THE NEW JERSEY EXPERIENCE: ACCOMMODATING THE SEPARATION BETWEEN THE LEGISLATURE AND THE JUDICIARY

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Recently, I had the honor to deliver the 1992 Arthur T. Vanderbilt Lecture. Although I knew about Arthur T. Vanderbilt's outstanding accomplishments as Dean of New York University School of Law, as the architect of our current judiciary, and as the Chief Justice of the New Jersey Supreme Court, it was not until I began to work on this address that I realized what a truly superb jurist he was. Like Chief Justice Marshall in *Marbury v. Madison*,[1] Vanderbilt had the foresight to establish the court's right to define its powers early in the life of New Jersey's new constitution. He did so in lucid and short opinions, written in record-breaking time. For example, *Winberry v. Salisbury*,[2] his landmark decision on the court's power, was argued on June 19, 1950, and his opinion was issued on June 27, eight days later.

The doctrine of separation of powers is a fundamental principle of American government. Our founding fathers were familiar with the writings of Locke, Montesquieu and Blackstone, which suggested the theory of separation of powers among varied branches of government. The doctrine, however, did not arise from, nor was it recognized as part of, English common law.[3]

Instead, as Holdsworth in his *History of English Law* informs us, the separation-of-powers doctrine arose from the long struggle of Englishmen against royal tyranny, which ultimately led to

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I would like to acknowledge Patrick DeAlmeida, Esq., my law clerk during the 1991-1992 court term, for his assistance with this article.

1 5 U.S. (1 Cranch) 137 (1803).

2 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950).

3 Max Radin, *The Doctrine of the Separation of Powers in Seventeenth Century Controversies*, 86 U. PA. L. REV. 842, 843 (1938).

the king's recognition of parliament's supremacy over matters of legislation and taxation, and of the judiciary's independence from both the king and parliament.[4] In this country, the rise of the doctrine was fueled by conflicts between the early Americans, the royal Governors and the English Board of Trade.[5]

When our federal Constitution was drafted, the doctrine as applied in England was quite inflexible, with strict barriers between the monarchy and parliament. Perhaps because we were a new country, or perhaps as a reflection of colonial distaste for the concentration of power at the expense of individual liberty and security, the concept of rigid definitions of the branches' powers was rejected by the framers of the American Constitution.

James Madison, the architect of our concept of separation of powers, defined the doctrine's meaning for the founding fathers in The Federalist Papers. From the beginning, Madison recognized that the separation-of-powers doctrine does not require an absolute division of powers among the three branches of government. He maintained that separation of powers did not intend that the branches of government:

> 'ought to have no *partial agency* in, or no control over, the acts of each other,' but rather that
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> > where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.
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> The evil is '[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many.' Such an accumulation, said Madison, 'may justly be pronounced the very definition of tyranny.'[6]

Or, as Lord Acton so aptly stated: "Power tends to corrupt and absolute power corrupts absolutely."[7]

Thus, the separation-of-powers doctrine evolved in this country not as an end in itself, but as a general principle to maintain the

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[4] Mulhearn v. Federal Shipbuilding and Dry Dock Co., 2 N.J. 356, 363, 66 A.2d 726, 729-30 (1949) (citing Sir William Searle Holdsworth, 10 HISTORY OF ENGLISH LAW 713-24).

[5] *Id.*

[6] Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 536-37 (1974) (emphasis in original) (quoting THE FEDERALIST No. 48, at 308 (James Madison) (H. Lodge ed., 1888); THE FEDERALIST No. 47, at 301-02 (James Madison) (H. Lodge ed., 1888)).

[7] First Baron John Emerich Acton, *Letter to Bishop Mandell Creighton* April 5, 1887, *reprinted in* Lord Acton, ESSAYS ON FREEDOM AND POWER 364 (1949).

balance between the three branches of government, to preserve their respective independence and integrity, and to prevent the concentration of unchecked power in the hands of any one branch. While the system has developed in many ways that Madison could not have foreseen, it has continued to function as he envisioned it would: as a network of checks and counter-checks within a representative government.

