect of federal railroad regulations over a municipality's except those having to do with safety or welfare.⁸¹ *R.F. v. Abbott Laboratories*⁸² held that federal medical regulations pre-empted a state product liability statute concerning defective design of a blood-testing device. The majority found that under the "implied preemption" doctrine, "plaintiffs' state law claim is preempted by the FDA's unique regulation of the Test based on principles of implied preemption rather than express preemption under the M[edical] D[evices] A[ct]."⁸³ Stein and O'Hern dissented on the basis that

⁷⁸ See 738 A.2d 955, 956 (N.J. 1999); see also Spill Compensation and Control Act, N.J. STAT. § 58:10-23.11 (1985) (current version available at N.J. STAT. § 58:10-23.11 (2000)).

⁷⁹ See *Lacey*, 738 A.2d at 956-57. See generally *Marsh v. N.J. Spill Comp. Fund and Env'tl. Claims Admin.*, 670 A.2d 67, 68 (N.J. Super. Ct. App. Div. 1996) (recognizing that Spill Fund is held strictly liable for cleanup and removal costs arising from forbidden discharge); *N.J. Dep't of Env'tl. Prot. v. Ventron Corp.*, 468 A.2d 150, 160 (N.J. 1983) (understanding that common law and statutory remedies are available in addition to remedies provided under Spill Act).

⁸⁰ 750 A.2d 57 (N.J. 1986).

⁸¹ See *Ridgefield*, 750 A.2d 57 (asserting that text and structure of Hazardous Materials Transportation Act indicate that Congress did not intend to establish private right of action); see also *Lewis v. Am. Cyanamid Co.*, 715 A.2d 967, 972 (N.J. 1998) (recognizing that Federal Act expressly preempted state from adding other requirements to labeling provision). See generally Symposium, *The State Role in Telecommunications Regulation: Models of Cooperative Federalism for Telecommunications*, 6 ALB. L.J. SCI. & TECH. 71, 74 (1996) (recognizing that preemption ensures compliance, designates responsibility, and advances negotiations).

⁸² 745 A.2d 1174, 1192 (N.J. 2000) (finding that basis for preemption was implied rather than expressed).

⁸³ See *R.F.*, 745 A.2d at 1192 (noting that Abbot's test requirements went above and beyond normal federal requirements that triggered preemption); see also William O.

the Court stretched the “implied preemption” doctrine too far, and its conclusion was not warranted by the facts presented.⁸⁴ The dissenters disputed the majority’s conclusion that the regulations of a federal agency (here the FDA) were sufficient to preempt a state law claim without violating the Supremacy Clause.⁸⁵ *R.F.* and *Ridgefield* continue a theme already present in the Poritz Court. In *Turner v. First Union National Bank*,⁸⁶ for example, Justice Garibaldi, writing for the Court, held that federal banking regulations pre-empted a state statute concerning legal representation fees in mortgage transactions.⁸⁷ And more recently, in *Housing Authority & Urban Redevelopment Agency of Atlantic City v. Taylor*, the Court in an opinion written by Justice Zazzali, reversed a decision in favor of the state housing authority seeking attorney’s fees from a tenant on the grounds that federal law prohibited low-income tenants

Fabrizi, *Home HIV Testing and Conflicts with State HIV Testing Regulations*, 21 AM. J.L. & MED. 419, 434 (1995) (observing that state law will be preempted if FDA has instituted regulation or requirement applicable to medical device). See generally Kenneth T. Sigman, Note, *Medtronic, Inc. v. Lohr: Bad Medicine for Manufacturers of Unproven Medical Devices*, 47 CATH. U. L. REV. 721, 724 (1998) (stating that 1976 Amendments to Medical Device Act preempted area traditionally left to states).

⁸⁴ See *R.F.*, 745 A.2d at 1198 (Stein, J., dissenting) (claiming that understatement of materiality and exaggeration of preemption analysis caused justice to dissent). See generally Dan L. Burk, *The Milk Free Zone: Federal and Local Interests in Regulating Recombinant*, 22 COLUM. J. ENVTL. L. 227, 249 (1997) (finding that state law is not preempted if it can operate independently from federal law); Marcia Coyle, *Business Tort Shield Comes Under High Court Review*, LEGAL INTELLIGENCER, Dec. 1, 2000, at 4 (discussing that preemption of state law under Medical Devices Act can be devastating for plaintiffs because there is no private cause of action under federal law).

⁸⁵ See *R.F.*, 745 A.2d at 1205-06 (Stein, J., dissenting) (asserting that federal-state balance of Supremacy Clause would be disturbed if federal agency could come in at any time and decide that its regulations are exclusive). See generally Burk, *supra* note 84, at 249 (discussing that preemption is matter of congressional intent, looking first for expressed statements and then for implied); *Common-Law Claims Are Not Expressly Preempted by Consumer Product Safety Act; Colon v. BIC USA, Inc.*, N.Y.L.J., Dec. 28, 2000, at 21 (noting that Supremacy Clause states that U.S. laws are “supreme law” and that federal law preempts state law when Congress expressly provides, when federal regulation removes entire field from state control, and when state law directly conflicts federal law).

⁸⁶ 740 A.2d 1081, 1083 (N.J. 1999) (finding that issue before court concerned interpretation of statute regarding mortgage transactions).

⁸⁷ See *id.* at 1090-91 (stating that statute specifically allows attorney’s fees to be charged to borrowers as long as services provided by attorney concern loan); see also Geoffrey M. Connor, *Banking Law How to be a Predatory Lender and How Banks Can Begin to Put an End to the Practice*, N.J.L.J., Sept. 4, 2000 (discussing how Alternative Mortgage Transactions Parity Act could preempt state laws when nondepository state-licensed lenders made “alternative mortgage transactions”). But see Bd. of Tr. of Operating Eng’r Local 825 Fund Svc. Facilities v. L.B.S. Constr. Co., 691 A.2d 339, 347 (N.J. 1997) (finding action to recover unpaid pension benefits from bonds issued under state public works bond act not preempted by ERISA).

from paying such fees.⁸⁸

Individual Rights

In developing the "New Judicial Federalism," the various state courts have elaborated different approaches to whether their state constitutions allowed a greater protection or expansion of individual rights than the federal constitutions.⁸⁹ The New Jersey Supreme Court has been well known in this debate for having adopted a "supplemental" approach to assessing rights claims under its state Constitution.⁹⁰ This approach, first discussed in a concurring opinion by Handler in *State v. Hunt*,⁹¹ was formally adopted by the Court a year later in *State v. Williams*.⁹² The approach sets out a series of criteria for considering whether to follow or depart from federal constitutional holdings. These criteria are: (1) the textual language of the two constitutions; (2) the legislative history of the state constitution; (3) the preexisting state law; (4) the structural difference between the constitutions; (5) whether the contested issues involve a matter of particular state interest or local

⁸⁸ 2002 WL 264181 (N.J. Feb. 26, 2002).

