NEW JERSEY LAWYER

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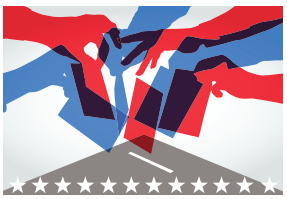

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DEPARTMENTS

JERALYN L. LAWRENCE

Let's Work Together to Navigate Our Professional Responsibilities

Ethics and professional responsibility are key underpinnings of the legal profession.

I recently had the pleasure of welcoming the newest 1L students at the state's law schools. At each orientation ceremony, I had the opportunity to share with them thoughts on the significance of becoming an attorney and that being a lawyer means being held to a higher standard. Our knowledge and skills are special—we have a unique set of tools and we must do everything we can to ensure the public, who turns to us for help, has faith that we will handle their matters with skill and a high level of attention to ethical guidelines.

These qualities and set of principles are at the heart of the justice system. As the New Jersey Commission on Professionalism in the Law puts it: "The conduct of lawyers and judges should be characterized at all times by professional integrity, personal courtesy and absence of bias in the fullest sense of those terms."

The NJSBA knows how important these ideals are and also knows that sometimes it is necessary to get some help with practice-related issues, such as trust accounting and other topics that aren't necessarily taught in law school. That's why we have devoted considerable *amicus* efforts on these topics and created resources, including continuing legal education programs, free member webinars from PracticeHQ and a new online resource center with information gathered from around the legal community that can be found at njsba.com.

We have seen firsthand how disastrous it can be for attorneys who end up facing ethics violations because they didn't understand or follow the rules for handling client funds. In New Jersey, any activity found to be knowing misappropriation leads to disbarment. While it is certainly appropriate when attorneys knowingly steal from clients, that level of punishment is sometimes imposed in cases where arguably any misappropriation was due to inattentive, sloppy or negligent recordkeeping—or even by simply making mistakes with client funds. Those were the kinds of issues at the center of two recent cases, *In the Matter of Dionne Larrel Wade An Attorney at Law* and *In the Matter of Joseph Cicala*. Both of these attorneys have been disbarred.

In New Jersey, any activity found to be knowing misappropriation leads to disbarment. While it is certainly appropriate when attorneys knowingly steal from clients, that level of punishment is sometimes imposed in cases where arguably any misappropriation was due to inattentive, sloppy or negligent recordkeeping—or even by simply making mistakes with client funds.

The duration of disbarment is now being studied and the Association is actively advocating for a change to the rules to allow a path to reinstatement, as is the practice in almost every other state in the country.

Here is some critical advice to anyone who might be facing an ethics charge or a random audit:

Get a lawyer.

Immediately.

You must cooperate with the investigation or audit, but do not do it alone.

We are a profession of problem solvers. So it is our natural instinct to try to resolve a problem or issue with our practice on

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FROM THE SPECIAL EDITORS

1947 Constitution Stands the Test of Time

By John C. Connell and Robert F. Williams

It does not seem like 25 years since the publication of our 1997 special *New Jersey Lawyer* issue commemorating the 50th anniversary of our state constitution. But 2022 does mark the 75th anniversary of that fundamental document.

We believe that our 1947 Constitution has stood the test of time. It has been improved through some important amendments, a few of which are covered in this issue. Further, its existing provisions have continued to be interpreted by our New Jersey Supreme Court as new issues arise. We cover some of those matters as well.

Much has changed, however, in the last quarter century of American state constitutional law. There is a much greater awareness by the public, interest groups, politicians, judges, and lawyers of state constitutions and their interpretation by state supreme courts than there was in 1997. Some of this is attributable to the hot-button marriage equality movement, which stimulated controversial constitutional amendment referenda and state supreme decisions leading up to the United States Supreme Court's definitive ruling. More recently, that Court's abortion decision "returning the matter to the states" has cast a very bright spotlight on state constitutions.

In this edition, we are privileged to offer erudite commentary by some of the leading legal practitioners in New Jersey on matters relating to our state constitution. We begin with New Jersey Chief Justice Stuart Rabner discussing what makes for a persuasive oral argument, particularly before the Supreme Court, with his tips for appellate advocacy. Next is Linda Wharton, who explains the bedrock importance of our state constitution in protecting women's reproductive health choices. Anthony Fassano and John C. Connell summarize the historical context of New Jersey's constitutional amendment legalizing cannabis use as well as its confrontation

JOHN C. CONNELL *is a shareholder/partner at Archer & Greiner, P.C., and a member of its Business and Government Litigation, Civil Rights, Media, and Appellate Advocacy practice groups. He has extensive experience in constitutional law matters.*

ROBERT F. WILLIAMS *is Distinguished Professor of Law Emeritus at Rutgers University School of Law, Camden, and Director of the Center for State Constitutional Studies. He has taught state constitutional law, and is a co-author of the textbook* The New Jersey State Constitution (3rd edition), *which offers a comprehensive history of the constitution and an analysis of its articles.*

with potential federal enforcement.

Bruce Rosen and Brittany Burns recount the development of free speech rights on private property uniquely founded on state constitutional principles. Robert F. Williams offers a reprint of his 1997 article, "From Ridicule to Respect" with an updated epilogue, echoing the continuing vitality of state constitutional jurisprudence. Connell catalogues each of our state constitutional amendments over the last 25 years, covering policy as well as governance issues.

Edward Hartnett offers a clarion exegesis of the legal complexities of redistricting under our state constitutional requisites. Alan Zegas tracks the case law developing in the wake of our groundbreaking constitutional amendment concerning bail reform. Hon. Gary K. Wolinetz and Bruce D. Greenberg explore the somewhat shifting sands of the right to a jury trial under the New Jersey Constitution. Ronald Chen acts as a scholarly guide through the murky constitutional morass of the intersection of actions in lieu of prerogatives writs and administrative actions.

Hon. Peter Buchsbaum draws on his considerable expertise to highlight the growth of the *Mt. Laurel* doctrine required under the New Jersey Constitution. Then, Steve Richman takes a completely different tack, treating not an existing state constitutional provision, but exploring the possibility of a new amendment concerning firearms regulation premised on state constitutional guarantees of public safety, a proposal that should be keenly noted by our New Jersey Legislature.

Finally, Judge Buchsbaum highlights a resource for lawyers, political figures, and the general public with a review of "New Jersey State Constitution," a book that provides a look at the state constitution's origin story, its evolution, and an analysis of its impact.

Our state constitution is the highest form of law in our state. It affects a wide range of our citizens' and clients' activities—many more than the federal Constitution. It is actually fairly accessible for our clients and ourselves. Yet it remains much less understood than the federal document. We will continue to address this paradox in these pages. ■

President's Perspective

Continued from page 5

our own. The reflex to try to explain the way through it is ingrained in us. Don't do it. Remember—this, like any part of the legal system, is an adversarial process and you should absolutely retain counsel.

Doing so isn't a reflection of guilt or wrongdoing. We never encourage friends to represent themselves *pro se* in any matter, certainly one that could lead to the end of their livelihood. Rather, seeking counsel is the ethical approach to any ethics investigation. An attorney who handles these kinds of matters has a special expertise that most of us do not possess. Having an attorney can also help neutralize emotions in stressful interviews and document review sessions. Furthermore, an experienced practitioner can help make the entire process smoother, including for representatives of the ethics system.

My Putting Lawyers First Task Force is actively examining ways to improve the lives of lawyers, and that means gathering information concerning the ethics and fee arbitration systems. It is collecting information from NJSBA members regarding positive experiences with either system, as well as areas in which they can be improved. We would like to propose solutions and changes to areas in the law that need to be fixed.

Any member who has had involvement with them as a respondent, investigator, attorney for respondent, or in any other way, should share feedback with Task Force Chairs Matheu D. Nunn at MNunn@einhornlawyers.com, and Robin Bogan at rcb@pbfamlaw.com. ■

PRACTICE TIPS

WORKING WELL

De-Stress, Decompress and Recharge!

By Lori Ann Buza
NJSBA Lawyer Well-Being Committee Chair
KSBranigan Law

After a long day of practicing law—in the courtroom, conference room, or even Zoom room—it is essential we recharge for the next one! It starts with the ability to wind down and decompress. But how?

It is important we figure out our best way of obtaining solid rest days. Most attorneys bring their work home with them and continue to think about the stresses of their day long into the night and while trying to go to bed. Instead, try to "compartmentalize your stress" by packing it away in your metaphorical briefcase before winding down each evening—put the case outside your bedroom door! Understand that your "briefcase of stress" will be waiting for you when you wake. Give yourself permission to let go of the contents that weighs on you—just for the night. And every night!

Some tips for winding down and getting a good night's sleep:

- Pick the same bedtime each day (or as close as possible, including weekends).
- Avoid stimulants such as caffeine, alcohol, and sugar after 5 p.m. Indeed, those with an overall good diet reportedly have better sleep.
- Try to exercise each day because by the evening, your body will feel more tired. It's best to exercise in the morning, as late exercise can rev you up.
- Try to go on a leisurely walk after dinner. Breathe the fresh air outside.
- Shut off your TV, phone, or other screens for a few hours before bed to avoid the blue light, which can trigger your body into thinking it is daytime.
- Read or play soft music to relax. You may try to listen to "soundscapes" such as ocean sounds, waterfalls, and rain while going to bed.
- Meditate and/or do breathing exercises at bedtime. Try guided meditations while lying in bed that focus on softening the muscles of the body.
- Make sure your bed and pillows are comfortable and supportive, and keep the temperature in your room on the cooler side. Also, make sure you block out light whether with blackout blinds or curtains and/or wearing an eye mask.
- Feel grateful for the day you had. Write in your gratitude journal! Smile, close your eyes and drift into the peace you earned after that long hard day.

When you wake, you can retrieve your "briefcase of stress" outside your door, but now with a refreshed and recharged strength to lighten it. In time, that it should feel lighter and lighter! ■

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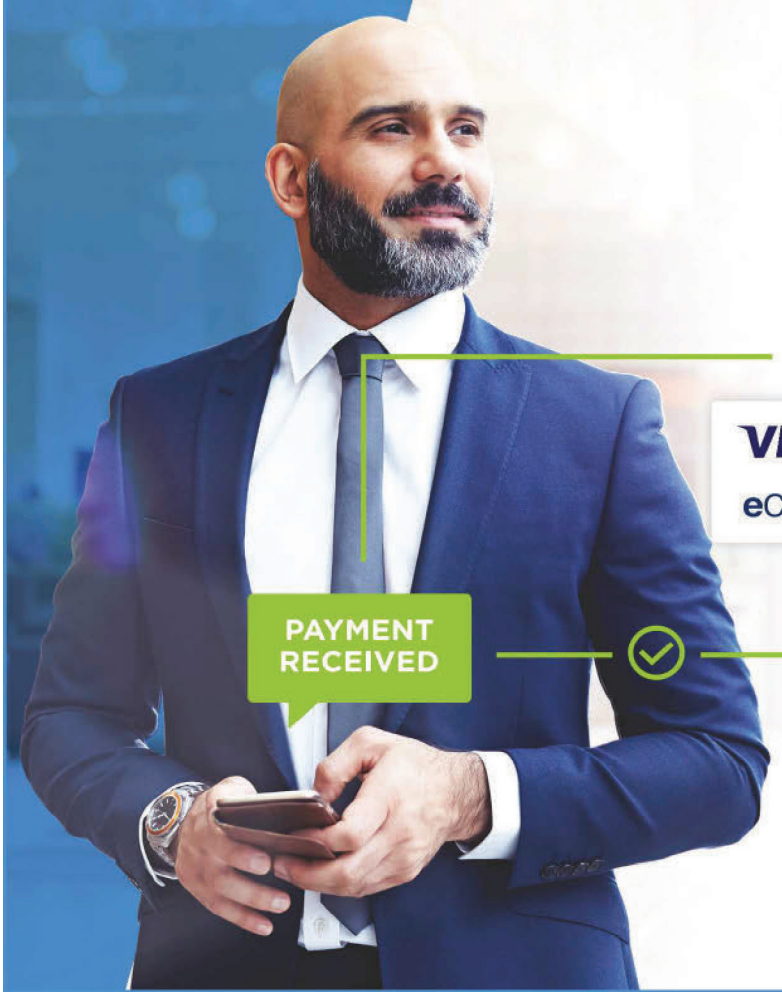

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TIPS ON APPELLATE ADVOCACY

CHIEF JUSTICE STUART RABNER *is the eighth chief justice to lead the New Jersey Supreme Court since the 1947 state constitution. Chief Justice Rabner was nominated to the Supreme Court by Gov. Jon S. Corzine and was sworn in on June 29, 2007. He was nominated for tenure by Gov. Chris Christie and was sworn in on June 20, 2014. After beginning his career as an assistant U.S. attorney, Chief Justice Rabner worked in a number of positions including first assistant U.S. attorney and chief of the terrorism unit. He was chief of the office's criminal division when he was named chief counsel to Governor Corzine in January 2006. He was named New Jersey attorney general in September 2006 and served in that position until his nomination to the Court.*

By Chief Justice Stuart Rabner

Editor's note: This article was adapted from remarks Chief Justice Rabner delivered at a June New Jersey Institute for Continuing Legal Education seminar on multicounty and multidistrict litigation. It has been lightly edited.

Perhaps the highest compliment that a fine advocate can receive after crafting an excellent brief or presenting a gifted oral argument is to see that they've persuaded the bench or moved a judge's thinking through skillful advocacy. I'm grateful to the countless attorneys who have appeared before the Supreme Court and taught my colleagues and me, time and again.

With that in mind, let's talk about what makes for persuasive oral advocacy, particularly before the Supreme Court. I can't promise to raise novel concepts—maybe just a slightly different perspective.

Let's begin with a question that may be in the back of your mind: "Does oral argument really matter?" The answer is most definitely, "yes." Judges, of course, take to the bench having read your materials and prepared for argument, and they do have a tentative view of the issues. At the Supreme Court level, though, the Justices don't discuss the case together before oral argument. We don't do so until conference, which takes place a week later.

It's fair to say that no one on the Court comes to oral argument with a closed mind. But even in cases where someone has a strong inclination before an argument, the strength and persuasiveness of a presentation can and does make a difference. I've heard Justices say many a time, "I went into argument leaning one way and left with a different view." That happened to me in a case just a few weeks ago. All of which begs the question, how does an advocate accomplish that result? What makes for a more effective oral argument?

How to Prepare—Always Ask 'Why Did the Court Take This Case?'

Let's focus on a few thoughts—first, the preparation stage, and then the presentation in court. As to preparation, there's no need to dwell on the obvious. The best advocates, of course, know their case and know the record. They've read the transcripts and organized them in an accessible way, and they know the law. That comes from old-fashioned hard work for which there is no substitute. It also gives one the confidence to handle any curveballs during oral argument.

Strong advocates gather and have key documents at their fingertips during an argument—not just an outline or a note card but critical parts of the record like an affidavit, a contract, or the text of a statute or regulation. I get nervous when a case turns on the language of a statute and an advocate walks up to the podium with nothing in hand, not even a copy of the law. That's either a sign of superhuman memory, which some have, or something a bit more worrisome.

The second point is a bit less obvious. As you get into the intricacies of your case, and you prepare and master the record and case law, step back and ask this question: "Why did the Court take this case?"

As you know, the Supreme Court has a discretionary docket for the most part. We select cases from well over 1,000 cert petitions and motions for leave to appeal each year. So ask yourself, "Why this one?"

The answer may not be readily apparent, but the exercise is important nonetheless. Most often, the Court is thinking about a legal issue the case raises in the context of an area of law. The Justices are concerned about the impact of a decision and how to provide guidance not simply for your case but others as well. So prepare for these questions: "What rule of law do you propose to resolve this and related cases?" "What principled rule do you suggest for this area of law?"

"My client is right and should win" is not the right answer. We do hear that from time to time. It's refreshingly honest but not all that helpful.

Next, think about how to structure the argument on several levels. I recall being taught to think of points in an argument as links in a chain that can be taken apart when questions are posed, and later put back together. Think about how to order those links in a smart way and examine all the arguments with the aim of persuading the Court and prevailing.

For example, if you have a strong procedural argument—"the other side waived a claim in a written agreement"—there's nothing wrong with stressing that point at the outset even if you think it's not the most exciting issue. Or if an argument depends on enforcing the plainly written words of the statute, it's better to start there than with a rousing constitutional claim that would require expanding the interpretation of a clause in the State Constitution. Under traditional standards in the case law, the Court will not reach the constitutional argument unless it has to.

As you go through the different links in your argument, recognize the strengths and weaknesses of the case and weave them into oral argument as you would in your brief. That way the Court does not hear about a weakness from your adversary first, which might undermine your credibility. Plus you have a chance to mitigate the weakness.

On that same subject, think about concessions or fallback arguments as you prepare, just in case things don't proceed as you hope. It's better not to wait for the crucible of oral argument to develop those positions.

It's also a good idea to write out a list of a few things you feel you must address. Consider writing four or five words on an index card and nothing more.

Look at the card as you get near the end of oral argument or if you're asked whether you have anything to add. At that point, it's all right to take two minutes and raise an important new point.

If you can, try to run through your argument aloud in advance. Ask colleagues to read the materials and pose questions at a mock oral argument. A simple alternative is to watch an oral argument. They are all archived and are available online through the Judiciary's website. There's always something to learn—a technique from the very best advocates that you might adopt, or something best to avoid, or simply a feel for how the Court approaches oral argument in general.

One last point before you step up to

the podium. After hours of painstaking preparation pretrial, at trial, and during the appellate phases of a case, push back the temptation to add an entirely new argument you thought of in the shower the morning of oral argument. At the very least, bounce the argument off someone else because there may be a good reason why it's gone undiscovered for so long.

Making Your Best Case in Court

Let's turn to the actual presentation in court. For context, it may help to understand how the Justices prepare for and approach oral argument. In a typical year, the Court hears six to eight cases in a two-day sitting. For each case, there's a good deal of material: the opinions of the trial and appellate courts; the briefs of the parties and amici; a bench memo that a single law clerk prepares for all the Justices, which can range from 40 to 140 pages; and, the record, of course, which can easily comprise 100 or 1,000 pages per case.

On top of that, the Justices are reading cert petitions and memos as well as disciplinary matters, and they have the responsibility to write opinions from prior sets of arguments. I tell you that so you can appreciate the limitations the Justices face and recognize competing demands, which make it hard to read the entire case file in each matter before oral argument.

So how do you focus a judge in the right direction? Don't underestimate the importance of a preliminary statement in a brief and an opening statement at oral argument. The Supreme Court offers advocates five uninterrupted minutes of argument at the outset. Take it, or take a part of it, and use the time to outline your case—not for flowery rhetoric. The best lawyers don't start with a flashy, dramatic opening. Instead, they begin with, "Here are four points I hope to cover. They are 'one, two,'" and so on. In a nutshell, counsel explain where the Appellate Division went wrong, or got it right, and why their side should prevail.

Why take that approach? Because you don't need to spend five minutes on procedural history, or facts the Court is familiar with, or a quote from Shakespeare. You may well lose the attention of the Court if that's where you start. It's better to simply say, up front, which arguments you are pressing and why. That helps the Court see the full structure on which you hope to hang different ornaments. And, on a practical level, it tells the Justices to allot time to address the third point you mentioned at the outset, as the argument proceeds.

That may sound a bit pedestrian, but it needn't be. You can certainly highlight key facts as you stress the importance of your case and work them into the first five minutes. You can demonstrate a bit of passion as you present core arguments. As you do that, try to offer a concise and persuasive roadmap for the vital issues.

Then jump into the argument itself. Again, start with your strongest, most important points. You have the Court's attention and don't want to squander it. That means it's all right to rest on the brief for a collateral or weak point that would logically come first.

Please keep in mind what we all learned in grammar school, which applies to oral advocacy as well. Speak clearly, speak loudly, and speak slowly enough to be heard and understood. Try to make eye contact with the Court. Because even the finest of lawyers can be nervous at the outset, try to commit to memory a few thoughts, which will enable you to begin the argument with confidence.

Please don't try to read—for a simple reason: It is difficult to listen to someone who is reading text, sentence after sentence, from a written document, unless they're a really good reader. It's better to work off an outline even if that means you'll stumble at points. That's only human.

Also, try not to read case citations that are in your brief; we can readily find them. On the flip side, it's helpful to hammer home the citation to a page in a lengthy appendix for a point that's critically important to your side. That will help and also encourage the Justice to look up the point afterward.

Please speak plainly. A good example comes from two briefs I read a while ago, which both said, "the foregoing makes pellucidly clear...." I had to read the passages twice. If you want to be clear, don't use opaque language.

Be yourself. It's tempting to take on the persona of an impressive, forceful lawyer you've watched, or a dramatic actor you thought had a persuasive manner. That usually doesn't work. You can bring conviction, passion, thoughtfulness, and courtesy into an argument in your own voice—with one exception. As retired Judge Mel Kracov was fond of saying, "Be yourself, unless you're a bit of a jerk, in which case you want to be someone else."

In any event, no argument is advanced with name-calling or attacking an adversary, even if they've attacked you first. You will never regret taking the high road in both written and oral presentations, and you'll earn the respect of the Court by doing so.

The finest advocates are able to have a conversation with the Court in a respectful way, which is easier said than done. That means you should listen carefully to questions that are posed, try to answer them, and try not to argue with the question. You can preserve a position by saying "that's not this case" and then answer the question directly.

Please don't get frustrated or deflated by a question or an interruption because questions can reveal a number of helpful things you can use to your advantage. A question can be a sign of something troubling a Justice. So explain why the issue is not a real concern and, better still, try to politely talk the Justice out of a problematic idea.

It's possible the Justices are talking to one another through their questions. Remember, we haven't discussed the case for a very long time since we voted to grant certification or a motion for leave to appeal months before. Get into the conversation that's taking place in front of you and press your point. It's always possible that a question is a friendly question; embrace it, grab onto that lifeline, and run with it. And sometimes a question is just a question. Don't overanalyze it; just try to respond and then return to another link in your argument.

Here's where it's important to think about making concessions and turning to a fallback position. If you're getting repeated questions from multiple Justices that suggest they're not buying your argument, it is not a sign of weakness to concede a tangential point. That enhances your credibility with the Court. Have in mind, as well, that the Justices may be thinking about the next case in this area, not yours. At this point, you have to exercise judgment and decide whether to present an alternative position—the fallback position you thought about in advance—because if you stand firmly on an all-or-nothing position, as sometimes you must, you may come away with nothing.

With that in mind, try to keep the Court focused on the big picture. You can vigorously believe there's been no error in the case yet also explain that, if there was an error, it was harmless. Or perhaps you should stress the standard of review and hammer away that your adversary must show the error was clearly capable of producing an unjust result, because counsel didn't object at the trial level.

Summarizing Your Argument and Rebuttal Tactics

Let's talk a bit about the end of an argument. You may be pressed by the Court to close out your argument because of timing. Have in mind a sentence or two to wrap up and remind the Court of the relief you seek. That's the right time to look at your index card and ask for two minutes to discuss the third point you promised to cover. Please don't expect that the Court will entertain another 10 to 15 minutes on the point, but we would likely be open to hear a few minutes more.

On to rebuttal, which is an art. Get in, make your point, and get out, just as you would with a redirect examination of a witness. Don't save up beautiful rhetoric to read at the end. Don't turn to a prepared two-minute speech. That's not the last thing you want to leave the Court.

Also, please think about timing. The Court, as many of you know, doesn't look at red or yellow lights; we are quite generous with time and often exceed the amount of time counsel requested for oral argument. But after a two-hour oral argument and more cases to follow, we typically don't have time to hear more than three to five minutes on rebuttal. The wisest advocates will sometimes say with confidence, "I have nothing to add. Thank you." That can convey a very strong message in its own right.

The Role of Amici

A few words about amici and oral argument. We welcome *amicus* briefs and argument. Many times, the most helpful advocates in the courtroom are amici because they don't enter a case solely to see a client win—not that there's anything wrong with that. They suggest a principled rule of law to apply across an array of cases, which is what we hope to hear from amici. The best amici are prepared to make a crisp presentation, jump into the core points of concern to the Court, and propose an approach that addresses a body of cases with an eye toward the broader consequences of a decision.

Does Oral Argument Matter? Absolutely

Let's return to where we began and ask again, "Does oral argument matter?" My colleagues and I regularly go back to recordings of oral argument. We do so days before conference and cite parts of arguments when we discuss cases the following week. For cases in which I write an opinion, I always listen to the entire oral argument again, and I know that's true of other Justices.

Oral argument matters in other ways as well. We all know that we may not win no matter how well we prepare. In fact, counsel may even lose to an unskilled advocate. I'm reminded of a case that involved the interpretation of a criminal statute and, more specifically, how to calculate the number of prior convictions after the statute had been altered. Each prior conviction could lead to an enhanced penalty, so there was a question about whether prior convictions under the old statute could count toward sentencing for a recent offense under the new law.

The statute related to prostitution offenses, and the advocate who appeared for the defense represented herself. She made a cogent argument. And despite very fine lawyering on the other side, she prevailed, as she should have, because the law was on her side.

I imagine her adversary didn't feel good about losing, but the outcome wasn't a reflection of the attorney in the case. It reflected fealty to the law, which is precisely what we want to see in a system of justice.