Interestingly, the Constitution of the United States does not explicitly provide for a separation of powers. Instead, by setting forth the establishment of the three branches of government and delegating to them their respective powers, it implies the doctrine. Unlike the federal Constitution, however, the New Jersey Constitution specifically provides for the separation of powers among the branches of government.[8]

The separation-of-powers article first appeared in substantially its present form in the New Jersey Constitution of 1844. Under the prior constitution of 1776, the doctrine of separation of powers was completely ignored. The Governor served as President of the Council, the upper house of the legislature, and as Chancellor and Ordinary, or Surrogate General. The Governor and the Council constituted the Court of Appeals of Last Resort, and the legislature elected the Governor annually, as well as the justices of the supreme court and the judges of the Court of Common Pleas.[9] Historians claim that the 1844 constitution was drafted "to remedy the fundamental defects of the constitution of 1776, which was hastily framed and adopted within nine days under revolutionary pressure."[10]

Despite the explicit constitutional language concerning the separation of powers in our state, we have always recognized that the doctrine does not require an absolute division of powers, but a cooperative accommodation among the three branches of government. The doctrine's aim is not to prevent such cooperative action, but to guarantee a system in which one branch cannot accumulate undue authority. The separation-of-powers doctrine under the 1947 New Jersey Constitution was first addressed by Chief Justice

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8 Article III, paragraph 1 of the New Jersey Constitution reads:
The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.

9 *Mulhearn*, 2 N.J. at 362-63, 66 A.2d at 729.

10 *See id.* at 362, 66 A.2d at 729.

Vanderbilt in three cases: *Massett Building Company v. Bennett*,[11] *Mulhearn v. Federal Shipbuilding and Dry Dock Company*,[12] and, the most famous of the three, the landmark *Winberry v. Salisbury*.[13]

Chief Justice Vanderbilt recognized early that a rigid and inflexible classification of the branches of government into mutually-exclusive, water-tight compartments would, and I quote from his opinion in *Massett*, "render government unworkable."[14] In that case, Chief Justice Vanderbilt, writing for the court, held that a statute relating to judicial investigations of county and municipal affairs did not violate the separation-of-powers provision of the New Jersey Constitution.[15]

In *Mulhearn*, the issue was whether the adjudicatory functions of the Division of Workmen's Compensation in the executive branch were the work of an "inferior court" under the constitution, giving the state supreme court power to review its judgments directly by certification.[16] The Vanderbilt court held that the Division of Workmen's Compensation was not a court but an administrative tribunal within a department that was a component part of the executive branch.[17] Accordingly, the court was without jurisdiction to grant certification. As expressed by Chief Justice Vanderbilt:

> [The defendant's] failure to comprehend that administrative adjudication is not judicial springs from the erroneous notion that all adjudication is judicial. That is not so and never has been so. . . . Once the obvious right of the Governor and the Legislature, each to adjudicate within his or its own proper sphere, is recognized and it is conceded that the courts are not the exclusive instrumentalities for adjudication, the true nature of the administrative adjudications, commonly termed '*quasi*-judicial,' becomes apparent. This term serves to characterize not the quality of the adjudication but its origin outside the judicial branch of government.[18]

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[11] 4 N.J. 53, 71 A.2d 327 (1950).

[12] 2 N.J. 356, 66 A.2d 726 (1949).

[13] 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950).

[14] *Massett*, 4 N.J. at 57, 71 A.2d at 329.

[15] The court in *Massett* examined N.J. STAT. ANN. § 40:6-1, which related to investigations of municipal and county expenditures. *Id.* at 56, 71 A.2d at 329. That statute has since been repealed by the legislature.

[16] Article VI, section V, paragraph 1 of the New Jersey Constitution reads:

> Appeals may be taken to the Supreme Court:
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> (d) On certification by the Supreme Court to the Superior Court and, where provided by rules of the Supreme Court, to the County Courts and the inferior courts. . . .

[17] *Mulhearn*, 2 N.J. at 365, 66 A.2d at 731.

[18] *Id.* at 364, 365, 66 A.2d at 730.

The most important decision for the judiciary, and I would hasten to add for attorneys, was Chief Justice Vanderbilt's opinion in *Winberry*. Although the controversy in *Winberry* was limited to defining the scope of the New Jersey Supreme Court's rule-making power, the opinion laid the groundwork on which the court, through subsequent decisions, delineated its position with respect to the two other branches of government.

In *Winberry*, the court addressed a conflict between a court rule and a statute dealing with the time to appeal, a subject clearly involving the practice and procedure in all state courts.[19] To resolve the issue, the court had to interpret the nature and extent of the judicial power under article VI, section 2, paragraph 3 of the constitution. Although the 1844 constitution contained a separation-of-powers clause, it was not until the 1947 constitution that article VI, section 2, paragraph 3 gave the supreme court the authority to make rules governing the administration of the judicial system.

