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Indefinite or Temporary Legislation? An Argument for how the New Jersey Supreme Court Should Settle the Pension and Health Care Benefits Act's Facial Contradiction

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I. Introduction

Expiration dates are ubiquitous in our lives. They are so commonplace that we probably do not realize how often we encounter them. Analyzing a simply daily task, like driving a car or using a credit card, illuminates how prevalent and impactful expiration dates are. Let's say that Jane drives her car to the supermarket where she intends to purchase groceries for dinner. Although it might not be immediately clear, this mundane task is packed with expiration dates. Of course, none of the expirations are apparent or relevant until the dates have passed, at which time they surface to significantly alter the outcome of Jane's day. For example, Jane must insure and register her car, both of which typically last one year before expiring. If the insurance or registration expires Jane's car might be towed and she could face license suspension and expensive fines if she gets into a car accident or gets stopped by the police on her way to the store. The credit card that Jane will use to buy the groceries has an expiration date and if the date has passed the sale will be declined and she will not be able to complete the purchase. These examples illustrate how impactful expirations are and highlight the commonly held understanding of expirations—once they lapse, that which was previously valid automatically becomes invalid.

Since the inception of our nation, lawmakers have realized the usefulness of expirations and have included express expiration dates in legislation, which are known as sunset laws or sunset clauses.[1] Just like expirations in all other facets of our lives, when a law or clause of a law

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[1] *Sunset Law*, Black's Law Dictionary (10th ed. 2014).

expires—it is no longer effective. Despite the longstanding practice[2] of using sunset laws, recently, the New Jersey appellate courts have decided to ignore a clear, express, and unambiguous expiration clause contained in the New Jersey Pension and Health Care Benefits Act (Chapter 78).[3] These decisions cut directly against our commonly held expectations and intuitive understanding of expirations. This comment will argue that these cases are not only ripe for New Jersey Supreme Court intervention but posits that intervention is vital to preserve the essence of sunset legislation as a whole.

On June 28, 2011, then-Governor Chris Christie enacted Chapter 78.[4] This controversial law dramatically changed pension and health care contributions for nearly 750,000 public employees and retirees across the state.[5] Chapter 78 ushered in sweeping changes, mainly to the operation, contribution, and withdrawal provisions of the state-administered retirement systems and the operation, contribution, and benefits provisions of the state-administered health benefits programs.[6] While there has been significant debate and litigation regarding the pension changes, this comment focuses specifically on the employee and retiree health care contributions portions of the law.

Prior to Chapter 78, public employees collectively bargained with their respective employers over the amount of employee contributions towards health care coverage. Even though employees and employers bargained, there was a state-mandated "floor" for employee

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[2] Arguably, the first sunset legislation was the Alien and Sedition Act of 1798, which expired by its own terms on a specific date less than three years after its enactment. Alien and Sedition Act of 1798, c. 74, § 4, 1 Stat. 596, 597 (1798) ("[T]his act shall continue and be in force until the third day of March, one thousand eight hundred and one, and no longer . . . .").

[3] New Jersey Pension and Health Care Benefits Act (Chapter 78), c. 78, 2011 N.J. Laws 551.

[4] *Id.*

[5] Richard Perez-Pena, *New Jersey Lawmakers Approve Benefits Rollback for Work Force*, N.Y. TIMES (June 23, 2011), https://www.nytimes.com/2011/06/24/nyregion/nj-legislature-moves-to-cut-benefits-for-public-workers.html.

[6] N.J. Division of Pension and Benefits, https://www.state.nj.us/treasury/pensions/reform-2011.shtml (last visited Oct. 15, 2019).

contributions at 1.5% of the employee's base salary.[7] With the enactment of Chapter 78 that all changed and collective bargaining over health care contributions was temporarily halted while employee contributions were mandated over a four-year period.[8] Section 39 of Chapter 78 established an employee/retiree contribution schedule, which was a sliding scale with the contribution amount centered on the employee's base salary.[9] To alleviate the harsh consequences of mandating significant employee contributions all at once, Chapter 78 directed an incremental phase-in over a four-year period, with a twenty-five percent increase each year until the full contribution amount was reached.[10] Importantly, the mandated health care contributions had limited longevity as Chapter 78 calls for recommencement of traditional collective bargaining procedures for health care contributions once the employees reach the full contribution amount.[11] Chapter 78 set the new "floor" for future health care contribution negotiations at the full contribution amount contained in the section 39 contribution schedule.[12] Most importantly, Chapter 78 contains a sunset provision that called for the expiration of the sections that mandate health care contributions four years after the effective date of the law.[13] Essentially, Chapter 78 served as a state-mandated four-year progressive financial reprieve for employers, while also

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[7] *See* Act of Mar. 22, 2010, c. 2, § 6(c)(2) 2010 N.J. Laws 84, 86; N.J. State Firefighters' Mut. Benevolent Ass'n v. State, No. MER-L-1004-10, 2011 LEXIS 154, at *8 (N.J. Super. Ct. Law Div. Jan. 19, 2011) ("Commencing on May 21, 2010, the effective date of Chapter 2 . . . the amount of contributions by employees shall be 1.5% of their base salary, notwithstanding any other amount that may be required additionally by means of a binding CNA.").

[8] *See* Ridgefield Park Bd. of Educ. v. Ridgefield Park Educ. Ass'n, 459 N.J. Super. 57, 62 (N.J. Super. Ct. App. Div. 2019) ("Chapter 78 prescribed specific contribution rates for public employees' health insurance coverage . . . to be phased in over the course of four years . . . .").

[9] Dawn Hiltner, *Local Associations Negotiate Chapter 78 Relief*, COLLECTIVE BARGAINING NEWS (Dec. 7, 2016 12:00 AM), https://www.njea.org/local-associations-negotiate-chapter-78-relief/.

[10] Chapter 78, c. 78, § 41(a), 2011 N.J. Laws 551, 630. *See also* Patrick Duncan, *Chapter 78 – Negotiating Over Health Benefits Costs*, New Jersey School Boards Association, https://www.njsba.org/services/labor-relations/resources/chapter-78/ (last visited Sept. 13, 2019).

[11] Chapter 78, c. 78, §§ 77–79, 2011 N.J. Laws 551, 673–75. *See also* Mark J. Magyar, *Christie Touts Sweeney's "Courage" in Signing Penson and Health Benefits Overhaul*, NJ SPOTLIGHT (June 29, 2011), https://www.njspotlight.com/stories/11/0629/0202/.

[12] Patrick Duncan, *Chapter 78 – Negotiating Over Health Benefits Costs*, New Jersey School Boards Association, https://www.njsba.org/services/labor-relations/resources/chapter-78/ (last visited Sept. 13, 2019).

[13] Chapter 78, c. 78, § 83, 2011 N.J. Laws 551, 675.

functioning as a reset button for health care contribution negotiations, tilting the scales in favor of the employers. Notably, Chapter 78 maintained the previous "floor" for health care contributions of 1.5% of base salary once contribution negotiations recommence.[14]

After enactment, employees across the state fiercely contested the validity of Chapter 78, mainly on constitutional grounds, but it withstood nearly every challenge thus far.[15] Despite the unsuccessful constitutional challenges, employees believed that their mandated health care contributions would only last four years due to the express sunset provision in the law.[16] The very last section of Chapter 78, section 83, contains an unambiguous sunset provision that expressly declares that sections 39 through 44, which are the sections that mandate employee and retiree health care contributions, expire four years after the law's effective date.[17] As per the express language in section 83, on June 28, 2015, sections 39 through 44 expired.[18] After June 28, 2015, some groups of employees and employers began to negotiate the employees' health care contribution amount, as instructed by the law. Other employees retired, believing that they did not have to contribute towards health care because sections 39 through 44 expired. Despite the expiration, some employers continued to impose employee/retiree health care contributions, arguing that the contribution mandate persisted beyond the express expiration due to the language in section 40(c). Section 40(c) contained language that acknowledged yet disclaimed the

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[14] *Id.* § 40(a) at 626.