One final point. Have in mind that you can "win" even if you lose on the merits. If you argue with skill and persuasive force, if your written and oral presentations reveal professionalism and integrity, that will leave a lasting impression and serve you well the next time you appear in court. You'll build a reputation for excellence regardless of the outcome in a particular case. And I guarantee the Justices will look forward to seeing and hearing from you when you next appear before the Court. ■

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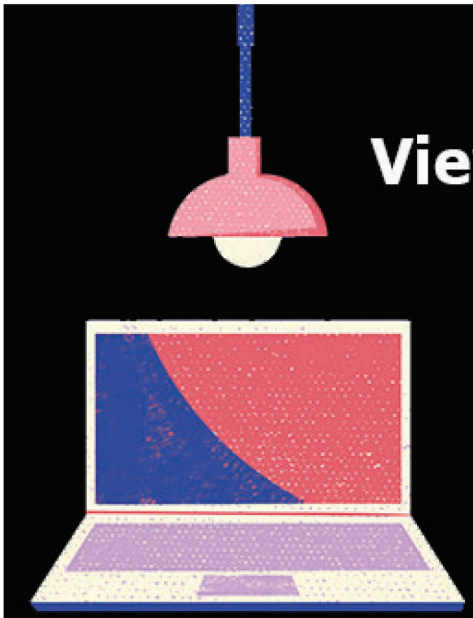

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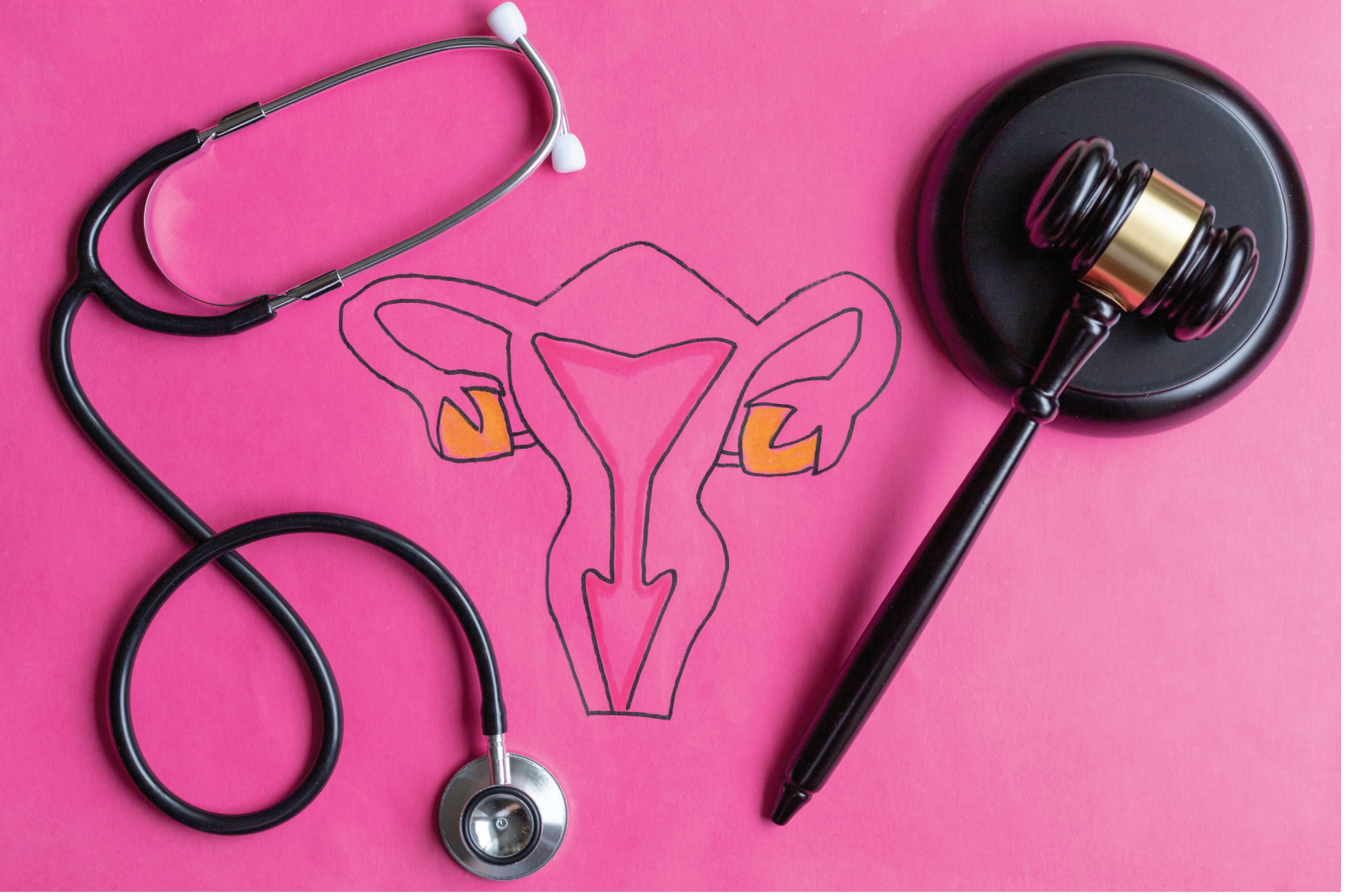

How New Jersey Protects Access to Abortion in the Aftermath of *Dobbs*

By Linda J. Wharton

LINDA J. WHARTON *is a professor of Political Science at Stockton University, where she teaches Constitutional Law, Gender and the Law, Civil Liberties, and Advanced Constitutional Litigation. Wharton's scholarly research and writing focuses on issues of state and federal constitutional law with a special concentration in the law of gender discrimination. From 1989 until 1997, she served as the Managing Attorney of the Women's Law Project, a public interest law firm located in Philadelphia, where she specialized in litigation and law reform relating to gender discrimination. She served as lead co-counsel in Planned Parenthood v. Casey, a challenge to Pennsylvania's restrictive abortion law, which was decided by the United States Supreme Court in 1992.*

In its controversial and widely criticized ruling in *Dobbs v. Jackson Women's Health Organization*[1] the United States Supreme Court withdrew federal constitutional protection for the right to abortion that had been in place for nearly five decades. The Court did so by overruling its prior landmark decisions in both *Roe v. Wade*[2] and *Planned Parenthood v. Casey.*[3] State constitutions and statutes are now the primary sources of protection for abortion rights in the United States. Fortunately, New Jersey is among a minority of states[4] that has a long and distinctive history of protecting access to abortion more strongly than the protections afforded under the federal constitution, exceeding the scope of protections that were in place under federal law even prior to *Dobbs*. Consequently, in the

aftermath of *Dobbs*, the right to terminate a pregnancy remains well-protected in New Jersey via both long-standing interpretations of the New Jersey Constitution by our state Supreme Court as well as the newly enacted Freedom of Reproductive Choice Act and other recent measures. Still, policymakers can do more to expand access to abortion and enhance protections for reproductive health care providers and those seeking abortion in New Jersey.

Protection under the New Jersey Constitution

In its ground-breaking 1982 decision in *Right to Choose v. Byrne*,[5] the New Jersey Supreme Court invalidated a state statute that restricted state Medicaid funds to abortions needed to preserve the life, but not the health, of the pregnant person. The Court held that New Jersey's Medicaid statute violated the right of pregnant persons to equal protection under the New Jersey Constitution. Two years earlier, in *Harris v. McRae*,[6] the United States Supreme Court considered a similar restriction on use of federal Medicaid funds for abortion in the Hyde Amendment and found no violation of the federal Constitution.

The New Jersey Supreme Court began its opinion by noting the unique role of it and other state high courts in the federalist system as independent interpreters of state constitutions, which are "separate sources of individual freedoms" and may provide more expansive protection of individual liberties than the United States Constitution."[7] The Court emphasized that "in more expansive language" than that of the federal Constitution, the New Jersey Constitution "by declaring the right to life, liberty and the pursuit of safety and happiness,...protects the right of privacy...."[8] Moreover, in a long line of cases, the Court had found that the right of privacy extended to a variety of areas, including "an individual's personal right to control her own body."[9] The Court explicitly recognized that "[t]he right to choose whether to have an abortion ...is a fundamental right of all pregnant women."[10]

Employing a traditional two-tiered equal protection analysis developed by the United States Supreme Court in cases under the federal Constitution, the Court reasoned that that the state's asserted interest in protecting potential life was not sufficiently compelling to justify New Jersey's interference with the fundamental right to choose whether to have an abortion under strict scrutiny review.[11] The Court further reasoned that under a balancing test employed in analyzing equal protections claims under the state Constitution, the government had not sufficiently justified its interference with the right to choose abortion by demonstrating a "greater 'public need' than is traditionally required in construing the federal constitution," given that the statute put the health of the pregnant person at risk.[12] On this basis, the Court held that the state was required to fund "those abortions medically necessary to preserve the life or health of the woman."[13]

Nearly two decades later in *Planned Parenthood of Central New Jersey v. Farmer*,[14] the New Jersey Supreme Court relied heavily upon its expansive analysis of state equality guarantees in *Right to Choose* when it held that the state's Parental Notification for Abortion Act (Act) violated the right to equal protection under the state constitution. As in *Right to Choose*, the Court emphasized that although the United States Supreme Court had upheld both parental consent and parental notice requirements for minors seeking abortion under the federal Constitution,[15] the language of Article I, paragraph 1 of the New Jersey Constitution offers more expansive protection than the federal Constitution, incorporating within its protection "the right of privacy and its concomitant rights, including the right to make certain fundamental choices."[16] The Court applied the *Right to Choose* balancing test to determine if the Act's differential treatment of young people who seek abortion and those who carry a pregnancy to term unfairly burdened young people seeking abortion in violation of the state Constitution's guarantee of equal protection.[17] The Court catalogued the considerable burdens imposed on a minor seeking abortion by that the Act's requirement that they either tell a parent of her decision to have an abortion or, alternatively, obtain a judicial waiver that allows them to bypass the parental notification requirement.[18] Both the notice requirement and the bypass mechanism significantly burdened young people seeking abortion by threatening their health and potentially "operat[ing] as a functional bar to a minor's exercise of her constitutional right to make her own reproductive decisions."[19] In contrast, the Court found that the state had " failed utterly" to show that it had any significant interest to justify these burdens.[20] Indeed, the law was "difficult to justify," given that New Jersey permitted minors to make health care decisions during pregnancy, including whether to undergo a caesarean section, a more difficult procedure than abortion.[21] Moreover, "the state has recognized a minor's maturity in matters related to her sexuality, reproductive decisions, substance-abuse treatment and placing her children for adoption."[22]

The Freedom of Reproductive Choice Act and related measures

New Jersey's strong constitutional protection for abortion has provided a solid foundation for statutory reform. In the months before the United States Supreme Court's decision in *Dobbs*, with an increasingly conservative United States Supreme Court poised to overturn lawstanding federal abortion precedent, the New Jersey Legislature solidified the protections set forth in *Right to Choose* and *Planned Parenthood of Central New Jersey*

by passing a state law that codified them. The Freedom of Reproductive Choice Act,[23] signed by Gov. Phil Murphy on Jan. 13, 2022, and effective on that same date, broadly protects abortion and other reproductive health care:

> Every individual present in the State, including, but not limited to, an individual who is under State control or supervision, shall have the fundamental right to: choose or refuse contraception or sterilization; and choose whether to carry a pregnancy, to give birth, or to terminate a pregnancy.... Any law, rule, regulation, ordinance, or order, in effect on or adopted after the effective date of this act, that is determined to have the effect of limiting the constitutional right to freedom of reproductive choice and that does not conform with the provisions and the express or implied purposes of this act, shall be deemed invalid and shall have no force or effect.[24]

The Act relies explicitly on the constitutional protection for abortion recognized in *Right to Choose* and *Planned Parenthood of Central New Jersey*. On that same day, Murphy also signed legislation expanding the contraception coverage required under private insurance and Medicaid from a six-month supply to a 12-month supply.[25]

Other recent measures focus on expanding the pool of reproductive health care providers, eliminating unnecessary targeted regulation of abortion providers and protecting providers and their patients from harm. In 2019, Murphy signed legislation expanding the state's Address Confidentiality Program to include reproductive health care providers and patients so as to protect them from harassment and violence by allowing their addresses to remain confidential.[26] In October 2021, the state Board of Medical Examiners unanimously voted to eliminate outdated and unnecessary regulations on abortion and to allow certain health care providers other than physicians to perform abortions.[27] The changes, adopted in December 2021, repeal a rule that "singles out abortion care for targeted regulation by, among other things, requiring terminations of pregnancy be performed only by a physician and barring office-based terminations beyond 14 weeks gestations."[28] The revisions also clear the path for advanced practice nurses, physician assistants, certified nurse midwives and certified midwives, "to perform early aspiration terminations of pregnancy."[29] Regulations will be updated "to integrate reproductive health care within the generally applicable rules designed to ensure the safety of patients who undergo surgery or special procedures in an office setting."[30]

Additional Protection for Abortion Access Post-*Dobbs*

In recent months, several states have enacted or proposed additional legislation that proactively strengthens and safeguards access to abortion.[31] With the anticipated influx of individuals seeking abortion from nearby states that ban or severely restrict the right to abortion[32] and some states poised to retaliate against those who help their residents get abortions elsewhere, proactive states are going further than simply "keep[ing] abortion legal within their state lines."[33] Following the lead of these states, on July 1, 2022, Murphy signed two bills into law that establish protections for abortions performed in New Jersey on out-of-state individuals.[34]

The first bill generally forbids disclosure of a patient's medical records relating to reproductive health care without their consent in "any civil, probate, legislative or administrative proceeding."[35] Public entities and employees are barred from cooperating with interstate investigations aimed at holding someone liable "for seeking, receiving, facilitating, or providing reproductive health care services that are legal in New Jersey."[36] Additionally, New Jersey licensing boards are prohibited from "suspending, revoking, or refusing to renew a license or registration of a professional based solely on their involvement in the provision of reproductive health care services."[37]

The second measure prevents the extradition of an individual in New Jersey to another state for "receiving, providing, or facilitating reproductive health services that are legal in New Jersey."[38] The passage of this legislation was followed on July 11, 2022, by Acting Attorney General Matthew Platkin's formation of a "Reproductive Rights Strike Force" to protect access to abortion care by both New Jersey and out-of-state residents.[39]

Earlier, in May 2022, in anticipation of the *Dobbs* decision Murphy proposed additional legislation to expand protections in New Jersey. Two reintroduced proposals[40] would mandate that insurers fully cover the costs of abortions without cost-sharing to patients and codify the state Board of Medical Examiners' expansion of the pool of abortion providers to include advanced practice nurses, midwives and physician assistants.[41] The proposal would also create a "Reproductive Health Access Fund" to support uninsured and underinsured patients needing reproductive health care and to provide training for reproductive health care providers and funding to cover enhanced security measures needed by at-risk reproductive health care sites.[42] Finally, the proposed measures would proactively protect abortion providers and patients by allowing "a person in New Jersey who is successfully sued in another state for their involvement in reproductive health care to file suit to recover damages resulting from the initial lawsuit."[43] These concepts were subsequently the basis of bills introduced in the New Jersey Legislature on June 20, 2022, (A4350) and June 23, 2022. (S2918).[44]

Conclusion

Amid the fragmented post-*Dobbs* abortion landscape that now exists in the United States, New Jersey offers strong protection for the right to choose abortion. Additional provisions such as those proposed by scholars, enacted in other states and proposed by Murphy would further safeguard reproductive health care providers and their patients. Lawyers, of course, can play an important role in safeguarding those rights.[45]

Endnotes

1. 597 U.S. ___ (2022).
2. 410 U.S. 113 (1973).
3. 505 U.S. 833 (1992).
4. As of April 2022, New Jersey's Supreme Court is one of 11 state high courts that "have recognized that their state constitutions protect abortion rights independent from and more strongly than the federal constitution...." Center for Reproductive Rights, *State Constitutions and Abortion Rights*, 1 (2022), reproductiverights.org/wp-content/uploads/2022/05/State-Constitutions-Report-5.12.22.pdf.
5. 91 N.J. 287, 450 A.2d 925 (1982).
6. 448 U.S. 297 (1980).
7. *Right to Choose*, 450 A.2d at 931-32.
8. *Id*. at 933. The Court relied upon Art. I, par. 1 of the New Jersey Constitution: "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." *Id.*
9. *Id*.
10. *Id*. at 934.
11. *Id.*
12. *Id*. at 936-37.
13. *Id*. at 938. At the time of the decision in *Right to Choose*, only two states—-Massachusetts and California—had invalidated state restrictions on public funding of abortion under their state constitutions. In subsequent years, other state courts, including those in Alaska, Connecticut, New Mexico, Minnesota and Arizona, have followed New Jersey's lead. *See* Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights through State Constitutions*, 15 Wm. & Mary J. of Women & L. 469, 501-510 (2009).
14. 165 N.J. 609 (2000).
15. *Id*. at 627-30 (discussing multiple decisions in which the United States Supreme Court has upheld both parental consent and notification laws that permitted a bypass of parental approval via a judicial proceeding).
16. *Id*. at 631.
17. *Id*. at 632-38.
18. *Id*. at 633-36.
19. *Id*. at 634.
20. *Id*. at 638 (quoting *Ohio v. Akron Center for Reproductive Health* (*Akron II*), 497 U.S. 502, 525-26 (1990) (Blackmun, J., dissenting)).
21. *Id*. at 636.
22. *Id*. According to the Guttmacher Institute, 37 states require some parental involvement in a minor's decision to have an abortion. Guttmacher Inst., Parental Involvement in Minors' Abortions (June 1, 2022), guttmacher.org/state-policy/explore/parental-involvement-minors-abortions

For a discussion of states that have joined New Jersey in invalidating parental involvement laws, *see* Wharton, *supra*, n. 13, at 510-20 (analyzing State decisions invalidating parental involvement laws under State constitutions).

23. N.J.S.A.10:7-2 (2022).
24. *Id*.
25. N.J.S.A. 30:4D-6s (2022).
26. N.J.S.A. 47:4-2 to 4-6 (2019).
27. Press Release, Governor Phil Murphy, *New Jersey Expands Access to Reproductive Health Care, Adopts New Rule from Unanimous Vote by State Board of Medical Examiners* (Dec. 6, 2021) nj.gov/governor/news/news/562021/20211206a.shtml .
28. *Id*.
29. *Id*.
30. *Id.*
31. Sarah Maslin Nir & Kate Zernike, *Connecticut Moves to Blunt Impact of Other States' Anti-Abortion Laws*, N.Y.Times (April 30, 2022), nytimes.com/2022/04/30/nyregion/connecticut-texas-abortion-law.html; Grace Ashford, *New York Lawmakers Push for Abortion Fund to Establish 'Safe Harbor,'* N.Y.Times (May 9, 2022), nytimes.com/2022/05/09/nyregion/letitia-james-abortion-roe-v-wade.html
32. Daniela Santamarina & Amber Phillips, *What Would Happen If Roe Were Overturned?* Wash.Post (May 3, 2022), washingtonpost.com/politics/2021/06/11/abortion-rights-roe-v-wade/
33. David S. Cohen, Greer Donley & Rebecca Rebouche, S*tates Want to Ban Abortion Beyond their Borders; Here's What Pro-Choice States Can Do,* N.Y.Times (Mar. 13, 2022), nytimes.com/2022/03/13/opinion/missouri-abortion-roe-v-wade.html
34. Press Release, Governor Phil Murphy, *Governor Murphy Signs Legislation to Protect Reproductive Health Care Providers and Out-of-State Residents Seeking Reproductive Services in New Jersey* (July 1, 2022), nj.gov/governor/news/news/562022/20220701a.shtml
35. *Id.*
36. *Id.*
37. *Id.*

38. *Id.*
39. Press Release, Acting Attorney General Matthew J. Platkin, Acting AG Platkin Establishes "Reproductive Rights Strike Force" to Protect Access to Abortion Care for New Jerseyans and Residents of Other States (July 11, 2022), njoag.gov/acting-ag-platkin-establishes-reproductive-rights-strike-force-to-protect-access-to-abortion-care-for-new-jerseyans-and-residents-of-other-states/
40. These measures were removed from the original Reproductive Freedom Act due to legislative resistance. The Freedom of Reproductive Choice Act enacted in 2022 directed the State Department of Banking and Insurance to study the feasibility of an abortion insurance coverage requirement but did not mandate coverage. Joey Fox, *Is New Jersey About to Face a Reckoning Over Abortion Access?* New Jersey Globe (May 20, 2022), newjerseyglobe.com/legislature/is-new-jersey-about-to-face-a-reckoning-over-abortion-access/
41. Press release, Governor Phil Murphy, *Governor Murphy Renews Efforts to Secure Reproductive Rights and Bolster Access to Reproductive Health Care in New Jersey* (May 11, 2022), nj.gov/governor/news/news/562022/20220511a.shtml
42. *Id.*
43. *Id.*
44. Eric Kiefer, *NJ Bill Would Help Women Pay for Abortions, Planned Parenthood Says*, Patch (June 22, 2022), patch.com/new-jersey/montclair/nj-bill-would-help-women-pay-abortions-planned-parenthood-says
45. *See* Joyce E. Cutler, *Abortion Seekers, Providers to get Free Legal Defense by Law Firms*, Bloomberg Law (June 1, 2022) news.bloomberglaw.com/business-and-practice/abortion-seekers-providers-to-get-free-legal-defense-by-firms

From 'Reefer Madness' to the War on Drugs to Legal Recreational Marijuana

How Safe are N.J. Residents from Federal Enforcement?

By Anthony M. Fassano and John C. Connell

In April 2022, the first recreational marijuana retail stores opened in New Jersey. However, the process that led to this point was anything but smooth. New Jersey is one of 19 states (as well as Washington, D.C., and Guam) to legalize recreational marijuana for adults. Thirty-seven states, Washington, D.C., Guam, Puerto Rico, and the U.S. Virgin Islands allow medical marijuana use. This development would be impossible to imagine by U.S. citizens at various times during the 20th century.

Historical Background

The first major movement to criminalize marijuana occurred over 100 years ago. In 1910, there was a revolution in Mexico, which resulted in many immigrants entering the United States. The same prejudices and fears that have always been present when there is large-scale immigration into the United States led to a backlash against this wave of immigrants, and this antipathy extended to the immigrants' traditional intoxicant: marijuana. The drug was also negatively associated with the Black jazz scene, which was in its beginning stages in New Orleans at the time.

As a result of these prejudices, 29 states outlawed marijuana by 1931. There was also a push to criminalize marijuana on the federal level, which led to the passage of the Marijuana Tax Act of 1937. This law ostensibly taxed the sale of the drug, but practically speaking, it essentially outlawed it throughout the country. Twenty years later, Congress passed the Boggs Act, which increased the penalties for all drug offenses, including marijuana, and began treating marijuana like any other narcotic drug. This was followed by the Narcotic Control Act of 1956, which further increased penalties for drug offenses. Many states followed suit, passing what became known as "little Boggs Acts," and stiffening the penalties for drug offenses, sometimes more harshly than provided by federal law.

Medical Marijuana

This trend continued into the late 1990s. During this time, there was support for allowing marijuana use, at least as a treatment for patients suffering from a variety of ailments, like chronic pain, nausea associated with chemotherapy treatment, glaucoma, and many other conditions.

In 1996, California was the first state to approve the use of medical marijuana under the Compassionate Use Act, known as Proposition 215. Other states followed suit. In 2000, Hawaii became the first state to legalize medical marijuana through an act of the Legislature. In 2014, with a number of states having legalized or decriminalized medical marijuana, Congress attached the Rohrabacher-Blumenauer Amendment to its annual omnibus spending bill.[1] This amendment prohibited the Department of Justice from spending funds to prosecute individuals using medical marijuana in compliance with state law. This amendment has been a part of all omnibus spending bills passed by Congress since. Today, the majority of states have legal medical marijuana.

In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, which differentiated between marijuana and other narcotics. There were even advocates for decriminalization of marijuana, including President Carter....However, this movement would end with the 1981 election of President Reagan and the War on Drugs.

Decriminalization

The following decades saw the pendulum swing back to more leniency toward marijuana use. During the Kennedy and Johnson administrations, with marijuana use widespread among white, middle-class young adults, there was a push for a reevaluation of the law. In 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act, which differentiated between marijuana and other narcotics. There were even advocates for decriminalization of marijuana, including President Carter.

However, this movement would end with the 1981 election of President Reagan and the War on Drugs. During the Reagan Administration, Congress passed three major pieces of drug legislation that resulted in stiffer penalties for marijuana possession, cultivation, and trafficking.

Recreational Marijuana

Legal recreational marijuana has lagged behind legal medical marijuana, but it has followed a similar trajectory. In 2012, Washington and Colorado became

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the first states to legalize recreational marijuana. Both states did so via ballot initiative. In the next 10 years, a number of other states took steps to legalize, or at least decriminalize, recreational marijuana or, in some cases, Cannabidiol (CBD) oil, which is an extract from marijuana.

New Jersey's Approach

New Jersey has followed the path toward legalization. Medical marijuana has been legal in this state since January 2010.[2] In 2017, Gov. Phil Murphy campaigned for legalizing recreational marijuana and handily won the governorship. In the 2018-2019 legislative session, there were attempts to pass a law to legalize recreational marijuana. Those efforts failed, but advocates successfully lobbied to put an initiative on the ballot in November 2020 in support of a state constitutional amendment. By a solid majority, the ballot initiative passed.[3]

Three months later, in February 2021, Murphy signed enabling legislation into law.[4] In the subsequent months, the Cannabis Regulatory Commission processed applications for dispensaries and, on April 21, 2022, the first 13 retail dispensaries in the state opened their doors.[5]

The Conundrum Created by Federal Regulation

With all of the state-level efforts underway, it is easy to forget that marijuana is still listed as a Schedule I narcotic (the same category as cocaine and heroin) by the federal government. When California voters approved the ballot measure to legalize medical marijuana, California law was in direct conflict with federal law. This conflict made its way to the United States Supreme Court in 2005 in *Gonzalez v. Raich*.[6] In that case, the Court upheld the constitutionality of the federal statute prohibiting marijuana on the ground that the Commerce Clause gives Congress the power to regulate marijuana. As explained above, other states including New Jersey followed California's lead, legalizing medical marijuana, and now recreational marijuana, despite the fact that the federal law is still on the books and the United States Supreme Court upheld the law just 17 years ago.