Article VI, section 2, paragraph 3 provides:

> The Supreme Court shall make rules governing the administration of all courts in the State and subject to law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

Specifically, in *Winberry*, the issue was whether "subject to law" allowed the legislature to override all the rules of the court, even those dealing with the court's own rules and procedures. Chief Justice Vanderbilt held that complete power and responsibility in the judiciary are concepts inconsistent with the notions of overriding legislation. He realized that if the legislature could overrule the courts in some of their essential operations, the judiciary "instead of being one of the three coordinate branches of the State Government, would have been rendered subservient to the legislature in a fashion never contemplated by any."[20]

So the Vanderbilt court interpreted the phrase "subject to law" to refer to laws "substantive in content" that define our rights and duties, but not to refer to the court's exclusive powers of rule-making with respect to practice and procedure, the administration of the courts and the professional conduct of members of the bench and bar.[21]

Justice Handler, in his 1981 opinion in *Knight v. City of Mar-*

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19 *Winberry*, 5 N.J. at 243, 74 A.2d at 408.
20 *Id.* at 247, 74 A.2d at 410.
21 *Id.* at 247-48, 74 A.2d at 410.

gate,[22] sets forth the court's current view on accommodating separation between the legislative and judicial branches. Indeed, *Knight* is a good illustration of how far the supreme court will go to accommodate the legislature when it is dealing with matters directly concerning that branch's legitimate governmental interest and that do not unduly intrude on the judiciary's authority.

Knight evaluated the constitutionality of the legislature's 1980 amendment to the New Jersey Conflicts of Interest Law,[23] which prohibited certain public officials, including members of the judiciary, from dealings or relationships with casinos.[24]

The statute was challenged on the grounds that the New Jersey Constitution precluded the legislature from enacting any laws purporting to govern the ethical conduct of members of the judiciary or persons admitted to the practice of law.[25]

Justice Handler, writing for the majority, immediately affirmed the supreme court's extensive constitutional powers. Relying on *Winberry*, the Justice noted that: "The Court's authority with respect to the administration of the courts is far-reaching; it encompasses the entire judicial structure and necessarily covers all aspects and incidents related to the justice system."[26] The same holds true of the court's power over the conduct of the members of the bar and bench.

Thus, the question squarely presented was whether such legislative actions could be accommodated with the state supreme court's preeminent, exclusive and extensive constitutional powers. We held that it could be so accommodated.

The court reiterated its belief that "[t]he constitutional doctrine of the separation of powers denotes not only independence but also interdependence among the branches of government."[27] Separa-

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22 86 N.J. 374, 431 A.2d 833 (1981).

23 The New Jersey Conflicts of Interest Law, N.J. STAT. ANN. § 52:13D-12 (West 1986), was made applicable to the New Jersey Casino Control Commission, the Division of Gaming Enforcement and all employees of both agencies by the legislature through enactment of N.J. STAT. ANN. § 5:12-59 (West 1988).

The legislature, through enactment of N.J. STAT. ANN. § 5:12-59(b) (West 1988), also required the Casino Control Commission to adopt a code of ethics modeled on the judicial code of ethics of the New Jersey Supreme Court.

As a result, dealings between those employees and casino operators were strictly limited.

24 In 1980, the Legislature amended the Conflicts of Interest Law to include all members of the judiciary in its limitation on dealings with casino operators.

25 *Knight*, 86 N.J. at 386, 431 A.2d at 839.

26 *Id.* at 387, 431 A.2d at 839-40 (citing Winberry v. Salisbury, 5 N.J. 240, *cert. denied*, 340 U.S. 877 (1950)).

27 *Id.* at 388, 431 A.2d at 840.

tion of powers contemplates that the several branches will cooperate so that government will succeed in its mission. Indeed, as Justice Handler so elegantly phrased it, "[i]nevitably some osmosis occurs when the branches of government touch one another; the powers of one branch sometimes take on the hue and characteristics of the powers of the others."[28]

The constitutional validity of a coordinate branch's action turns on the legitimacy of the action's underlying purpose and the nature and extent of its encroachment on judicial prerogatives and interests. In assessing whether the legislature's actions pose an unbridgeable conflict, the question is considered not with "a jealous or begrudging evaluation by the Court of comparative judicial and legislative interests, but a realistic and fraternal appreciation of the profound concern of the legislature, an equal branch of government. . . ."[29] Finding that the goals and prohibitions of the conflict of interest law were substantially similar to the goals and spirit of the court's ethical rules, the *Knight* court held that the legislature had not interfered with the supreme court's administration or regulation of the judiciary or the legal profession.

The widely-repeated term "separation of powers" is misleading. The system is more accurately described as one of "separated institutions sharing powers." At times, the result is a seemingly confused, rather than a neat, political system. All the branches of government in New Jersey realize, however, that an absolute division of powers would not serve the public well.

Initially in New Jersey separation-of-power questions concerning the relationship between the legislative and judicial branches arose in two kinds of cases: those that focused on the power of the legislature to make laws that interfered with judicial authority, *Winberry* and *Knight* being the two best examples, and those where, as Justice Handler stated in *Knight*, the nature of the governmental power in question "defies exact placement or neat categorization [and where] it may not always be possible to identify a subject as belonging exclusively to a particular branch."[30] In *State v. Leonardis I*[31] and *State v. Leonardis II*,[32] the issue was whether the pretrial intervention program[33] created by court rules belonged in the judicial

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28 *Id.*

29 *Id.* at 392, 431 A.2d at 842.