[15] *See, e.g.*, N.J. Educ. Ass'n v. State, NO. L-771-12, 2013 LEXIS 1459, at *88–90 (N.J. Super. Law Div., Jun. 13, 2013) (upholding various portions of Chapter 78 as constitutional after plaintiffs claimed the law violated their contract rights, substantive due process rights, and civil rights).

[16] *See* Chapter 78, c. 78, § 83, 2011 N.J. Laws 551, 675; Diane D'Amico, *Law's Expiration May Renew Battle Over Benefits*, PRESS OF ATLANTIC CITY (Jan. 31, 2016, 5:35 PM), https://www.thedailyjournal.com/story/news/local/2016/01/31/laws-expiration-may-renew-battle-benefits/79612412/.

[17] Chapter 78, c. 78, § 83, 2011 N.J. Laws 551, 675 ("This act shall take effect immediately, and sections 39 through 44, inclusive, shall expire four years after the effective date."). As per the express terms of section 83, the employee contribution scale expired on June 28, 2015.

[18] *Id.*

expiration, effectively making the expiration wholly ineffectual.[19] Due to the law's glaring facial contradiction, it is no surprise that litigation quickly followed.[20]

In *Pepe v. State*, the plaintiffs were newly retired public-school employees who asserted that they should not be required to contribute towards health care in retirement as section 83 clearly indicates that the contribution scale expired on June 28, 2015.[21] In the Mercer County Superior Court, Judge Mary C. Jacobson acknowledged the express expiration but nevertheless determined "it is not always appropriate to read a statute literally, but that a court must instead be guided by legislative intent and spirit as revealed in the statute as a whole, and in legislative history, and not in isolation."[22] Judge Jacobson ruled in favor of the defendants and the case was appealed to the Appellate Division where it was affirmed.[23] Again, the plaintiffs appealed and on November 12, 2019, the New Jersey Supreme Court denied certification.[24]

Just five days prior to the Supreme Court's denial of certification in *Pepe*, the appellate court decided another case, *Hamilton Township Superior Officers Ass'n v. Township of Hamilton* (hereinafter *Hamilton*),[25] that challenged the mandate of health care contributions after the expiration date. Like in *Pepe*, the appellate court in *Hamilton* determined that although section 83 of Chapter 78 expired on June 28, 2015, the plaintiff retiree was nevertheless required to make health care contributions beyond the expiration.[26]

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[19] *Id.* § 40(c) at 629 ("Notwithstanding the expiration date set forth in section 83 of this act . . . the parties shall be bound to apply the requirements of this paragraph until they have reached the full implementation of the schedule set forth in subsection a. of this section.").
[20] *See* Pepe v. State, No. A-0074-17T2, 2019 LEXIS 1101, at *4–6 (N.J. Super. Ct. App. Div. May 14, 2019).
[21] *Id.* at *6.
[22] *NJEA Receives Ruling in Post-Retirement Medical Benefits Lawsuit*, NJEA NEWS (Aug. 7, 2017, 10:49 AM), https://www.njea.org/njea-receives-ruling-post-retirement-medical-benefits-lawsuit/.
[23] *Pepe*, No. A-0074-17T2, 2019 LEXIS 1101, at *12.
[24] Pepe v. State, 083029, 2019 LEXIS 1530, at *1 (N.J. November 12, 2019).
[25] *Hamilton Twp. Superior Officers Ass'n v. Twp. of Hamilton*, A-0016-18T1, 2019 LEXIS 2282 (N.J. Super. Ct. App. Div. Nov. 7, 2019) (per curiam).
[26] *Id.* at *7.

This comment serves to highlight the facial contradiction in the law and argue that both *Pepe* and *Hamilton* were decided incorrectly by the appellate court. Although the New Jersey Supreme Court denied certification in *Pepe*, the issue is far from over. The *Hamilton* case provides an example how litigation will persist as groups of employees continue to contribute towards health care despite the expiration of the sections of the law that requires them to do so. Part II of this comment will explain the relevant provisions of Chapter 78 in detail. This comment will focus narrowly on the Chapter 78 sections that control employee and retiree health care contributions, including the section that calls for the expiration of those sections. Part III will assess the New Jersey Supreme Court's statutory interpretation jurisprudence. Part IV will address various forms of "temporary" and "sunset" legislation and its longstanding applications in New Jersey and federally. Part V will detail the facts of three cases involving the interpretation of Chapter 78's language and Part VI will provide a detailed analysis and critique of those cases. Part VII will argue that interpretation of the contradictory language is ripe for New Jersey Supreme Court determination. Part VIII will provide a detailed analysis of the contradicting sections of Chapter 78 and argue that the expiration date should be dispositive. Part IX will explain the implications of a finding that the health care contribution sections expired. Part X will conclude.

II. Chapter 78

On June 28, 2011, the Pension and Health Care Benefits Act, P.L.2011, c.78 was signed into law by then-Governor Christie after bi-partisan support in the legislature.[27] The law made significant changes to public employee's pension system to shore-up the strained system and it temporarily mandated employee health care contributions to provide financial relief to

[27] Laura Water, *Here's What's Wrong with NJEA's Strategy to Unseat Senate President Steve Sweeney*, NJLEFTBEHIND (Mar. 30, 2017), https://njleftbehind.org/2017/03/heres.whats-wrong-with-njeas-strategy-to-unseat-senate-president-steve-sweeney/.

employers.[28] The relevant sections of Chapter 78 relating to health care contributions are detailed below.

A. An Overview of the Statutory Framework

The framework for the employee and retiree health care contributions is contained in several different sections with interplay between the sections. This paragraph provides a brief overview while subsequent sections delve into the individual sections in detail. Section 39 established the contribution scale for employees and retirees.[29] Sections 40 through 43 mandated employee and retiree contributions, in accordance with the scale established in section 39.[30] Sections 40 through 43 also established the four-year phase-in period and provided a contribution "floor" of 1.5% of the employee's or retiree's base salary.[31] The only meaningful difference between sections 40 through 43 is that each section covers a different group of public employees. Sections 77 through 79 established that employee contributions are to be negotiated after the four-year phase-in period is complete.[32] Section 83 established the effective date of Chapter 78, June 28, 2011, and the expiration date of sections 39 through 44 inclusive, June 28, 2015.[33]

1. Section 39

Section 39 provided three different employee contribution scales, which varied slightly depending on the type of coverage provided.[34] The three types of coverage are: family; member

[28] Marie Blistan & Ed Richardson, *We Need to Make Health Care More Affordable for Educators, NJEA Says*, NJ.COM (May 22, 2019), https://www.nj.com/opinion/2019/05/we-need-to-make-health-care-more-affordable-for-our-teachers-njea-says.html. *See also* Burgos v. State, 222 NJ 175, 228 (2015) (Albin, J., dissenting) ("The language in Chapter 78 clearly establishes the intent of the Legislature and Governor to create an enforceable contractual right to funding of the pension system . . . .").
[29] *See* Chapter 78, c. 78, § 39, 2011 N.J. Laws 551, 622–25.
[30] *See id.* § 40–43 at 625–37.
[31] *See id.*
[32] *See id.* §§ 77–79 at 673–75.
[33] *Id.* § 83 at 675.
[34] *See id.* § 39 at 622–25.

along with their child or spouse; and individual.[35] Depending on the plan, level of coverage, and employee's salary, the employee contributions ranged anywhere from three to thirty-five percent of the premium.[36]

2. Section 40(a)

Sections 41 through 43 cover different classes of public employees that were not covered in section 40, but section 40 is the only section explained in detail in this comment as that was the section relevant in the *NJEA* and *Pepe* cases explained below. Section 40(a) provided "public employees of the State and employers other than the State shall contribute, through the withholding of the contribution from the pay, salary, or other compensation, toward the cost of health care benefits coverage . . . in an amount that shall be determined in accordance with section 39 . . . ."[37] Chapter 78 did not mandate full employee contributions all at once. Instead, the law provided for a four-year incremental phase-in period.[38] During years one through three, employees paid a portion (first year one-fourth, second year one-half, third year three-fourths) of the full amount established in section 39.[39] Lastly, section 40(a) provided an employee contribution "floor" of 1.5% of the employee's base salary.[40]

