

## SYMPOSIUM: THE "NEW JUDICIAL FEDERALISM" AND NEW JERSEY CONSTITUTIONAL INTERPRETATION<sup>†</sup>

### INTRODUCTION

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I want to begin by congratulating the *Constitutional Law Journal* for planning this extremely ambitious and interesting program. And, as well, for the publication today of their "Special Issue on New Jersey Constitutional Law."<sup>1</sup> Congratulations to you all.

It is my pleasure to introduce our topic today, and then to introduce the distinguished speakers who are with us. This year we celebrate a turning point in the history of New Jersey. As already indicated by Mr. Lance, this year is the fiftieth anniversary of the constitutional convention, which significantly changed the constitution of New Jersey. The major purpose, which Mr. Lance did mention already, was to increase the power of both the executive branch of government, and the judicial branch of government. The convention was successful in achieving those goals, and today we have one of the most powerful governorships in the country, as well as a modern and powerful judicial branch. Today, we are looking at the New Jersey Supreme Court, and particularly, the court under Chief Justice Wilentz.

Prior to the convention in 1947, New Jersey's judicial system was described as the worst in the country. One author writing in 1943 used particularly colorful language to describe the court system in New Jersey. He said,

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<sup>†</sup>The articles contained in the symposium portion of this issue are adaptations of presentations given at Seton Hall University School of Law on March 12, 1997.

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"If you want to see the common law in all its picturesque formality, with its fictions and its fads, its delays and uncertainty, the place to look for them is not in London, not in the modern gothic of the law courts in the Strand, but in New Jersey. Dickens, or any other law reformer of a century ago would feel more at home in Trenton, than in London."<sup>2</sup>

Subsequent, however, to the 1947 constitution, which drastically changed the structure of the New Jersey courts, and with the appointment of Arthur T. Vanderbilt as Chief Justice, the perception of the New Jersey courts changed drastically. Vanderbilt was a major figure both within the state and nationally. He was a highly regarded trial attorney, Republican leader of Essex County, Dean of N.Y.U. Law School, and President of the American Bar Association. He was later seriously considered for the position of Chief Justice of the United States Supreme Court, losing out to Chief Justice Warren. The combination of the major structural change of the judiciary under the constitution, the preeminent reputation of Chief Justice Vanderbilt, the early decisions within the court, and the major administrative changes within the system instituted by the Chief Justice, led to a totally different view of the court system in New Jersey.

As Professors Tarr and Porter said, by 1957, when Justice Vanderbilt died, "New Jersey courts enjoyed an unaccustomed national stature, and the state basked in its reputation for judicial progress."<sup>3</sup> The New Jersey Supreme Court continues to enjoy a distinguished national reputation. In 1988, Tarr and Porter said, "Since World War II, the New Jersey Supreme Court has assumed a role of leadership in the development of legal doctrine, thereby earning for itself a national reputation for activism and legal reformism."<sup>4</sup>

Some years ago, Duncan Kennedy, one of the leaders of the critical legal analysis movement, and a Professor at Harvard, referred to the New Jersey Supreme Court as the "quintessential liberal activist reformist court in the country."<sup>5</sup> I often use that line in class and then follow with the line, "And he meant it as a compliment." Thus indicating, of course, that some of that reputation is accorded by those with a liberal judicial philosophy, and perhaps not necessarily by the majority.

Since 1947, not counting the very brief tenure of Chief Justice Garven,

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<sup>2</sup>G. ALAN TARR AND MARY CORNELIA ALSIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 187 (1988) (citing DENIS W. BROGAN, *THE ENGLISH PEOPLE: IMPRESSIONS AND OBSERVATIONS* 108 (1943)).

<sup>3</sup>*Id.* at 194.

<sup>4</sup>*Id.* at 184.

<sup>5</sup>Taken from a speech given by Professor Duncan to the New Jersey Judicial College.

there have only been four Chief Justices in New Jersey. Now, of course, five, with the recent appointment of Chief Justice Deborah Poritz. Chief Justice Arthur Vanderbilt was followed by Chief Justice Joseph Weintraub, then Chief Justice Richard Hughes, and, the person we honor later tonight, Chief Justice Robert Wilentz.

Each were strong individuals who, while differing in personality, all were legally astute with strong positions about the future of New Jersey, and worked vigorously to improve the system of justice in the state. Thus, it is an interesting time to be considering the New Jersey Supreme Court. In this fiftieth anniversary year, we will begin to assess the changes that will come as a result of the change in leadership of the court over this past year.

The *Constitutional Law Journal* has gathered together for today an extraordinary panel. We have three outstanding jurists, two professors specifically concerned with state constitutional issues, and two attorneys who have been involved in some of the most important constitutional issues dealing with our criminal justice system.

The format will be as follows: Justice Daniel O'Hern will present his views on the appropriate use of the new federalism. That is, the use by state courts of their own state constitutions to grant greater rights than had been granted by the United States Supreme Court, even though the federal and state constitutions may have been identical, or very similar in words. Professor Robert Williams will then present a different view of the use of the new federalism. Professor Edward Hartnett will then respond to both those presentations. At that point, we will begin looking at specific areas in which those issues have arisen. Judge Howard Kestin will discuss freedom of speech, Mr. Boris Moczula will discuss the death penalty, and Judge Burrell Ives Humphreys and Mr. Ronald Susswein will discuss search and seizure.