30 *Id.* at 389, 431 A.2d at 840.

31 71 N.J. 85, 363 A.2d 321 (1976).

32 73 N.J. 360, 375 A.2d 607 (1977).

33 The pretrial intervention (PTI) program was created by court rules as a procedural alternative to the traditional system of prosecuting and incarcerating crimi-

or legislative branch. In *In re: Salaries for Probation Officers of Bergen County*[34] and *Passaic County Probation Officers' Ass'n v. County of Passaic*,[35] the issue was whether the legislature, the judiciary, or both branches had authority over public employees, such as probation officers, whose duties are an integral part of the judicial system.

More recently, however, the focus of the separation-of-powers debate has shifted from such turf battles and concerns about the legislature trespassing on the judiciary's prerogatives to questions of whether the judicial branch is trespassing on the legislature's authority. Instead of whether the court has the power to intervene to invalidate governmental action, the issue has become whether the court can compel the other branches of government to act, and if they fail to do so, whether the court may act on its own accord.

Concern about the dangers of "judicial activism" or "judicial legislation," however, are not new. Indeed, there probably never has been a period in American history when judicial decisions were not challenged as exceeding legal authority and intruding on the power of the legislature.

It is important to recognize that *within this governmental check and balance system* there is also the public's capacity to trigger checks and balances. We all know that individuals and groups, aggrieved by one branch's interpretation of the Constitution or a law, may mobilize and use their access to another branch to frustrate or reverse policies they do not like or to reinforce those that they do. A clear example in New Jersey is seen in the area of charitable immunity. In 1958, after a trilogy of decisions abrogating common law charitable

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nal suspects. *Leonardis I*, 71 N.J. at 92, 363 A.2d at 324-25. The program avoids trial of criminal defendants where full-scale "prosecution would be counterproductive, ineffective or unwarranted." *Id.* at 89, 363 A.2d 323. Instead, defendants enter a rehabilitative program, and on successful completion, the government abandons prosecution of the underlying charges. Admission into the programs is conditioned on approval of the prosecutor. *Id.* at 113, 363 A.2d at 336.

In *Leonardis I*, the court held that the judicial power to create such a program through rulemaking was accompanied by an implied power to review the operation and procedures of the program as well as any legal determinations it produces. *Id.* at 109, 363 A.2d at 333-34.

In *Leonardis II*, the court held that the administration of PTI programs was not a judicial encroachment on the legislative power to fix punishment for criminal activity. *Leonardis II*, 73 N.J. at 372, 375 A.2d at 613.

[34] 58 N.J. 422, 278 A.2d 417 (1971) (holding that statute permitting judges to appoint probation officers and to fix their salaries does not violate separation-of-powers doctrine).

[35] 73 N.J. 247, 374 A.2d 449 (1977) (holding that probation officers serve as an integral part of the court system and necessarily come within the supervision and regulation of the judicial branch).

immunity,[36] the charities prevailed on the legislature to pass a statute reinstating such immunity within three months of the court's decisions.[37]

Groups not only seek access to the legislature, however, to redress their grievances against the court; they also seek access to the courts to address their grievances against the legislature. Indeed, recourse to the courts may be the most practical avenue open to a group lacking numbers, prestige or money, or to similarly-situated individuals who seek either to challenge legislative or executive action or to establish new constitutional rights.[38]

There is little doubt that over the past twenty years people have increasingly turned to the courts for individual and social justice. Laws creating new causes of action in the environmental field, in the areas of civil rights and consumer rights, to name a few, have increased at a geometric rate and permeate all aspects of society. All these developments impact on the justice system, the public and the media's perception of the judiciary, and raise the fear of judicial activism.

A realistic appraisal of the judiciary's authority, however, discloses several significant limitations on its alleged ability to legislate. First and foremost, judges are not self-starters. We do not initiate action. We must wait for an actual dispute between genuinely-adverse parties who have standing to bring an issue before a court. Moreover, once a dispute is brought before a court, the court may only address the issues as presented in that case. Unlike the legislature, we are constricted in our fact-finding to the evidence provided by the parties in the case before us. Moreover, we have little control over our agenda. Courts simply cannot decline to hear cases properly brought before them. Even at the appellate level, many courts may exercise little influence over what subject matters reach their docket.[39]

Second, although our opinions may carry influence as precedent, their immediate reach is circumscribed. Unlike a statute, our

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[36] *See* Dalton v. St. Luke's Catholic Church, 27 N.J. 22, 141 A.2d 273 (1958); Collopy v. Newark Eye and Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958); Benton v. Young Men's Christian Ass'n of Westfield, 27 N.J. 67, 141 A.2d 298 (1958).