3. Section 40(b)(1)

Section 40(b)(1) addressed retirees and stated that the employees specified in section 40(b)(2) (mentioned above) shall also contribute in retirement the amount of health care contributions established in section 39.[41] The retiree's pension allowance, not the amount the

[35] Chapter 78, c. 78, § 39, 2011 N.J. Laws 551, 622–25.
[36] *Id.*
[37] Chapter 78, c. 78, § 40(a), 2011 N.J. Laws 551, 625–26.
[38] *See id.*
[39] *Id.*
[40] *Id.* at 626.
[41] § 40(b)(1) at 626.

individual was paid while working, is used to calculate the percentage of retiree contribution under the section 39 scale.[42]

4. Section 40(b)(3)

Section 40(b)(3) provided a "grandfather" clause that exempted retiree contributions for public employees "who have 20 or more years of creditable service in one or more State or locally-administered retirement systems on the effective date of P.L.2011, c.78 . . . ."[43] Because of the "grandfather" clause, the first opportunity for a dispute to arise about retiree contributions would be five years after Chapter 78 was enacted as that is when employees would be eligible to receive state-provided health care benefits in retirement.

5. Section 40(b)(4)

Like the "floor" for employee contributions established in section 40(a), section 40(b)(4) established a "floor" for retiree contributions at 1.5% of the retiree's pension.[44]

6. Section 40(c)

While the Chapter 78 sections mentioned thus far can be confusing, the true confusion of the law occurs in section 40(c). Section 40(c) established that employees are bound by the contribution scale established in section 39 until they reach the full contribution amount.[45] Section 40(c) states "[n]otwithstanding the expiration date set forth in section 83 of this act . . . the parties shall be bound to apply the requirements of this paragraph until they have reached the full implementation of the schedule set forth in subsection a. of this section."[46] Importantly, the language expressly acknowledged the unambiguous expiration date contained in section 83 and

[42] *Id.*
[43] Chapter 78, c. 78, § 40(b)(3), 2011 N.J. Laws 551, 628.
[44] *Id.* § 40(b)(4) at 628.
[45] *Id.* § 40(c) at 628–29.
[46] *Id.* at 629.

immediately attempted to modify its effectiveness by utilizing the word "notwithstanding." Section 83 will be addressed below, but for now it is important to recognize that the section that established employee contributions, section 40(c), clearly acknowledged another section that called for its expiration.

7. Section 77

The Chapter 78 sections that control retiree contributions are contained in sections 77 through 79.[47] Section 77 corresponds to the employees covered in sections 40 and 43 respectively. Section 77 also establishes a definitive end to the mandated employee contributions provided in section 40 as it expressly instructs the employer and employee to bargain for health care contributions once the full fourth-year implementation amount is reached.[48] According to section 77, once the parties reach the full implementation amount the parties are to conduct negotiations for their collective negotiations agreement (CNA) "as if the full premium share was included in the prior contract . . . in a manner similar to other negotiable items between the parties."[49] Like section 40(c), this section dictates that the parties remain bound to sections 39 and 40, *notwithstanding their expiration*, until the full implementation amount of employee contributions is reached. This means that section 77 calls for employees to contribute towards health care even after the expiration of said sections.[50] Section 77 also expressly directs that those employees whose contribution amount in retirement was based on section 40 or 43 shall be required to continue contributions in retirement, notwithstanding that those sections have expired.[51] As just explained,

[47] *See id.* §§ 77–79 at 673–75.
[48] *Id.* § 77 at 673.
[49] Chapter 78, c. 78, § 77, 2011 N.J. Laws 551, 673.
[50] *Id.*
[51] *Id.*

section 77 contains two more examples of how the law clearly acknowledged the expiration date immediately before contradicting it.

8. Section 83

The very last section of Chapter 78 is section 83, which states, "[t]his act shall take effect immediately, and sections 39 through 44, inclusive, shall expire four years after the effective date."[52] As per the clear language in section 83, sections 39 through 44 unequivocally expired on June 28, 2015.[53]

III. Statutory Interpretation

From the beginning of our nation, the courts have been tasked with the challenge of interpreting statutes. In the landmark *Marbury v. Madison* case, United States Supreme Court Justice John Marshall famously proclaimed, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[54] While Justice Marshall was referring to the United States Constitution, this quote accurately depicts the role of the court when interpreting a statute—determining what the law is. When defining the meaning of a statute, "the prevailing view is that a judge's task is not to make the law, but rather to interpret the law . . . ."[55] Over the years, two general theories of statutory interpretation have emerged—textualism and purposivism.[56] Purposivists believe that courts should interpret a statute in a way that advances the statute's overall purpose.[57] Conversely, textualists argue that the judges should focus primarily on the statute's text. Textualists "look at the statutory structure and hear the words as they would sound

[52] § 83 at 675.
[53] *See id.*
[54] 5 U.S. 137, 177 (1803).
[55] VALERIE C. BRANNON, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS, at ii (2018).
[56] *Id.* at 10.
[57] *Id.* at 11.

in the mind of a skilled, objectively reasonable user of words."[58] Textualists[59] believe that this precept is vital to preserving the separation of powers to ensure that the courts do not usurp the legislative branch.[60]

A. Statutory Interpretation Jurisprudence in New Jersey

While most scholarly articles analyze the United States Supreme Court's approach to statutory interpretation, the New Jersey Supreme Court has adopted its own distinct statutory interpretation jurisprudence. Professor Adam Yoffie conducted an assessment of the New Jersey Supreme Court's approach to statutory interpretation between 2000 and 2009 and he found that three main theories of statutory interpretation emerged: textualism, intentionalism, and purposivism.[61] Textualism relies on the express language of the statute, with traditional textualists endorsing the "plain meaning" rule.[62] Under the theory of intentionalism, "the court's objective should be to ascertain the legislature's intent underlying the statute and ideally how the legislature would have intended this particular statutory interpretation case to be decided."[63] Intentionalism employs an eclectic approach that considers the text, legislature's intent, common law, principles of equity, and cannons of statutory interpretation, amongst other things.[64] Like intentionalism,

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[58] Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J. L. & PUB. POL'Y 59, 65 (1988).

[59] Perhaps the most famous textualist, Justice Antonin Scalia, argued that "focusing on 'genuine but unexpressed legislative intent' invites the danger that judges 'will in fact pursue their own objectives and desires' and, accordingly, encroach into the legislative function by making, rather than interpreting, statutory law." BRANNON, *supra*, note 55, at 14 (citation omitted) (quoting Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 22 (Amy Gutmann ed., 1997)).

[60] *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 19 YALE L. J. 1750, 1763 ("[S]tructurally, textualists' strong conceptions of separation of powers lead them to advocate a very limited judicial role in statutory interpretation, in which judicial discretion must be cabined through clear rules, as judges strive to 'interpret' but not 'make' law.").

[61] Adam G. Yoffie, *From Poritz to Rabner: The New Jersey Supreme Court's Statutory Jurisprudence, 2000-2009*, 35 SETON HALL LEG. J. 302, 312 (2011).

[62] *Id.*

[63] FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION, 59 (2009).

[64] *See* Yoffie, *supra* note 61, at 316.

purposivism focuses on the broad search for the Legislature's purpose[65] where the judges work with the legislature, through the use of legislative history, to determine the statutory meaning.[66]

Professor Yoffie's nine-year analysis of statutory interpretation in New Jersey focused on two Supreme Court eras: Chief Justice Deborah Poritz between 2000 and 2006; and Chief Justice Stuart Rabner between 2006 and 2009.