When there is a conflict between federal and state law, the Supremacy Clause dictates that state law must give way. But in practice, both the executive and legislative branches can take actions that prevent the enforcement of federal law.

As a matter of prosecutorial discretion, the Department of Justice can choose whether to prosecute people who use recreational marijuana in compliance with the law of the state in which they are located. As a matter of policy, Attorney General Merrick Garland has indicated that enforcement of federal marijuana laws against those acting in compliance with state law is an inefficient use of federal resources. Thus, even though someone using marijuana in a state that allows it is technically committing a federal crime, that person will not be prosecuted. However, this policy could change if a new administration or a new attorney general decides to take a different enforcement approach.

Further, federal law burdens businesses in the cannabis industry. Although it is arguably not illegal for a financial institution to work with businesses in the industry, federal reporting requirements for suspicious and illegal (under federal law) can expose financial institutions to great risk and high reporting costs. As a result, many financial institutions choose to forgo working with the cannabis industry altogether. According to a recent survey, only 518 of almost 5,000 U.S. commercial banks reported working with the industry in 2021.

Congress, of course, has the power to repeal the law making marijuana illegal. But it can also use its spending power to render the law effectively void, even though it remains on the books. In fact, at least with regard to medical marijuana, Congress has done so by including the Rohrabacher-Blumenauer Amendment with the passage of every omnibus spending bill since 2014. Congress could continue to take this action, and even decide to expand it to those using recreational marijuana in accordance with State law. However, like the executive action described above, subsequent congresses could undo this move.

With all of the state-level efforts underway, it is easy to forget that marijuana is still listed as a Schedule I narcotic (the same category as cocaine and heroin) by the federal government.

Also, will the amount of time that passes with the use of legal recreational marijuana affect the decision of federal officials who may otherwise want to start federal marijuana prosecutions? At this point, there are over a dozen recreational marijuana dispensaries in New Jersey, with more applications pending. The companies involved made a significant investment in time and money into their businesses relying on their businesses being legal. Actors in other states where recreational marijuana has been legal for longer no doubt have even higher investments involved. Would this reliance make a federal official, anxious to begin prosecutions, hesitate? Should it?

And does the manner in which the states arrived at legal recreational marijuana make a difference? Some states, including New Jersey, resorted to direct democracy on the issue because the state Legislature failed to act. As a result, legal recreational marijuana is now enshrined in the New Jersey Constitution. And this ballot initiative overwhelmingly passed with over two-thirds of the vote. But would the fact that the citizens of the state have directly spoken on this issue affect federal officials debating whether to enforce the federal law? Should public opinion, which has trended in the direction of increased support for legal marijuana, and which led to the passage of ballot initiatives as in New Jersey, matter?

Conclusion

The answer to these questions is "it depends." Business reliance on the current state of the law and direct democracy could influence federal decision-makers, but this influence would likely mean very little to a federal official who believes strongly that the federal law should be enforced. There is certainly no mechanism in place to prevent the federal official from changing the policy and beginning federal prosecutions.

This issue is especially relevant today. With the country increasingly polarized, the large number of state trifectas (one party in control of both state legislative houses and the governorship), and Congress unable to pass legislation on a number of important issues, the possibility that a state could pass laws conflicting with federal law, or of federal officials sympathetic to conflicting state law, electing not to enforce federal law. One's view on this potential problem may depend on one's attitude toward the underlying substantive issue: advocates of legal marijuana may support federal efforts to refrain from enforcing federal law. However, those individuals may view differently the same action by federal officials regarding a different substantive issue, such as gun control, same-sex marriage, or immigration. ■

Endnotes

1. *See, e.g.*, Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, §537, 133 Stat. 13, 138 (2019).
2. N.J.S.A. 24:6I-1 *et. seq*.
3. N.J. Const. (1947), Art. IV, § 7, ¶13
4. N.J.S.A. 24:6I-31 *et seq.*
5. Henry Savage, *Where You Can Buy Recreational Marijuana in New Jersey*, Philadelphia Inquirer, April 25, 2022, inquirer.com/philly-tips/where-to-buy-legal-cannabis-nj.html (last accessed July 28, 2022)
6. 545 U.S. 1 (2005).

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Free Speech on Private Property

Adapting a Set of Fundamental Rights Under the New Jersey Constitution

By Bruce S. Rosen and Brittany Burns

For the first time anywhere in the United States, an appellate court has ruled that...private communities are 'constitutional actors' and must therefore respect their members' freedom of speech. The Court recognized that just as shopping malls are the new public square, these associations have become and act, for all practical purposes, like municipal entities unto themselves.

Prof. Frank Askin following the N.J. Supreme Court's 2007 decision in *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n.*[1]

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Free speech is a fundamental right, but it is not absolute under either the First Amendment to the United States Constitution or Article I of the 1947 New Jersey Constitution.[2] Yet, beginning the mid-1970s, New Jersey, like California and a handful of other states, has been an outlier in applying its own constitution to expand rights in many areas, not the least of which has been application of free speech principles in the face of private property rights.[3]

The New Jersey Supreme Court's 1980 decision in *State v. Schmid*,[4] authored by Justice Alan Handler, described Article I as "more sweeping in scope than the First Amendment."[5] The Court declared unconstitutional Mr. Schmid's arrest for distributing handbills on the Princeton University campus. In doing so, the Court took a cue from a United States Supreme Court decision which had simultaneously limited free speech rights under the federal constitution while ruling that a state's organic and general law can independently furnish a basis for protecting individual rights of speech and assembly.[6] That case stemmed from an appeal of a California Supreme Court decision which declared that state's constitution protects speech and petitioning, reasonably exercised, in privately-owned shopping centers, and that these state constitutional provisions do not violate the owner's federal constitutional rights.[7]

Schmid, which dealt with visitors to a private campus with considerable public access, focused the Court on attempting to "achieve the optimal balance between the protections to be accorded private property and those to be given to expressional freedoms exercised upon such property."[8] In doing, so the Court concluded that:

> [T]he State Constitution furnishes to individuals the complementary freedoms of speech and assembly and protects the reasonable exercise of those rights. These guarantees extend directly to governmental entities as well as to persons exercising governmental powers. They are also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property. The State Constitution in this fashion serves to thwart inhibitory actions which unreasonably frustrate, infringe, or obstruct the expressional and associational rights of individuals exercised under Article I, paragraphs 6 and 18 thereof.[9]

The Court fashioned a standard in *Schmid* that it built upon in subsequent cases, which considers (1) the nature, purposes, and primary use of such private property, generally, its "normal" use, (2) the extent and nature of the public's invitation to use that property, and (3) the purpose of the expressional activity undertaken upon such property in relation to both the private and public use of the property. "This is a multifaceted test which must be applied to ascertain whether in a given case owners of private property may be required to permit, subject to suitable restrictions, the reasonable exercise by individuals of the constitutional freedoms of speech and assembly."[10]

Enter the late Rutgers Law School Professor (and founder of the school's Constitutional Litigation Clinic) Frank Askin, who, with a variety of co-counsel and the backing of the American Civil Liberties Union-New Jersey, filed a series of cases over more than two decades which ultimately expanded the *Schmid* free speech precedent into shopping malls and housing developments where many New Jerseyans live and gather.

Askin and his team's first major foray into the area was the 1994 decision in *New Jersey Coalition Against the War in the Middle East v. J.M.B. Realty Corp.*,[11] where the New Jersey Supreme Court applied the State Constitution's free speech and assembly provisions to permit reasonable free speech and assembly at privately-owned regional shopping malls after individuals there sought to hand out leaflets and discuss their opposition to the Iraq War.

The Court held that even though regional shopping malls were privately owned, they provided the public with an "all-embracing invitation,"[12] to shop or browse, similar to a public downtown. The Court found that each of the elements of the *Schmid* test were met but added the requirement that there be a balancing of "expressional rights and privacy rights,"[13] which was mentioned in *Schmid*. Although the Court went well beyond any federal precedent, it attempted to draw similar principles from U.S. Supreme Court cases, as described and summarized in Justice Thurgood Marshall's dissent in *Hudgens v. NLRB,*[14] stating "where private ownership of property that is the functional counterpart of the downtown business district has effectively monopolized significant opportunities for free speech, the owners cannot eradicate those opportunities by prohibiting it."[15] However, the Court's largess was expressly limited to large regional shopping centers ("[n]o highway strip mall, no football stadium, no theatre, no single high suburban store, no stand-alone use, and no small to medium shopping center").[16]

Six years later, in 2000, the Court applied the same tests to strike down a mall's demands that the Green Party obtain a $1 million insurance policy, sign a hold harmless agreement, and limit their leafleting to a handful of days. The Court said that while it had in *Coalition* granted malls "extremely broad powers"[17] to promulgate reasonable regulations concerning time, place, and manner of leafleting, it "did not intend that these regulations would prevent the exercise of expressive activities."[18]

Askin's team then moved its focus to free expression in the housing context, such as planned unit developments such as condominium complexes where the plaintiffs were owners, not visitors. In the 2007 decision in *Comm. For A Better Twin Rivers v. Twin Rivers Homeowners' Ass'n,* the Court applied the *Schmid* and *Coalition* tests to uphold regulations against placement of signs, use of a community room, and access to a community's newspaper were "reasonable time, place and manner restrictions."[19] However, the Court then went out of its way to recognize plaintiffs in these settings as constitutional actors and it ruled restrictions by a private community association must be reasonable, and such challenges may be valid and may yet be successful, and then laid out a roadmap for non-constitutional "common interest"[20] challenges to similar regulations.

In 2012, the Askin team's *amicus* arguments won a larger victory where a condominium owner's political signs in his unit's windows were analyzed in the context of a complete ban on residential signs and the prohibitions were struck down. The Court, in a decision by Chief Justice Stuart Rabner, determined that because the plaintiff's property rights and free speech rights outweighed the homeowner's association's no-sign rules, it declared the restriction written into the restrictive covenants in the deed to be "unenforceable."[21] Two years later, Chief Justice Rabner again found for the plaintiff, again supported by Askin's *amicus* brief for the ACLU, in the case of a high-rise apartment owner who was prohibited from distributing campaign materials as part of his run to be a board of directors member.[22] The Court surveyed all of its free speech/private property cases and clarified that for residents of a "private common-interest community,"[23] courts should focus on the *Schmid* prong concerning "the purpose of the expressional activity undertaken"[24] in relation to the property, and should also consider the "general balancing of expressional and property rights."[25] In that case, the Court pointed out that rather than create reasonable time, place, and manner restrictions, the association simply banned distribution of campaign materials, which the court ruled was unreasonable.

Askin retired shortly after that case and died in 2021, these cases being part of his multifaceted legacy of battles for constitutional rights. In the place where these concepts were incubated, however, the situation has become more restrictive: California's far more conservative Supreme Court has since narrowed its original *Pruneyard* decision, narrowing a state regulation allowing a right of a union to picket in shopping centers to plazas, atriums, and food courts,[26] and the U.S. Supreme Court has gone even further, ruling that a California regulation allowing an agricultural union access to an employer's property for unionization efforts was a taking that required compensation.[27] Although these issues have not come back to the fore in New Jersey, they can still be teed up at any time; as it stands, however, Chief Justice Rabner's Court does not seem likely to follow suit. ■

Endnotes

1. 190 N.J. 344 (2007).
2. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press.... The people have the right freely to assemble together, to consult for the common good, to make known their opinions to their representatives, and to petition for redress of grievances. N.J. Const. (1947), Art. 1, ¶¶1, 6, & 18.
3. Since then many states have retreated from these positions and required state action before rights can be enforced. See *Comm. For A Better Twin Rivers v. Twin Rivers Homeowners' Ass'n*, 192 N.J. 344, 363-64 (2007).
4. 84 N.J. 535, 557 (1980).
5. *See id.* at 557 (1980).
6. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).
7. 23 Cal.3d 899.
8. 84 N.J. 535, 561 (1980).
9. *See id.* at 560.
10. *See id.* at 563.
11. *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 N.J. 326 (1994).
12. *See id.* at 355.
13. *See id.* at 362.
14. 424 U.S. 507 (1976).
15. 138 N.J. 366.
16. *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 N.J. 326 (1994).
17. *Green Party of N.J. v. Hartz Mountain Indus., Inc.*, 324 N.J. Super. 192, 217-218 (App.Div. 1999) (quoting *N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 N.J. 326 (1994).
18. *Ibid.*
19. 192 N.J. 344 (2007).
20. *Ibid.*
21. *Mazdabrook Commons Homeowners' Ass'n v Khan*, 210 N.J. 482 (2012).
22. *Dublirer v.2000 Linwood Avenue Owners, Inc*., 220 N.J. 71 (2014).
23. *Ibid.*
24. *See id.* at 74 (2014).
25. *Ibid*.
26. *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8*, 55 Cal.4th 1083 (2012).
27. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021).

New Jersey's State Constitutions

From Ridicule to Respect

by Robert F. Williams

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Twenty-five years ago I served as co-special editor of the issue commemorating the 50th anniversary of our state constitution. A lot has happened in the intervening years but I think my article from then has stood the test of time. It outlines the history of our constitution and appears here with a short epilogue.—*Robert F. Williams, Distinguished Professor of Law Emeritus, Rutgers Law School*

The cornerstone of our state government is our state constitution. All state governmental action, whether it be executive, legislative or judicial, must conform to this organic law. Even though governmental action is generally clothed with a presumption of legality, the judiciary, which is the final arbiter of what the constitution means, must strike down governmental action which offends a constitutional provision.

Chief Justice Richard J. Hughes (1977)[1]

The 1947 New Jersey Constitution was the most exciting and wonderful thing that happened in my lifetime on the political level. My enthusiasm for the 1947 constitution has roots in its history.

Richard J. Hughes (1990)[2]

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Richard J. Hughes, who served both as chief justice and governor in New Jersey, knew full well the impact that the state constitution has on state and local governmental institutions. The high degree of respect that he showed for the New Jersey State Constitution, however, is something that has existed in New Jersey only since 1947. Prior to that watershed year, 50 years ago, New Jersey's constitution was not a document that drew expressions of praise. Our current constitution, therefore, represents the culmination of New Jersey's state constitutional history dating from 17761 and even earlier.[4] Our state constitutional history will continue to develop for as long as we are a state.

New Jersey's 1776 Constitution

New Jersey's first constitution, which took effect on July 2, 1776, was hastily drafted during wartime. It was part, but not a central feature, of the state constitution-making explosion that the Revolution triggered.[5] The origins, including the actual drafters, of New Jersey's 1776 constitution are still being debated today.[6] The lessons learned by trial and error during this period of state constitutionmaking prior to the U.S. Constitution were very important to the framers at the U.S. Constitutional Convention.[7]

During the debates over the ratification of the new U.S. Constitution, the proponents and opponents often adverted to the provisions of the state constitutions as either models to be followed or examples to be rejected. In James Madison's famous *Federalist No. 47,* concerning separation of powers, he noted:

> The constitution of New Jersey has blended the different powers of government more than any of the preceding. The governor, who is the executive magistrate, is appointed by the legislature; is chancellor and ordinary, or surrogate of the State; is a member of the Supreme Court of Appeals, and president, with a casting vote, of one of the legislative branches. The same legislative branch acts again as executive council of the governor, and with him constitutes the Court of Appeals. The members of the judiciary depanment are appointed by the legislative department, and removable by one branch of it, on the impeachment of the other.[8]

Alexander Hamilton similarly made negative reference to the New Jersey Constitution in his *Federalist No. 66.* He defended the U.S. Constitution's provision for the trial of impeachments in the Senate against the charge that it was an unwise blending of judicial and legislative authority. Hamilton noted that the New York Constitution made essentially the same provision, and referenced the New Jersey Constitution as an extreme example of blending legislative and judicial authority. "In that of New Jersey, also, the final judiciary authority is in a branch of the legislature."[9]

Later, in the *Federalist No. 70,* Hamilton gave grudging praise to the New Jersey Constitution's establishment of a single executive, the governor. He defended the similar, federal single executive president ("unity") by way of example:

> This unity may be destroyed in two ways: either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and cooperation of others, ii the capacity of counsellors to him. Of the first, the two Consuls of Rome may serve as an example; of the last, we shall find examples in the constitutions of several of the States. New York and New Jersey, if I recollect right, are the only States which have intrusted the executive authority wholly to single men.[10]

Criticisms of New Jersey's 1776 constitution, however, did not come only from outside the state. The constitution contained no separate Declaration of Rights; did not adequately separate the powers of government, but rather reflected "legislative omnipotence;"[11] and, as noted by Hamilton, established the governor and legislative council as the "court of appeals in the last resort." This latter provision led to Chief Justice Joseph C. Hornblower's comment at the 1844 Constitutional Convention that the court of appeals had "long since been christened by eminent Counsel, not the Court for the Correction of Errors but the Court of High Errors!"[12]

William Griffith, a well-known lawyer from Burlington, wrote a series of 53 articles in the *New Jersey Gazette* in 1798 under the name "Eumenes," meaning "well-disposed." These articles criticized the existing New Jersey Constitution and urged the Legislature to call a constitutional convention. These papers form a highly sophisticated late 18th century state constitutional critique.

Despite the widespread criticism of New Jersey's first state constitution, and a number of efforts to change it, it stayed in place for 68 years, until 1844.

New Jersey's 1844 Constitution

Finally, after many years of what seemed like only theoretical criticism of the state constitution, the practical impact of its flawed design began to be felt. The Legislature called a constitutional convention in 1844, and New Jersey's second constitution was lebated, presented to the voters, and ratified.[13]

The new 1844 constitution added a separate Bill of Rights, the basis of today's Article I; eliminated property requirements for voting by white males; and made the governor directly elected by the people, with a veto power and a longer term, but as yet without the ability to succeed him or herself. The political court of appeals was reworked into the court of errors and appeals. The new constitution provided a mechanism, although cumbersome, for its own amendment.

The 1873 Constitutional Commission and 1875 Amendments

After the Civil War and the financial crisis of the early 1870s, the residual needs for state constitutional reform in New Jersey became more pressing than ever. The main focus of the suggested changes was aimed at the legislative branch and its preoccupation with passing special laws, interfering with local government, and granting special privileges. In his 1873 opening address to the Legislature, Governor Joel Parker argued strongly for a constitutional convention to address these problems.[14] The Legislature was unwilling to take the risks associated with a constitutional convention but finally, on the last day of the session, agreed to a compromise—the appointment of a constitutional commission)[15]

The appointed commission debated virtually all of the important issues in state constitutional revision, and submitted an ambitious package of recommended changes to the Legislature. These were fully debate in the legislative session of 1874, and re-adopted in 1875 before being placed on the ballot for electoral approval.[16] The Legislature recommended 28 amendments, which were all approved by the voters in 1875.

A number of the most important structural provisions in our current state constitution date from this major series of changes in 1875. For example, the requirement of a thorough and efficient education,[17] the governor's item veto,[18] the ban on special laws passed by the Legislature,[19] the restrictions on laws interfering with municipal affairs,[20] and the requirement of uniformity in taxation,[21] all of which play a major role in our government today, were adopted in 1875.

Since a series of these state constitutional changes were aimed at limiting the Legislature, the 1875 provisions brought the judiciary into much more regular conflict with the Legislature. As John Bebout observed in 1942, these changes adopted in 1875 "necessarily entailed a tremendous increase in judicial review of legislation. Since 1875 over half of the more than 300 legislative acts invalidated by the courts were nullified because of the 1875 amendments."[22]

In addition, the public debate over the ratification of the 1875 amendments brought into sharp relief a broader Protestant-Catholic conflict in New Jersey. In the state constitutional debates, this arose over apparent attempts by leaders of the Catholic Church to defeat a number of the amendments that were seen as possibly having a negative impact on the Church and parochial schools. A commentator on this religious conflict recently noted:

> the secular press agreed that the Catholic effort to defeat the proposals had prompted an even stronger Protestant campaign to ratify them, in which Democrats, as well as Republicans, voted in their favor.[23]

The 1875 changes in the New Jersey Constitution responded to, in a short-term way, the built-up pressure for state constitutional reform. The state constitution, with these changes, would remain in place through the turn of the century and through the two great World Wars.

The 1947 Constitution

Leon S. Milmed has observed:

> The year 1947 is easily recognized as the most eventful thus far in the history of State Government in New Jersey. For those many valiant citizens who had toiled long and hard for constitutional revision, this was a year of rekindling of hopes dimmed by the decisive defeat at the polls in 1944 of a revised Charter which had been agreed upon and submitted to the voters by the Legislature. For all the citizens of New Jersey, this was a year which brought to fruition a model State Constitution.[24]

The road to the 1947 constitution, however, was a difficult process of state constitutional reform that took up most of the 1940s.[25] Strong gubernatorial leadership was a central feature in this decade of state constitutional debate and change. Governors Charles Edison, Walter E. Edge and Alfred E. Driscoll made state constitutional revision a central feature of their campaigns and administrations.[26]

Although Governor Edison campaigned on a proposal for a constitutional convention and suggested this in his 1941 inaugural address, the Legislature still resisted the idea. Again, as it had done in 1873, the Legislature created a commission. The Hendrickson Commission, chaired by Senator Robert C. Hendrickson proposed a revised constitution and recommended that it be submitted to the electors. The Legislature, instead, formed a joint committee that received public testimony and, ultimately, suggested that no action be taken until the war was over.[27]

Almost immediately, however, a new strategy was pursued. The Legislature passed a bill asking the voters to authorize it to draft a new constitution and submit it to the voters. This referendum was approved, and the 1942 Hendrickson Commission draft served as the basis for a joint legislative committee's recommended new state constitution.[28] This revised constitution, though, despite then-Governor Edge's strong support, was defeated decisively at the polls in November 1944.[29]

After the completion of the war, however, Driscoll renewed the repeated calls for a constitutional convention in his campaign for governor. He noted in his 1947 inaugural address, that state constitutional revision had "pursued an uncertain course ever since the annual message of Governor Joel Parker in 1873, in which he advocated a constitutional convention."[30] Because of changed political circumstances, virtually all of the political actors decided to support the proposal for a convention.

The 1947 constitutional convention was authorized by the Legislature and approved by the voters. It was limited, however, to the extent that it was prohibited from revising the system of equal representation of counties in the state during the summer of 1947. Its debates are well documented.[31]

The convention suggested major changes in the structure of government and rights. The Bill of Rights was expanded to include equal rights for women[32] and collective bargaining rights for labor unions.[33] Also included was a modern anti-discrimination provision.[34] In possibly the most important contribution of the 1947 constitution, the judiciary was streamlined and modernized. Finally, the executive branch was strengthened by simplifying its organization, strengthening its veto power, permitting succession, and bringing all of the executive agencies directly under gubernatorial control.

Even though 1947 in New Jersey may have reflected a "Dry Revolution,"[35] it was the most important year in the state's constitutional history.

Indeed, New Jersey's new constitution provided an example of a modem, streamlined state constitution for the rest of the country. As Leon Milmed observed:

> The successful conclusion of the revision movement—the fact that New Jersey today has a model State Constitution—is predominantly attributable to the dynamic leadership of Governor Driscoll and the vigorous and sustained support which he gave to the work of the Convention.[36]

In fact, the New Jersey Constitution served as a model for other states such as Alaska.

> Alaska's constitution was written by territorial residents who reflected the unique political aspirations and experience of Alaskans. However, there is nothing parochial about the document. Indeed, it embodies the most modem and progressive concepts of state constitutional draftsmanship. The delegates were aware of the current thinking of political scientists and state constitutional lawyers. They brought constitutional scholars from around the country to advise them, and they had at hand several new state constitutions (Missouri, 1945; New Jersey, 1947; and Hawaii, 1950).[37]

Thus, the 1947 New Jersey Constitution came to be viewed nationally as a model state constitution,[38] "one of the best state constitutions in the country."[39] Consequently, its revised judicial article led the editor of the *Journal of the American Judicature Society* to write in 1948 that "New Jersey Goes to the Head of the Class."[40]

Since 1947, New Jersey's constitution has remained relatively stable. The issue of malapportionment finally came to a head in the 1960s, resulting in the 1966 Constitutional Convention concerning reapportionment. Finally, the issue of equal representation of counties in the state Senate was laid to rest.[41]

Although we have adopted a few constitutional amendments, we have not altered the basic streamlined structure adopted in 1947. 'Therefore, amendments concerning matters such as gambling,[42] pocket vetoes by the governor,[43] legislative "veto" of administrative regulations,[44] recall of public officials,[45] full state funding for the judicial system,[46] and providing limitations on unfunded mandates to local governments[47] reflect relatively minor adjustments in the 1947 document.

The past 50 years have served to reinforce the positive reputation of the New Jersey Constitution. It remains the responsibility of this and future generations, however, to keep it that way.

EPILOGUE

In the 25 years since I wrote this article the New Jersey Constitution has retained its essential characteristics: It remains relatively short and has not been amended at an inordinate rate.

Most likely more people are aware of it now because of the number of high-visibility issues associated with it like marriage equality, cannabis legalization, Governor Christie's decision not to renominate two Supreme Court justices for tenure, discussions of whether our constitution could be used to lower our property taxes, the necessity of a Lieutenant Governor, whether an increase in judges' salary deductions for pensions and healthcare constituted an unconstitutional diminution of judicial salaries, continued judicial enforcement of the Mt. Laurel limits on exclusionary zoning and Thorough and Efficient public school funding, minimum wage, reform of the cash bail system, public employee pensions, and disagreements over COVID-19 pandemic restrictions that continue to bring the State constitution to the attention of the public.