[37] *See* N.J. STAT. ANN. § 2A:53A-7 (West 1987).

[38] For a thorough discussion of the ability of interest groups to trigger action within a governmental system based on the separation of powers, *see* WALTER F. MURPHY, JAMES E. FLEMING AND WILLIAM F. HARRIS, II, AMERICAN CONSTITUTIONAL INTERPRETATION 52-54 (1986).

[39] *See generally* G. Alan Tarr and Russell S. Harrison, *Legitimacy and Capacity in State Supreme Court Policymaking: The New Jersey Court and Exclusionary Zoning*, 15 RUTGERS L.J. 513, 543 (1984).

decision only binds the parties before the court. For instance, even the landmark decision of *Brown v. Board of Education*[40] held only that school segregation in Topeka, Kansas was unconstitutional. It did not require the officials of other boards of education to desegregate their schools.

Third, courts are limited in the number and kinds of remedies they may fashion. Although we can declare a statute unconstitutional, we cannot compel the legislature to enact a new law or compel the Executive to prosecute those who violate a law. Although we may invalidate a statute for failure to protect the rights of minorities, we cannot directly compel the other branches to enact a law that protects a particular class of citizens. Additionally, we must rely on the executive to enforce our judgments.[41]

Without the power of the purse or the ability to appeal directly to the people (as the other branches can), the real effect of our decisions on the populace is narrow. Thus, the contours of judicial practice are designed to create a formidable barrier against the judicial branch trespassing on the legislature's power.

As Chief Justice Weintraub accurately recognized, however, courts make decisional law every time they adjudicate a case. They may fill gaps in existing statutes and previous decisions. Many of the cases concern the interpretation of new statutes or create new statutory cause of actions, thus permitting the judiciary to craft the foundation for an entire area of law. In such situations, it is a court that may issue the first public pronouncement of how a person's rights are affected by a new law. It is, however, the legislature's intent that is being interpreted, not that of the courts — a point often missed by those who rally against judicial activism.

What is not so readily understood is that the legislature and the judiciary together make law and the legislature often relies on courts to amplify, elaborate upon and, indeed, at times to create the law.

Lawmaking is, to an extent, a continuum. Regardless of whether the judicial or legislative branch undertakes the task, there is a functional bridge between the legislative enactment and the judicial interpretation and application of statutes. In making law, the legislature is guided by the precedent of the decisional law, as well as by political concerns. Indeed, in adopting the Uniform Commercial Code or the model penal statute, the legislature looked to the

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40 347 U.S. 483 (1954).

41 For a discussion of the limits on judicial lawmaking power, see Charles D. Breitel, *Lawmakers*, 65 COLUM. L. REV. 749 (1965).

decisional and statutory laws for precedent, consistency, the effect on policy factors and, of course, the reasonable expectations of the community.[42]

It is also clear that the legislature, bolstered by the common law tradition of the evolution of the law by the courts, often drafts statutes in broad terms, intentionally leaving to the courts, and increasingly to the executive branch, the obligation to fill in statutory gaps.[43]

In New Jersey, however, the most significant method for passing lawmaking responsibilities on to the courts has been the legislature's simple failure to act.[44] The stalemate sometimes results from deadlock, the inability to reach a consensus on the issue, the fear of political repercussions or simply the inability to resolve an extraordinarily difficult issue facing society.

In 1985, in his address to this august body, Justice Handler defined a hard case as one in which existing law is inadequate and that requires creative and novel reasoning, albeit grounded on sound legal principles, to reach a sound disposition.[45] Cases without precedent propel the law toward new horizons. These cases invariably involve issues of social policy or public morality. Understandably, in these areas the legislature may find it difficult to act. It is, therefore, not surprising that in deciding these hard cases, the courts are perceived to have ventured beyond their appropriate jurisdictional role and to have engaged in legislating. Those who think so, however, do not recognize that the legislature has failed to act and that the court has been presented with a case that it is constitutionally obligated to resolve.

The right-to-die cases demonstrate such an area of law. In each of the right-to-die opinions, *Quinlan*,[46] *Conroy*,[47] *Jobes*,[48] *Farrell*,[49] and

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42 *Id.* at 760.

43 *Id.* at 761.

44 *See id.* at 762.

45 The contents of Justice Handler's address to the Harvard Law School Association of New Jersey on November 21, 1985 were adapted into an article, *Jurisprudence and Prudential Justice*, which appears at 16 SETON HALL L. REV. 571 (1986).