During Chief Justice Deborah Poritz's tenure as a New Jersey Supreme Court Justice from 1996 to 2006, the court adopted an intentionalism-like approach to statutory interpretation; making clear that the "goal in interpreting statutes is to discern and to give effect to the underlying legislative intent."[67] In 2004, the Poritz court outlined its statutory interpretation approach stating:

> As in all exercises of statutory interpretation, we start with the language of the legislation. ¶ 'If the statute is clear and unambiguous on its face and admits of only one interpretation, we need delve no deeper than the act's literal terms to divine the Legislature's intent . . . [h]owever, if the statute is not clear and unambiguous on its face, we consider sources other than the literal words of the statute to guide our interpretive task. [T]he Court considers extrinsic factors, such as the statute's purpose, legislative history, and statutory context to ascertain the Legislature's intent.'[68]

Even though the Poritz court *generally* adopted an intentionalism approach, some Justices, including Justice Verniero and Justice Rivera-Soto, advocated for a more textual/plain language approach.[69]

Current New Jersey Supreme Court Chief Justice Stuart Rabner has served as Justice since 2007 and during his tenure the court's approach has been described as "modified-textualism."[70]

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[65] CROSS, *supra* note 63, at 60.
[66] Yoffie, *supra* note 61, at 319.
[67] *Id.* (citation omitted) (quoting James v. Bd. of Trs. of Pub. Emps. Ret. Sys., 164 N.J. 396, 404 (2000)).
[68] State v. Pena, 178 N.J. 297, 307 (2004) (quoting State v. Thomas, 166 N.J. 560, 567 (2001)).
[69] Yoffie, *supra* note 61, at 333. *See also* Trinity Cemetery Ass'n, Inc. v. Wall, 170 N.J. 39, 44–47 (2001) (Verniero, J., concurring) ("[O]ne need look no further than the plain language of the Act to reach that result."); Marshall v. Klebanov, 188 N.J. 23, 42 (2006) (Rivera-Soto, J., dissenting) ("The application of the legislative construct to this case is simple and direct . . . the mandated conclusion is self-evident from the plain language of the statute . . . .").
[70] Yoffie, *supra* note 61, at 337.

The Rabner Court's modified-textualism approach is evidenced through citations to two primary cases: *Pizullo v. New Jersey Manufacturers Insurance Co.*[71] and *DiProspero v. Penn*.[72] The unanimous *Pizullo* court proclaimed the court's statutory interpretation jurisprudence:

> Our analysis requires that we first consider the meaning and intent of our Legislature in enacting the statute that is at the heart of this dispute. In any matter requiring our consideration of a statute, our essential task is to understand and give effect to the intent of the Legislature. In doing so, we look first to the plain language of the statute, seeking further guidance only to the extent that the Legislature's intent cannot be derived from the words that it has chosen. In the event that the language is not clear and unambiguous on its face, we look to other interpretive aids to assist us in our understanding of the Legislature's will.[73]

In *DiProspero*, the court reiterated that:

> A court should not resort to extrinsic interpretative aids when the statutory language is clear and unambiguous, and susceptible to only one interpretation . . . [o]n the other hand if there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, including legislative history, committee reports, and contemporaneous construction.[74]

In 2009, the Rabner court cited *DiProspero* and continued its commitment to stopping the search for legislative intent when the text is unambiguous.[75] Although it was decided in 2005, the New Jersey Supreme Court's statutory interpretation framework established in *DiProspero* remains strong today.[76]

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[71] *See* 196 N.J. 251 (2008).
[72] *See* 183 N.J. 477 (2005).
[73] 196 N.J. at 263–64 (citations omitted).
[74] 183 N.J. at 492–93 (citations, internal quotation marks omitted) (quoting Lozano v. Frank DeLuca Const., 178 N.J. 513, 522 (2004); Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 75 (2004)).
[75] State v. Baker, 198 N.J. 189, 193 (2009) (declining to adopt construction against the plain language of the statute, even when other jurisdictions have done so).
[76] *See* S.L.W. v. N.J. Div. of Pensions & Benefits, 238 NJ 385, 394 (2019) (stating that statutory language is the best indicator of legislative intent and if the language is clear then the inquiry ends; only if ambiguity persists, will the court will turn to extrinsic evidence). *See also* State *ex rel*. D.M., 238 N.J. 2, 16 (2019) (stating that the court resorts to extrinsic evidence, like legislative history, only when the statutory language is susceptible to more than one interpretation).

IV. Temporary Legislation and Sunset Clauses

Black's Law Dictionary defines a "sunset law" as "[a] statute under which a governmental agency or program automatically terminates at the end of a fixed period unless it is formally renewed."[77] The term "sunset law" is used interchangeably with other terms like, "sunset clause," "sunset provision," or "temporary legislation." Regardless of the name used, they all refer to statutes that contain a clause limiting the duration of their own validity.

Historically these statutes were known as "duration clauses" or "temporary legislation."[78] Temporary legislation has been a prevalent legislative tool of both federal and state legislatures[79] and its roots can be traced to colonial times, as evidenced by the Federalist Papers.[80] In Federalist 26, Alexander Hamilton argued for the temporary nature of Article I, §8, c. 12 of the United States Constitution,[81] which restricts appropriations of military funds for two-year periods.[82] Hamilton asserted a two-fold argument for temporary legislation: that temporary legislation produces the "deliberative benefits" of the legislature deliberating about the propriety of a law;[83] and that temporary legislation produces an important democratic safeguard—public attention.[84] According to Hamilton, temporary legislation allows new information to be considered at the procedural stages and serves to check against unwise policy as the public will be afforded the opportunity to "sound their alarm."[85] Hamilton further posited that repeatedly creating legislation that is contrary to public interest is inherently more difficult to sustain compared to a one-time permanent statute.[86]

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[77] *Sunset Law*, Black's Law Dictionary (10th ed. 2014).
[78] Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247 (Winter 2007).
[79] *Id.* at 255.
[80] *Id.* at 248.
[81] *Id.* at 250–51.
[82] *See* U.S. CONST. art. I, § 8, cl. 12.
[83] THE FEDERALIST NO. 26 (Alexander Hamilton).
[84] Gersen, *supra* note 78, at 251.
[85] *Id.*
[86] Gersen, *supra* note 78, at 252.

Thomas Jefferson was such a proponent of temporary legislation that he argued that *all* statutes and constitutions should not last longer than nineteen years.[87] While Jefferson's argument for temporary constitutions did not garner much support, it serves to highlight the concept of temporary legislation's deep roots.

University of Chicago Law School Professor Jacob E. Gersen conducted comprehensive research on temporary legislation which revealed that "temporary legislation has been used extensively by both federal and state legislatures. . . ."[88] Professor Gersen found that:

> State legislatures have relied equally on temporary legislation, both historically and recently, enacting temporary legislation to control the payments of colonial rents, to regulate slavery, to govern welfare policy, in the riot acts, in tax policy, in bankruptcy policy, on physician-assisted suicide, and even in policies on cameras in courtrooms.[89]

According to Professor Gersen, the term "sunset legislation" differs slightly from temporary legislation, but they are closely related.[90] While temporary legislation dates back to the Founding Era, "sunset legislation" emerged at the state level in 1976 and was specifically aimed at reducing unfettered growth of governmental agencies and the expansion of bureaucracy.[91]

Slightly different yet are "sunset provisions," which refer specifically to *clauses* contained within legislation itself that allow the legislation, or administrative regulatory board, to expire on a specific date unless the legislature acts to renew.[92] Sunset provisions usually require the legislation or board to undergo a review with three possible options: recommend allowing the law

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[87] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES, 59 (1982). *See also* Gersen, *supra* note 78, at 251.
[88] Gersen, *supra* note 78, at 256 ("To name only a handful of applications, temporary legislation has been used in immigration policy, taxation of life insurance, election law, agricultural policy, judicial rules, international trade policy, internet taxation, congressional responses to judicial decisions, bankruptcy law, energy policy, telecommunications policy, government reform, and tax policy generally.").
[89] *Id.* at 256–57.
[90] *Id.* at 259.
[91] *Id.* at 260. *See also* Mark B. Blickle, *The National Sunset Movement*, 9 SETON HALL LEG. J. 209, 209 (1985).
[92] BRIAN BAUGUS & FELER BOSE, SUNSET LEGISLATION IN THE STATES, 3 (2015).

or board to sunset; recommend allowing the law or board to continue with modification; or allowing the law or board to continue without modification.[93]