⁸⁹ See Peter J. Galie, *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns*, COUNCIL OF ST. GOV'T, Mar. 22, 1997, at 37 (noting that in last twenty years ideological change on U.S. Supreme Court is one favoring recognition of rights protection in state constitutions); Andrew S. Winter, *Raven Revisited: Do Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of Their Homes?*, 15 ALASKA L. REV. 315, 322 (1998) (observing that "New Judicial Federalism" is liberal use of state constitution). See generally Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M. L. REV. 199, 207-19 (1998) (reviewing several approaches taken by state supreme courts).

⁹⁰ See Tarr & Porter, *supra* note 7, at 207-208 (stating difficulty in determining whether or not court will act on state constitution); see also Kathleen Brady, *Search and Seizure; Court Refuses to Adopt Labron, Exigent -Circumstances Finding Vital to N.J. Warrant Exception*, N.J.L.J., May 29, 2000, at 19 (recognizing that New Jersey's state constitution is commonly interpreted to allow for greater protection of rights than federal counterpart); E.E. Mazier, *Statute Enhancing Penalty for Harassment Motivated by Bias Withstands Constitutional Attack*, N.J.L.J., June 13, 1994, at 16 (noting that New Jersey Supreme Court usually turns to state constitution in attempt to provide its citizens broader protection of certain rights).

⁹¹ 450 A.2d 952, 955 (N.J. 1982) (understanding that role of state constitution is to act as second level of defense for rights protected under U.S. Constitution).

⁹² See 459 A.2d 641, 650 (N.J. 1983) (recognizing individual rights under state constitution when state's constitutional history, public policy, legal traditions warrant such action); see also *Right to Choose v. Byrne*, 450 A.2d 925, 927 (N.J. 1982) (considering Due Process claim under New Jersey's constitution as independent source of rights). See e.g., *State v. Schmid*, 423 A.2d 615, 625 (N.J. 1980) (acknowledging state constitution as alternative basis for determining public's right of access to pre-trial stage of criminal prosecution).

concern; (6) state traditions and history; and (7) the public attitude of the state's citizenry.⁹³ Justice Pollock described this approach as providing that "a court looks first to the federal constitution when deciding whether state action is valid. If, however, the status of the litigant's rights are questionable under the United States Constitution, or if the asserted violation of rights is found valid under that document, then a court consults the state constitution."⁹⁴

The Court has used this approach to carve out, where necessary, greater protections for individual rights than those afforded under federal precedents. It has not been wholeheartedly accepted, however, even by the New Jersey Justices themselves. Justice O'Hern, for example, stated a reluctance to interpret state guarantees as greater than federal because of "(1) . . . a deeper respect for the Constitution of the United States and the Supreme Court of the United States, and (2) because of a pragmatic concern that the reservoirs of the state constitution may be drained by over consumption."⁹⁵ Even in *Hunt* itself, Justice Pashman noted that under the "criteria" approach "a state court is compelled to the [United States] Supreme Court's decision, and to explain, in terms of the identified criteria, why it is not following the Supreme Court precedent," which seems to detract from the independence of the state constitutional analysis.⁹⁶ Some scholars have also noted the weaknesses in

⁹³ See *Hunt*, 450 A.2d at 962, 965-67 (Handler, J., concurring) (discussing criteria to determine when to invoke state constitution as independent source of protection of individual rights); see also *State v. Ramseur*, 524 A.2d 188, 300 (N.J. 1987) (Handler, J., dissenting) (arguing that not fully interpreting state constitution "arrests the progress we have made in expounding our constitution"). See generally *State v. Stever*, 527 A.2d 408, 415 (N.J. 1987), cert. denied 484 U.S. 954 (1987) (noting that state constitution and laws may provide greater protection than federal counterparts).

⁹⁴ See Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship between State and Federal Courts*, 63 TEX. L. REV. 977, 984 (1985) (describing supplementary approach to assessing claims under state constitution); see also Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1028 (1985) (inquiring whether state constitution offers means of supplanting federal rights); Van Cleave, *supra*, note 89, at 209-10 (discussing supplemental interpretation).

⁹⁵ See O'Hern, *supra* note 10, at 828 (noting reluctance to follow trend allowing more protections in state constitution than Supreme Court finds in federal Constitution); see also Marie L. Garibaldi, *The Rehnquist Court and State Constitutional Law*, 34 TULSA L.J. 67, 73-76 n.91-97 (1998) (discussing "supplemental" or "criteria" approach and noting differences among Justices). See generally Folster, *supra* note 21, at 1542-43 (examining decisions of Justices Handler, O'Hern and Pollack).

⁹⁶ See *Hunt*, 450 A.2d at 960 & 960n.1 (Pashman, J., concurring) (disagreeing with

limiting the unique discourse of state constitutional theory to a limited set of criteria.⁹⁷

Despite some reservation, however, the Court has continued to employ the supplemental approach. In *Dale* and *V.C.* the Court continued to expand its notion of rights under the state Constitution. The only partial retreat perhaps is where the search and seizure protections run into compelling state policies, as in *J.G.* and *PBA Local*, decided in light of recent Supreme Court precedent.

The Court's commitment to the "supplemental" approach of state constitutional interpretation was apparent in the *Farmer* case, which strongly disputed the state's reasons that the parental notification act overcame the interests of minors. In *Farmer*, Poritz stated that "we have not hesitated to read [the state Constitution] to provide greater rights than its federal counterpart" and held for the Court that the protections of Article 1, section 7 of the state Constitution provided fuller privacy protections than the federal Constitution. Justices O'Hern and Verniero dissented in separate opinions on the basis that there was insufficient evidence of undue burden to overturn the statute.⁹⁸

In *New Jersey Coalition Against War in the Middle East v.*

majority's analysis of when divergent state and federal interests are appropriate); see also Garibaldi, *supra* note 95, at 73-75 (1998) (quoting Rehnquist, "I do not think the [United States Supreme] Court is necessarily the final arbiter of the law of the land. It is the final arbiter of the U.S. Constitution and of the meaning of Federal statutes and treaties. . ."). See generally Brennan *supra* note 2, at 503-504 (citing benefit of double source of protection).