46 In re Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied sub nom*, Garger v. New Jersey, 429 U.S. 922 (1976) (holding that individuals in persistent, vegetative or comatose state with no reasonable prospect of recovery have right to terminate extraordinary, life-saving measures administered to them).

47 In re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985) (holding that elderly, institutionalized patients with serious and permanent mental and physical impairments who are expected to live less than one year even with treatment have right to terminate non-extraordinary, life-sustaining treatment administered to them).

48 In re Jobes, 108 N.J. 394, 529 A.2d 434 (1987) (holding that non-elderly, institutionalized patients in a persistent vegetative state who have not previously

Peter,[50] the court repeatedly called on the other branches of government to resolve issues raising profound moral, social, religious, technological, philosophical and legal questions that presented themselves with increasing frequency. We stated time and again that the legislature was the proper branch of government to set guidelines in that area. But patients, their families and physicians, faced with these difficult and complex decisions and operating under threat of civil or criminal liability, had no legislative guidelines. Understandably, they turned to the courts for relief.

In response to the concerns expressed in our opinions, the legislature, in 1985, created the New Jersey Bioethics Commission. After numerous hearings ranging over a six-year period, the legislature passed the New Jersey Advance Directives for Health Care Act[51] in November, 1991. The legislation largely implemented the Commission's recommendations, which, in turn, had relied heavily on the court's right-to-die decisions.

Clearly, our prior decisions raised both the visibility of the issues involved and the public's consciousness of the novel problem. Without the court's prodding, resolution of the questions raised may never have been realized.

Other areas particularly fraught with danger for a legislator involve new constitutional rights, particularly rights not universally embraced by the public. A good example of such a situation, perhaps the best, is that presented by the questions addressed in the *Mount Laurel* trilogy.

The three *Mount Laurel* cases demonstrate the separateness, as well as the interdependence, of the governmental powers. In 1975, in *Mount Laurel I*,[52] the supreme court, aware of the legislative char-

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expressed an opinion regarding attitude towards treatment have right to terminate non-extraordinary, life-sustaining treatments administered to them).

49 In re Farrell, 108 N.J. 335, 529 A.2d 404 (1987) (holding that non-institutionalized, competent patients who are terminally ill and can express their wishes have right to terminate non-extraordinary, life-sustaining treatment administered to them).

50 In re Peter, 108 N.J. 365, 529 A.2d 419 (1987) (holding that institutionalized patients in persistent, vegetative state but who are not expected to die in the near future and who have expressed attitudes about treatment before incompetency have right to terminate non-extraordinary, life-sustaining treatments administered to them).

51 N.J. STAT. ANN. § 26:2H-53 (West 1987).

52 Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975) (holding that state constitution forbids developing municipalities from foreclosing through zoning regulation the realistic opportunity to construct low-income and moderate-income housing units).

acter of the issues to be resolved, explicitly afforded the coordinating branches the opportunity to address the problem. No action was taken, compelling the court eight years later in *Mount Laurel II*[53] to fashion a remedial program to effectuate the constitutional obligation to provide the opportunity to build affordable housing. From the outset, Chief Justice Wilentz, writing for the court, recognized that the issues being addressed were far more amenable to legislative and executive attention than to judicial action. As Chief Justice Wilentz wrote:

> [A] brief reminder of the judicial role in this sensitive area is appropriate, since powerful reasons suggest, and we agree, that the matter is better left to the Legislature. . . . [But] while we always have preferred legislative to judicial action in this field, we shall continue — until the Legislature acts — to do our best to uphold the constitutional obligation that underlies the *Mount Laurel* doctrine. That is our duty. We may not build houses, but we do enforce the Constitution.[54]

Importantly, we signalled our clear intention to abate our role in the area if the other branches of government took sufficient steps toward fulfilling the constitutional mandate articulated in *Mount Laurel I.*

Mount Laurel II demonstrates both the effective role the court can play and its limitations. As the Chief Justice stated with respect to our limitations, we cannot build houses. Without people pushing the other branches to act, the effectiveness of our remedies remains questionable. We can, however, place an issue at the front of the state's political agenda. No one doubts that, but for the *Mount Laurel II* decision, the New Jersey Fair Housing Act[55] would not have been enacted. The court was the legislature's catalyst.

The court gave the other branches not only an incentive to act — the desire to remove the judiciary from the field of affordable housing — but also gave the legislature cover to help it avoid political flack: "I don't want to do this, but the court made me."

In *Mount Laurel III*,[56] we kept the promise articulated in *Mount Laurel II* and momentarily withdrew from the field when the legislature acted. As the Chief Justice so eloquently stated:

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53 Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (reaffirming the holding of *Mount Laurel I* and establishing judicially-imposed remedies to carry out its mandate).