Unlike permanent legislation, sunset legislation does not tie the hands of the successor legislators, rather they remain free to reenact the lapsed provisions, either in its entirety or with modification.[94] By inserting a sunset provision in the statute, the legislature is choosing to limit the scope of the legislation temporally without restricting the power of the future legislature and allowing them to act as they deem appropriate with the benefit of new information.[95] The future legislature essentially gets to determine de novo how to proceed on the legislation in question.[96]

As Professors John Roberts and Erwin Chemerinski note, sunset provisions with a limited life span often reflect a slim majority on a controversial issue, or a temporary solution to a specific problem that legislators are uncertain will work.[97] Of course, through a majority of votes the legislature always has the option of reenacting or modifying the legislation when the sunset time approaches.[98]

A. Reasons for Temporary Legislation

According to Professor Gersen, temporary legislation is used to produce strategic or political benefits like filling gaps in the law, responding to a policy problem that itself is deemed temporary, or for experimental purposes.[99]

One example of gap-filler temporary legislation is Congress's enactment of a temporary law that mandated continuation of payments to retirees in the wake of a company's bankruptcy

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[93] *Id.*
[94] John C. Roberts & Erwin Chemerinski, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1784 (2003).
[95] *Id.*
[96] *Id.* at 1784–85.
[97] *Id.* at 1808.
[98] *Id.*
[99] Gersen, *supra* note 78, at 274.

filing.[100] This law was proposed as a direct response to a company ceasing to pay medical benefits for nearly 68,000 retirees after the company filed for bankruptcy as there were no laws preventing this from happening.[101] The specific emergency passed quickly and after the crisis ended, Congress enacted *permanent* legislation to respond on a broad scale to similar Chapter 11 bankruptcy issues involving retiree benefits that might arise in the future.[102]

An excellent example of experimental and policy-based temporary legislation is the USA PATRIOT Act (Patriot Act). In the wake of the September 11, 2001 terrorist attacks on the United States, Congress faced the challenge of protecting the American people from future attacks and responded to the emergent national security concerns by enacting the Patriot Act. The Patriot Act contained sixteen temporary provisions that were initially set to expire on December 31, 2005.[103] When the Patriot Act was first debated in Congress, Senator Ron Wyden was concerned about the powers the Act was to bestow on the federal government.[104] To assuage his concerns, Senator Wyden added a sunset provision to three sections of the Act that concerned him most, meaning if Congress did not pass a new law renewing the specific sections they would expire automatically.[105] Senator Wyden hoped the "provisions would be more thoughtfully debated at a later, less panicked time."[106] Many legislators still regard sections of the Patriot Act as cause for concern, which is

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[100] *See* Pub. L. No. 99-591, 100 Stat. 3341, 3341-74 (1986).
[101] Dan Keating, *Good Intentions, Bad Economics: Retiree Insurance Benefits in Bankruptcy*, 43 VAND. L. REV. 161, 162 (1990).
[102] *Id.*
[103] Larry Abramson & Maria Godoy, *The Patriot Act: Key Controversies*, NAT'L PUB. RADIO (Dec. 16, 2005), https://www.npr.org/news/specials/patriotact/patriotactdeal.html.
[104] Dara Lind, *Everyone's Heard of the Patriot Act. Here's What it Actually Does.*, VOX (June 2, 2015, 8:30 AM), https://www.vox.com/2015/6/2/8701499/patriot-act-explain.
[105] *Id.*
[106] *Id.*

likely why they remains susceptible to expiration and congress has yet to remove sunset provisions and extend them permanently.[107]

The Patriot Act is possibly the best example of temporary legislation in action. Several sections of the Act deliberately contained expirations, giving Congress the opportunity to assess the need for their continuation later due to their highly controversial nature. Some of these provisions subsequently expired without renewal, while Congress expressly extended others with modification. As the sunset dates approached, Congress and the President scrutinized the immense power that the law conferred and assessed the need for its continuation based on the information available at the time.

Temporary legislation and sunset provisions still play a prominent role in our laws today, both federally and on the state level. Chapter 78 is but one example of a law that contains a sunset provision. What makes Chapter 78 unique is that aside from the clear expiration, it also contains contradictory language that attempt to disclaim the expiration. This facial contradiction has led to uncertainty and litigation, which is analyzed below.

V. Litigation Surrounding the Health Care Contribution Mandate

This Part analyzes three key cases. The first case was litigated prior to the expiration date in section 83 and the latter two occurred thereafter. Of importance is Judge Mary C. Jacobson's conflicting determinations in the first two cases and the Appellate Division's acquiescence to her contradictory holdings.

[107] *See* Robert Chesney, *Three FISA Authorities Sunset in December: Here's What You Need to Know*, LAWFARE (Jan. 16, 2019, 12:50 PM), https://www.lawfareblog.com/three-fisa-authorities-sunset-december-heres-what-you-need-know (noting the likely "legislative battle" looming over the business records and roving wire provisions of the Patriot Act which are set to expire on Dec. 15, 2019).

A. The *NJEA* Case

The first case to address Chapter 78's mandatory health care contribution scheme was *New Jersey Education Ass'n v. State* (*NJEA*).[108] The plaintiffs, who were comprised of labor unions, individual union members, and related organizations, filed the complaint on March 29, 2012, alleging, inter alia, that the mandated health care contributions in retirement violated their constitutional rights.[109] The plaintiffs sought a declaratory judgment that Chapter 78 is unconstitutional and a permanent injunction enjoining the state from administering the challenged sections of Chapter 78.[110] Mercer County Superior Court Judge Mary C. Jacobson ultimately dismissed the health care contribution challenges for lack of standing.[111] Recognizing and understanding the defendant's position and Judge Jacobson's reasoning on the standing issue is critically important.

In establishing the facts at issue for the record, Judge Jacobson highlighted that section 40 requires employees with less than twenty years of service at the time of enactment to contribute towards health care in retirement.[112] But, Judge Jacobson also acknowledged that "[t]he provisions of section 40 will expire four years after the laws implementation."[113] In defense, the Office of the Attorney General of New Jersey asserted that the plaintiffs lacked standing as section 40 was to expire four years after enactment.[114] The State argued that the law "grandfathered" employees with twenty or more years of credit service at the time the law was enacted, meaning the plaintiffs

[108] NO. L-771-12, 2013 LEXIS 1459 (Super. Ct. Law Div. June 13, 2013).
[109] *Id.* at *1–4. The plaintiff's claim that the increase in pension contributions, the "improper delegation of authority to pension committees to change benefit levels and eligibility requirements," and the increased contributions in retirement for public employees with less than twenty years of service violated the United States and New Jersey Constitutions. *Id.* at *3.
[110] *Id.* at *3–4.
[111] *Id.* at *89.
[112] *Id.* at *13.
[113] *Id.*
[114] *NJEA*, NO. L-771-12, 2013 LEXIS 1459, at *42.

could not show how section 40 would adversely affect anyone because the non-"grandfathered" employees that would be effected in the future will retire *after* section 40 expires.[115] Judge Jacobson provided the illustrative example that "an employee who has been employed for nineteen years and 364 days on the day the law was enacted would be ineligible to retire and receive benefits for five more years, *at which time this section of the statute will no longer be effective*."[116] The plaintiffs argued that some union members had less than twenty years of service at enactment but were able to purchase service credits so that when combined with their actual service credit it would total more than twenty five years, thus enabling them to retire with employer-paid health benefits.[117] The plaintiff's complaint provided the example of police detective Gary Souss, who alleged that he missed the "grandfather" exception by six months so he was not statutorily exempted from contributions in retirement.[118] The court noted that section 40 would expire before Souss became eligible to retire with employer-paid benefits[119] and Judge Jacobson reiterated that section 40 "only applies to those with less than twenty years of service and expires on June 28 [sic], 2015."[120] Judge Jacobson determined that the plaintiffs "failed to plead clear harm to any individual by enforcement of Section Forty" because it had limited practical applicability and "no employee with less than twenty years of service at the time of enactment will be eligible to receive benefits until after the law has expired."[121] After determining that sections 39 through 44 would expire, Judge Jacobson dismissed the counts that challenged section 40 for a lack of standing.[122]

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[115] *Id.*
[116] *Id.* at *49 (emphasis added).
[117] *Id.* at *50–51.
[118] *Id.* at *50.
[119] *Id.*
[120] *NJEA*, NO. L-771-12, 2013 LEXIS 1459, at *52.
[121] *Id.* at *52–53.
[122] *Id.* at *54.