⁹⁷ See Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1044-45 (1997) (analyzing New Jersey state court interpretations of criteria application vis-à-vis application of state constitution); see also Edmund B. Spaeth, *Toward A New Partnership: The Future Relationship of Federal and State Constitutional Law*, 49 U. PITT. L. REV. 729, 741 (1988) (comparing Justice Brennan and Judge Linde's approaches to resolving relationship of state and federal constitutional law). Compare James W. Talbot, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 WASH. L. REV. 1099, 1100-1103 (1991) (exploring difference between Washington State Constitution and Federal Constitution).

⁹⁸ Compare *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 643 (2000) (holding state interest in enforcing statutory classification does not outweigh woman's fundamental rights and is unconstitutional under equal protection clause of New Jersey Constitution), with *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 894-901, (1992) (holding Pennsylvania abortion legislation constitutional, except for spousal notice provisions, under Fourteenth Amendment due process clause of United States Constitution). See generally Kevin Francis O'Neill, *The Road Not Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights*, 11 N.Y.L. SCH. J. HUM. RTS. 5, 28 (1993) (noting that state constitutions are neglected by lawyers advancing cause of reproductive freedom).

J.M.B. Realty,⁹⁹ the Court, through a majority opinion by Wilentz, expanded free speech rights beyond those in the federal Constitution and allowed leaf letters into a privately owned shopping mall. *JMB* was an influential decision, and a number of other states courts have adopted its reasoning.¹⁰⁰ This past term, in *Green Party of New Jersey v. Hartz Mountain Industries, Inc.*,¹⁰¹ the Court was offered the opportunity to reassess or limit the extent of its holding in *JMB*. The case involved a shopping mall that imposed a series of conditions on groups seeking to petition or pass out leaflets inside the mall, including the posting of a \$1 million insurance policy, a “hold harmless” agreement and restricting access to a certain number of days.¹⁰² Justice O’Hern, opining for the Court, strongly affirmed *JMB* and held that a mall could not impose those conditions under the state constitution, at least not unless such requirements, after sufficient fact-finding could be “related to the actual activities” proposed by the leaf letters.¹⁰³ The *Hartz* opinion lays out in great detail the New Jersey courts’ long commitment to free speech rights,¹⁰⁴ which have been “at the

⁹⁹ 650 A.2d 757, 760 (N.J. 1994), cert. denied sub nom Short Hills Assocs. V. N.J. Coalition Against War in the Middle East, 516 U.S. 812 (1995) (holding right of free speech in New Jersey state constitution requires regional shopping centers to permit distribution of leaflets subject to reasonable conditions); cf. William G. Mulligan, Found. for the Control of First Aid Squadders and Roving Paramedics v. Brooks, 711 A.2d 961, 963-65 (N.J. 1998) (finding no violation of state constitutional right of free speech). See generally Stanley Mosk, *Brennan Lecture: States’ Rights – And Wrongs*, 72 N.Y.U.L. REV. 552, 564n.86 (1997) (discussing authority of state to exercise right to adopt more expansive constitutional liberties than federal Constitution provides).

¹⁰⁰ See Stanley H. Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States*, 62 ALB. L. REV. 1229, 1254-58 (1999) (discussing free speech rights under federal and state constitutions); see also Thomas P. Leff, *The Arts: A Traditional Sphere of Free Expression? First Amendment Implications of Government Funding to the Arts in the Aftermath of Rust v. Sullivan*, 45 AM. U.L. REV. 353, 375-76 n.139 (1995) (comparing individual’s right to free speech in private and public forums); cf. United States v. Kokinda, 497 U.S. 720, 736-37 (1990) (re-affirming protection of free speech in traditional public forum).

¹⁰¹ 752 A.2d 315 (N.J. 2000).

¹⁰² *Id.* at 317.

¹⁰³ *Id.* at 332.

¹⁰⁴ See *State v. Schmid*, 423 A.2d 615 (N.J. 1980) (stating right to free speech under New Jersey Constitution guards against unreasonable or oppressive conduct of both government and private parties); *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971) (holding although employer of migrant farm workers may reasonably require those visiting his employees to identify themselves, employer may not deny worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among all citizens); see also Richard T. Pfohl, Note, *Hague v. CIO and the Roots of Public Forum Doctrine: Translating Limits of Powers into Individual Rights*, 28 HARV. C.R.-C.L. L. REV. 533 (1993) (discussing *Hague v. CIO* decision and New Jersey’s historical placement at center of debate over speech and assembly).

historical center of debate over speech and assembly,” and the changing demographics that persuaded the Court to treat shopping malls as the “new main street.”¹⁰⁵

Hartz preserves the Court’s traditional heightened protection of political speech, as well as its inclination to adapt traditional analyses (such as the public forum doctrine) to changed circumstances. In *Township of Pennsauken v. Schad*,¹⁰⁶ the Court determined that a municipality’s ordinances regarding sign size and location did not violate the rights of the owner of an adult bookstore. The reasoning of the case (written by Handler) reflects a great deal of deference to the wishes of the local zoning boards in regulating business in general, and adult businesses in particular.¹⁰⁷ For example, the Court relied extensively on the interpretive principle that zoning regulations ought to be interpreted liberally in favor of the municipality, and conform to a “common sense understanding of the statutory language.”¹⁰⁸ However, seven months earlier, in *Township of Saddlebrook v. A.B. Family Center, Inc.*,¹⁰⁹ a unanimous Court found that a township could not enforce a state statute that would effectively bar an adult bookstore from operating at all, but remanded to the trial court for further findings.¹¹⁰ The Court determined that the effect of such a statute could not be restricted only to a municipality’s geographic boundaries, but that there must be “alternative channels of communication within the relevant market area.”¹¹¹

¹⁰⁵ See *Hartz*, 752 A.2d 315, 321-24 (N.J. 2000) (stating “regional and community shopping centers have achieved their goal: they have become today’s downtown and to some extent their own community.”); see also Mark C. Alexander, *Attention Shoppers: The First Amendment in the Modern Shopping Mall*, 41 ARIZ. L. REV. 1, 1-2 (1999) (noting ever-expanding importance of shopping malls in modern American society and discussing scope of constitutional rights to engage in expressive activity in such privately-owned places); Maurice F. Kirchofer, Note, *New Jersey State Constitution Requires Privately Owned Shopping Malls to Allow Access for Expressional Leafletting, Subject to the Owner’s Reasonable Time, Place, and Manner Restrictions*, 27 SETON HALL L. REV. 289, 304 (1996) (examining societal phenomenon of city to suburb migration and replacement of downtown commercial and social activity hubs with modern shopping mall).