54 *Id.* at 212-13, 456 A.2d at 417.

55 N.J. STAT. ANN. §§ 52:27D-301 to -309 (West 1986).

56 The Hills Development Co. v. Township of Bernards, 103 N.J. 1, 510 A.2d 621 (1986).

> By virtue of the [New Jersey Fair Housing] Act, the three branches of government in New Jersey are now committed to a common goal. . . . This kind of response, one that would permit us to withdraw from this field, is what this Court has always wanted and sought. It is potentially far better for the State and for its lower income citizens.[57]

As one commentator has noted:

> If it was not clear before, *Mount Laurel III* leaves no doubt that the court's attempt in *Mount Laurel II* to implement the constitutional obligation never was intended to usurp the responsibilities of the political branches. Indeed, the preferability of the legislative and executive solution is reiterated no fewer than ten times throughout *Mount Laurel III*.[58]

The *Mount Laurel* trilogy and the right-to-die cases involve a mix of individual and societal rights. They address not only the particular parties to the action but community and societal interests as well. Ultimately, they can only be resolved by intergovernmental responsibility, initiative and cooperation. The cases show, however, how the judiciary can serve as a spark for both legal and social change.

In contemporary jurisprudence, it is impossible to catalogue all the ways the judicial branch and the legislative branch accommodate each other. We know, however, that such accommodation takes place in many instances.

The enactment of the 1960 Evidence Act[59] and the court's interpretation of the statute to date is a good example of the continuous accommodation between the judicial and legislative branches. The Act's historical background is set forth in *State v. D.R.*,[60] a 1988 opinion. Briefly, as previously discussed, the 1947 constitution gave the judiciary rule-making power over "practice and procedure" in the courts but was otherwise silent on the power to adopt rules of evidence.

In *Busik v. Levine*,[61] Chief Justice Weintraub acknowledged the difficulty of classifying evidence as either "substance" or "procedure," conceding that both classifications are descriptive of different applications of the rules of evidence. That same conceptual difficulty in determining whether evidence was or was not within the judiciary's exclusive power to adopt rules of "procedure" led to an

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57 *Id.* at 63, 65, 510 A.2d at 654, 655.

58 Paula A. Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30, 50 (1988).

59 N.J. STAT. ANN. §§ 2A:84A-33 to 2A:84A-49 (West 1976).

60 109 N.J. 348, 374-75, 537 A.2d 667, 680-81 (1988).

61 63 N.J. 351, 307 A.2d 571, *appeal dismissed*, 414 U.S. 1106 (1973).

impasse between the branches of government in the late 1950s. During that period separate committees designated by the judiciary and the legislature studied proposed rules of evidence for New Jersey, but stalemated over which body had the power to adopt the rules.[62]

The deadlock was broken by the passage of the Evidence Act, which provided the mechanism for the adoption of additional rules. The rationale for the pragmatic compromise crafted by the Act was explained by Chief Justice Weintraub in *Busik*:

> The rules of evidence were adopted cooperatively by the three branches of government under the Evidence Act, 1960. . . after the Supreme Court and the Legislature conducted their separate studies. . . . Thus we did not pursue to a deadlock the question whether "evidence" was "procedural" and therefore. . . the sole province of the Supreme Court. Nor were we deterred by the specter of the criticism that, if "evidence" is "substantive," it was unseemly or worse for the Court to participate in the "wholesale" promulgation of substantive law. The single question was whether it made sense thus to provide for the administration of justice, and the answer being clear, we went ahead.[63]

The Evidence Act provided for the current statutory procedure for adopting new or revised evidence rules.[64]

The court, however, is not statutorily precluded from effecting change in the rules governing the admission of evidence. Rule 5 of the New Jersey Rules of Evidence provides that "[t]he adoption of these rules shall not bar the growth and development of the law of evidence in accordance with fundamental principles to the end that the truth may be fairly ascertained."

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62 Alexander D. Brooks, *Evidence*, 14 RUTGERS L. REV. 390, 391-92 (1960).

63 *Busik*, 63 N.J. at 367-68, 307 A.2d at 580 (footnote omitted).

64 As explained in *State v. D.R.*:

> Pursuant to the Evidence Act, 1960, the procedure for adopting new or revised rules requires that a draft of the proposed rule be entered on the agenda and discussed at a Judicial Conference . . . publicly announced by th[e] Court on "September 15 next" following the Judicial Conference and concurrently delivered to the President of the Senate, Speaker of the General Assembly, and the Governor. . . . Unless canceled by a joint resolution of the Senate and Assembly signed by the Governor, the proposed rule becomes effective on July 1 next following the rule's announcement by the Court. . . . In addition, th[e] Court may adopt or revise rules of evidence at any time, without presentation at a Judicial Conference, with the concurrence of the Senate and General Assembly reflected by a joint resolution adopted by those bodies and signed by the Governor.