These last 25 years have continued to demonstrate the wide range of important, every-day matters that implicate our constitution. I see no indication that this important role it plays in our State is likely to change in the future. ■

Endnotes

1. *Vreeland v. Byrne,* 72 N.J. 292, 310 (1977) (Hughes, C.J., dissenting).
2. Robert F. Williams, The New Jersey State Constitution: A Reference Guide, Commemorative Issue (1990) in Foreword at xix.
3. *See* Robert F. Williams, New Jersey's Constitution of 1776: "We shall have a Republick established by the end of the week," 120 N.J. Lawyer, the Magazine 21 (August 1987).
4. New Jersey's state constitutional history, of course, goes well back into the Colonial period. See Julian R. Boyd, Fundamental Laws and Constitutions of New Jersey, 1664-1964 (1964).

5. For an in-depth study of New Jersey's first constitution, see Charles R. Erdman, Jr., The New Jersey Constitution of 1776 (1929). This excellent book, now out of print, was published by Princeton University Press.
6. Compare Robert F. Williams, *supra* note 2, at 1-2 with Irwin N. Gertzog, The Author of New Jersey's 1776 Constitution, 110 New Jersey History 1 (Fall/Winter 1992).
7. Robert F. Williams, "Experience Must Be Our Only Guide": The State Constitutional Experience of the Framers of the Federal Constitution, 15 Hastings Const L. 0. 403 (1988).
8. The Federalist No. 47, at 318 (J. Madison) (Modern Library ed. 1937).
9. The Federalist No. 66, at 430 (A. Hamilton) (Modern Library ed. 1937).
10. The Federalist No. 70, at 456 (A. Hamilton) (Modern Library ed. 1937). Hamilton added that "New Jersey has a council whom the governor may consult. But I think, from the terms of the consti- tution, their resolutions do not bind him." *Id.*
11. Erdman, *supra* note 5, at 69.
12. John Bebout, "Striking a Balance: Demand for an Independent Judiciary, 1776-1844," in Jersey Justice: 300 Years of the New Jersey Judiciary 122 (Carla Vivian Bello and Arthur T. Vanderbilt II, Eds. 1978).
13. Frederick M. Herrmann, The Constitution of 1844 and Political Change in Antebellum New Jersey, 101 New Jersey History 29 (Spring/Summer 1983); John Bebout, "Introduction," Proceedings of the New Jersey State Constitutional Convention of 1844 (1942). liii.
14. Williams, *supra* note 2, at 9.
15. Robert F. Williams, Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change, 1 Hofstra L. and PolySymp. 1, 7-10 (1996).
16. *Id.* at 9.
17. Art. VIII, § IV, para. 1.
18. Art. V, § I, para. 15.
19. Art. IV, § VII, paras. 7, 8, 9.
20. Art. IV, § VII, para. 9(13).
21. Art. VIII, § I, para. 1(a).
22. John Bebout, "Introduction," Proceedings of the New Jersey State Constitutional Convention of 1844 cvi (1942).
23. Samuel T. McSeveney, Religious Conflict, Party Politics, and Public Policies in New Jersey 1874-75, 110 New Jersey History 18, 33 (Spring/Summer 1992).
24. Leon S. Milmed, "The New Jersey Constitution of 1947," 1 N.J.S.A. 91 (1971).
25. Richard J. Connors, The Process of Constitutional Revision in New Jersey: 1940-1947 (1970).
26. Williams, *supra* note 2, at 13-16.
27. *Id.* at 14.
28. *Id.* at 15.
29. *Id.*; Connors, *supra* note 25, at 108-09.
30. Milmed, *supra* note 24, at 91.
31. Williams, *supra* note 2, at 144-45.
32. Art. I, para. 1. Robert F. Williams, The New Jersey Equal Rights Amendment: A Documentary Sourcebook, 16 Women's Rights Law Reporter 69 (Winter 1994)
33. Art. I, para. 19. Richard A. Goldberg and Robert F. Williams, Farmworkers' Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights, 18 Rutgers Law Journal 729 (1987).
34. Art. I, para. 5.
35. This was the title given by constitutional convention delegate Frank G. Schlosser to his memoir of the convention. Dry Revolution: Diary of a Constitutional Convention (1960). Another good treat- ment is contained in a book written by a staff person during the 1947 convention. Richard N. Baisden, Charter for New Jersey: The New Jersey Constitutional Convention of 1947 (1952).
36. Milmed, *supra* note 24, at 94.
37. Gordon S. Harrison, Alaska's Constitution: A Citizen's Guide 6 (3rd ed., 1992).
38. Legal historian Lawrence Friedman has stated that New Jersey's 1947 constitu- tion presents a "paradigm case" of a "technician's constitution." Lawrence M. Friedman, State Constitutions in Historical Perspective, 496 Annals of the American Academy of Political and Social Science 33, 39 (1988).
39. John E. Bebout and Joseph Harrison, The Working of the New Jersey Constitution, 10 William and Mary L. Rev. 337 (1968).
40. Editorial, "New Jersey Goes to the Head of the Class," 31 J. Am. Jud. Soc'y 131 (1948).
41. Williams, *supra* note 2, at 17.
42. Article IV, § VII, para. 2.
43. Article V, § I, para. 14(a).
44. Article V, § IV, para. 6.
45. Article I, para. 2. b.
46. Article VI, § VIII.
47. Article VIII, § II, para. 5.

1997–2022

Amendments to the New Jersey Constitution

In the last 25 years, the 1947 New Jersey Constitution has been the object of numerous amendments which in certain instances address policy issues as opposed to governance framework. This is consistent with an emerging modern trend in the use of state constitutions generally. For ease of reference, those New Jersey amendments made since 1997 are highlighted in the listing below.

1. **Gambling**. Art. 4, §7, ¶2 (Amended at general election Nov. 3, 1953, eff. Dec. 3, 1953; Nov. 4, 1969, eff. Dec. 4, 1969; Nov. 7, 1972, eff. Dec. 7, 1972; Nov. 2, 1976, eff. Dec. 2, 1976; Nov. 3, 1981, eff. Dec. 3, 1981; Nov. 6, 1984, eff. Dec. 6, 1984; Nov. 6, 1990, eff. Dec. 6, 1990; Nov. 3, 1998, eff. Dec. 3, 1998; Nov. 2, 1999, eff. Dec. 2, 1999; S.C.R. No. 132, §1, approved at general election Nov. 8, 2011, eff. Dec. 8, 2011; S.C.R. No. 11, §1, approved at general election Nov. 5, 2013, eff. Dec. 5, 2013; S.C.R. No. 91, §1, approved at general election Nov. 2, 2021, eff. Jan. 1, 2022).

2. **Cannabis etc**. Art. 4, §7, ¶13 (Adopted by S.C.R. No. 183, §1, approved at general election Nov. 3, 2020, eff. Jan. 1, 2021).

3. **Taxation etc**. Art. 8, §1, ¶3 (Adopted at general election Nov. 3, 1953, eff. Jan. 1, 1954. Amended at general election Nov. 5, 1963, eff. Dec. 5, 1963; Nov. 8, 1983, eff. Dec. 8, 1983; Nov. 8, 1988, eff. Dec. 8, 1988; Nov. 2, 1999, eff. Dec. 2, 1999; S.C.R. No. 110, §1, approved at general election Nov. 5, 2019, eff. Dec. 5, 2019; A.C.R. No. 253, §1, approved at general election Nov. 3, 2020, eff. Dec. 3, 2020).

4. **Funding for open space etc**. Art. 8, §2, ¶7 (Adopted at general election Nov. 3, 1998, eff. Dec. 3, 1998. Amended at general election Nov. 4, 2003, eff. Dec. 4, 2003).

5. **Redistricting etc**. Art. 4, §3, ¶4 (Adopted by A.C.R. No. 188, §1, approved at general election Nov. 3, 2020, eff. Dec. 3, 2020).

6. **Vacancy in office of Governor or Lieutenant Governor etc**. Art. 5, §1, ¶8 (Amended at general election Nov. 8, 2005, eff. Jan. 17, 2006).

7. **Eligibility for office of Governor and Lieutenant Governor**. Art. 5, §1, ¶2 (Amended at general election Nov. 8, 2005, eff. Jan. 17, 2006).

8. **Appointment and removal of department heads etc**. Art. 5, §4, ¶4 (Amended at general election Nov. 8, 2005, eff. Jan. 17, 2006).

9. **Persons denied right of suffrage etc**. Art. 2, §1, ¶6 (Amended at general election Nov. 7, 1995, eff. Dec. 7, 1995. Amended by L.2007, S.C.R. No. 134, §1, approved at general election Nov. 6, 2007).

10. **Ineligibility of members for civil office or position**. Art. 4, §5, ¶1 (Amended at general election Nov. 8, 2005, eff. Jan. 17, 2006).

11. **Term of office of Governor and Lieutenant Governor etc**. Art. 5, §1, ¶5 (Amended at general election Nov. 8, 2005, eff. Jan. 17, 2006).

12. **Motor fuel and petroleum product taxes etc**. Art. 8, §2, ¶4 (Adopted at general election Nov. 6, 1984, eff. Dec. 6, 1984. Amended at general election Nov. 7, 1995, eff. Dec. 7, 1995, Nov. 7, 2000, eff. Dec. 7, 2000; Nov. 7, 2006, eff. Dec. 7, 2006; Nov. 8, 2016, eff. Dec. 8, 2016).

13. **State minimum wage rate**. Art. 1, ¶23 (Adopted by S.C.R. No. 1, §1, approved at general election Nov. 5, 2013, eff. Dec. 5, 2013).

14. **Appointment of executive heads etc**. Art. 5, §4, ¶2 (Amended at general election Nov. 8, 2005, eff. Jan. 17, 2006).

15. **Public disclosure of certain information relating to sex offenders**. Art. 4, §7, ¶12 (Adopted at general election Nov. 7, 2000, eff. Dec. 7, 2000).

16. **Credit of natural resource damages awards etc**. Art. 8, §2, ¶9 (Adopted by S.C.R. No. 39, §1, approved at general election Nov. 7, 2017, eff. Dec. 7, 2017).

17. **Personal income tax; use to reduce or offset property taxes**. Art. 8, §1, ¶7 (Adopted at general election Nov. 2, 1976, eff. Dec. 2, 1976. Amended at general election Nov. 6, 1984, eff. Dec. 6, 1984; Nov. 7, 2006, eff. Dec. 7, 2006).

18. **Contributions collected from assessments on wages**. Art. 8, §2, ¶8 (Adopted by S.C.R. No. 60, §1, approved at general election Nov. 2, 2010, eff. Dec. 2, 2010).

19. **Office ineligibility of Governor and Lieutenant Governor etc**. Art. 5, §1, ¶3 (Amended at general election Nov. 8, 2005, eff. Jan. 17, 2006).

20. **Funding for preservation of lands etc**. Art. 8, §2, ¶6 (Adopted at general election Nov. 5, 1996, eff. Dec. 5, 1996. Amended at general election Nov. 4, 2003, eff. Dec. 4, 2003; Nov. 8, 2005, eff. Dec. 8, 2005; Nov. 7, 2006, eff. Dec. 7, 2006; S.C.R. No. 84, §1, approved at general election Nov. 4, 2014, eff. July 1, 2015).

21. **Election of Governor and Lieutenant Governor etc**. Art. 5, §1, ¶4 (Amended at general election Nov. 8, 2005, eff. Jan. 17, 2006).

22. **General elections**. Art. 2, §1, ¶1 (Amended at general election Nov. 7, 1995, eff. Dec. 7, 1995; Nov. 8, 2005, eff. Jan. 17, 2006).

23. **Salary of Governor and Lieutenant Governor etc**. Art. 5, §1, ¶10 (Amended at general election Nov. 8, 2005, eff. Jan. 17, 2006).

24. **Justices of the Supreme Court and judges of the Superior Court etc**. Art. 6, §6, ¶6 (Amended by L.2012, S.C.R. No. 110, § 1, approved at general election Nov. 6, 2012, eff. Dec. 6, 2012).

25. **Appointment of Lieutenant Governor to fill unexpired term etc**. Art. 5, §1, ¶9 (Amended at general election Nov. 8, 2005, eff. Jan. 17, 2006).

26. **Vacancy in office of Governor etc**. Art. 11, §7 (Adopted at general election Nov. 8, 2005, eff. Jan. 17, 2006).

27. **Failure of Governor-elect or Lieutenant Governor-elect to qualify etc**. Art. 5, §1, ¶7 (Amended at general election Nov. 8, 2005, eff. Jan. 17, 2006).

28. **Secretary of State and Attorney General etc**. Art. 5, §4, ¶3 (Amended at general election Nov. 8, 2005, eff. Jan. 17, 2006).

29. **Vacancy in office of Governor etc**. Art. 5, §1, ¶6 (Amended at general election Nov. 8, 2005, eff. Jan. 17, 2006).

30. **Finance, limitation of indebtedness**. Art. 8, §2, ¶3 (Amended at general election Nov. 8, 1983, eff. Dec. 8, 1983. Amended by L.2008, S.C.R. No. 39, §1, approved at general election Nov. 4, 2008).

31. **Double jeopardy; pretrial release; grounds for denial of pretrial release**. Art. 1, ¶11 (Amended by S.C.R. No. 128, §1, approved at general election Nov. 4, 2014, eff. Jan. 1, 2017).

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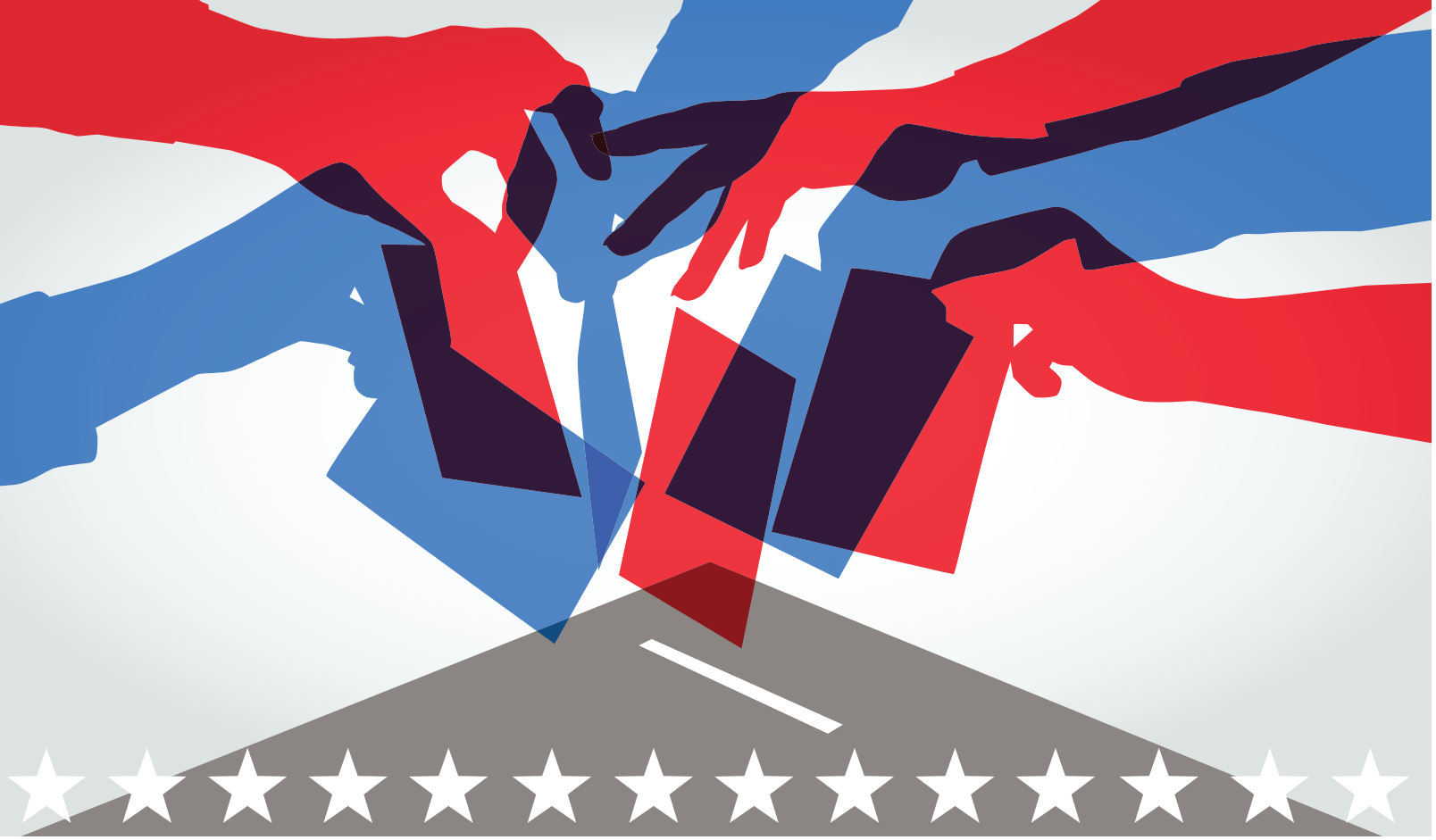
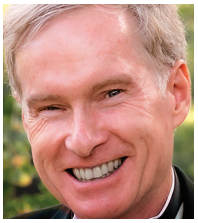


A Districting Amendment—or a Districting Convention?

A Look at How We Can Address Gerrymandering



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By Edward A. Hartnett

Earlier this year, the Supreme Court of New Jersey faced a problem. Its chosen independent member of the New Jersey Congressional Districting Commission, a respected former member of the Court itself, had offered this explanation of his tie-breaking vote:

> In the end, I decided to vote for the Democratic map, simply because in the last redistricting map it was drawn by the Republicans.
>
> Thus, I conclude that fairness dictates that the Democrats have the opportunity to have their map used for this next redistricting cycle.[1]

The Court, in a unanimous opinion written by Chief Justice Stuart Rabner, rejected all legal challenges to the resulting map, observing that the independent mem-

ber's "vote marks the end of a political process," that "follows days of private meetings and discussions in a hotel, with one side and then the other.... Those discussions and their resolution are not subject to procedural rules or judicial review in precisely the manner that an agency decision or a trial judge's ruling would be."[2]

The Court added, "Questions of partisanship or the appearance of partisanship can affect the public's confidence, yet our current system is designed to be overseen by twelve partisan members and a thirteenth member whom the party delegations propose," and noted pointedly that "there are other ways to conduct the redistricting process," such as "independent redistricting commissions that include citizens with no party affiliation, in order to 'increase the degree of separation between map-drawers and partisan politics.'"[3] The choice whether to retain the existing system of districting or to change it "is left to the people of our State."[4]

Although Chief Justice Rabner suggested the possibility of a constitutional amendment, he did not (unlike his predecessor, Chief Justice Joseph Weintraub) suggest a constitutional convention.[5] Prior generations held conventions in the 1940s and 1960s, but we have not done so since. "Prying the power to redistrict or influence the redistricting process out of the hands of legislators is no small feat," as one redistricting scholar explains.[6] It is especially difficult in New Jersey, which lacks initiative and referendum. But as difficult as it may be to convince the Legislature to call a constitutional convention—it took years of work to convene the 1947 convention—a convention offers the best hope for creating a system that recognizes what the Supreme Court of the United States has called the "core principle of republican government," that "the voters should choose their representatives, not the other way around."[7] A convention could be structured to minimize the impact of partisan politics. It could address not only the process of districting, but also the criteria to be used.

A convention could also address both congressional districting and the similar process used to establish districts for the New Jersey Legislature.[8] Reform of state legislative districting may prove to be especially important if the Supreme Court of the United States adopts some version of the Independent State Legislature (ISL) theory and limits the ability of state constitutions and state courts to constrain the way that state legislatures draw congressional districts.[9] To the extent that state legislatures are independent of state constitutions and state courts in establishing congressional districts, the more important it is who the members of those state legislatures are. And the more important it is who the state legislators are, the more important it is how the state Legislature itself is districted. Partisanship in districting the state Legislature could beget unchecked partisanship in congressional districting.

1947 Constitution

The 1947 Constitution said nothing about the creation of congressional districts, leaving the matter to the state Legislature to determine under Article I of the United States Constitution and the federal statute requiring single member districts.[10] With nothing in the state constitution to constrain the gerrymandering of congressional districts, the result was that, as then-Gov. Robert B. Meyner put it in 1960, "Redistricting ordinarily occurs only when the Legislature and the Executive are of the same political persuasion and the result often reflects this affinity." He observed that there had been no change to the congressional districts for more than 28 years, and some congressional districts had more than twice as many people as others.[11]

The 1947 Constitution did, however, constrain the gerrymandering of state legislative districts by requiring that state legislative districts follow county lines. This was obviously true for the state Senate, in which each county had a single senator. But it was also true for the General Assembly, whose members were also elected by county.[12] The only way to gerrymander a state legislative district would be to change county borders. No new county has been created since the creation of Union County in 1857.[13] And border changes since 1947 have been insignificant: a quarter acre in 1950, and three-quarters of an acre in 1958.[14]

But while gerrymandering of state legislative districts was not an issue under the 1947 Constitution, apportionment of those seats was. The 1947 Constitution required that seats in the General Assembly "be apportioned among the several counties as nearly as may be according to the number of their inhabitants," but also provided that "each county shall at all times be entitled to one member and the whole number of members shall never exceed sixty."[15] These provisos made it impossible to achieve an equal ratio of inhabitants to Members of the Assembly in each county. If that were not enough, the requirement to reapportion was not always heeded.[16]

1966 Convention

After the Supreme Court of the United State decided *Reynolds v. Sims* and held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis,"[17] New Jersey held a constitutional convention to change its Legislature. Although it was clear that it would no longer be permissible for each county to have a single senator, there was considerable effort to respect county lines. This effort was not simply due to respect for tradition; it was also designed to constrain partisan gerrymandering. And municipal lines were to be respected where possible for the same reason.

This rationale was explicit. For example, one of the monographs produced to inform the delegates' deliberations was entitled The Prevention of Gerrymandering.[18] Among the techniques listed to reduce gerrymandering was to avoid splitting municipalities.[19] When dealing with municipalities that were so large that they needed to be split, another technique to reduce gerrymandering was to limit the number of parts in which larger municipalities could be split. Even U.S. Chief Justice Earl Warren acknowledged the risk: "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."[20]

The convention proposed, and the people adopted, a revised legislative scheme that apportioned senators among Senate districts by population, with each Senate district to "be composed, wherever possible, of one single county, and, if not so practicable, of two or more contiguous whole counties."[21] Each Senate district with only one senator would also be an Assembly district. Senate districts with more than one senator would be divided into Assembly districts. Unless necessary to meet a limitation on population deviation, "no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the State," and tight constraints were imposed on the number of district that the larger counties or municipalities could be divided into.[22]

These provisions are still in the current text of the New Jersey Constitution. However, a series of New Jersey Supreme Court decisions have effectively deleted them from the Constitution.[23] Of course, under the Supremacy Clause of the United States Constitution, state law must give way to valid federal law.[24] But these decisions have done more than insist that these state constitutional provisions yield to the extent that federal law requires. Instead, they have freed those engaged in districting from having to pay any attention at all to these constitutional provisions. Normally, judges try to save as much as possible of a legal enactment; New Jersey judges even engage in what they call "judicial surgery" to do so.[25] But here, the New Jersey Supreme Court has wielded an axe rather than a scalpel.

The result is that anyone who looks to the text of the New Jersey Constitution to understand the structure of the New Jersey Legislature will be badly misled.

A New Convention

A new convention could take up Chief Justice Rabner's invitation to create a nonpartisan districting commission. If a nonpartisan commission is a bridge too far, perhaps a commission could draw on New Jersey's longstanding tradition of cross-party judicial appointments with a requirement that some or all commissioners not be affiliated with the party of the appointing official.[26]

A convention could address both congressional and state districting. It could establish clear standards to be applied by that commission, reducing the risk that a nominally nonpartisan commission might be dominated by partisans. Of course, people will disagree on the appropriate criteria and the extent to which they should constrain the commission, but the more determinate the standards established in the Constitution, the less it is necessary to rely on the independence of the commission itself. And a convention could make clear that the chosen criteria govern to the extent possible, even if federal law requires that they give way in particular circumstances.[27]

At the time of the 1966 Convention, computerized districting was in its infancy.[28] Now, "advancements in computing technology have enabled mapmakers to…generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage," making "gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides."[29] This same technology can be used to assist an independent commission.[30] Of course, the technology cannot choose the criteria for us, and it might be impossible for a computer to pick the "best" of all possible maps.[31] But a computer can randomly generate thousands of maps meeting certain chosen criteria, and then rank those maps according to certain other chosen criteria.[32] Such a ranking could inform (or constrain) a commission, and be quite useful if any map that would otherwise be chosen under state law runs afoul of any existing or new federal law.

Politicians looking to district for partisan advantage or for self-preservation—elected officials looking to choose their voters rather than the other way around—may not like this idea. But that is why a constitutional convention may be our best hope. ■

Endnotes

1. *Matter of Cong. Districts by New Jersey Redistricting Comm'n,* 249 N.J. 561, 573 (2022).
2. *Id.* at 576.
3. *Id.* at 579–80.
4. *Id.* at 580.
5. *Jackman v. Bodine*, 43 N.J. 453, 475 (1964) ("Some members of the Court believe that a Constitutional Convention is the sole permissible method of dealing with the problem before us…."). *See also Jackman v. Bodine*, 44 N.J. 414, 421 (1965) (scheduling argument on the question whether a Constitutional Convention is required "unless prior thereto a statute shall be duly adopted providing for such a Convention").
6. Emily Rong Zhang, Bolstering Faith

with Facts: Supporting Independent Redistricting Commissions with Redistricting Algorithms, 109 Calif. L. Rev. 987, 1000 (2021).