The decision in *NJEA* solidified the public employees' understanding that the Chapter 78 health care contribution mandate was limited to a four-year duration. Not only did the unambiguous language of the law declare the expiration, but the State asserted the sections would expire and Judge Jacobson confirmed they would expire. This false security, however, was short lived and troubles arose once public employees retired after June 28, 2015, and the State deducted health care contributions in accordance with the schedule in section 39, despite the expiration of that section of the law. Litigation quickly followed, as illustrated by the *Pepe* case detailed below.

B. The *Pepe* Case

Plaintiffs Linda J. Pepe, Kim M. Reilly, and Terry A. Dolbow, Sr. were public-school employees and members of the state-operated School Employees' Health Benefit Program (SEHBP).[123] The plaintiffs retired on July 1, 2015, after sections 39 through 44 expired.[124] The plaintiffs were not in the class of public employees exempted from Chapter 78 retiree health care contributions[125] because they did not have twenty years of service credit in the pension system when Chapter 78 was enacted.[126] Upon retirement, the plaintiffs' employer, the State of New Jersey, deducted health care contribution payments from their pensions and the plaintiffs sued claiming they were owed premium-free health care in retirement.[127]

The plaintiffs' suit was based on three different grounds. First, like the plaintiffs in *NJEA*, the plaintiffs made several constitutional-based challenges.[128] The plaintiffs second assertion was a direct result of *NJEA*; the State should be estopped from implementing section 40 because the State previously asserted, and more importantly the court subsequently determined, that section 40

[123] Pepe v. State, No. A-0074-17T2, 2019 LEXIS 1101, at *4 (N.J. Super. Ct. App. Div. May 14, 2019).
[124] *Id.* *See also* Chapter 78, c. 78, § 83, 2011 N.J. Laws 551, 675.
[125] *See* Chapter 78, c. 78, § 40(b)(3), 2011 N.J. Laws 551, 628.
[126] *Pepe*, No. A-0074-17T2, 2019 LEXIS 1101, at *4.
[127] *Id.*
[128] *Id.* at *5 ("[I]mplementation of § 40 violated their constitutionally-protected 'vested contractual rights' . . . and the due process provisions of the Federal and State Constitutions.").

expired.[129] Lastly, the plaintiffs claimed that section 77 does not apply to them because they do not have CNA's that specifically address health benefits in retirement.[130] Recall from Part II that section 77 directs the parties to bargain for health care contributions once the employees reach the full contribution amount after the four-year phase-in period. The *Pepe* plaintiffs argued that they were part of a group of employees whose CNA's did not cover health benefits, therefore, once section 40 expired all retirees should revert back to the contribution status prior to the effective date of Chapter 78, meaning statutorily established contribution-free health benefits in retirement.[131] Surprisingly, Judge Jacobson determined that sections 39 and 40 applied to the plaintiffs and subjected them to contributions in retirement.[132] This determination stands in direct contrast to Judge Jacobson's previous determination in *NJEA*, that the retirees would not be subject to contribution in retirement because the law expired on June 28, 2015.[133]

Judge Jacobson quickly disregarded the constitutional and estoppel-based claims but analyzed the section 77-realted claim in detail. The judge acknowledged that section 77 was ambiguous, so she turned to the "equity of the statute" to discern the legislature's intent[134] and concluded that the plaintiffs' assertion "was contrary to the Legislature's intent."[135] The judge cited two cases[136] and determined that the legislature "intended to make benefits, including medical benefits, uniform among all public workers in the State."[137] Judge Jacobson noted that

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[129] *Id.* at *6.
[130] *Id.*
[131] *Id.*
[132] *Pepe*, No. A-0074-17T2, 2019 LEXIS 1101, at *7.
[133] *See* N.J. Educ. Ass'n v. State, NO. L-771-12, 2013 LEXIS 1459, at *52–53 (N.J. Super. Law Div., Jun. 13, 2013).
[134] *Pepe*, No. A-0074-17T2, 2019 LEXIS 1101, at *7.
[135] *Id.* at *9.
[136] N.J. State Policemen's Benevolent Ass'n Local No. 42 v. N.J. State Health Benefits Comm'n, 153 N.J. Super. 152, 156 (N.J. Super. Ct. App. Div. 1977) (noting that the Legislature has a clearly stated interest in assuring equality of treatment for employees); Commc'ns Workers of Am. v. State, Dep't of Treasury, 421 N.J. Super. 75, 104 (N.J. Super. Ct. Law Div. 2011) (acknowledging that the Legislature has a "longstanding goal of requiring uniform health benefits among all levels of public employees, both State and local").
[137] *Pepe*, No. A-0074-17T2, 2019 LEXIS 1101, at *9.

statute N.J.S.A. 52:14-17.46.9(d), which is the codification of section 40, was amended after Chapter 78 was enacted in 2011.[138] The 2011 amendment added an express reference to Chapter 78 and also added the word "certain" before "school employee in retirement."[139] The statute reads in relevant part, "the payment in full of premium or periodic charges for eligible retirees . . . shall be continued without alteration or interruption and there shall be no premium sharing or periodic charges for certain school employees in retirement . . . ."[140] Judge Jacobson accepted the State's argument that the amended language, "*certain* school employees", strictly referred to those school employees exempted from contributing towards health care in retirement; the section 40 "grandfathered" employees with twenty years of service credit at the time Chapter 78 was enacted.[141] Ultimately, Judge Jacobson ruled in favor of the State and dismissed the complaint with prejudice.[142]

On appeal, the plaintiffs asserted that Judge Jacobson's interpretation of Chapter 78 was incorrect as it goes against the plain language of the law, specifically section 83 which unambiguously states that sections 39 through 44 expire.[143] The Appellate Division did not analyze any issues raised by the plaintiffs and provided a one-liner affirming "substantially for the reasons expressed by Judge Jacobson in her thorough, well-reasoned and supported oral decision."[144] The plaintiffs appealed and on November 12, 2019, the New Jersey Supreme Court denied certification.[145]

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[138] *Id.* at *8. *See* N.J. Stat. Ann. § 52:14-17.46.9(d) (West 2011) (current version at N.J. Stat. Ann. § 52:14-17.46.9(e) (2019)).
[139] N.J. Stat. Ann. § 52:14-17.46.9(d) (West 2011).
[140] *Id.* § 52:14-17.28e.
[141] *Pepe*, No. A-0074-17T2, 2019 LEXIS 1101, at *8. *See also* Chapter 78, c. 78, § 40(b)(3), 2011 N.J. Laws 551, 628.
[142] *Pepe*, No. A-0074-17T2, 2019 LEXIS 1101, at *11.
[143] *Id.*
[144] *Id.* at *12.
[145] Pepe v. State, 083029, 2019 LEXIS 1530, at *1 (N.J. November 12, 2019).