¹⁰⁶ 733 A.2d 1159 (N.J. 1999).

¹⁰⁷ *Id.* at 1168-71.

¹⁰⁸ *Id.* at 1166.

¹⁰⁹ 722 A.2d 530 (N.J. 1999).

¹¹⁰ *Id.* at 536.

¹¹¹ *Id.* at 536. *But see Do-Wop Corp. v. City of Rahway*, 168 N.J. 191 (2001) (holding state statute barring adult business could be enforced).

Plaintiffs' Rights

Glick reminds us that it is in the nuts-and-bolts of state practice and procedure that state courts have the most influence and decide the greatest number of cases, rather than merely the major constitutional or legal issues of the day.¹¹² The New Jersey Supreme Court has long been a leader in developing new legal doctrines to deal with changing circumstances. Forty years ago, in *Henningson v. Bloomfield Motors, Inc.*,¹¹³ the Court eliminated the doctrine of privity in product liability cases,¹¹⁴ which expanded the ability of plaintiffs to recover in tort.

However, over the last five years some have thought that a shift toward limiting these types of innovations has become evident in the Court's approach. On this view, the Court has moved away from accepting new theories of liability, while continuing to affirm decisions based upon precedent that *already* granted broader theories.¹¹⁵ Perhaps the most dramatic exception to this perceived general trend was *F.G. v. MacDonnell*.¹¹⁶ In a 5-2 opinion written by Justice Pollock, the Court affirmed the Appellate Division in part and reversed in part, and remanded.¹¹⁷ The Court held that F.G. could pursue a claim for breach of fiduciary duty against MacDonnell.¹¹⁸ F.G. could also proceed against Harper, another defendant, if on

¹¹² Glick, in John B. Gates & Charles A. Johnson, ed. *The American Courts: A Critical Assessment* 95 (1991).

¹¹³ 161 A.2d 69 (N.J. 1960).

¹¹⁴ Privity of contract rules maintain that manufacturers or sellers of products alleged to have caused injury cannot be held liable on the ground of negligence to one with whom they are not in privity of contract. Origins of this doctrine are found in *Winterbottom v. Wright*, 10 Mees & W. 109 (1842). See *Cox v. Laws*, 145 So.2d 703 (Miss. 1962) (honoring former opinions of Mississippi courts requiring privity of contract as prerequisite to negligence cause of action); *Baxter v. Ford Motor Co.*, 12 P.2d 409 (Wash. 1932) (recognizing impact of commercial practices in place at time on "strait jacket of privity").

¹¹⁵ See *Taylor v. Cutler*, 724 A.2d 793 (N.J. 1999) (exemplifying New Jersey Supreme Court's reluctance to broaden boundaries of tort law with its failure to create cause of action for preconception tort); *Alloway v. Bradlees Inc.*, 723 A.2d 960 (N.J. 1999) (expressing court's fidelity to precedents in area of construction site negligence and holding fast to broad recovery right against responsible tortfeasors); see also Ronald B. Grayzel, *Liberal Currents Ebb: Court Declines to Create Tort for Preconception Negligence But Reaffirms Commitment to Other Expansive Liability Theories*, N.J.L.J., Sept. 6, 1999, at S-4 (asserting that Poritz court is "not searching for opportunities to explode out of the gate to blaze new frontiers").

¹¹⁶ 696 A.2d 697 (N.J. 1997).

¹¹⁷ *Id.* at 705.

¹¹⁸ *Id.* at 703 (asserting "fiduciary duty essentially requires proof that a parishioner trusted and sought counseling from the pastor").

remand the trial court found that such an action would not result in entanglement with church doctrine.¹¹⁹ The majority framed the issue as whether “the First Amendment to the United States Constitution shields a member of the clergy from a claim of inappropriate sexual conduct with a parishioner who has consulted the member of clergy for pastoral counseling.”¹²⁰ The Court canvassed cases from other jurisdictions that have allowed claims on the basis of a fiduciary duty between clergy and parishioner for certain types of torts. No court, however, has recognized a separate clergy malpractice claim,¹²¹ because of a hesitation to become entangled in religious teaching or to judge clergy by secular standards of care. The Court found the breach of fiduciary duty cases persuasive, and held that pastoral counseling creates a fiduciary relationship. “By accepting a parishioner for counseling, a pastor also accepts the responsibility of a fiduciary.”¹²² Like psychotherapists and their patients, pastoral counselors may be liable for breaches of fiduciary duty toward their parishioners.¹²³ The First Amendment, therefore, does not protect a cleric from a breach a duty claim when the cleric’s actions arise in the context of a counseling relationship. “[T]he record supports the inference that MacDonell’s alleged misconduct was not an expression of a sincerely held religious belief, but was an egregious violation” of his duty toward the plaintiff.¹²⁴ The Court recognized deposition testimony presented to the trial court from Episcopal church officials that affairs between married priests and parishioners contravene church doctrine, which the defendants did not

¹¹⁹ *Id.* at 704 (concluding “courts can adjudicate F.G.’s claim for breach of fiduciary duty without becoming entangled in the defendants’ free exercise of their religion”).

¹²⁰ *Id.* at 701.

¹²¹ *Id.* at 703 (noting “Appellate Division acknowledged that F.G.’s claim presented an issue of first impression in New Jersey, and that no other court in the United States had yet recognized a clergy-malpractice claim”).

¹²² *Id.* at 703.

¹²³ *Id.* at 705 (stating that “pastoral counselors, like psychotherapists . . . may be liable for breach of a fiduciary relationship with a parishioner”).