7. *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S. Ct. 2652, 2677 (2015). *See also* N.J. Const. (1947), Art. I, §2(a) ("All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it.").
8. N.J. Const. (1947), Art. IV, §3 (providing for ten partisan members plus a single neutral selected by the Chief Justice).
9. *See Moore v. Harper*, 2022 WL 2347621, cert. granted (June 30, 2022). *Cf.* Vikram Amar and Akhil Amar, Eradicating Bush-League Arguments Root and Branch: The Article II Independent State Legislature Notion and Related Rubbish, 2021 Supreme Court Review 1, __ n.97 (forthcoming) (agreeing, in the context of Presidential elections, that the Court should grant *certiorari* on the independent State legislature question "precisely to repudiate once and for all the specious ISL claims").
10. U.S. Const., Art. I, §4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."); 2 U.S.C. §2c.
11. Minutes of the 184th General Assembly 33 (Jan. 12, 1960) ("For example, the 1st District now has 550,000 people, while the 13th and 14th each have only about 270,000.").
12. N.J. Constitution of 1947, Art. IV, §III. ("The General Assembly shall be composed of members elected biennially by the legally qualified voters of the counties, respectively...."). A committee at the 1947 Convention asked the Attorney General whether the creation of Assembly districts within the counties would be consistent with the referendum authorizing the convention, which instructed the convention to retain the existing county lines and basis of representation. The Attorney General answered no, based on judicial decisions interpreting the pre-1947 constitution to require that assemblymen be elected at large in each county. 3 Proceedings of the N.J. Constitutional Convention 641-44. *See Morris v. Wrightson*, 56 N.J.L. 126, 204–05 (Sup. Ct. 1893) (holding assembly districts unconstitutional based on the plain language of the constitution and rejecting an argument based on settled usage of such districts, while pointing out that assembly districts had been "so devised, by massing together the qualified voters of one political party, as to secure to the minority of qualified voters of the county an unjust advantage in the choice of members of the assembly... conspicuously, but not exclusively,... in the county of Hudson [with its] 'Horseshoe District' ... as well known in this state as a synonym for... unfair political methods as is the word 'gerrymander' throughout the United States."); *Smith v. Baker*, 74 N.J.L. 591, 592 (E.&A. 1906) (*per curiam*) (deciding case on the grounds stated in Wrightson and noting that an "opinion in the case in hand would necessarily be repetitious"). General Van Ripen added that whatever constitution the convention proposed would have to be reviewed by the Secretary of State for compliance with the people's instructions, could not be put to the people for a vote without the Secretary certifying such compliance, and that in the Attorney General's opinion, the Secretary could not so certify if the proposed constitution called for Assembly districts within the counties rather than at large in each county. *Id.* at 643-44.
13. *See* John F. Snyder, The Story of New Jersey's Civil Boundaries, 1606-1968, at 52. (1969, 2004 reprint by New Jersey Geological Survey).
14. *Id.* at 58. The 1958 transfer of about three quarters of an acre from Springfield in Union to Millburn in Essex was so minor that it does not even appear in a history of Millburn that reports such minutiae for 1958 as the high school graduates wearing caps and gowns for the first time. Mariam Meisner, A History of Millburn Township 215, ebook available at millburnlibrary.org/wp-content/uploads/2021/05/HistoryMillburnTownshipEbook.pdf. By contrast, "from 1852 to 1893, when assemblymen were elected from single-member districts within the counties the [gerrymandering] process was raised to a high degree of artistry." Ernest C. Reock, Jr., The Prevention of Gerrymandering 1 (background materials for 1966 convention).
15. N.J.Const. (1947), Art. IV, § III.
16. Minutes of the 184th General Assembly 32 (Jan. 12, 1960) (quoting Governor Driscoll's 1953 call for immediate reapportionment of the Assembly and stating, "We are now eight years overdue.").
17. 377 U.S. 533, 568 (1964).
18. Reock, *supra*, n.14. Other contributors to the prepared material included Samuel A. Alito, Vincent Biunno, and Alan Handler.
19. Reock, *supra*, n.14 at 5-6.

20. *Reynolds v. Sims*, 377 U.S. 533, 578–79 (1964). The Supreme Court of New Jersey made a similar point. "[T]he drawing of original lines involves the problem of gerrymandering." *Jackman v. Bodine*, 44 N.J. 414, 417 (1965).
21. N.J.Const. (1947), Art. IV, §2, ¶1.
22. N.J.Const. (1947), Art. IV, §2, ¶3.
23. *Scrimminger v. Sherwin*, 60 N.J. 483, 492, 497-98 (1972) (holding that "our Constitution's mandate for adherence to county lines cannot be followed under the present population distribution in our State," that "the Senate districts to be created without reference to counties must be single-member districts," and that while municipalities are "appropriate building blocks for the creation of districts," the larger municipalities will "have to be breached," and "the Commission may have to depart from the direction in Art. 4, §II, 3, concerning the division of a municipality"); *Davenport v. Apportionment Comm'n*, 65 N.J. 125, 133 (1974) (holding that "once the use of counties as building blocks was declared unenforceable, as it had to be under the demographic pattern shown by the 1970 censu[s], the county concept ceased to have any viability in the creation of Senate districts"). While these cases might have been read to be limited to the demographic patterns at the time, there were instead read to have "so discredited the constitutional scheme" that later "apportioners were freed," not only from the constitutional provisions involved in those decisions, but also from the two-district limitation of Art. 4, §2, ¶3, that was not involved in those decisions. *McNeil v. Legislative Apportionment Comm'n of State*, 177 N.J. 364, 392 (2003). McNeil also relied *sua sponte* on claim preclusion based on earlier federal litigation, ignoring that a federal court has no authority to order State officials to comply with State law. *McNeil*, 177 N.J. at 393-400 (ignoring *Pennhurst v. Halderman*, 465 U.S. 89 (1984)).
24. U.S. Const., Art. VI.
25. *State v. Comer*, 249 N.J. 359, 402 (2022); *Town Tobacconist v. Kimmelman*, 94 N.J. 85, 104 (1983) ("When a statute's constitutionality is doubtful, a court has the power to engage in 'judicial surgery' and through appropriate construction restore the statute to health").
26. *See* Arthur T. Vanderbilt, The Challenge of Law Reform 33 (1955) (noting that New Jersey has enjoyed a bipartisan judiciary "for a century as a matter of unbroken tradition" and that a "bipartisan system insures that at least half of the judges will not be appointed for political considerations, but rather because they are competent lawyers with judicial temperament").
27. Some fear a runaway convention. But both the 1947 and 1966 conventions were limited. The 1947 convention was prohibited from changing county lines or the basis of representation in the legislature. *See*, *supra*, n.12. And the 1966 convention was limited to revising the representation of the people in a Legislature to comply with the requirements of the United States Constitution. Session Laws of New Jersey, chapter 43 (1965).
28. Reock, *supra*, at 14 n.14 (noting that the use of computers to prevent gerrymandering has been suggested, but "the development of this technique probably has not yet progressed far enough to be very satisfactory").
29. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting).
30. Zhang, *supra*, at 1000 n.6.
31. Micah Altman, The Computational Complexity of Automated Redistricting: Is Automation the Answer?, 23 Rutgers Computer & Tech. L.J. 81 (1997).
32. For example, five thousand maps with contiguous districts could be generated, all of which have no more than a 10% population deviation. *See, e.g.*, *Harris v. Arizona Indep. Redistricting Comm'n*, 578 U.S. 253, 259 (2016) (noting that prior cases have made clear that an apportionment plan with a maximum population deviation under 10% does not require justification by the State under the Fourteenth Amendment). Tighter tolerances are required for Congressional districts. *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) ("States must draw congressional districts with populations as close to perfect equality as possible."). The maps generated could all be ranked based on how many splits of political subdivisions they involve, and the maps with the lowest number of such splits could be further ranked by least population deviation.

Legislature, Courts Shape Evolving Bail Reform Landscape

By Alan L. Zegas

Beginning in 2007, when the New Jersey Legislature eliminated the death penalty for murder, the constitutional right to bail applied to all cases.[1] The system relied heavily upon the setting of a monetary bail sufficient to ensure the presence of the accused at trial. Defendants were required to post cash or arrange for a bond to secure their release.[2]

The system had unfair consequences: Defendants who posed a substantial risk of danger to the community or were a high risk of flight could be released if they posted untainted funds with the court in an amount set by the court, which was often high. By contrast, poorer defendants, accused of less serious crimes, who posed little risk of flight, were held in custody because they could not post modest amounts of bail.

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In 2014, the voters approved an important amendment to the state constitution, modifying Article I, paragraph 11, dating from 1844, to permit pretrial detention under certain circumstances and relegating cash bail to the last option to ensure that defendants appear at trial. This new set of constitutional mandates was to be implemented by the Legislature.

On any given day, the New Jersey county jail system has in its custody approximately 15,000 inmates. A 2013 study of the New Jersey jail population revealed that 12% of the jail population was held in custody because of an inability to pay $2,500 or less.[3] The study also revealed that there was a backlog of: 41% of the municipal court cases; 53% of the Superior Court cases pre-indictment; and 45% of the criminal cases post-indictment. Inmates who had been indicted but not yet tried had been in custody for 314 days on average. Some inmates were sitting in jail for longer than their likely jail sentence would be if they had been tried and convicted.

A 2013 study of the New Jersey jail population revealed that 12% of the jail population was held in custody because of an inability to pay $2,500 or less.[3] The study also revealed that there was a backlog of: 41% of the municipal court cases; 53% of the Superior Court cases pre-indictment; and 45% of the criminal cases post-indictment. Inmates who had been indicted but not yet tried had been in custody for 314 days on average. Some inmates were sitting in jail for longer than their likely jail sentence would be if they had been tried and convicted.

As a result of these statistics, New Jersey's bail laws, which had been based entirely upon the payment of money or a bond, were replaced by a statutory system that disfavored pretrial detention and instead favored the release of individuals based upon their judicially-assessed risk of flight and their danger to the community.

Under the new statutory scheme, a prosecutor may file a motion at any time seeking the pretrial detention of a defendant if crimes of certain classes are alleged. A pretrial detention hearing is to be held no later than the defendant's first appearance. If pretrial detention is sought after the defendant's first appearance, a hearing is to be held within three days unless an application for a continuance is made by the prosecutor or defendant.

At the detention hearing, a defendant has the right to counsel or to the appointment of counsel, if the defendant is indigent. The defendant also has a right to testify without the testimony being used to prove guilt at trial, present witnesses, cross-examine witnesses, and present information "by proffer or otherwise."

Depending upon the crime charged a rebuttable presumption may arise that the individual poses a risk of flight or danger to the community, or a rebuttal presumption may arise that some combination of monetary bail or non-monetary conditions, arise in favor of the individual's pretrial release.

A prosecutor seeking to rebut a presumption favoring the defendant's pretrial release must prove the need for detention by clear and convincing evidence.

Court Interpretations

Since the new detention statute was enacted, the New Jersey Supreme Court has issued several decisions interpreting the law. Chief Justice Stuart Rabner, writing for the Court in the first of the Court's detention decisions, *State v. Robinson*,[4] upheld the constitutionality of the new statute. Robinson, the defendant, had been arrested and was charged with first degree murder and possessory weapons offenses. The state moved for the defendant's detention. At the detention hearing, the defendant demanded that the state disclose to defendant a surveillance video of the shooting. The Supreme Court, noting that the pretrial detention rule called for discovery of "statements and reports" held that the state was not required to disclose surveillance videos.

The Court also ruled that although statements related to a witness who is referred to in both the affidavit of probable cause and incident report must be disclosed, if the incident report alone references an expert report, and the state does not otherwise rely on it at the detention hearing, the report need not be disclosed to defendant at the hearing.

In *State v. Ingram,*[5] a case decided shortly after *Robinson*, the defendant was charged by way of a complaint-warrant with various possessory weapons offenses. At a pretrial detention hearing, the defendant maintained that for the state to prove the existence of probable cause, a witness must be called. The Supreme Court disagreed. The Court held that if the information in a defendant's criminal history, record of court appearances, and recommendations in the public safety assessment are com-

pelling, the judge may find grounds for pretrial detention by clear and convincing evidence based on those documents alone. The Court also ruled that a post-arrest finding of probable cause may be based on hearsay and a written proffer in a non-adversarial setting.

Subsequently, *State v. S.N.*[6] involved a defendant who was charged in a complaint-warrant with first-degree aggravated sexual assault on a person under the age of 13, second-degree child endangerment, and fourth-degree lewdness. The trial court ordered defendant detained. The Appellate Division reversed and the Supreme Court affirmed, modifying the decision of the Appellate Division.

Analyzing the posture of the case, the Court noted that the "abuse of discretion" standard is to be applied on review of pretrial detention determinations under the Criminal Justice Reform Act. The Court held that the trial court had abused its discretion in ordering the detention of the defendant. The Court noted that a trial court's decision not supported by articulable facts is not entitled to deference and may constitute an abuse of discretion.

The Court also found that the trial court had abused its discretion because the charges did not carry a presumption of detention; the defendant was 50 years old, gainfully employed, and lacked a criminal history. Although the defendant was a citizen of both the United States and Canada, he had strong ties to the community, including his support of his adoptive parents and his relationship with his biological children.

In *State v. Dickerson*,[7] the defendant was charged with second-, third-, and fourth-degree crimes relating to drugs, unlawful interception or use of official communications, and the possession of weapons. At a pretrial detention hearing, the trial court released the defendant as a sanction against the state for failing to provide the defendant with the affidavit used to support the search warrant.

Justice Lee Solomon, writing for the Court, held that the Criminal Justice Reform Act did not mandate automatic disclosure of an affidavit of probable cause supporting a search warrant. No circumstances existed, the Court held, to necessitate disclosure of the affidavit supporting the search warrant. In so ruling, the Court noted that when the offenses charged include an element of possession, a showing of probable cause that the defendant committed the offense requires that the state establish the existence of a nexus between the defendant and the contraband in the defendant's possession within the meaning of the charged offenses.

If the nexus is at issue, the defendant is free to challenge probable cause on those grounds. The Court noted that the detention rule requires disclosure of materials that relate to the state's presentation at the detention hearing. If it is an affidavit that supplies the nexus between the defendant and the contraband found the warrant should be disclosed. In detention cases, the Court noted, judges have discretion to require production of additional discovery at a hearing, including the search warrant affidavit, when appropriate. Pretrial release of a defendant, the Court held, may not be used as a discovery sanction. Only the failure of the state to establish probable cause or to overcome the presumption of release justifies release.

Defendants in *State v. Mercedes*[8] were charged in separate actions with robbery and drug possession respectively. The trial judge ordered pretrial detention for the robbery defendant but denied the state's motion for pretrial detention of the drug possession defendant.

The Court upheld the detention order entered against the robbery defendant. As to the drug possession defendant, the Court stated that a recommendation against pretrial release based only on the type of offense charged cannot justify detention by itself unless the recommendation is based on one of two presumptions in the Criminal Justice Reform Act. A defendant may request that a detention hearing be reopened if (1) the order of detention relied solely on a recommendation against release by the pretrial services program, (2) the recommendation was based only on the type of offense charged, and (3) the recommendation was not based on an offense of murder or a crime that carries a sentence of life imprisonment.

The defendant in *State v. Pinkston*[9] was ordered detained in a prosecution for second-degree eluding and second-degree aggravated assault while alluding. The Supreme Court held that pretrial detention is appropriate only if, after a hearing, a judge finds by clear and convincing evidence that no release conditions would reasonably assure the defendant's appearance in court, the safety of the community, or the integrity of the criminal justice process. The Court also held that, in determining whether pretrial detention is appropriate, courts may consider information about the nature and circumstances of the offense, the weight of the evidence, the defendant's history and characteristics, the nature of the risk of danger and obstruction the defendant poses, and the release recommendation of the pretrial services program.

A defendant, the Court noted, has a qualified, but not absolute, right to call adverse witnesses at pretrial detention hearings. Before being allowed to call an adverse witness regarding the propriety of detention at a pretrial detention hearing, a defendant must proffer how the witness's testimony would tend to undermine the state's evidence in support of detention in a material way. The proffer, the Court stated, must tend to negate the propriety of detention.

The Court, in *State v. Hyppolite*,[10] said that when the state seeks to detain a defendant prior to trial under the Criminal Justice Reform Act, "all exculpatory

evidence" must be disclosed prior to the detention hearing. The state, failing to disclose all exculpatory evidence prior to the hearing, made a disclosure after the defendant was ordered detained. In such a circumstance, the Court ruled, trial judges should apply a modified materiality standard in deciding whether to reopen the hearing.

The hearing should be reopened, the Court ruled, if there is a reasonable possibility that the result of the detention hearing would have been different had the evidence been timely disclosed. The burden is on the state, the Court found, to demonstrate that there is no reasonable possibility the withheld evidence would have changed the outcome of the hearing, thereby obviating the need for a new hearing. Concluding that the result of the detention hearing could have been different had the exculpatory evidence been timely disclosed, the Court held that the hearing must be reopened.

In *State v Canales*,[11] the defendant moved for leave to appeal from the trial court's order detaining him prior to trial. Though denying the motion for leave to appeal, the Court remanded the case to the trial court to determine whether probable cause existed to charge defendant with first-degree rather than second-degree racketeering. If first-degree charges were not supported, the Court ordered that the trial judge determine what impact the second-degree charge would have on the court's detention decision.

In *Matter of Request to Release Certain Pretrial Detainees*,[12] the Office of the Public Defender and the American Civil Liberties Union filed a motion for an order to show cause seeking the immediate release or new detention hearings for detainees who had been confined for six months or more due to delays in their trials caused by the COVID-19 pandemic.

The Court stated that it could not summarily determine whether due process had been violated without consideration of the specific circumstances of each individual pretrial detainee's case, including the length of the detention at issue. The Court did note, however, that if pretrial detention under a regulatory scheme is significantly prolonged, a defendant's confinement may become punitive and violate their due process rights.

With respect to the detainees suffering a delay of their trial date due to the COVID-19 pandemic, the trial court stated that various factors could be considered, including: (1) the length of the detainee's detention to date as well as the projected length of ongoing detention; (2) whether the detainee had been or would be in detention longer than the likely amount of time they would actually spend in jail if convicted; (3) the existence and nature of any plea offer; (4) the detainee's particularized health risks, if any, and whether they presented a heightened risk they would contract COVID-19; and (5) other factors relevant to pretrial detention as outlined by statute.

Applying the foregoing factors, the Court held that defendants have the right to reopen their detention hearings if they: (1) have been detained for at least six months; and (2) can make a preliminary showing that, based on one or more of the above factors, they are entitled to relief.

Defendants, non-citizens, were charged with aggravated assault and criminal mischief in *State v. Lopez-Carrera*.[13] To prevent removal of the defendants from the country by immigration officials before trial, the state successfully moved for pretrial detention. The Supreme Court reversed, finding that the Criminal Justice Reform Act does not authorize the pretrial detention of a non-citizen defendant to prevent their removal from the country.

The Criminal Justice Reform Act is still in its infancy, and the law will continue to be interpreted as new circumstances arise. Some are sharply critical of the law, claiming that dangerous defendants are being released. Amendments to the act have been proposed. Whether the fundamental structure of the law is changed remains to be seen. The federal counterpart to the law, enacted in 1984, still exists today.■

Endnotes

1. *See State v. Robinson*, 229 N.J. 44, 52 (2017).
2. *Id.*
3. New Jersey Jail Population Analysis, Identifying opportunities to Safely and Responsibly Reduce the Jail Population, *Luminosity in Partnership with the Drug Policy Alliance, Marie VanNorstrand, PhD.*
4. 229 N.J. 44 (2017).
5. 230 N.J. 190 (2017).
6. 231 N.J. 497 (2018).
7. 232 N.J. 2 (2018).
8. 233 N.J. 152 (2018).
9. 233 N.J. 495 (2018).
10. 236 N.J. 154 (2018).
11. 240 N.J. 558 (2020).
12. 245 N.J. 218 (2021).
13. 245 N.J. 596 (2021).

New Jersey's Constitutional Right to a Civil Jury Trial: 'Inviolate' But Not 'Absolute'

By Hon. Gary K. Wolinetz and Bruce D. Greenberg

The 1947 New Jersey Constitution guarantees the right to a jury trial, stating that "[t]he right of trial by jury shall remain inviolate."[1] But that has not meant that a jury trial is available in every civil case. Instead, whether a case can be tried by jury depends on whether it "would have been entitled to trial by jury before 1947."[2] That inquiry is "as old as the Republic."[3] This article addresses how courts have decided issues of jury trial rights in various civil cases in the 75 years since the 1947 Constitution.

Law vs. Equity Distinction

Borrowing its structure from English common law and equity principles, New Jersey is one of only a few states that has retained separate Law and Chancery courts. Chancery cases involve claims "in which the plaintiff's primary right or principal

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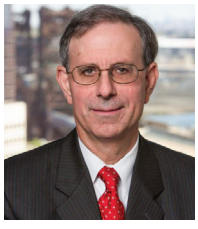

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Beginning almost immediately after the adoption of the 1947 Constitution, cases have applied the doctrine of "ancillary equitable jurisdiction" to restrict jury trials.[13] Since plaintiffs have the ability to choose their venue, plaintiffs who want a jury trial in a case implicating both legal and equitable issues may often ensure a jury trial by filing in the Law Division. This often results in defendants who want to pursue legal counterclaims in a case filed in Chancery being foreclosed from a jury trial.

relief sought is equitable in nature."[4] Such claims historically were not triable by a jury.[5] Thus, to this day, chancery cases are not tried to a jury, except if the court, "on motion or its own initiative," empanels an advisory jury as to "any issue not triable of right by a jury.[6] In contrast, "[t]raditionally, the right to a jury trial attaches in legal...actions,"[7] which are generally venued in the Law Division.[8]

Ancillary Equitable Jurisdiction

But what of cases that entail both equitable and legal (money damage) claims? Even before 1776, when New Jersey adopted its first Constitution, which stated that "the inestimable right of trial by jury shall remain confirmed, as part of the law of this colony, without repeal, forever,"[9] chancery courts could decide ancillary legal claims without a jury.[10] Legal issues have been considered "ancillary" if they are "germane to or grow out of the subject matter of the equitable jurisdiction."[11] In contrast, if "legal claims arise from controversies that are independent of the equitable action, they should be tried separately before a jury."[12]

Beginning almost immediately after the adoption of the 1947 Constitution, cases have applied the doctrine of "ancillary equitable jurisdiction" to restrict jury trials.[13] Since plaintiffs have the ability to choose their venue, plaintiffs who want a jury trial in a case implicating both legal and equitable issues may often ensure a jury trial by filing in the Law Division. This often results in defendants who want to pursue legal counterclaims in a case filed in Chancery being foreclosed from a jury trial.

In *Lyn-Anna Properties, Ltd. v. Harborview Development Corp.*,[14] the plaintiffs filed suit in the Chancery Division against their partners in a failed real estate development, seeking an accounting and other equitable relief. The defendants responded with a damages counterclaim for legal malpractice and fraud, and they demanded a jury trial on the counterclaim.[15] The Chancery Division, the Appellate Division, and the Supreme Court all rejected the jury demand.[16] The Supreme Court reaffirmed the doctrine of ancillary equitable jurisdiction and stated:

> The nearly fifty years of experience since the adoption of the Constitution of 1947 convince us that that historic doctrine of ancillary equitable jurisdiction has been working well and that this discretionary jurisdiction can continue to be reposed in our chancellors. Those "courts of conscience" guard at once the right to trial by jury and the right to an equitable action when a remedy at law might be inadequate.[17]

The Appellate Division had earlier applied the doctrine to a damages counterclaim brought under the New Jersey Antitrust Act[18] in a Chancery Division case that was instituted to compel specific performance of a contract to convey properties in Atlantic City.[19] Even though the defendants had strategically amended their pleadings to strike their own claims for equitable relief, leaving only their damages counterclaim, and had consented to transfer the disputed properties to moot the plaintiffs' specific performance claims, their jury demand failed.

What mattered was "the facts existing at the inception of the suit. Thus, if the primary relief sought by the complainant was equitable in nature, equity had jurisdiction to settle all issues, even though purely legal in nature, where subsequent events made it impractical or unnecessary to award equitable relief."[20]

Gray Areas: Actions for Declaratory Judgment

Declaratory judgment actions represent their own special category. Such actions "were unknown at common law" and did not exist before 1947.[21] Instead, the Uniform Declaratory Judgments Act,[22] governs the right to declaratory relief.[23]

New Jersey courts have long held that a declaratory judgment is "neither equitable nor legal in its nature ... [but] takes on the color of either, depending upon the issue."[24] The equitable versus legal analysis is informed by "the historical basis for the cause of action and focus on the requested relief[,' and o]f the two, the more persuasive factor is the requested relief."[25] In categorizing actions for declaratory judgments, courts have

taken a practical approach, refusing to permit the decision to be "driven by the label a party affixes to its pleading" but instead "transcend[ing] superficialities and reach[ing] the substance of what is alleged and sought."[26] The result is a highly case-sensitive analysis.