State v. D.R., 109 N.J. at 375, 533 A.2d at 681.

Former Federal Judge Vincent P. Biunno, who was involved in the efforts that led to the Evidence Act, commented on the intended scope of Rule 5:

> This is not a rule of relaxation, and neither trial judges nor appellate courts are to so consider it. . . . There will be areas in which evidence law will continue to develop on a case-by-case decisional basis. . . . At the same time, it is not to be expected that the appellate courts will employ the decisional process on a case-by-case basis to modify the formal rules in the event it should seem that the applicable rules, as adopted, ought to be modified on the basis of experience or theory.[65]

In *State v. D.R.*, the court examined whether new rules concerning the admission of an out-of-court statement by the child victim of sexual abuse constituted a change that "ought to be modified on the basis of experience or theory" and hence modified pursuant to the statutory procedures set forth in the Evidence Act, 1960. We held that it was such a rule and it would be inappropriate for a fundamental change of that magnitude to be adopted solely by judicial decision. However, as Justice Stein, writing for the court, explained:

> We come to that conclusion not on the basis of constitutional power, but as a matter of comity, with due regard both to the complexity of the subject matter and for the cooperative mechanism that has been relied on in the past to promulgate New Jersey's Rules of Evidence.[66]

Examples of the interplay and accommodation between the legislative and judicial branch abound. Of course, sentencing authority has long been shared among all three branches of government. In *State v. Des Marets*,[67] we recognized that the mandatory-sentencing scheme established by the Graves Act[68] intruded on the judicial prerogative to suspend sentences in criminal actions, a power courts in New Jersey have exercised since 1846. Reasoning that mandatory sentences would be meaningless if a judge could suspend them, however, the court recognized the substantial public interest and clear legitimacy of the legislative power in this area and held its exercise of power constitutionally permissive in that instance.[69]

The court is most active when the legislature has not spoken, when in a sense we are the last resource available to aggrieved indi-

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65 *Id.* at 372-73, 537 A.2d at 679-80 (quoting N.J. R. EVID., Preliminary Comments at xvii-xviii (1987)).

66 *Id.* at 376, 537 A.2d at 681.

67 92 N.J. 62, 455 A.2d 1074 (1983).

68 N.J. STAT. ANN. 2C:43-6(c) (West 1982).

69 *Des Marets*, 92 N.J. at 80, 455 A.2d at 1083.

viduals. For example, in *Comite Organizador de Trabajadores Agricolas v. Molinelli*,[70] we had to define the rights and remedies available to migrant and seasonal Puerto Rican farm workers. There were no state or federal labor relations statutes governing such workers. Article I, paragraph 19 of the New Jersey Constitution[71] was the only source of protection they had. We used the state constitution to apply specific statutory protections not yet adopted by the federal or state legislatures.[72]

In contrast, when the legislature has spoken, particularly where the allocation of government money is the core of the dispute, the court gives great deference to it. The court is rightly hesitant to invalidate a legislative program before that program has had a chance to be tested. In *Barone v. Department of Human Services*,[73] the court upheld the eligibility provisions of the Pharmaceutical Assistance to the Aged and Disabled Act,[74] reaffirming the legislature's power to allocate the resources of the State. So long as the classifications chosen by the legislature rationally advance a legitimate governmental objective, the method need not be the fairest available nor the statutory scheme we would have selected. It is simply not for the courts to determine the best method of allocating State resources.

All of these cases demonstrate that the New Jersey experience remains one of continuous and fluid dialogue among all the branches of government in seeking an accommodation of their respective powers. History teaches us that democracy does not survive unless power is divided. This lesson was learned by the founding fathers of our nation and it has been followed in New Jersey by all three branches of government.

The New Jersey experience demonstrates that we have learned to accommodate the separation between the legislature and the judiciary and that both branches have worked together through the

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70 114 N.J. 87, 552 A.2d 1003 (1989).

71 Article I, paragraph 19 of the New Jersey Constitution reads:

> Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

72 *Comite Organizador*, 114 N.J. at 96, 552 A.2d at 1007-08 ("In the absence of . . . implementing legislation, we have held that [Article I, paragraph 19] is self-executing and that the courts have both the power and obligation to enforce rights and remedies under this constitutional provision.").

73 107 N.J. 355, 526 A.2d 1055 (1987).

74 *See* N.J. STAT. ANN. §§ 30:4D-20 to -35 (West 1981).

years to provide one of the best legal systems in the nation for the people of New Jersey — a legacy of which Arthur T. Vanderbilt justly can be proud.