¹²⁴ *Id.* at 702 (recalling testimony of church officials that church doctrine does not sanction sexual conduct by rectors). *But see* Langford v. Roman Catholic Diocese of Brooklyn, 705 N.Y.S. 2d 661, 662 (N.Y. App. Div. 2000) (stating that there is no real distinction between clergy malpractice and breach of fiduciary duty). *See generally* N.H. v. Presbyterian Church, 1999 OK 88, 26 n.47 (Okla. 1999) (noting split in authority concerning First Amendment and ministerial officers); Scott Idleman, *Tort Liability, Religious Entities, and the Decline of Constitutional Protection*, 75 IND. L.J. 219, 232-33 (2000) (discussing problems that arise in defining standard for clergy malpractice).

dispute. The Court did not address how trial courts would determine whether the cleric's actions arose from sincerely held religious beliefs. Justice O'Hern dissented in an opinion joined by Justice Garibaldi. The dissenters concluded that the majority misunderstood the issue. The defendant clergy were not alleging that their conduct was excusable because immunized by the First Amendment; "rather, F.G. asserts that the conduct is tortious because the defendant is a religious."¹²⁵ According to O'Hern and Garibaldi, the basis of the plaintiff's case was that MacDonell breached a duty of pastoral care towards her. Exploration of that duty necessitates an examination of clerical religious duties. As there is no general duty for other types of fiduciaries to refrain from voluntary sexual relationships with their adult clients, the imposition of liability here rests solely upon the defendant's status. Indeed, the dissent interpreted the majority opinion as holding that "but for MacDonell's status as a clergyman, his conduct was unrelated to religious doctrine."¹²⁶ The dissent closed by stating:

[t]he First Amendment offers no defense to sexual crimes or abuse [but] no principle of general civil law makes it a tort for competent adults to engage in consensual sexual conduct. . . . Whatever we may think of the morality of the acts involved, a breach of the tenets of the Episcopal religion . . . does not give rise to a tort action.¹²⁷

¹²⁵ See *MacDonell*, 696 A.2d at 706 (O'Hern, J., dissenting) (noting majority rationale misses constitutional point entirely). *But see* *H.R.B. v. Archbishop Justin Rigali*, 913 S.W.2d 92, 99 (Mo. Ct. App. 1995) (stating religion was not merely incidental to plaintiff-defendant relationship and First Amendment precludes secular courts to judge sectarian matters). See generally *Idleman*, *supra* note 124, at 232 (explaining clergy malpractice cause of action requires determination of reasonable clergy standard and reeks of unconstitutional standard).

¹²⁶ See *MacDonell*, 696 A.2d at 706 (O'Hern, J., dissenting) (summarizing plaintiff's argument that "but for" MacDonnell's status as clergyman, no secular law would make his extramarital affair tort or crime); see also *Hester v. Barnett*, 723 S.W.2d 544, 553 (Mo. Ct. App. 1987) (stating that intentional tort by cleric may be actionable even if conduct which caused harm was related to exercise of religious belief). See generally *Dausch v. Rykse*, 52 F.3d 1425, 1429 (7th Cir. 1994) (describing cause of action for fiduciary duty as elliptical way to state clergy malpractice and therefore not recognized).

¹²⁷ See *MacDonell*, 696 A.2d at 709 (O'Hern, J., dissenting); see also *DeVries v. Habitat for Humanity*, 689 A.2d 142, 142 (N.J. 1997) (holding injured volunteer could sue charity because volunteer did not receive psychological benefit for performing volunteer work for purposes of being "beneficiary" of charity under statute granting charities immunity from suit from injury to "beneficiaries"). See generally *Idleman*, *supra* note 124, at 232 (noting every jurisdiction presented with opportunity to enforce clergy malpractice has declined).

However, limits to the Court's expansive views were beginning to appear. In a unanimous 1998 opinion by Poritz, the Court determined in *Baxt v. LiLoia*¹²⁸ that a plaintiff could not bring a cause of action based solely on an alleged violation of the Rules of Professional Conduct governing attorney behavior. While violations of the Rules could assist in measuring the proper standard of care, they were "not designed to establish standards for civil liability."¹²⁹ The Court rejected the argument that such a cause of action was necessary to ensure attorney compliance with the Rules, relying instead on the profession and the court's role in disciplining the profession. In 1999, in *Taylor v. Cutler*,¹³⁰ the Court summarily affirmed without opinion an appellate court's denial of a claim for "preconception negligence."¹³¹ This decision was confirmed in part by *Lynch v. Scheininger*,¹³² which allowed plaintiffs to proceed on a claim of medical malpractice resulting in preconception negligence but held that the decision to have another child in the face of knowledge of the risk constituted a supervening cause and therefore would bar such a claim.¹³³ In *Kaufman v. I-Stat Corp.*,¹³⁴ Justice LaVecchia, in an extensive opinion dealing with the Efficient Market Hypothesis of economic theory, rejected the plaintiffs' argument that the "fraud on the market" theory to demonstrate reliance should be adopted in common law fraud claims.¹³⁵

Nor has the Court declined to extend its own authority where a plaintiff might otherwise be precluded from vindicating her rights. In *Blakey v. Continental Airlines*,¹³⁶ the plaintiff sued

¹²⁸ 714 A.2d 271, 275 (N.J. 1998) (stating violation of Model Rule should not give rise to cause of action nor create presumption of breach of legal duty).

¹²⁹ *Id.* at 275 (noting further that purpose of Model Rule are subverted when invoked as procedural weapons). See Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 337-38 (1998) (discussing whether disciplinary violation should be deemed violation of lawyers duty of care). But see *Lipton v. Boesky*, 313 N.W.2d 163, 166 (Mich. Ct. App. 1981) ("The Code of Professional Responsibility is a standard of practice for attorneys which expresses in general terms the standards of professional conduct expected of lawyers in their relationships with the public, the legal system, and the legal profession.").

¹³⁰ 724 A.2d 793 (N.J. 1999).

¹³¹ See *Taylor*, 724 A.2d at 793.

¹³² 744 A.2d 113 (N.J. 2000).

¹³³ *Id.* at 113.

¹³⁴ 754 A.2d 1188 (N.J. 2000).

¹³⁵ *Id.* at 1188 (noting proof on market theory is not equivalent of proof of indirect reliance required in common-law fraud action).