In *Wood v. New Jersey Mfrs. Ins. Co.*,[27] the Supreme Court held that an insured's claim of bad faith by an insurer, authorized by *Rova Farms Resort, Inc. v. Investors Ins. Co. of America*,[28] "is and always has been a breach of contract claim, and it is beyond question that a breach of contract claim was at common law and remains today an action triable to a jury."[29] In contrast, *Ciba-Geigy Corp. v. Liberty Mut. Ins. Co.*,[30] an environmental case against insurers seeking recovery of future remediation costs, was held to be equitable because the plaintiffs were essentially seeking specific performance, a classic equitable remedy, and because remediation was "a form of equitable relief that can require continuing supervision.[31] The fact that the plaintiffs also claimed "substantial future damages" did not alter the result, because the amount of those damages was "both uncertain and unknown."[32] The Supreme Court did, however, limit its ruling to actions seeking recovery of future environmental remediation costs, declining to "reach the broader question concerning the extent to which the right to a jury trial attaches to actions for coverage on other kinds of insurance policies."[33]

More recently, the Appellate Division affirmed the denial of a jury trial in *IMO Indus., Inc. v. Transamerica Corp*.[34] There, an insured sued insurers for a declaration of rights under its insurance policy, and for compensatory and punitive damages for breach of contract and related claims.[35] Amended complaints added other insurers as defendants and advanced additional claims.[36] The plaintiff sought a jury trial, but defendants filed motions to strike the jury demand.[37] The trial judge granted those motions.[38] On appeal, the Appellate Division affirmed.[39] Focusing on the original complaint, the trial judge had determined that "defendant insurers were obligated to provide coverage for future indemnification and defense costs," and those were equitable claims to which no jury trial right attached.[40] The Appellate Division agreed on both counts.

The lesson is that courts will focus on the original complaint even though the amended complaints added monetary damage claims, and in any event, the relief sought in all of the different complaints stemmed from and was intertwined with the equitable claims for enforcement of the plaintiff's alleged contractual rights.[41] The Appellate Division distinguished an earlier case, *Ward v. Merrimack Mut. Fire Ins. Co.*,[42] "because *Ward* was a coverage case where the primary remedy sought was money for damages already incurred. The plaintiff here was not making claims for any future or ongoing injury."[43]

As those insurance coverage cases indicate, determining whether there is a right to jury trial in a declaratory judgment action requires careful attention to the primary relief sought, the extent to which a contrasting form of relief is intertwined with that primary relief, and other factors. The law in this area will doubtless continue to evolve.

Gray Areas: Actions Under Other Statutes

The Declaratory Judgment Act is perhaps the only statute that can be viewed as seeking either primarily legal or primarily equitable relief. Our courts have been asked to opine about jury trial rights under other statutes, and the results have varied. In some instances, after a court ruled, the Legislature intervened to amend the statute and overrule the court's decision. This article cannot address every such case, but some key examples follow.

New Jersey Antitrust Act

In *Boardwalk Properties v. BPHC Acquisition, Inc*.[44] the Appellate Division affirmed the ruling of the Chancery Division that the New Jersey Antitrust Act[45] does not afford a right to a jury trial. The court stated, "[t]he purpose of the Act is the prevention of trade restraining practices which have a tendency to deprive the public of benefits ordinarily derived from a competitive market. While a private litigant may financially gain from a suit under the statute, the overriding purpose of the Act is to advance the public policy in favor of competition. Moreover, when the statute is viewed as a whole, the available remedies afforded to the Attorney General in prosecuting civil actions under the statute combined with the remedies available to a private litigant are predominantly equitable in nature."[46] The fact that the Act omitted any reference to a jury trial also contributed to the result.[47]

As those insurance coverage cases indicate, determining whether there is a right to jury trial in a declaratory judgment action requires careful attention to the primary relief sought, the extent to which a contrasting form of relief is intertwined with that primary relief, and other factors. The law in this area will doubtless continue to evolve.

New Jersey Consumer Fraud Act

In contrast, in *Zorba Contractors, Inc. v. Housing Authority, City of Newark*,[48] the Appellate Division held that there is a right to a jury trial in an action by a consumer under the New Jersey Consumer Fraud Act (CFA).[49] The court offered the following reasons for that conclusion.

First, the CFA expressly authorizes "legal relief" as well as equitable relief.[50] The court noted that "the Legislature's characterization of a cause of action as 'legal' may justify an inference that it intended to authorize a jury trial" even though the CFA did not expressly so provide.[51] Second, "N.J.S.A. 56:8-19 only allows a person who has suffered an 'ascertainable loss of moneys or property' to maintain a private CFA action. Thus, the essential legislative objective in authorizing a private CFA action was to afford defrauded consumers an opportunity to obtain legal relief for such 'ascertainable loss[es].'"[52] Finally, the Appellate Division recognized the "close relationship" between a private action under the CFA and a claim for common law fraud.[53] A consumer may pursue both types of claims in the same case, on the same basic facts, and the court observed that "[t]here is an undisputed right to a jury trial in an action for common-law fraud."[54] Were there no right to a jury trial on a CFA claim, "there would be a risk that the jury and the trial court would make conflicting findings concerning a common factual issue."[55] The Appellate Division was unwilling to assume that the Legislature intended "to require bench trials of private claims under the CFA that substantially overlap and may be tried together with common-law fraud claims that are required to be tried before a jury."[56]

Law Against Discrimination and Conscientious Employee Protection Act

In at least two instances, the Legislature has acted to overrule judicial decisions finding no jury trial right under a statute. In *Shaner v. Horizon Bancorp.*,[57] the Supreme Court held that there was no right to a jury trial under the New Jersey Law Against Discrimination (LAD).[58] As the Supreme Court later recognized, the Legislature overruled that decision in 1990 by amending the LAD to provide for a jury trial right.[59] Similarly, the Legislature overruled an Appellate Division opinion[60] that the Conscientious Employee Protection Act (CEPA),[61] lacked a right to a jury trial.[62] But there may be a wrinkle.

In *Kaye v. Rosefielde*,[63] the Appellate Division affirmed a Chancery Division decision that CEPA and breach of contract counterclaims could not be the subject of a jury trial. The court approved the Chancery Division's "invocation and application of the doctrine of ancillary jurisdiction" in that complex case and "properly exercised his discretionary authority to adjudicate the counts in Rosefielde's counterclaim that sought purely legal relief in the form of compensatory damages."[64] The Appellate Division so ruled despite the statutory amendment to CEPA that provided for a jury trial.[65] The Supreme Court later reversed the Appellate Division's decision on other grounds, without addressing the question of jury trial for the CEPA claim.[66] But the Appellate Division's ruling is a reminder that ancillary equitable jurisdiction can be a trump card in the jury trial context, even when a statute that expressly affords a jury trial right is at issue.

Conclusion

Civil jury trials in New Jersey are "inviolate," as the 1947 Constitution provides. But the right to a civil jury trial is not absolute. Certain cases may see a "race to the courthouse" to assert prayers for equitable relief in an attempt to foreclose a jury trial. A nuanced analysis of such factors as the relief sought, the historical treatment of that relief or the underlying claim(s), context, and the doctrine of ancillary equitable jurisdiction is often necessary to understand the proper result. ■

Endnotes

1. N.J. Const. (1947), Art. I, §9.
2. *Lyn-Anna Properties, Ltd. v. Harborview Development Corp.*, 145 N.J. 313, 321 (1996).
3. *Id*. at 318.
4. R. 4:3-1(a)(1). That Rule goes on to state that Chancery is the appropriate venue "even though legal relief is demanded in addition or alternative to equitable relief."
5. *Wood v. Tallman*, 1 N.J.L. 177, 183 (Sup. 1793) ("The Chancery, Prerogative and Spiritual courts have always proceeded without the intervention of a jury"); Schnitzer & Wildstein, New Jersey Rules Service 1260 (1958) ("The practice of hearing Chancery causes without a jury is almost as old and certainly as well established [as the right to trial by jury])."
6. R. 4:35-2. Under that same Rule, however, if all parties consent to try by a jury one or more issues not otherwise so triable, that jury's verdict will have "the same effect as if trial by jury had been a matter of right."
7. *Wood v. New Jersey Mfrs. Ins. Co.*, 206 N.J. 562, 574 (2011) (citations omitted).
8. *See* R. 4:3-1(a)(5) (stating that all actions not enumerated in prior subparagraphs of R. 4:3-1 "shall be filed and heard in the Law Division or the Law Division, Special Civil Part").
9. N.J. Const. (1776), Art. XXII. The Constitution of 1844 stated (like the 1947 Constitution) that "[t]he right of trial by jury shall remain inviolate." N.J. Const. (1844), Art. I, §7.
10. *Mantell v. International Plastic*

Harmonica Corp., 141 N.J. Eq. 379, 393 (E. & A. 1947) (stating that "where equity has rightfully assumed jurisdiction over a cause for any purpose, it may ordinarily retain the cause for all purposes, and proceed to a final determination of the entire controversy, and establish purely legal rights and grant legal remedies").

11. *Fleischer v. James Drug Stores*, 1 N.J. 138, 150 (1948).
12. *IMO Indus., Inc. v. Transamerica Corp.*, 437 N.J. Super. 577, 634 (App. Div. 2014) (citing *New Jersey Highway Auth. v. Renner*, 18 N.J. 485, 488-89 (1955)).
13. The earliest cases were *Fleischer*, 1 N.J. 138, and *Ebling Brewing Co. v. Heirloom, Inc.*, 1 N.J. 71 (1948). For discussions of those and other such cases, see Bruce D. Greenberg and Gary K. Wolinetz, The Right to a Civil Jury Trial in New Jersey, 47 Rutgers L. Rev. 1461 (1995); Bruce D. Greenberg and Gary K. Wolinetz, "Civil Jury Trials Under the New Jersey Constitution," New Jersey Lawyer Magazine, June, 1997.
14. 145 N.J. 313 (1996).
15. *Id*. at 317.
16. *Id*.
17. *Id*. at 333.
18. N.J.S.A. 56:9-1 *et seq.*
19. *Boardwalk Properties v. BPHC Acquisition, Inc.*, 253 N.J. Super. 515 (App. Div. 1991).
20. Id. at 527-28 (quoting *Middlesex Concrete Prods. Excavating Corp. v. Northern State Improvement Co.*, 129 N.J. Eq. 314, 316-17 (E. & A. 1940)).
21. *Ciba-Geigy Corp. v. Liberty Mut. Ins. Co.* (*In re Environmental Insurance Declaratory Judgment Actions)*, 149 N.J. 278, 291 (1997).
22. N.J.S.A. 2A:16-50 to 62.
23. *Ciba-Geigy*, 149 N.J. at 292.
24. *See Utility Blade & Razor Co. v. Donovan*, 33 N.J. Super. 566, 572 (App. Div. 1955).
25. *Wood*, 206 N.J. at 575 (citations omitted).
26. *Id*. at 576.
27. 206 N.J. 562 (2011).
28. 65 N.J. 474 (1974).
29. *Wood*, 206 N.J. at 578 (citing *Steiner v. Stein*, 2 N.J. 367, 372 (1949).
30. 149 N.J. 278, 291 (1997).
31. *Id*. at 293-96, 300.
32. *Id*. at 296.
33. *Id*. at 298.
34. 437 N.J. Super. 577 (App. Div. 2014).
35. *Id*. at 598.
36. *Id*. at 599.
37. *Id*.
38. *Id*.
39. *Id*. at 631-36.
40. *Id*. at 631.
41. *Id*. at 634-35.
42. 312 N.J. Super. 162 (App. Div. 1998).
43. *IMO*, 437 N.J. Super. at 636.
44. 253 N.J. Super. 515 (App. Div. 1991).
45. N.J.S.A. 56:9-1 et seq.
46. 253 N.J. Super. at 530.
47. *Id*. at 529.
48. 362 N.J. Super. 124 (App. Div. 2003).
49. N.J.S.A. 56:8-1 et seq.
50. 362 N.J. Super. at 137 (citing N.J.S.A. 56:8-19).
51. *Id*. at 137-38, 139.
52. *Id*. at 138.
53. *Id*. at 139.
54. *Id*.
55. *Id*. at 140.
56. *Id*.
57. 116 N.J. 433 (1989).
58. N.J.S.A. 10:5-1 et seq.
59. *Richter v. Oakland Bd. of Educ.*, 246 N.J. 507, 537 (2021) (citing L.1990, c. 12, §§1, 2).
60. *Abbamont v. Piscataway Tp. Bd. of Educ.*, 238 N.J. Super. 603 (App. Div. 1990).
61. N.J.S.A. 34:19-1 et seq.
62. L. 1990, c.12, N.J.S.A. 34:19-5.
63. 432 N.J. Super. 421 (App.Div. 2013), rev'd on other grounds, 223 N.J. 218 (2015).
64. *Id*. at 433.
65. *Id*.
66. 223 N.J. 218 (2015).

How Two Constitutional Reforms Gave New Jersey Government More Streamlined Authority and Judicial Review

By Ronald K. Chen

The 1947 New Jersey Constitution was transformative in many ways, not the least of which was the arrangement of a previously chaotic morass of administrative agencies into a relatively streamlined executive branch that provided for effective supervision of those agencies by the governor, and the creation of a coherent mechanism for meaningful review of those administrative actions by the judiciary.

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The pre-1947 Structure of State Government and Availability of Judicial Review

Under the 1844 Constitution, the executive branch was a jumble of more than 80 assorted departments, agencies, bureaus, offices and authorities, each acting with virtual autonomy and with very little real supervision possible by the governor. In a 1943 speech advocating for constitutional reform, former Gov. Charles Edison complained:

> The governor has no cabinet, as the President of the United States has, and as many governors have. Rather, the men who head the various departments and who would normally make up his cabinet are persons appointed by earlier governors, elected by the Legislature, elected by commissions or boards, or even elected by non-governmental societies or associations. They are not responsible to the governor, and he can discover only at their pleasure what is going on in their departments. They are often political opponents of his. Some of them count that day lost when they cannot find some way to use the powers of their offices to embarrass him and to bring his administration into disrepute.[1]

As noted in the proceedings of the 1947 Constitutional Convention, this grossly inefficient structure was intentional in order to make the executive "the weakest of the three branches, a result which stemmed from the Colonial fears and suspicions of 'tyrannical executives' which permeated the State Constitutional Convention of a century ago"[2] (referring to the 1844 Constitutional Convention).

One consequence of this intentional disarray was that it also made judicial review of administrative agency decisions extremely difficult, and often based on the subjective caprices of the judge. The procedural device to review an agency decision was the prerogative writ, a device inherited from medieval England by which the Crown through the law courts exercised control over inferior courts or officials. Each of the prerogative writs—*procedendo, mandamus*, prohibition, *quo warranto, habeas corpus*, and *certiorari*—had peculiar requirements for its invocation, and minor procedural errors in seeking the correct writ could result in denial. As its name implies, unlike writs of right, prerogative writs were considered only at the individual discretion of the judge to whom they were presented, and advance permission from the judge merely to file the petition was necessary.

The 1947 Constitution…adopted a pyramidal structure for the executive branch, which limited the number of "direct reports" to the governor and did not require the governor to engage in the ordinary management of each department, but nevertheless placed the entire executive branch under the governor's ultimate "supervision" through the ability to hire and fire the department heads.[3]

The 1947 Constitution

The major structural reforms of the 1947 Constitution are well known: (1) the conversion of the office of governor from a weak executive to one of the strongest of the nation, with full power of appointment over the Executive Branch and a strong veto power over legislation, and (2) the complete reorganization of the judiciary, including the jurisdictional merger of law and equity into one Superior Court and a newly constituted Supreme Court as the court of last resort, with the Chief Justice as the administrative head of the entire judicial branch.

Two particular reforms are perhaps less often noted, but they have had an effect on the review and accountability of executive agency decisions. To replace the unmanageable assortment of 80+ autonomous independent agencies, Article V, Section IV, ¶1 requires that the Legislature allocate by law all the executive administrative offices and functions of state government within not more than 20 principal departments (currently there are 15), arranged to the extent possible according to similarity of function. Article V, Section IV, ¶2 further requires that all these principal departments be under the supervision of the governor, and unless the Legislature provided otherwise, headed by a single executive, nominated and appointed by the governor, with the advice and consent of the Senate, and who (except for the Secretary of State and the Attorney General) serve at the governor's pleasure. The 1947 Constitution therefore adopted a pyramidal structure for the executive branch, which limited the number of "direct reports" to the governor and did not require the governor to engage in the ordinary management of each department, but nevertheless placed the entire executive branch under the governor's ultimate "supervision" through the ability to hire and fire the department heads.[3]

The second particular reform affected the judiciary. Article VI, Section V, ¶4, "superseded" prerogative writs, and "in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right,

except in criminal causes where such review shall be discretionary." This facially cryptic language, probably undecipherable except to those who already had a predicate understanding of the ancient procedure of prerogative writs to which this provision refers and ostensibly supplants, establishes the modern practice of the availability of judicial review of administrative agency decisions. Pursuant to this provision, the Supreme Court has enacted Rule 2:2-3, providing for review as of right to the Appellate Division from final decisions of statewide agencies, Rule 8:2, providing for review in the Tax Court for all tax matters decided by a state or local agency, and for all other review of non-statewide final agency decisions, Rule 4:69, providing for an action in lieu of prerogative writs in the Law Division of the Superior Court.

The Re-emergence of the Independent Administrative Agency

The mandate of Article V, Section IV, ¶¶1&2 that there exists a multi-tiered pyramidal reporting structure organized around a relatively small number of principal departments headed by a single executive reporting to the governor, undoubtedly worked a structural improvement compared to the pre-1947 state of affairs described by Governor Edison. But those improvements could not have kept pace with the explosive growth of the administrative state and the delegation of many adjudicative and policy making functions by the department head to the staff of administrative agencies. An individual commissioner managing a medium-sized department undoubtedly has more supervisory responsibilities than the pre-1947 governor had over the entire state, and requiring the department's chief executive to approve all decisions can result in delayed decision-making, especially with respect to administrative adjudicatory proceedings.

One response in New Jersey was the creation of the Office of Administrative Law in 1979, in which executive branch administrative law judges are delegated by an agency head the role of conducting administrative proceedings and rendering initial decisions on contested matters. While ALJ decisions are nominally recommendations to the agency head for final disposition, they are in most cases effectively final decisions, and delays in the adjudicative process have prompted calls to make ALJ decisions *de jure* final without even the theoretical possibility of revision by the commissioner or agency head.[4] Whether bypassing the agency head and allowing an administrative law judge to render the final decision of an executive branch agency is consistent with Article V, Section IV, §2, and the implied requirement that the department's chief executive have control of all decisions within the department under the ultimate supervision of the governor, is a constitutional issue that has been has not yet been directly addressed by a court, although it has triggered commentary within the profession.[5]

The Legislature itself has frequently effectively negated the requirement of Article V, Section IV, ¶1, that all executive agencies be allocated within one of the principal departments by use of an odd grammatical construct: the "in but not of" agency. Under this device, the Legislature declares in the enabling act that the agency is, solely for purposes of Article V, Section IV, ¶1, declared to be "in" a specified department, but is nevertheless not "of" that department, a distinction which frees it from any supervisory or budgetary control of the department head. Thus, the Council on Affordable Housing is "in but not of" the Department of Community Affairs, the Office of the Public Defender of is "in but not of" the Department of the Treasury, and likewise dozens of other agencies, although part of the executive branch, are nevertheless autonomous and free from managerial control by a department head, and ultimately only responsible directly to the governor, especially when the time comes to establish its annual budget.

Whether the framers of the 1947 Constitution intended the requirements of Article V, Section IV, ¶1, to be evaded so effortlessly through this superficial linguistic expedient is certainly debatable. While the Legislature is given the general power to establish the structure of state government, if that power was intended to be unlimited and permit autonomous agencies outside the normal chains of command, then it would have been a simple enough drafting task simply to say so without the additional language of Article V, Section IV, ¶1, requiring placement of all agencies within a principal department.

The Supreme Court, however, appeared to validate the "in but not of" device in *In re Plan for the Abolition of the Council on Affordable Housing*.[6] The issue before the Court in *In re Plan for the Abolition of the Council on Affordable Housing* was not, strictly speaking, over the constitutionality of bypassing the governance authority of department heads or the governor over agencies within the executive branch. Rather, it was purely a question of statutory interpretation of the Reorganization Act,[7] and whether the Legislature, which clearly has the ultimate constitutional authority to determine the structural existence of executive agencies, intended to delegate to the governor the power under that Act to abolish an agency that had been designated by the Legislature as "in but not of" a principal department.

Nevertheless, the Court appeared to support the power of the Legislature to bypass supervisory control by a principal department head, and indeed the governor, despite Article V, Section IV, ¶2.

> Underlying the Legislature's approach is a practical reality: to insulate an office from

a principal department head, but not from the Chief Executive to whom the agency head reports, see N.J. Const. art. V, § 4, ¶2, would accomplish little. The consequence in this appeal is that an agency designed to be independent of DCA would in effect be run by its Commissioner. That outcome would be at odds with the Legislature's intent.[8]

Even though not a constitutional decision, the import of the Court's reasoning leads to the inference that, despite Article V, Section IV, ¶2, it would uphold a construct by which agencies can exist within the executive branch but be autonomous and outside the direct control of either the department head or the Governor.

It is interesting to contrast the New Jersey Supreme Court's apparent recognition of the legitimacy of independent and autonomous executive agencies, despite the state constitutional language suggesting otherwise, with recent pronouncements of the United States Supreme Court, which has narrowed considerably the power of Congress to create such agencies that are outside the direct governance control of the president. Thus, in *Seila Law LLC v. Consumer Financial Protection Bureau*,[9] the Court found that Congress violated separation of powers principles when it provided that the director of the Consumer Financial Protection Bureau was removable only for inefficiency, neglect, or malfeasance, and thus did not serve at the pleasure of the president. "Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control."[10]

Unlike the New Jersey Constitution, in which the doctrine of separation of powers is set forth explicitly in the text,[11] of which Article V, Section IV, ¶2 is a particular application, the concept is merely implied without being expressly stated in the United States Constitution based on the historical understanding of executive power. The *Seila* Court however, quoting Washington and Madison, reasoned that under Article II, "The entire 'executive Power' belongs to the President alone," and thus "lesser officers must remain accountable to the President, whose authority they wield,"[12] with only two narrow exceptions: "one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority."[13]

Despite the very different textual predicates in the two constitutions that would suggest that New Jersey should, if anything, be the more receptive of the two sovereignties to the concept of the "unitary executive," it is the federal Supreme Court that has demonstrated that receptivity, relying upon implications of the constitutional text and historical antecedents in defining the scope of federal executive power. The New Jersey Supreme Court, on the other hand, defers to the ultimate power of the Legislature to structure the executive branch, and treats the management structures described in Article V, Section IV, ¶¶1&2, as default starting points rather than substantive constitutional limitations. Since on matters of the organic structure of government, judicial interpretation of the United States Constitution in no way binds the state other than by its persuasive value, New Jersey's distinct interpretation of separation of power principles in this regard is likely to remain doctrinally distinct from analogous cases regarding the allocation of federal executive power.

It is interesting to contrast the New Jersey Supreme Court's apparent recognition of the legitimacy of independent and autonomous executive agencies, despite the state constitutional language suggesting otherwise, with recent pronouncements of the United States Supreme Court, which has narrowed considerably the power of Congress to create such agencies that are outside the direct governance control of the president.

Judicial Review of Administrative Agency Action

In contrast to Article V, Section IV, ¶¶1&2, in which textually forceful language has not been interpreted in a way to have meaningful practical impact, Article VI, Section V, ¶4, by which "Prerogative writs are superseded," is textually opaque to those who do not have a background in medieval English legal process, but nevertheless has been vigorously interpreted in a way to provide a unique mechanism by which administrative agency action is subject to judicial review in New Jersey.

Use of the word "superseded" rather than "abolished" in this clause is instructive, since the courts quickly made clear that the availability of judicial review of agency action as if it existed before 1947 had not been eliminated, but to the contrary had been strengthened as a result of this constitutional provision. Shortly after the 1947 Constitution's adoption, the newly constituted New Jersey Supreme Court, in *Fischer v. Bedminster*

Twp.,[14] characterized Article VI, Section V, ¶4, as the "clearest language" by which "the Constitution commits to the Supreme Court the regulation of the new remedies provided in lieu of prerogative writs." And because the source of that authority was now constitutional, and not merely statutory, "[n]either the exercise of the power inherent in the old Supreme Court by means of the prerogative writs nor the regulation of the remedy is subject to legislative control."[15]

In most states, such as an Article 78 proceeding in New York,[16] and in the federal system under the Administrative Procedure Act,[17] judicial review of administrative agency action is created solely by statute, and thus the Legislature defines the scope of review, the available remedies, and any exceptions that it chooses to make. The fact that in New Jersey, judicial review of administrative agency action is mandated by the state constitution, and cannot be curtailed by the legislature, instills a more forceful judicial attitude toward the availability of a remedy and the scope of review. Thus, New Jersey is "is conscious of itself as the jurisdiction in which judicial review has been most freely available with the least encumbrance of technical apparatus."[18]

To be sure, judicial review in New Jersey, as in other jurisdictions, is typically circumscribed by deference to the administrative agency in its exercise of technical expertise, and is generally limited to reversing actions that are "arbitrary, capricious or unreasonable or if the action is not supported by substantial credible evidence in the record as a whole."[19] But under Article VI, Section V, ¶4, that deference is an act of judicial self-restraint, not a legislatively imposed limitation. And while available judicial remedies were defined by those which were traditionally available through one of the prerogative writs,[20] our state Supreme Court has noted that New Jersey has long been creative in adapting the scope of those remedies.