C. The *Hamilton* Case

The plaintiff in the *Hamilton* case was the Hamilton Township Superior Officers Association (SOA) on behalf of police Sergeant James Walters who retired on July 1, 2017.[146] The SOA contended that Chapter 78 did not apply to Walters as he retired over two years after section 83 expired.[147] The court acknowledged that section 83 expired on June 28, 2015, but determined that it remained effective until the four-year phase-in period was complete, which in Walters' case would have been July 1, 2017.[148] When Walters retired he was covered by a CNA that remained in effect until December 31, 2018.[149] That CNA expressly required retirees to make contributions in accordance with Chapter 78 and the court determined, therefore, that the expiration in section 83 was not applicable to Walters.[150] Ultimately, the appellate court affirmed the lower court's grant of summary judgment to the defendants.[151]

VI. Reconciling *Pepe* with *NJEA*

In *NJEA*, Judge Jacobson determined that sections 39 through 44 would expire on June 28, 2015, therefore, future retirees did not have standing as they would not have to contribute towards health care benefits after that date.[152] As noted above, this was not only Judge Jacobson's holding, but the State's assertion as well. But just a few years later in *Pepe*, Judge Jacobson apparently ignored section 83's unambiguous expiration, and her previous holding, and instead determined that the State could mandate retiree contributions towards health care after June 28, 2015. Not

[146] Hamilton Twp. Superior Officers Ass'n v. Twp. of Hamilton, A-0016-18T1, 2019 LEXIS 2282, at *1, 4 (N.J. Super. Ct. App. Div. Nov. 7, 2019) (per curiam).
[147] *Id.* at *6–7.
[148] *Id.* at *7.
[149] *Id.* at *7–8.
[150] *Id.* at *7.
[151] *Id.* at *2.
[152] N.J. Educ. Ass'n v. State, NO. L-771-12, 2013 LEXIS 1459, at *52 (N.J. Super. Law Div., Jun. 13, 2013).

surprisingly, the State was no longer asserting that the law expired as they did in *NJEA*, instead the State deducted health care contributions from retirees and treated the law as valid.

Given the State's assertion and her own previous holding in *NJEA*, it is puzzling that Judge Jacobson did not quickly reach the same conclusion in *Pepe*. So, what changed? If Judge Jacobson had originally determined in *NJEA* that the plaintiffs claim simply was not *ripe*, it would make sense that the *Pepe* plaintiffs were different. But that is not what the judge held in *NJEA*; rather she determined—and reiterated many times—that there would be no future harm to the union employees since the sections of Chapter 78 would expire on June 28, 2015. In *Pepe*, Judge Jacobson noted that her determination in *NJEA* "may very well have been in error" as the current plaintiffs are "in a similar position to the plaintiffs in [*NJEA*] . . . [but] now . . . affected by the continuing contributions."[153] Of course, everyone makes mistakes from time to time and even judges are not impervious to the occasional error. But when judges contradict their own previous holding, they usually go through great lengths to either distinguish the case or thoroughly explain their new reasoning or explain the mistake. Judge Jacobson did none of these and failed to provide any explanation why her previous holding "may very well have been in error."

The judge focused her analysis on the plaintiffs' section 77-related argument and acknowledged that section 77 was ambiguous.[154] Judge Jacobson stated that the "equity of the statute" aided her determination of the legislature's intent and reasoned that the "grid was a transition period . . . but not intended to be temporary as to just one particular group of employees, the school employees[,] that somehow were put in a more favored status than other employees."[155] Assuming the judge was correct on both issues, the grid was a transition period and the law did

[153] Pepe v. State, No. A-0074-17T2, 2019 LEXIS 1101, at *11 (N.J. Super. Ct. App. Div. May 14, 2019) (first alteration added).
[154] *Id.* at *9.
[155] *Id.*

not intend to treat school employees better than others, that only resolves the plaintiffs' section 77-related claims, but does not address her holding in *NJEA* that the contribution mandate would expire.

Judge Jacobson further reasoned that the Legislature's intent was to "make benefits, including medical benefits, uniform among all public workers in the State" while claiming that "[t]he legislation . . . envisioned the continuation of contributions . . . after the expiration of the grid . . . ."[156] It is unclear whether Judge Jacobson used this determination of legislative intent to overcome her holding in *NJEA*, but even if that was the purpose of section 40, it could not possibly be the purpose of section 83.

Judge Jacobson supported her determination by referencing two cases[157] while completely ignoring the contradiction in the law. While the cases do provide some support for the uniformity argument in a general context, the argument that the legislature intended specifically for health care contributions to be uniform is not plausible. If the Legislature intended for continuation of mandated health care contributions after expiration of the grid, the Legislature would not have specifically included an unambiguous expiration. Moreover, the Legislature could not have possibly intended uniform health care contributions when the law specifically *directs* the employees and employers to engage in collective negotiations for health care contributions after the full implementation amount is reached.[158] At most, the Legislature intended uniform contributions for four years after the effective date of the law, as that is how long the sections were expressly valid. There are hundreds of different employee unions throughout the state,[159] and

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[156] *Id.*
[157] *Id.* (citing N.J. State Policemen's Benevolent Ass'n Local No. 42 v. N.J. State Health Benefits Comm'n, 153 N.J. Super. 152, 155 and Commc'ns Workers of Am. v. State, Dep't of Treasury, 421 N.J. Super. 75, 105).
[158] Chapter 78, c. 78, § 77, 2011 N.J. Laws 551, 673.
[159] For example, according to the Census of State and Local Law Enforcement Agencies, in 2008 there were 550 law enforcement agencies in New Jersey, nearly all of which have their own CNA with their respective employers. *See* Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, U.S. DEPT. OF JUST., BUREAU OF JUST.

nearly all of them have CNA's with their respective employers. If the Legislature intended uniformity for retiree health care contributions it would be patently absurd to not only permit—but direct—that these hundreds of different groups freely engage in negotiations concerning the contribution amount. Analyzing the law itself, rather than relying on a case from more than forty years ago, quickly dispels the notion that the Legislature intended uniform contribution amounts beyond four years. The limited reasoning and strained determination of Legislative intent provided by Judge Jacobson in *Pepe* is not convincing and does not address the facial contradiction of sections 40(c) and 83. Simply stated, the State and Judge Jacobson were both correct in *NJEA*; the law clearly calls for the expiration of health care contributions on June 28, 2015, but that was completely ignored in *Pepe*.

After the plaintiffs appealed, the Appellate Division had an opportunity to review Judge Jacobson's decision. But, instead of addressing the expiration issue head-on the Appellate Division punted by affirming the judge's decision with a generic one-liner, "[w]e affirm substantially for the reasons expressed by Judge Jacobson in her thorough, well-reasoned and supported oral decisions."[160] Neither Judge Jacobson or the Appellate Division attempted to reconcile the facial contradiction in sections 40 and 83.

VII. The New Jersey Supreme Court Should Settle the Statutory Contradiction

The New Jersey Supreme Court is the highest appellate court in New Jersey and one of its primary functions is to hear appeals from the Appellate Division of the Superior Court.[161] There are a few ways a case can make it to the New Jersey Supreme Court; one is through a grant of

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STAT., (July 2011), https://www.bjs.gov/content/pub/pdf/csllea08.pdf (last visited Nov. 2, 2019). Importantly, this does not account for the numerous other public sector jobs, like firefighters, teachers, county, state workers, etc. affected by Chapter 78, each of which have their own local unions with their own CNA's.

[160] *Pepe*, No. A-0074-17T2, 2019 LEXIS 1101, at *12.

[161] N.J. CONST. art. VI, § 2, ¶ 2.

certification after petition from a party to the suit,[162] and another is sua sponte.[163] The Supreme Court's authority to grant or deny certification, is limited by Rule 2:12-4 which provides, "[c]ertification will be granted only if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court . . . ."[164]

In *Pepe*, the Appellate Division delivered a unanimous opinion, therefore the parties were not entitled to a "right of review."[165] But under Rule 2:12-1, the Supreme Court may grant certification sua sponte if the issue is of "great public importance."[166] The low percentage rate of certifications granted by the court relative to the number certifications filed illuminates just how selective the court is in granting certification.[167] Despite the court's selectivity, Chapter 78 is indeed a matter of great public importance as it effects hundreds of thousands of public employees[168] and hundreds of employers throughout the state. The law's importance is evidenced by the numerous Chapter 78 related cases that the New Jersey Supreme Court has already addressed.[169] All of these cases involved constitutional-based challenges, but the Supreme Court has yet to consider a case strictly on statutory interpretation. In addition to *Pepe* and *Hamilton*, there are several other cases that raised statutory interpretation questions that have reached the

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[162] N.J. Ct. R. 2:12-3.
[163] N.J. Ct. R. 2:12-1.
[164] N.J. Ct. R. 2:12-4.
[165] *See* N.J. CONST. art. VI, § 5, ¶ 1(b).
[166] *See* N.J. Ct. R. 2:12-1.
[167] According to the Annual Report of the New Jersey Courts for the court year 2017-2018, there were 1232 petitions for certification filed, of which ninety-nine were granted. During that period, the New Jersey Supreme Court file sixty-five opinions. *See* Bruce D. Greenberg, *2017-18 Supreme Court and Appellate Division Statistics*, N.J. AP. LAW, (Dec. 18, 2018), http://appellatelaw-nj.com/2017-18-supreme-court-and-appellate-division-statistics/.
[168] *See* Perez-Pena, *supra* note 5.
[169] *See* DePascale v. State, 211 N.J. 40, 47 (2012) (holding that Chapter 78 violated the New Jersey Constitution as applied to state justices and judges because the law requires them to make increased judicial contributions to the pension system and health benefits); Burgos v. State, 222 NJ 175, 222 (2015) (determining that Chapter 78 did not create an enforceable contract that would bind the State because the Debt Limitation Clause in the New Jersey Constitution prohibited the Legislature from doing so); Berg v. Christie, 225 N.J. 245, 280 (2016) (upholding Chapter 78's suspension of the cost of living adjustments in retirement).