¹³⁶ 751 A.2d 538 (N.J. 2000).

several of her co-employees as well as her employer for allegedly defamatory comments published on a computer bulletin board.¹³⁷ The defendant-employer knew of the bulletin board and facilitated employees' use of it, but had no direct control over its content. The Court found that it had jurisdiction over both the co-employees and the employer.¹³⁸ The Court remanded for further factual findings as to whether the bulletin board's operation was sufficiently related to the employer's business as to create liability for comments placed on it. With regard to the individual employee-defendants, the Court found jurisdiction using traditional principles of due process, finding "minimum contacts" but remanding as to whether assertion of jurisdiction would violate "traditional principles of fair play and substantial justice."¹³⁹

In two cases, decided one week apart, the Court allowed one plaintiff to overcome the statute of limitations in one but not the other. In the first case, *Mancuso v. Nickles*,¹⁴⁰ the Court, in an opinion written by O'Hern, ruled that because the plaintiff did not receive reliable medical advice until after the running of the statute, she should not be barred from bringing suit.¹⁴¹ Plaintiff was diagnosed with a benign tumor; in 1991 a second diagnosis gave some indication of malignancy, but plaintiff's doctor did not inform her. It was not until 1996 that plaintiff learned that the 1989 and 1991 incidents may have been negligent. Plaintiff was

¹³⁷ *Id.* at 547 (noting plaintiff added defamation to further support claim of hostile environment); see also *Morris v. Oldham*, 201 F.3d 784, 788 (6th Cir. 2000) (citing Supreme Court cases finding vicarious liability to victimized employee for actionable hostile environment).

¹³⁸ See *Blakey*, 751 A.2d at 538-42 (answering affirmatively question whether employees of Continental Airlines should reasonably expect to be subject to personal jurisdiction). See generally Todd D. Leitstein, *A Solution for Personal Jurisdiction on the Internet*, 59 LA. L. REV. 565 (1999) (discussing jurisdictional problems related to Internet); John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 IND. L.J. 893, 979 (1999) (discussing additional factors necessary for jurisdiction in online context).

¹³⁹ See *Blakey*, 751 A.2d at 553-54 (discussing traditional principles of personal jurisdiction). See generally Leitstein, *supra* note 138, at 569 (analyzing personal jurisdiction in relation to growth of Internet); Rothchild, *supra* note 138, at 979 (noting additional factors considered when determining personal jurisdiction in online context).

¹⁴⁰ 747 A.2d 255 (N.J. 2000).

¹⁴¹ See *Mancuso*, 747 A.2d at 260 (noting Mancuso was reasonably unaware injury was possibly due to fault of doctor); see also *Maertín v. Armstrong World Industries, Inc.*, 2000 U.S. Dist. Lexis 5857 at *42 (D.N.J. May 3, 2000) (stating not all injuries are easily discovered). See generally *The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits*, 96 HARV. L. REV. 1683 (1983) (discussing statutes of limitation in relation to toxic torts and difficulty of discovering injury).

not dilatory and had only acted upon the "nature of information available" to her at the time.¹⁴² The Court stated that the discovery rule was designed to "avoid harsh results" such as the one present in those circumstances.¹⁴³ The other case, *Lapka v. Porter Hayden Co.*,¹⁴⁴ was written by Verniero, with Stein and O'Hern dissenting. *Lapka* involved a plaintiff with asbestosis. The plaintiff was diagnosed with "pleural thickening" and "pulmonary fibrosis."¹⁴⁵ When plaintiff filed a workers' compensation claim, the application indicated that he had been exposed to "asbestos, noise and other chemicals." Based on those facts, the Court found that the plaintiff must have known of his condition when he filed a workers' compensation claim in 1986, even though a medical diagnosis did not occur until 1996, specifying his illness as asbestosis. The dissenters characterize the decision as "exalting literalism over substance," and would have allowed the claim.¹⁴⁶

Verniero and O'Hern disagreed again in *Rocci v. Ecole Secondaire MacDonald-Cartier*,¹⁴⁷ which involved the ability of a plaintiff to bring a defamation claim against a public school without alleging actual damages. The Court held that a letter written about a teacher's behavior by another teacher deserved First Amendment protection because it involved a matter of public concern.¹⁴⁸ "In view of that conclusion, we hold that reputational or pecuniary harm may not be presumed in this case absent a showing of 'actual malice' as that term is defined in *New*

¹⁴² See *id.* at 35 (discussing information possessed by patient); see also Molly J. Liskow, *Medical Malpractice; A Patient Reasonably Unaware of Potential Malpractice Claim Allowed to Use Discovery Rule*, N.J. LAWYER, Feb. 28, 2000, at 16 (discussing nature of information available to plaintiff); Jeffrey L. Loop, 30 SETON HALL L. REV. 1331, 1333-34 (2000) (discussing Mancuso opinion).

¹⁴³ 747 A.2d 255 (N.J. 2000).

¹⁴⁴ 745 A.2d 525 (N.J. 2000).

¹⁴⁵ *Id.* at 528 (describing how plaintiff responded in workman's' compensation claim petition form under "describe extent and character of injury").

¹⁴⁶ *Id.* at 532 (Stein, J., dissenting) (discussing Court's bar of petitioner's product liability suit for insufficient notice); see also Henry Gottlieb, *Asbestos Suit Limitations Period Starts With Workers' Comp Filing Divided Opinion by Supreme Court is Setback for Discovery Rule*, 159 N.J.L.J. 861 (2000) (indicating dissenting view in *Lapka*, and how "reasonable medical support" is basis for plaintiff's notice); Paul B. Matey, *Torts—The Discovery Rule—A Sworn and Signed Workers' Compensation Petition May Impute Knowledge of a Cause of Action for Occupational Exposure to Asbestos Without a Formal Evidentiary Hearing—Lapka v. Porter Hayden Co.*, 30 SETON HALL L. REV. 1336, 1340-41 (2000) (discussing Stein's dissenting opinion in *Lapka*).

¹⁴⁷ 755 A.2d 583 (N.J. 2000).

¹⁴⁸ See *id.* at 584 (indicating court's ruling).

York Times v. Sullivan.”¹⁴⁹ Because the plaintiff did not allege any facts supporting such damages, summary judgment for the defendant was affirmed. O’Hern dissented and argued that a plaintiff alleging malice and reputational harm should be allowed to plead presumed damages, with any actual damages to be decided by a jury who could determine the value of the harm.

Of the justices voting for the plaintiff in *Mancuso*, two – O’Hern and Garibaldi – are gone, and O’Hern was the lone dissenter in *Rocci*. The meanings of these cases have yet to become clear, though three recent decisions may be an indication of the Court’s thinking. With all the Justices except Verniero (who did not participate) joining, the Court (through Justice Long) in *Amedio v. Beuchamp*,¹⁵⁰ found “extraordinary circumstances” and allowed the plaintiff to pursue a claim against a state agency under the state Tort Claims Act that otherwise would have been barred by the statute of limitations. The Court found that incorrect advice from her attorney as to the meritorious nature of the claim, and the reliance of plaintiff upon that advice, constituted a sufficient showing to allow plaintiff to proceed.