> [T]he fact remains that certiorari, the most widely used of the prerogative writs, as it developed in New Jersey, presents an outstanding example of the capacity of the common law to develop to meet new needs. The New Jersey courts "have taken in almost every respect a more liberal view of the province of the writ [of certiorari] than the courts of other commonwealths...."[21]

The special constitutional provenance of the power of judicial review over administrative agencies, and New Jersey's "liberal view of the province of the writ of certiorari" that in turn defines the action in lieu of prerogative writs created by Article VI, Section V, ¶4, have, either singly or in combination, yielded at least two observable consequences that distinguish the process of judicial review over agency action in New Jersey.

The first is the development, independent of constitutional minimums imposed by the due process clause, of fundamental procedural fairness. New Jersey's doctrine of fundamental fairness "serves to protect citizens generally against unjust and arbitrary governmental action, and specifically against governmental procedures that tend to operate arbitrarily. [It] serves, depending on the context, as an augmentation of existing constitutional protections or as an independent source of protection against state action."[22] New Jersey case law has therefore required agencies to provide procedural protections against the wrongful deprivation of interests that might, standing alone, not being cognizable as liberty interests under the due process clause, but which nevertheless would amount to arbitrary action if not corrected.[23] And the New Jersey Supreme Court has made clear that the source of the fundamental fairness doctrine emanates from "the exercise by New Jersey courts of their function of review (as here) of the action of administrative agencies" which lead it "to strike down arbitrary action and administrative abuse and to insure procedural fairness in the administrative process."[24] The decisions applying the fundamental fairness doctrine are "grounded in the duty of this Court to discharge faithfully its constitutional review of actions of government agencies."[25]

The second doctrinal consequence of the constitutional duty of judicial review is the requirement that an agency explain the reasons for its decision sufficiently for a court to engage in meaningful judicial review, even if under a deferential standard. Perhaps driven by the original meaning of the writ of *certiorari volumus*, *i.e.*, "we wish to be informed," the courts have long required administrative agencies to provide "adequate findings which determine the basic facts and embody [the] conclusions resting thereon."[26] These findings are "of the utmost importance not only in insuring a responsible and just determination by the Director, but also in affording a proper basis for effective judicial review." And even though outright reversal of administrative agency action may not be directly possible due to the deferential standard of review, a court may indirectly cabin a questionable agency decision by requiring it to explain its reasons. As the Court observed in *Monks v. New Jersey State Parole Board*, "One of the best procedural protections against arbitrary exercise of discretionary power lies in the requirement of findings and reasons that appear to reviewing judges to be rational."[27]

Conclusion

In his seminal concurring opinion in *State v. Hunt*,[28] Justice Alan Handler listed seven criteria or standards that would justify construing the state constitution differently than the United States Constitution: (1) textual differences in the constitutions; (2) "legislative history" of the provision indicating a broader mean-

ing than the federal provision; (3) state law predating the U.S. Supreme Court decision; (4) differences in federal and state structure; (5) subject matter of particular state or local interest; (6) particular state history or traditions; and (7) public attitudes in the state.[29] As the preceding discussion hopefully demonstrates, many if not most of these criteria explain why the structure of the administrative state and judicial review of agency decisions under the New Jersey Constitution have taken a different doctrinal path from their federal analogs. The future holds the potential for even further divergence as the new membership of the United States Supreme Court explores jurisprudential volte-faces in the area of administrative law. ■

Endnotes

1. Quoted in 2 N.J. Constitutional Convention.1451 (1947).
2. Report of the Committee on Executive, Militia and Civil Officers, 2 N.J. Constitutional Convention 1122 (1947).
3. The original draft provided that the principal departments be under the "supervision and control" of the governor, but the words "and control" were deleted in committee. While being considered by the Committee on the Executive, Militia and Civil Officers, the concern was expressed that the original language "would seem to imply that the Governor could issue orders to all of these departments," which direct management was considered inappropriate in some circumstances, leading to the change. 5 N.J. Constitutional Convention 373-74.
4. A2722/S2666, 214th Legislature (introduced May 10, 2010). This bill passed the Assembly (77-0) and received a second reading in the Senate, but was not adopted.
5. *Compare* Editorial, "No De Facto Fourth Branch," 205 N.J.L.J. 22 (Jun. 20, 2011), *with* Paul Josephson & Susan Feeney, "ALJ Final Decisions Are Here Already, And Don't Create a Fourth Branch," 205 N.J.L.J. 23 (Aug. 8, 2011).
6. 214 N.J. 444, 473 (2013).
7. Reorganization Act of 1969, N.J.S.A. 52:14C-1 to 52:14C-11.
8. *Id.* at 473-74.
9. 140 S.Ct. 2183 (2020).
10. *Id.* at 2192.
11. N.J. Const. (1947), Art. III, §1. "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."
12. *Seila Law*, 140 S.Ct. at 2197. *But see* Daniel Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 Stan.L.Rev. 175 (2021) (rebutting the historical understanding that the executive had absolute removal power over subordinates, and noting that Parliament frequently restricted King's right to remove royal officials).
13. *Id.* at 2200.
14. 5 N.J. 534 (1950).
15. *Id.* at 541. "[I]n New Jersey, judicial review of administrative agency determinations has the support of a special constitutional provision… which largely immunizes it from legislative curbs." *In re Senior Appeals Examiners*, 60 N.J. 356, 363 (1972) (rejecting contention that the legislature precluded judicial review of the Civil Service Commission's decisions regarding state employee compensation plan).
16. N.Y. Civil Practice Law & Rules §§7801 to 7806.
17. Pub.L. 79–404, 60 Stat. 237, enacted June 11, 1946. The sections governing judicial review are codified at 5 U.S.C. §§701 to 706.
18. *In re Senior Appeals Examiners*, 60 N.J. at 363 (quoting Louis Jaffe, Judicial Control of Administrative Action 535 (1965)).
19. *N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric.*, 196 N.J. 366, 384-85 (2008).
20. *See In re Application of Li Vols*i, 85 N.J. 576, 593 (1981). "On its face, this constitutional provision grants to all individuals a review„as of right,'in the Superior Court in any situation where, prior to 1947, they may have been entitled to a prerogative writ; and so the provision has been interpreted consistently.'" *Hills Development Corp. v. Bernards Township*, 103 N.J. 1, 44 (1986).
21. *Ward v. Keenan*, 3 N.J. 298, 305-06 (1949) (quoting Frank Goodnow, *The Writ of Certiorari*, 6 Pol.Sci.Q. 493, 532 (1891)).
22. *Doe v. Poritz,* 142 N.J. 1, 108 (1995).
23. *See, e.g.*, *State v. Njango*, 247 N.J. 533, 537 (2021) (fundamental fairness doctrine applies when someone was being subjected to potentially unfair treatment and there was no explicit statutory or constitutional protection to be invoked).
24. *Avant v. Clifford*, 67 *N.J.* 496, 520 (1975).
25. *New Jersey State Parole Bd. v. Byrne*, 93 N.J. 192, 207 (1983).
26. *Abbotts Dairies, Inc. v. Armstrong*, 14 N.J. 319, 333 (1954).
27. *Monks v. N.J. State Parole Bd.*, 58 N.J. 238, 245 (1971) (quoting Davis, Administrative Law §16.12 at 585 (1970 Supp.)).
28. 91 N.J. 338 (1982)
29. *Id.* at 364-67. Although originally contained in Justice Handler's concurring opinion in *State v. Hunt*, these criteria were subsequently endorsed by the Court a year later in *State v. Williams*, 93 N.J. 39, 57 (1983).

Affordable Housing and the Mount Laurel Doctrine

Enforcement has Returned to the Courts

By Hon. Peter A. Buchsbaum

The Courts Re-enter the Fray in 2015: In re N.J.A.C 5:96 and 5:97[1]

The state constitutional requirement that each community in New Jersey plan to meet its fair share of the region's need for affordable housing came into being with the first *Mt. Laurel* decision in 1975.[2] The second decision, in 1983[3] put teeth into the Court's ruling by holding that builders could get to build their projects if they sued and proved that the town's zoning was exclusionary, which most of them were, due to widespread resistance to the first *Mt. Laurel* case.

An uproar followed. The Legislature finally acted, approving the Fair Housing Act,[4] which set up an administrative agency, the Council on Affordable Housing, to administer the affordable housing obligation. In 1986, the so-called *Mt. Laurel III*[5] ruling deferred to the agency and most cases were remitted to it for the next several decades. For a while, until around 2000, the agency basically did its job and two rounds of affordable housing plans were reviewed and for the most part approved based on allocation formulas it devised.

Unfortunately, the Mount Laurel Doctrine foundered after 2000. The agency set up to enforce it, the Council on Affordable Housing (COAH), essentially ceased to function. For 15 years it failed to adopt a valid set of affordable housing allocations for that period. Its efforts were rejected by the Supreme Court which found that all the formulas it had devised essentially rewarded exclusion by making past growth the key, even where a community has not grown due to restrictive ordinances.[6] The Fair Share Housing Center (FSHC), a non-profit law office whose mission was to see Mt. Laurel implemented, petitioned the Court in aid of litigant rights to have the Court resume control over fair shares and enforcement of the affordable housing requirements. The Court gave COAH several deadlines for implementing valid fair share regulations.

In March 2015, the Court heard the FSHC petition for relief in an embarrassing oral argument in which the justices repeatedly asked the state whether any action was in the offing. The Deputy Attorney General, who was called upon to speak even before the appellant FSHC argued, had to admit nothing was being planned—no meetings, no staff consultation, no studies. The Justices had to deal with the reality that the administrative alternative to judicial enforcement it approved in 1986 had ceased to exist.

The March 2015 opinion was both forward looking and conservative. It confirmed that the fair share numbers had to be real. They could not simply be based on projections of local growth that were diluted by past exclusionary practices.[7] Thus, the Court insisted upon a return to the kind of fair share formula that had informed the development of housing allocations in the 1994 to 2000 period. Such factors as available vacant land, percentage of the region's non-residential ratables, comparative wealth, and employment had to be used since they did not reward prior restrictive practices.

Having decided that the Courts had to resume the task of supervising affordable housing, the Court had to lay out a path for doing so. In several respects, its holding in this regard was conservative. It agreed with the municipalities' argument that they were not responsible for the delay, that it was COAH which had failed to carry out its duty to provide valid local allocations on which plans could be founded. It therefore gave all the towns the opportunity to file declaratory judgment actions which would include immunity from builder remedy lawsuits as they were developing new housing plans in good faith. While the Supreme Court envisioned a fairly short period for stays, the trial courts were very generous in granting extensions, due in part to the time needed to develop the new housing numbers and the complexity of formulating plans to implement those numbers.[8]

In addition, the Court resumed the use of court-masters to aid the parties to housing litigation in resolving disputes and to advise the trial court as to whether a municipal plan or a developer's proposal should be treated as realistic. The Court also established a special group of judges to hear the cases, just as it had with *Mt. Laurel II* in 1983.[9] The Court determined that the bulk of

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...[T]he Mount Laurel Doctrine foundered after 2000. The agency set up to enforce it, the Council on Affordable Housing (COAH), essentially ceased to function. For 15 years it failed to adopt a valid set of affordable housing allocations for that period. Its efforts were rejected by the Supreme Court which found that all the formulas it had devised essentially rewarded exclusion by making past growth the key, even where a community has not grown due to restrictive ordinances.

COAH substantive regulations in N.J.A.C. 5:93 adopted for the second round of housing plans should be used in specifying how such plans should be devised for the third round, covering the period 2015 to 2025. It thus adopted the statutory 10-year timeframe for plans and implicitly approved regulatory specifications as to densities, requirements for an income mix, rental bonuses, limits on senior citizen housing, length of affordability controls, and the like.[10] In general, it held that the second-round methodologies for determining need should generally be used.

Critically, at the same time the Court gave localities a green light in devising innovative strategies to achieve compliance:

> First, as we said in *In re Adoption of N.J.A.C. 5:96 & 5:97, supra,* previous methodologies employed in the First and Second Round Rules should be used to establish present and prospective statewide and regional affordable housing need. 215 *N.J.* at 620, 74 *A.*3d 893. The parties should demonstrate to the court computations of housing need and municipal obligations based on those methodologies.
>
> Second, many aspects to the two earlier versions of Third Round Rules were found valid by the appellate courts. In upholding those rules the appellate courts highlighted COAH's discretion in the rule-making process. Judges may confidently utilize similar discretion when assessing a town's plan, if persuaded that the techniques proposed by a town will promote for that municipality and region the constitutional goal of creating the realistic opportunity for producing its fair share of the present and prospective need for low- and moderate-income housing.[11]

Accordingly, while the numbers should be determined objectively, municipal governments had leeway to decide how to achieve them. Objective factors like vacant land, relative wealth, growth in non-residential ratables, and substandard housing, rather than local predilections or history, would determine the local fair share, but critically communities were not given a one-size-fits-all straitjacket for implementation.

The Court also addressed the issue of unmet fair shares from the first and second rounds, *i.e.*, the 1987 to 1999 obligations. Here, its holding was emphatic, not conservative. Because of housing recessions and other factors, including local resistance, some of these earlier plans had never been carried out. The Court responded, "our decision today does not eradicate the prior round obligations; municipalities are expected to fulfill those obligations. As such, prior unfulfilled housing obligations should be the starting point for a determination of a municipality's fair share responsibility."[12]

The Court further ensured that the proceedings to establish municipal compliance would be adequately monitored. While towns could seek a declaratory judgment of compliance which would exempt them from a builder's remedy, they could do so only on notice to interested parties, including crucially the FSHC. The Court thus gave FSHC not only the right to notice of every municipal declaratory judgment proceeding but the unique right to intervene and be heard in all of them.[13] The Court by these means established a four-pronged check on the implementation of housing obligations during judicial review:

1. FSHC input in every case plus any interested parties, including builders who might want their land included in a plan.
2. The court-masters who had to review the plan.
3. The *Mt. Laurel* judges' independent review of the plans.
4. Processes for the broader public to be involved, including both proceedings at the municipal level for adoption of master plan elements and ordinances as well as a fairness hearing process before the court based upon the settlement of class actions in which anyone impacted by a municipal plan could be heard.

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In addition, there was always the back up of a builder's remedy lawsuit for towns which did not proceed in good faith.[14]

The Results—2015 to 2022

Over 340 New Jersey municipalities decided to take the option of filing declaratory judgment suits to avoid builder remedy litigation. The FSHC has participated in every one of these cases. Builders with property and private citizens have participated in many of them. The results reported by FSHC in a presentation to the State and Local Government Section/Land Use Institute Webi-

nar in January 2021 are as follows:

- Projected 50,000+ additional affordable homes over next decade from 330+ municipal agreements following *Mt. Laurel IV* in addition to the 65,000 units developed earlier.[15] FSHC also reported on the beneficial results of earlier *Mt. Laurel* development. New Jersey showed the greatest increase of all States in Share of Units Sited in Neighborhoods with under 30% Poverty (-29.9); New Jersey also showed the greatest decrease of all States in Poverty Exposure of Tax Credit Units (-11.5%).[16]
- For adults, access to housing reduced exposure to disorder and violence, improved mental health, and increased economic independence.
- For children, access improved education, learning conditions at home, school quality, and reduced exposure to disorder and violence.
- No adverse effects on taxes, property values, or crime rates.[17]

The range of techniques now being used to satisfy the housing obligations is truly remarkable. This writer's experience as a court-master in just six of the 330 settled cases has included the following remarkable array, for both rental and for sale affordable homes:

1. Housing developments with a portion of units sets aside as affordable.
2. Adaptive reuse of uneconomic office space for affordable housing and retail uses.
3. Reuse of former sites for hospital and other facilities, like quarries.
4. Public private partnerships for the redevelopment of obsolete downtown properties.
5. Deed restrictions newly placed on existing multifamily dwellings.
6. Conversion of formerly proposed senior housing sites into sites for mixed family and affordable housing.
7. Overlay zones particularly in more built-up towns to ensure that any future reuse of currently occupied sites would include affordable homes.
8. Use of development fee trust funds and federal block grant moneys to fund rehabilitation of existing dwellings.
9. Development of alternative dwelling units like up to 10 units of accessory apartments in existing homes as well as group homes for people with disabilities.
10. Municipally sponsored construction of 100% affordable development where there is a realistic plan for such development.

This is based on only a small sample of the 340+ approved plans.[18] All are encouraged by the applicable COAH regulations as described further on.

Where land is currently unavailable to meet the full obligation and it must be deferred, in built-up towns or those without access to sewer or water infrastructure, the housing obligation may be deferred but not extinguished. These so-called vacant land and/or durational adjustments provide a means for ensuring that changes in land use planning, for example, by redevelopment, must account for the unresolved fair share.

The Role of the Court-Masters and the Plan Approval Process

Court approval is a two-step process. The fairness hearing evaluates, with public input, whether both the fair share number used in a settlement and the mechanisms to address the obligation are fair to the low- and moderate-income class.[19] Before the decision by Judge Mary C. Jacobson, there had been two competing fair share calculations. Most cases were settled with FSHC prior to the more definitive ruling by Judge Jacobson, allowing a discount of up to 30% off the third-round number in the expert's study.

At the fairness hearing the proposed plan is scrutinized not only by FSHC and any objectors, but by the court-master and the court. Findings as to the adequacy of the proposed plan are placed on the record. These findings are subject to the municipality actually implementing the plan through resolutions, ordinances, contracts and appointment of administrative officials, all of which must be done before there is a final approval of the municipal plan, and entry of a judgment of compliance and repose, described below as the second step in the process.

The review of the plans is not cursory. Any housing sites must be (1) realistically available and developable, *i.e.*, have access to infrastructure, approvable, *e.g.*, have a reasonable chance of surviving environmental reviews, and (2) suitable, that is, compatible with other land uses.[20] Unreasonable cost generative development requirements are not permitted as are impact studies that would question the density or suitability of a court-approved site.[21] In other words, a town cannot require an impact study which would undermine the court's determination of site suitability, density, or character. Minimum densities of 4 to 6 units per acre are generally mandated.[22] If a municipality proposes to undertake its own construction, both the regulations and FSHC, along with the court-master, will want to see a realistic plan for funding and actual construction, with a back-up commitment to bond for any shortfall if grants do not cover the entire cost of the proposal.[23]

Similar to the effect of the Supreme Court's 2015 decision, the regulations developed pursuant to the New Jersey Fair Housing Act encourage a variety of techniques for meeting fair share as described above[24] But they also impose obligations, in particular, for rental housing, affordability standards, phasing in of affordable units in mixed income developments, bedroom mix, and affirmative marketing requirements.[25] Further, they

must accommodate a mix of incomes, averaging 52% of the HUD median income for the relevant region for for-rent units and 55% for for-sale units.[26]

Price controls enforce affordability standards. A for-sale unit must be priced so that no more than 28% of the family income be paid for mortgage interest and amortization, assuming a 5% down payment, plus insurance, property taxes which must be based on the price restricted value of the unit, and condo or homeowner fees. Rental units must have lease amounts that do not exceed 30%, including utility charges, of the relevant family income.[27]

The court, the court-master, and especially FSHC also review plans for rehabilitation of deficient units which are included in calculations of present need. Substandard units that are proposed to be rehabilitated to satisfy present need must meet minimum expenditures of $10,000 per unit, and are subject to affordability controls of 6 years for owner-occupied units and 10 years for rentals.[28]

At the conclusion of the process, after adoption of the necessary ordinances, bonding resolutions, spending plans, rehabilitation, and marketing manuals, and the like, the court will hold a compliance hearing to make sure the plan is being implemented. If it approves the plan, the court will issue a final judgement of compliance and repose like COAH's former grant of substantive certification. The Order will recite the court's findings that the plan has satisfied the Fair Housing Act and the *Mt. Laurel* doctrine. It will grant the municipality protection against builder remedy lawsuits and other *Mt. Laurel* litigation through the end of the planning period, now 2025.

The State is still always learning. For example, the early controls started expiring a few years ago. Their extension became a key problem. Hence, we now have provisions for options to buy units at the restricted price and/or continue controls at the end of the 30-year control term.[29] The point here is that these regulations, in both their flexibility and their demands, are a rich source of potential solutions for a whole host of affordable housing issues that exist through our country.

What Now: The Future of Mt. Laurel and Affordable Housing

New Jersey has a framework in place. But frameworks are not a building. The 50,000 units projected by FSHC will hopefully appear in real life before too long. But there are no guarantees. A lot depends on the ability of FSHC and the courts plus compliance monitors to keep watch. Will there be resistance when developments actually have to come in for approvals before local board and State regulatory authorities? Many developments were stalled in the past during the local approval process when local boards had to confront unfriendly neighbors clamoring that the whole thing was a mistake.[30] How will courts, agencies, and localities actually manage the process between approval of a housing plan and actual construction. The record over the past twenty years does not suggest that plan certification equates to shovels in the ground. New Jersey still has a multi-level development approval process heavily dependent on State as well as local approvals from a variety of entities, from sewer authorities, to zoning officers, to State department regulators, and time is the enemy of affordable housing. These issues have been addressed to some extent by the enforcement of the requirement that all proposals show that they can be approved, and by the broad discretion given to municipal plans, but a prediction is not an outcome.

Also, with so many municipal projects being proposed, will the communities actually get the grants, and spend the money needed to see these housing opportunities come to fruition, especially if neighbors show up to complain? Who will keep the foot on the housing pedal when they do?

The economy also can hold surprises. Many of the units approved in the first and second rounds were stalled by housing recessions that recurred in the 1990s, and especially 2008. By the time the recessions had lifted, housing preferences had changed, away from suburban townhomes of the kind projected in the second round, 1994 to 2000. The great variety of housing types proposed now will help by providing a more resilient choice of dwellings. But as the Supreme Court itself remarked in *Mt. Laurel III*, uncertainty characterizes predictions about residential building.[31]

One giant question is the fourth round. The process is supposed to begin anew in 2025, a mere three years from now. How that will occur can only be guessed now.

The bottom line, as stated in *Mt. Laurel II*, is that courts "may not build houses, but we do enforce the Constitution."[32] The builder's remedy remains a real backstop option if all else fails.[33] New Jersey courts have acted more emphatically and empathetically than those elsewhere, giving our State better odds than most of our nation to make progress in reaching its affordable housing goals. ■

Endnotes

1. 221 N.J. 1 (2015). The case is also known as *Mt. Laurel IV*.
2. 67 N.J. 151 (1975).
3. 92 N.J. 158 (1983).
4. N.J.S.A. 52:27D-301 et seq.
5. 103 N.J. 1 (1986).
6. *See, infra*, n.7.
7. *See In re Adoption of 5:96 and 5:97*, 215 N.J. 578 (2013), voiding the so-called growth share approach. COAH missed several deadlines imposed by the Supreme Court for adopting new, compliant regulations for fair share allocations.

The Court finally ran out of patience in March 2015.

8. Several trial courts grappled with the various allocation methodologies that had been advocated by the interested parties. *Matter of Application of Township of South Brunswick*, 448 N.J.Super. 441 (Law Div. 2016), and the later opinion by Judge Jacobson in March 2018, involving West Windsor and Princeton townships. Colleen O'Dea, *NJ Court Determines How Many Affordable-Housing Units Needed by 2025*, NJ Spotlight News (Mar. 12, 2018) (njspotlight.com/2018/03/18-03-11-nj-superior), finding the statewide need including the gap period to be 155,000 units of affordable housing. This opinion has not been officially published.
9. The Court decided to appoint a special Mt. Laurel judge in each of the state's 15 judicial vicinages.
10. These specifications are discussed, *infra*.
11. 221 N.J. at 30. Subsequent pages, 221 N.J. at 30-33, described some specific modifications in the calculation of need and fair share that had been approved by the courts. Examples are bonuses for transit-oriented development, elimination of certain factors in estimating substandard housing, and credits for extension of affordability controls. The details of fair share calculation may be fascinating, but they would require an entirely separate article. This essay is more concerned with the dynamics of achievement, recognizing that achievement of the full need is aspirational.
12. *Id.* The Court later decided that needs generated during COAH's 15-year period of dormancy also had to be addressed. *In re Declaratory Judgments*, 227 N.J. 508 (2017).
13. 221 N.J. at 23.
14. This has happened. *In re Township of East Brunswick*, Docket No. L-4013-15 (N.J.Super.Ct., Law Div. 2022), order filed February 24, 2022.
15. David N. Kinsey, Ph.D., FAICP, NJPP, Kinsey & Hand, Planning, Princeton, New Jersey, with data provided by NJ COAH, December 2014, from data recorded by municipalities and reported to NJ DCA.
16. Ellen, Ingrid G., Keren Horn, Yiwen Kuai, Roman Pazuniak, and Michael David Williams, "Effect of QAP Incentives on the Location of LIHTC Properties" U.S. Department of Housing and Urban Development Office of Policy Development and Research (2015).
17. Massey and other studies cited in Rothstein, Color of Law studying Ethel Lawrence Homes in Climbing Mt. Laurel, Douglas Massey, et al. (2013).
18. This material is taken from review of the Housing Plans submitted to the Court by the author as court -master in Washington, North Plainfield, and Peapack-Gladstone and Bernardsville Boroughs, the Town of Clinton, and Lebanon Township.
19. The fairness hearing procedure was first set out in *Morris County Fair Housing Council v. Boonton Twp.*, 197 N.J. 359 (Law Div.), *aff'd o.b.* 209 N.J.Super. 108 (App.Div 1986), and *East/West Venture v. Borough of Ft. Lee*, 286 N.J.Super. 311 (App.Div. 1996). Both the fairness hearing and the ultimate compliance hearing must be conducted with public notice and an opportunity for citizens to be heard by the Court. Notice is given by mail to the interested party list and by publication.
20. N.J.A.C. 5:93-5.3(b).
21. N.J.A.C. 5:93-10.2 & 10.3.
22. N.J.A.C. 5:93-5.6.
23. N.J.A.C. 5:93-5.5. See also N.J.A.C. 5:93-5.2 (h) which requires a similar municipal commitment to fund rehabilitation programs.
24. *See* n.19, *supra*, and N.J.A.C. 5:93- 5.9 to 5.16. It is noted that the references in the regulations, *e.g.*, 5:93-6, to regional contribution agreements, *i.e.*, paying a city to undertake part of a suburbs obligation, are no longer valid since the authorization for RCA's has been repealed. P.L. 2008, c.48, §16.
25. N.J.A.C. 5:93-5.6 (d), 5:93-5.15, 5:93-7.4; 5:93-11.
26. N.J.A.C. 5:93-7.4.
27. N.J.A.C. 5:93-7.4 (h) and (i). In its January 2021 presentation, FSHC gave examples of how these price controls make a difference. Market rents in a rental complex near Princeton were $2,260 for a one bedroom to $4,565 for a three bedroom; the corresponding affordable rentals were $580 to $1,160 and $804 to $1,608, based on income ranges for the affordable units.
28. N.J.A.C. 5:93-5.2(g)-(k). $2,000 of this sum may be used for administration of the rehabilitation program.
29. N.J.A.C. 5:93-5.4.
30. Signs of this resistance are still evident. See the controversy over units proposed for among other things property formerly owned by Rosie O'Donnell in the extraordinarily affluent community of Saddle River close to New York City. northjersey.com/story/news/bergen/saddle-river/2020/03/03/saddle-river-nj-residents-protest-affordable-housing-settlement/4938843002/ (Mar. 4, 2020). President Nixon spent his retirement there.
31. *Hills Development Co. v. Bernards Twp.*, 103 N.J. 1, 54 (1986).
32. 92 N.J. at 213.
33. *Toll Brothers v. West Windsor Twp.*, 173 N.J. 502 (2002).