In *Caravaggio v. D’Agostini*¹⁵¹ and *Aden v. Fortsh*,¹⁵² Verniero and LaVecchia dissented from decisions that allowed plaintiffs to bring their cases despite technical and substantive hurdles. In *Caravaggio*, the Court, relying in part on *Mancuso*, allowed a plaintiff to proceed against her doctor despite the statute of limitations because although the plaintiff knew she had been injured and that someone was at fault, she “was not aware that the injury was additionally due to her physician’s avoidable fault.”¹⁵³ *Aden* eliminates the defense of comparative fault in actions against professionals. In *Aden*, the plaintiffs failed to read their home insurance policy, which covered damages in an

¹⁴⁹ See *id.*; see also 376 U.S. 254, 280 (1964) (defining “actual malice” as having “knowledge that it was false or with reckless disregard of whether it was false or not”). See generally Brian Markovitz, *Public School Teachers as Plaintiffs in Defamation Suits: Do They Deserve Actual Malice?*, 88 GEO. L.J. 1953, 1955-61 (2000) (discussing actual malice standard and its application to public school teachers); Mike Steenson, *Defamation Per Se: Defamation By Mistake?*, 27 WM. MITCHELL L. REV. 779, 785-86 (discussing *N.Y. Times*, and requirement to prove actual malice for public officials to recover damages).

¹⁵⁰ 751 A.2d 1047 (N.J. 2000).

¹⁵¹ 765 A.2d 182 (N.J. 2001).

¹⁵² 776 A.2d 792 (N.J. 2001).

¹⁵³ *Caravaggio*, 765 A.2d at 188.

amount far less than they thought. The plaintiffs sued their insurance broker. The Court affirmed the high standard it has imposed on professionals, stating that "a plaintiff's conduct cannot be charged as negligence in actions in which the plaintiff failed to detect error in the discharge of the very responsibility [the plaintiff] hired a professional to perform."¹⁵⁴ Verniero, joined by LaVecchia and Coleman, dissented on the grounds that the Court's decision relieved insured of the responsibility to read their policies and conflicted with the public policy of writing insurance policies in clear language for the benefit of nonprofessional insured.¹⁵⁵

Where the activities of the private sector spill over into the public, the Court continues to adhere to its strong precedents protecting employees and allowing them to exonerate a public interest free of fear of termination. In 1995, Pinello characterized the New Jersey Court's position as innovative, due to its 1980 decision in *Pierce v. Ortho Pharmaceutical Corp.*,¹⁵⁶ which eliminated at-will termination of employment where the termination is contrary to a clear mandate of public policy.¹⁵⁷ This language was subsequently codified in the Conscientious Employees Protection Act, known as "CEPA."¹⁵⁸ CEPA cases continue to take up significant space on the Court's docket, and have been decided generally in favor of plaintiffs.¹⁵⁹

In *Mehlman v. Mobil Oil*,¹⁶⁰ the first major CEPA case decided under Poritz, the Court found that knowledge of a specific public policy was not required, so long as the plaintiff reasonably believed that the defendant's action was violating some public policy. The 1999 *Higgins v. Pascack Valley Hospital*¹⁶¹ decision

¹⁵⁴ *Aden*, 776 A.2d at 805.

¹⁵⁵ *Id.* at 806 (Verniero, J., dissenting).

¹⁵⁶ 417 A.2d 505 (N.J. 1980).

¹⁵⁷ *See id.* at 512 (indicating holding of case); *see also* Daniel R. Pinello, *The Impact of Judicial-Selection Method on State Supreme Court Policy* 48-49 (1995). *See generally* Elizabeth H. Confer, *Tenth Circuit Surveys: Employment Law*, 76 DENV. U.L. REV. 805, 809 (1999) (discussing the decision in *Pierce* as articulating and creating public policy "as a cause of action for wrongful discharge").

¹⁵⁸ N.J. Stat. § 34:19-3 (2000).

¹⁵⁹ *See* Rosemary Alito, *Another Very Good Year for Plaintiffs*, 161 N.J.L.J. 981 (2000) (discussing how CEPA was created to protect employee-plaintiffs who report illegal and unethical activities in workplace); *see, e.g., Higgins v. Pascack Valley Hospital*, 730 A.2d 327 (N.J. 1999) (indicating success of plaintiff in CEPA claim).

¹⁶⁰ 707 A.2d 1000 (N.J. 1998).

¹⁶¹ 730 A.2d 327 (N.J. 1998).

affirmed that CEPA prohibits termination of an employee for reporting a co-employee's behavior, even where the employer did not know of the behavior. Also, in *Roach v. TRW, Inc.*,¹⁶² decided this year, the Court upheld a jury verdict where the employee presented evidence of wrongful termination, but on the basis of acts not necessarily impacting upon public policy. Such conduct fell within other prongs of CEPA for which the jury found sufficient evidence existed. Although O'Hern and Handler dissented in *Mehlman*, on the grounds that the public policy relied on by the jury in reaching its decision was not specific enough as a matter of law, *Higgins* and *Roach* were both unanimous.

Mehlman, *Higgins* and *Roach* all favored plaintiffs vindicating their right to bring to the attention of their supervisors and derivatively the public matters of concern without fear of retribution. The one crack in the uniform approach to CEPA claims the Court has adopted appeared in *Fleming v. Correctional Healthcare*.¹⁶³ There, while agreeing with the general interpretation of the law given by the majority, Chief Justice Poritz and Justice Verniero dissented from the *per curiam* opinion that the Court should be careful lest CEPA be invoked merely to protect "insubordinate or poor performers." The dissenters' position, should it ultimately prevail, may herald a stricter review of the plaintiff's case before allowing CEPA claims to proceed.

Another emerging point of contention is in the area of jury instructions, specifically the so-called "ultimate outcome" instruction. In *Wanetick v. Gateway Mitsubishi*,¹⁶⁴ the Court, through Justice Verniero held that in cases brought pursuant to the Consumer Fraud Act, juries should be instructed that the Act provides for treble damages and counsel fees should the plaintiff prevail. Verniero reasoned that some jurors might have knowledge of how the statute operates and so would be confused were they not instructed regarding it. In response to the argument, raised in the dissent, that knowledge of the Act's provisions would affect the jury's damages award, the Court

¹⁶² 754 A.2d 544 (N.J. 2000).

¹⁶³ 751 A.2d 1035 (N.J. 2000).

¹⁶⁴ 750 A.2d 79 (N.J. 2000).

relied on the jurors' good faith against prejudicial findings.¹⁶⁵ Justice Coleman dissented, arguing that allowing the jury to know about the treble damages provision would prejudice their fact-finding as to compensatory damages (in that juries might decrease an otherwise adequate compensatory award if they know that the "real" amount will be triple), and does not in any way aid their determinations.¹⁶⁶ *Wanetick* can be read as "balancing the scales" for defendants against an earlier opinion of the Court, *Roman v. Mitchell*,¹⁶⁷ which held that jurors must be informed that under New Jersey's comparative fault scheme, a plaintiff found more than fifty percent liable for his own damage will be precluded from recovery.

FINDINGS AND CONCLUSIONS

The New Jersey Supreme Court was expected to change under Chief Justice Poritz. In particular, the Court was expected to reverse what some saw as the activist or liberal trends of the "New Judicial Federalism" characteristic of the Wilentz Court. While we have seen some shifting in what may be termed a conservative direction, some of these changes predated Chief Justice Poritz. For example, the Megan's Law cases represented to some a more deferential view toward the legislature and a more sympathetic view toward the rights of victims than the rights of defendants. Overall, however, the Court seems committed, at least for now, to follow its precedents.

The foregoing review of cases in selected areas seems to indicate that the Court is holding, in general, its traditional course as a progressive state supreme court. The Court has kept to its precedents favoring state authority over local autonomy, and the values of national regulation over state preemption. The

¹⁶⁵ *Id.* at 84 (addressing concern argued by dissent); see also Rocco Cammarere, *Consumer Fraud Trials; Jury Must Know of Potential Trebling*, N.J. LAW., May 15, 2000, at 4 (discussing majority's belief that informing juries of treble damage provision is acceptable); Molly J. Liskow, *Consumer Protection; Jury In a Consumer Fraud Case Must Be Instructed That Award Will Trigger a Punitive Remedy*, N.J. LAWYER, May 15, 2000, at 34 (stating any uneasy feelings court had were allayed by good faith of jurors).

¹⁶⁶ See *Wanetick*, 750 A.2d at 86-7 (Coleman, J., dissenting) (reasoning jury knowledge of treble damage provision is irrelevant); see also Steven P. Bann, *Wanetick v. Gateway Mitsubishi et al, A-106 September Term 1998*, N.J.L.J., May 15, 2000, at 640 (restating Justice Coleman's opinion that plaintiffs may be negatively affected by informing juries about treble damages).

¹⁶⁷ 413 A.2d 322, 342 (1980).

effects of *Abbott* and *Proportionality Review* are still unclear, but may represent confidence to let the state authorities proceed at their own pace with less intensive oversight from the judiciary.

On individual rights, the Court has decided (at least for now) to retain its supplemental approach of assessing rights claims as a way of expanding the range of individual rights recognized in New Jersey.¹⁶⁸ *Dale* and *Farmer* should assuage any fear of a retreat from a vigorous protection of certain rights. Similarly, *Hartz* affirms that political expression will be allowed in any place that opens itself to the public, and may not be unduly restricted by private owners of quasi-public spaces such as shopping malls. Where local sensibilities come into play, however, especially regarding issues that impact upon local conceptions of morality, *Schad* may foreshadow a slight retreat from an expansive view of expressive rights. Poritz' initial decisions, *J.G.* and *PBA Local*, may indicate that the Court will be more comfortable in importing federal standards wholesale, which may indicate an implicit dissatisfaction with the "supplemental" approach, especially where the national precedent seems to be moving in a more conservative direction.¹⁶⁹

The cases also reveal a slight reluctance developing to let plaintiffs proceed without hindrance to their claims. *Wanetick* may represent a more favorable understanding of the position of defendants, especially in the face of potentially large judgments. Overall, however, this reluctance has not borne much fruit. The precedents of *Blakey*, *Mancuso* and the CEPA cases will likely endure. Further, as in *F.G.*, the Court has clearly endorsed new causes of action in the interest of fairness and the recognition of changing standards of culpable behavior.¹⁷⁰

¹⁶⁸ See generally Mulcahey, *supra* note 7, at 867-71 (noting New Jersey courts afford broader rights to individuals in search and seizure cases, as well as providing more protection to victims in rape cases). *But cf.* Folster, *supra* note 21, at 1541 (concluding New Jersey Supreme Court does not always rely on state constitutional guarantees and adding "there have certainly not been many shining examples of independent state constitutional adjudication from the New Jersey Supreme Court").

¹⁶⁹ See Scott Carbone, Note, *The Unreasonable Expectation of Privacy: The "New" New Jersey Supreme Court Reevaluates State Constitutional Protections*, 30 SETON HALL L. REV. 361, 388 (1999) (discussing New Jersey Supreme Court's potential for transition to conservative path due to departure of more activist justices).

¹⁷⁰ One question that deserves some additional attention as the Poritz Court further develops its jurisprudence is whether these Justices will speak, as Suzanna Sherry characterized it in an article on Justice O'Connor, in a particularly "feminine voice." See Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 605-10 (1986) (discussing Justice O'Connor's feminine perspective in

emphasizing community, virtue, and contextual approaches to certain legal issues). While the Court has always been seen as sensitive to the rights of women, it had its first woman Justice only in 1982, when Justice Garibaldi joined the bench. Now there are three, Justices Long and LaVecchia in addition to the Chief Justice.

While studies concentrating on individual female judges have illuminated their approaches to state constitutional interpretation, a definitive analysis of a feminine voice in state supreme courts has not emerged. See Linda B. Martarese, *Other Voices: The Role of Durham, Kaye, and Abramson in Shaping the 'New Judicial Federalism'*, 2 EMERGING ISSUES IN STATE CONST. LAW 238 (1989).

A rigorous, empirical inquiry therefore might have interesting results in this debate, as predictions on how a female justice might vote may differ from the reality. For example, in *Konzelman v. Konzelman*, 729 A.2d 7, 17 (N.J. 1999). Chief Justice Poritz and Justice Garibaldi voted with the majority in affirming a decision upholding cohabitation clauses in divorce settlements. Justice O'Hern and Justice Stein, in a vigorous dissent, characterized the majority's holding as "turn[ing] back the clock on years of efforts to improve the economic and social status of divorced women." *Id.* at 17. Such provisions may have the effect, the dissent charged, of inappropriate inquiry into the private lives of divorced women, and ignoring their real economic needs. Applying a feminist methodology to the New Jersey Supreme Court's opinions, therefore, may shed additional light on the scholarship of the "feminine voice" in the state court context.