A State Constitutional Right to Firearm Safety

An Idea Whose Time Has Come?

By Steven M. Richman

STEVEN M. RICHMAN *is a member of Clark Hill in its Princeton, Philadelphia and New York offices. He is former chair of the of* New Jersey Lawyer *editorial board, former president of the New Jersey State Bar Foundation, former chair of the American Bar Association's International Law Section, and currently American Bar Association Representative to the United Nations.*

The issue of gun control has been punctuated by the spate of tragic and unspeakable mass shootings that have engulfed the United States in 2022, the ongoing "everyday" gun violence and use of guns in suicide, as well as the recent United States decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*.[1] States and their units (county and municipality) as well as the federal government have regulatory authority over firearms, but preemption conflicts persist not just between federal and state governments, but between state and local governments. Beyond competing interests at the legislative level, the courts have needed to resolve legal issues that are as much about public policy as they are about law.

New Jersey's state constitution has never included an equivalent to the federal Constitution's Second Amendment.[2] However, New Jersey does have an "inalienable rights" provision:

> All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.[3]

Perhaps the time has come for a clear statement in the New Jersey Constitution that declares public safety in the area of firearms and similar weaponry to be a matter of fundamental importance. Given that states have a vital function as laboratories for policy within the federal system,[4] this article explores the feasibility and desirability of such a provision in the New Jersey state constitution.

Federal law regarding firearms derives from the Second Amendment to the U.S. Constitution, stating the well-known language that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[5] During most of this country's history the United States Supreme Court interpreted the Second Amendment more in terms of public safety than individual rights to bear arms.[6] This changed in 2008 with *District of Columbia v. Heller*[7] and the 2010 decision in *McDonald v. City of Chicago*.[8] The most recent expansion of the Second Amendment's reach occurred this year in *Bruen*.

This shift from restriction on societal rights to expansion of individual rights at a time of growing gun violence in the United States demands a solution. Because state constitutional law expands and contracts with the equivalent federal constitutional law, it can grant greater rights but not impose lesser rights. As a general principle, in the federal system of the United States, state courts can interpret their state constitutions to provide greater, but not lesser, protections than those afforded under the federal constitution.[9] In such circumstances they are immunized against federal review.[10] Consequently, after *Heller, McDonald* and now *Bruen,* the arguable effect on the states has been to move from no federal constitutional limits on their authority to regulate firearms to the significant limits of the last generation. Nonetheless, states retain significant space to regulate, constitutionally and statutorily, firearms sales and use. New Jersey, for example, has *78* laws, according to one source, that address items such as legal age for possession of long guns, to purchase of handguns, to where guns may be carried to surrender orders, and so forth.[11]

Complicating state law regarding regulation of firearms is the issue of preemption, in which state-level governance overrides local regulation.[12] This is particularly important in the area of firearms; according to the National League of Cities, "only seven states give their local governments broad authority to regulate firearms and ammunition. These states also rank among those with the lowest gun death rates. In the remaining states, local firearm and ammunition regulation that is more stringent than existing state law is preempted in one way or another."[13]

The State Constitutional Right to Firearm Safety

Against this background, consideration is warranted of a state constitutional provision declaring public safety from firearm injury and death to be a fundamental policy of the state, to be enforced within the limits of the Supreme Court's Second Amendment jurisprudence. Such a provision conceivably could require firearms regulation statutes to be liberally construed in favor of this policy.[14] It might go further, in constitutional text, to outlaw or regulate assault rifles, bump-stocks, large magazines, purchases by those under 21, "ghost guns," and so forth. A model for such a provision would be Wisconsin's Constitutional statement that enabled legislative and judicial action in another area involving dangers to society, i.e., products liability, declaring as a matter of policy that, "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."[15] Here, the statement would amplify and flow from the inalienable rights provision, and provide that every person is entitled to be safe from dangerous weaponry, and adjust automatically.

Because state constitutional law expands and contracts with the equivalent federal constitutional law, it can grant greater rights but not impose lesser rights. As a general principle, in the federal system of the United States, state courts can interpret their state constitutions to provide greater, but not lesser, protections than those afforded under the federal constitution.

While statutes may be more easily revoked by legislative action, state constitutions are more durable. Inclusion of policy statements helps ensure permanence by elevating the standards for challenge and amendment, and provides additional support for legislation enacted to implement such constitutional policy.[16] What a state constitution declares as a matter of policy may also be relevant to a federal court attempting to predict what a state court would do in a particular area as well.[17] Two states, for example—Wisconsin and Arkansas—have placed policy statements in their constitutions to address particular substantive areas.[18]

Such a provision limited, as it must be, under the Second Amendment interpreted by the United States Supreme Court, would contract or expand according to the reach of the Second Amendment. If, for example, the Supreme Court ruled that states could not ban assault rifles, that provision of New Jersey's clause would no longer be enforceable. This kind of provision would be self-executing and could certainly be implemented by statutes.[19]

The "State constitutional space" permitted to the states under the Second Amendment has been contracting, most recently under the *Bruen* decision. It contracted the states' competence to regulate firearms in public, thereby reducing their state constitutional space in this regard in an accordion-like fashion. A state constitutional clause like the one suggested here would contract automatically.

One criticism of this proposal might be that these types of policy matters should be treated in ordinary statutory law and not state constitutional text. Yet state constitutions, unlike the federal Constitution, have regularly been used to entrench policy matters since the 1800s. New Jersey, although somewhat less than other states, is no different.[20] Consider our recent amendments including minimum wage and cannabis policy in the state constitution. Statutes can be repealed; state constitutional provisions are much more difficult to change.

The question, therefore, becomes the value or legal import of such a statement of policy in the context of firearms regulation where the state seeks to set a policy rationale in the context of public safety. The individual rights of the firearms owner, while express in the federal constitution, nonetheless are not limitless, as expressly recognized by the majority opinion in *Heller.*[21] One component to the Court's analysis in *Heller* was whether the right to bear arms would be destroyed by the regulation.[22]

Conclusion

New Jersey does not start with the "handicap" of a constitutional right to bear arms provision. Such a provision has not proved an impediment to state or federal courts sustaining appropriate firearms regulation. On the other hand, if the state constitutional amendment were aimed more toward strengthening individual rights to be secure or safe, it might well provide another leg of analysis on which to apply an appropriate level of scrutiny under the state police power. Even though such a statement of policy would expand and contract with federal jurisprudence under the rule that a state constitution can provide more, but not less, protection to the right at issue, such a constitutional statement would be entitled to recognition, as noted even in *Bruen*. The right to security under the 14th Amendment, and universal jurisprudence recognizing that even in "right to bear arms" states the right is not unlimited or absolute, the question persists if more harm than good will be done by attempting to regulate or legislate by way of constitutional amendment. It remains something to consider. The New Jersey Supreme Court has emphasized that "[t]he New Jersey Constitution not only stands apart from other state constitutions, but also may be a source of individual liberties more expansive than those conferred by the Federal Constitution."[23] However, what should be considered more and how it is to be accomplished is the question.

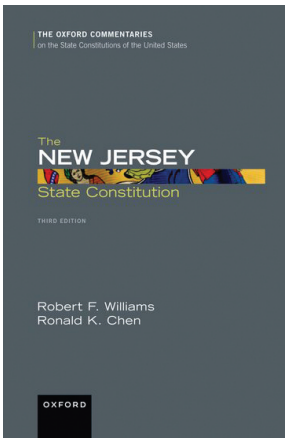
This is a preliminary idea and deserves serious consideration by political leaders in our state that strives to be a national leader in gun control and protection. There will be many more details to be considered, but maybe now is the time for such consideration. ■

Endnotes

1. 142 S.Ct. 2111, 2122 (2022)
2. Robert F. Williams & Ronald K. Chen, The New Jersey State Constitution 50 (3d ed. 2022)
3. N.J. Const. (1947), Art. ¶1.
4. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S. Ct. 371, 386–87, 76 L. Ed. 747 (1932)(Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").
5. The focus here is on state constitutional law. For an understanding of federal statutory law and the Supreme Court's jurisprudence on this, see generally Congressional Research Service, *Federal Firearms Laws: Overview and Selected Legal Issues for the 116th Congress* (March 25, 2019) (crsreports.congress.gov/product/pdf/R/R45629). *See also United States v. Cruikshank*, 92 U.S. 542 (1875); *United States v. Miller*, 307 U.S. 174 (1939); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. City*

of Chicago, Ill., 561 U.S. 742 (2010).

6. *United States v. Miller*, 307 U.S. 174, 178 (1939).
7. 554 U.S. 570 (2008).
8. 561 U.S. 742 (2010).
9. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).
10. *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983).
11. *State Firearm Laws*, statefirearmlaws.org/state-state-firearm-law-data.
12. Ballotpedia, *Firearms Preemption Conflicts Between State and Local Governments* (Sept. 2, 2021), *ballotpedia.org/Firearms_preemption_conflicts_between_state_and_local_governments#:~:text=Firearms%20preemption%20conflicts%20between%20state%20and%20local%20governments,-From%20Ballotpedia&text=Ballotpedia%20covers%20preemption%20conflicts%20between,authority%20at%20a%20lower%20level.*
13. National League of Cities, *City Rights in an Era of Preemption: A State-by-State Analysis* (2018 Update) (nlc.org/wp-content/uploads/2017/02/NLC-SML-Preemption-Report-2017-pages.pdf).
14. N.J. Const. (1947), Art. IV, §VII, ¶11 (liberal construction of local government power).
15. *See*, *infra*, n.19
16. *See, e.g., Dohme v. Eurand Am., Inc.*, 2011-Ohio-4609, ¶ 18, 130 Ohio St. 3d 168, 172, 956 N.E.2d 825, 829 ("In an action claiming wrongful termination, the terminated employee must assert and prove a clear public policy deriving from the state or federal constitutions, a statute or administrative regulation, or the common law.").
17. *See, e.g., Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 618-620 (3d Cir. 1992), as amended (May 29, 1992).
18. Wisconsin provided policy that was used in the product liability context, *see* §9, quoted above; *see Burton v. E.I. du Pont de Nemours & Co., Inc.*, 994 F.3d 791, 816 (7th Cir. 2021) ("The role of fungibility in the risk-contribution theory further confirms that it is a legal issue for the court. Fungibility is a prerequisite to applying the risk-contribution theory. The Wisconsin Supreme Court considers it when deciding whether a plaintiff lacks an adequate remedy at law, such that the Wisconsin Constitution authorizes the court to develop one."). Arkansas also provided a policy statement in its state constitution regarding abortion, which was partially struck down but nonetheless remains for certain purposes. *See* Ark. Const. amend. LXVIII, §§1-3; Section 2 states that "[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution."). In *Dalton v. Little Rock Fam. Plan. Servs.,* 516 U.S. 474, 478 (1996) the Supreme Court addressed these clauses and held "[t]he District Court's invalidation of §§2 and 3 of the amendment was based on the proposition that these sections "have no function independent of" §1. Even assuming that to be true, once §1 is left with the substantial application that the Supremacy Clause fully allows, §§2 and 3 subsist as well.") (citation omitted). Section one dealt with the use of public funds for abortion. Another example of a policy statement in a state constitution is in Article XXIX of the Massachusetts State Constitution, which addresses impartial interpretation of laws (malegislature.gov/laws/constitution).
19. Robert F. Williams, *The Law of American State Constitutions* 343-345 (2009) (self-executing provisions are enforceable by the courts without implementing legislation).
20. Williams & Chen, *supra*, n.2 at 5-6.
21. Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.... For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.... Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller,* 554 U.S. 570 (2008) (quotations and citations omitted).
22. *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008).
23. *Lewis v. Harris*, 188 N.J. 415, 456 (2006) (citation and quotation omitted).



BOOK REVIEW

NEW JERSEY STATE CONSTITUTION
THIRD EDITION
by Robert F. Williams and Ronald K. Chen

(The Oxford Commentaries on the State Constitutions of the United States, Oxford University Press, 2022)

The New Jersey Constitution
An Origin Story, Evolution, and Analysis

By Hon. Peter A. Buchsbaum

In the aftermath of United States Supreme Court's recent decisions regarding abortion, regulation of guns, establishment/freedom of religion, and climate change regulation, we need to remember that the High Court's words are not necessarily final for all of us. The Oxford State Constitution series, and this New Jersey volume by Robert F. Williams and Ronald K. Chen in particular, vitally remind us that state constitutions can provide broad protections for civil rights and liberties that the federal charter does not.

Williams and Chen are highly qualified for this task. Robert F. Williams is a Distinguished Professor of Law Emeritus at Rutgers University School of Law, Camden, and director of the Center for State Constitutional Studies. He has taught state constitutional law, and his numerous publications include a highly regarded textbook on this subject. Chen, a Distinguished Professor of Law and Judge Leonard I. Garth Scholar at Rutgers Law School, Newark, is also a faculty associate at the Eagleton Institute of Politics. He has served as a cabinet officer in New Jersey and litigates constitutional law cases with the Rutgers Constitutional Litigation clinic.

The purpose, importance and direction of this book are clearly charted in the Foreword by the Oxford series editor Lawrence Friedman, the established state constitutional scholar:

> Operating in the shadow cast by the U.S. Constitution, State constitutions and the State court decisions interpreting them remain critical sources of governmental authority and restraint. It has been the goal of the Oxford Commentaries on the State Constitutions of the United States to illuminate these constitutions for a wide audience—to explain the unique history of each State constitution and explore, in an accessible way, what the various provisions of the American State constitutions in their great variety mean and how they have been interpreted and applied over time.

The book fulfills this purpose admirably for both general audiences and New Jersey lawyers who can use it to both understand and debate our state's legal framework. It provides a wonderful historic background for almost every provision in our state constitution. It gives a comprehensive review of where New Jersey, either through differential text or judicial interpretation, has found broader freedoms in the state constitution than those afforded in the federal one as interpreted by

the U.S. Supreme Court. It provides an origin story for many of the provisions now in the state constitution.

The book begins with an historical overview and description. We have had in our state only three actual, fully fleshed out constitutions, those of 1776, 1844, and now, most admirably, 1947. To these three, the authors add a fourth, the reforming provisions adopted in 1875 which led to our thorough and efficient education clause, Art. VIII, Sec. IV, Para. 1, and the restraints on special legislation, general limitation on legislative intervention in municipal government, and prohibiting the giving of gifts or credit to private entities. Art. IV, Sec. VII, Paras. 7 to 10. It is noteworthy that in this era of radical Republicanism in the U.S. Congress, there seems to have been a reforming impulse in our state and possible others, even though Democrats dominated here.

Underneath this history lies a big question. New Jersey, as the authors point out, has had a uniquely small number of major constitutional changes since 1776—three and a half if you count 1875 as a partial reform. Why is this?

They answer that the New Jersey Constitution has generally stuck to framework rather than policy issues. As a result, our constitution is a lot shorter and more general than others. They cite one study which indicated that only 14% of the New Jersey Constitution was devoted to policy issues in contrast to the national average of 40%. So there is less need for constant amendments as policy preferences change. As proof of their thesis, the authors cite the one clearly policy driven choice in the constitution, the regulation of gambling and games of chance. Those provisions have been frequently amended with respect to big issues like casino gambling, and smaller ones such as non-profit lotteries/raffles and boardwalk games.[1]

This paucity of constitutional revisions makes the 1947 constitutional change seem almost miraculous. It is harder to change a framework than to nibble round the edges of issues like gambling policy or lotteries. As the authors point out, the powers of the Judiciary and the executive branches were much enhanced by the new Articles V and VI of the 1947 charter. In Article V, the governor was given real control over the executive departments as the only elected statewide official, a real veto that could only be overridden by a two-thirds vote in both houses, and a four- instead of a three-year term, with the right to succeed themself for one additional term. So the state went from having one of the nation's weakest governors to one of its strongest.

The change in the Judiciary was even more sweeping. The book describes how Article VI created a real Supreme Court of last resort, which our state previously never had, and gave that Court and its Chief Justice extraordinary powers over Court rules, administration, judicial assignments, and the practice of law. New Jersey justice went from being a joke to being an exemplar of how a modern court system should be structured. Plus, the court system was unified so that litigants would not be shunted from equity to law and back, and it was made clear that relief from governmental decisions was available as of right, not at the discretion of a judge. The authors not only describe this process, but include a bibliographical essay which contains numerous citations to books describing the revolution of '47.[2] To go from a court system whose table of organization looked like a snarled fishing line, to one which, as amended, has only two courts, Supreme Court and the Superior Court, was and in retrospect remains, astonishing. Having all this information in one place in one book can only help practitioners and the public understand how we got from there to here, now 75 years after the fact, when much of the history might otherwise be forgotten.

Of course 1947 was not a panacea. The third rail of New Jersey constitutional history remained untouched, namely the one senator per county rule that had existed from the outset. So 11 rural counties could outvote in the Senate far more populous counties elsewhere. Even in 1873, as the authors recount, there were articles like the one in the "Newark Daily Advertiser" bemoaning the fact that pine barrens region could outvote the populous parts of the state in deciding where a railroad could go:

> The pine-barrens have beaten the populace. Ten gentlemen, representing the wealth, power, honour and good sense of the State of New Jersey, representing also the bulk of its population and its true will and purpose, yesterday voted for a competing railroad between New York and Philadelphia. Eleven other men, whose title is Senator, representing an innumerable host of stunted pines, growing on sand-barrens, voted the bill down.... You can't make pine trees vote nor endow them with a conscience.

It took the one person one vote decisions of the United States Supreme Court in the 1960s finally to end this travesty whereby counties, functionally the least powerful level of New Jersey government, each got one Senator no matter what its population.

As the above quote suggests, the earlier constitutional history which the book details so well is not at all dry. This is New Jersey, after all. So some of this history almost gets to be entertaining. Our 1776 Constitution was really a fossil. Our governor also served as chancellor in equity, which meant that all governors elected between 1776 and 1844 were lawyers. There was no veto power and the Legislature elected all the Judges and other officials. This constitution also contained an explosion clause which said that it would be void if the colonies reconciled with England.

The historical background also explains some current provisions which seem downright odd. The opening paragraph in Art. IV, Sec. VII, Laws Prohibited, Para. 1, says the Legislature shall not grant a divorce. It appears from the authors' commentary, that the pre-1844 Legislature spent an inordinate amount of time considering individual petitions for divorce. Judicial divorce is now so ingrained that we easily forget that state legislatures have plenary power to do a lot of things that are restrained solely by state constitutions.

Similarly, the provisions regarding special legislation arose because Legislatures before 1875 could strip local governments in the other party's hands of real power and install special commissions containing favored party members. They also endlessly and supposedly corruptly debated individual railroad and corporate charters.[3] An historical marker in Hopewell Borough documents the so-called frog war,[4] after the Legislature finally granted what became the Jersey Central Railroad the right to lay a track competing with the dominant Pennsylvania Railroad.

Some of the history laid out in the book is less than inspiring. The 1776 Constitution, supported by a 1790 statute, gave women and Black people the right to vote, the book reports, although —with a high property qualification of owning property worth 50 pounds—probably very few did. In any case this right was quietly and without challenge eliminated by statute in 1807. The 1844 Constitution definitively limited suffrage to white males, albeit without any property qualification. Only the 15th Amendment to the U.S. Constitution changed that regressive feature. Further, while New Jersey was the first state, the book asserts, to ratify the Bill of Rights in November 1789, its own constitution did not contain a charter of liberties at that time.

However, the 1844 charter did contain our first state bill of rights, now found in Article I of the 1947 Constitution. It begins with broad language about people being free and independent derived from the Virginia Declaration of Rights of 1776, which in some way resembles the shining words of Jefferson's Declaration of Independence of that same year. However, the New Jersey declaration has legal force, as part of the state constitution, and thus has been interpreted broadly in the direction of equality, as in the famous Mt. Laurel zoning cases which held that a person cannot be denied the opportunity to find housing through exclusionary zoning laws. And in concluding this review, there can be no better theme than pointing out (as Williams and Chen do) how New Jersey has led in finding a broader scope for rights from Medicaid-funded abortion to equality in education, to housing, and to fairness in general.

In fact, and this is detailed in the book, New Jersey has developed an extensive state jurisprudence of liberty relying on the 1844 rights charter, plus the requirement for students to receive a thorough and efficient education. While that provision, added as part of the reforms of 1875, may be in Article VIII, Section IV, relating to taxation and finance, it speaks to equality among our state's children. The basic tack taken by the New Jersey Supreme Court in deciding whether the state constitutional charter of liberties should be interpreted more expansively than those of the federal Constitution was laid out by Justice Alan B. Handler in a 1982 concurrence in *State v. Hunt*, described in the book as follows:

> Justice Handler, [whose concurrence was adopted by the Supreme Court in *State v. Williams*, (1983)] listed seven criteria or standards that would justify a result different from the U.S. Supreme Court's: (1) textual differences in the constitutions; (2) "legislative history" of the provision indicating a broader meaning than the federal provision; (3) state law predating the U.S. Supreme Court decision; (4) differences in federal and state structure; (5) subject matter of particular state or local interest; (6) particular state history or traditions; and (7) public attitudes in the state. He concluded that reliance on such criteria demonstrates that a divergent state constitutional interpretation "does not spring from pure intuition but, rather, from a process that is reasonable and reasoned."

These criteria, especially differences in the state structure and state language have played out over the decades. To take two famous examples, zoning is more of a state than a federal issue, and the thorough and efficient clause is much more specific as to education than a general equal protection mandate. Similarly, the Court's free speech cases on issues like speech on a mall that is on private property are not constrained by the requirement in the federal Fourteenth Amendment which protects citizens only from state actions. Also, with its greater familiarity with state practice, the Court has felt freer to impose a higher standard on law enforcement in the areas of certain telecommunications records and accuracy of search warrants. Thus guided, and with the support of the independent Supreme Court established in 1947, New Jersey has maintained a leadership role in protecting the rights of its citizens, even where the U.S. Constitution does not support their freedom. This lesson from Williams and Chen may be the most important teaching in their book.

In sum, Williams and Chen have provided a clear, compact, and comprehensive guide to our state constitution and its interesting history. Nowhere else would you be able to find so much packaged so efficiently. Practitioners will benefit from its stories and its insights and as well as from its legal analysis. The book will also provide a firm foundation for both Law School and general political science classes. It should be read and debated by the general public as well. ■

Endnotes

1. While the authors also reference the comparative difficulty of amending the New Jersey Constitution, that factor seems not to have been a significant barrier to amendment in recent years. For example, the change in the constitution re judicial salaries was adopted by the Legislature and approved by the voters in a few short months.
2. *See, e.g.*, Bello and Vanderbilt II, New Jersey's Judicial Revolution: A Political Miracle (NJICLE, New Brunswick 1997); Johnson, Battleground New Jersey: Vanderbilt, Hague and the Battle for Justice (Rutgers University Press, New Brunswick 2014)
3. See Sackett, Modern Battles of Trenton (1895), an invaluable account of New Jersey politics from the civil war to the end of the 19th Century.
4. A frog is a device which allows one railroad track to cross-over another at grade. There was an armed standoff between forces of the two roads over inserting such a frog to allow the competing road to pass on to the Delaware River and connect New York City to Philadelphia.

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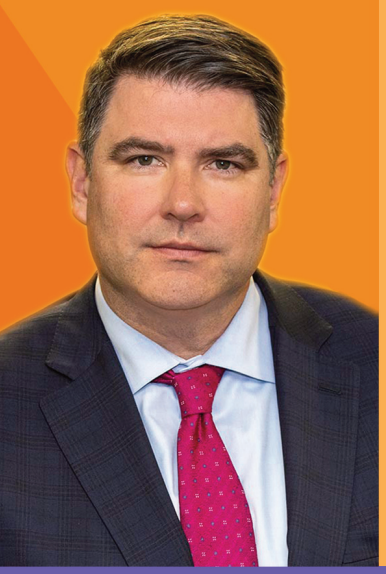

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