Appellate Division[170] but none have resolved the expiration issue, and none have reached the Supreme Court.

The breadth and impact of Chapter 78 is immense as it effects nearly all public employees and retirees in New Jersey, a number reaching hundreds of thousands.[171] The financial implications on both employees and employers are enormous, yet one pivotal question remains unaddressed by the Supreme Court; how can some provisions of Chapter 78 expressly expire yet remain effective to bind employees and retirees beyond their expiration? This issue is ripe for determination and the Supreme Court should grant certification to interpret the statute and make a bright line rule. The Supreme Court's recent denial of certification in *Pepe* will likely do nothing to discourage the hundreds of unions and thousands of employees who all have standing to sue on this unanswered issue. Cases like *Hamilton* indicate that litigation will continue until the Supreme Court squarely addresses Chapter 78's facial contradiction. The Supreme Court should acknowledge the importance of this issue, and the fact that it will persist, and grant certification to review the *Hamilton* case and settle the dispute with finality.

VIII. Reconciling the Conflict

If the Supreme Court reviews the *Hamilton* case, they will have to grapple with the conflicting sections to make the ultimate determination. This Part utilizes the cannons of statutory interpretation discussed above and provides an outline to reconcile Chapter 78's facial contradiction.

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[170] *See In re* New Brunswick Mun. Emps. Ass'n, 453 N.J. Super. 408 (N.J. Super. Ct. App. Div. 2018); Brick Twp. PBA Local 230 v. Twp. of Brick, 446 N.J. Super. 61 (N.J. Super. Ct. App. Div. 2016); *In re* Clementon Bd. of Educ., No. A-0372-15T1, 2016 LEXIS 2163 (N.J. Super. Ct. App. Div. Sep. 30, 2016); Ridgefield Park Bd. of Educ. v. Ridgefield Park Educ. Ass'n, 459 N.J. Super. 57, (N.J. Super. Ct. App. Div. 2019).

[171] *See* Perez-Pena, *supra* note 5.

A. Section 83 is Unambiguous

As explained in Part II above, the sunset provision in Chapter 78 provides, "[t]his act shall take effect immediately, and sections 39 through 44, inclusive, shall expire four years after the effective date."[172] Section 83 contains only twenty words and is one of the shortest sections of the extensive 124-page law. Section 83 is concise, yet unmistakably clear and a reasonable person could only construe the language literally; sections 39 through 44 expire four years after the effective date.

Importantly, the word "shall" is utilized twice in this section; first to signal the commencement of the Act and second to signal the expiration of the named relevant sections.[173] The word "shall" is commonly used in statutes and the United States Supreme Court precedent provides that "shall" generally serves as a mandatory command, rather than permissive action.[174] The New Jersey Supreme Court maintained a similar position in *State v. Thomas*, where the court assessed the meaning of "shall" in criminal statute 2C:43-6(f).[175] The New Jersey Supreme Court determined that the word "shall" "clearly indicates that the Legislature meant enhancement to be *mandatory*."[176]

Given the New Jersey Supreme Court precedent that "shall" is a mandatory phrase, the unambiguous express language in section 83 can be interpreted but only one way—sections 39

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[172] Chapter 78, c. 78, § 83, 2011 N.J. Laws 551, 675.
[173] *See id.*
[174] Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) ("The mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion.").
[175] The statute states, "shall upon application of the prosecuting attorney be sentenced by the court to an extended term." N.J.S.A. 2C:43-6(f).
[176] State v. Thomas, 188 N.J. 137, 149–50 (2006) (emphasis added). *See* IA Sutherland Statutes and Statutory Construction, § 25:4 (Norman J. Singer ed., 6th ed. 2000) ("Whether a statute should be given mandatory . . . effect is . . . a question of statutory construction to which all of the rules and principles of construction are applicable . . . [; however,] [u]nless the context otherwise indicates a use of the word 'shall' (except in future tense) indicates a mandatory intent."). *See also* Harvey v. Bd. of Chosen Freeholders, 30 N.J. 381, 391 (1959) (observing that "[t]he word 'may' is ordinarily permissive or directory, and the words 'must' and 'shall' are generally mandatory").

through 44 unequivocally expired on June 28, 2015.[177] According to the New Jersey Supreme Court's longstanding statutory interpretation jurisprudence conveyed in *DiProspero*, "[a] court should not resort to extrinsic interpretative aids when the statutory language is clear and unambiguous, and susceptible to only one interpretation . . . ."[178] There is no authority to go beyond the language of section 83 as the language is unmistakably clear, sections 39 through 44 expired on June 28, 2015.[179]

B. Section 40(c) is Unambiguous

As discussed in Part II, section 40(c) states, "[n]otwithstanding the expiration date set forth in section 83 of this act, P.L.2011, c.78, or the expiration date of any successor agreements, the parties shall be bound to apply the requirements of this paragraph until they have reached the full implementation of the schedule . . . ."[180] Section 40(c) also incorporates the word "shall", which suggests a mandatory continuation of employee contributions until full implementation is reached, but it also acknowledges section 83's expiration. If the contributions continue until the full amount is reached as section 40(c) instructs then section 83 is left entirely ineffective. Conversely, if section 40 expired as section 83 instructs then section 40(c) is rendered ineffective.

C. Section 83 and Section 40(c) are Irreconcilable

When looking at the contradiction of sections 83 and 40(c), a key interpretive question arises; can the two sections be reconciled? In 2012, Supreme Court Justice Antonin Scalia and Bryan Garner published a book outlining many of the existing canons of statutory interpretation,

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[177] *See* Chapter 78, c. 78, § 83, 2011 N.J. Laws 551, 675.
[178] 183 N.J. 477, 492–93 (2005) (citations, internal quotation marks omitted) (quoting Lozano v. Frank DeLuca Const., 178 N.J. 513, 522 (2004)). 183 N.J. 477 (2005). *See also* S.L.W. v. N.J. Div. of Pensions & Benefits, 238 NJ 385, 394 (2019) (stating that statutory language is the best indicator of legislative intent and if the language is clear then the inquiry ends; *only* if ambiguity persists, will the court will turn to extrinsic evidence). *See also* State *ex rel*. D.M., 238 N.J. 2, 16 (2019) (stating that the court resorts to extrinsic evidence, like legislative history, *only* when the statutory language is susceptible to more than one interpretation).
[179] *See* Chapter 78, c. 78, § 83, 2011 N.J. Laws 551, 675.
[180] *Id.* § 40(c) at 629.

one of which addresses contradictory language.[181] The "harmonious-reading" cannon provides that when possible, "[t]he provisions of a text should be interpreted in a way that renders them compatible, not contradictory."[182] If the two sections cannot be reconciled, a second interpretive question arises; which section should prevail? The New Jersey Supreme Court has stated, "[w]hen there is a conflict in interpretation, we turn to the well-established canon of construction that a legislative provision should not be read in isolation or in a way which sacrifices what appears to be the scheme of the statute as a whole."[183] These two important questions will be analyzed below.

First, there is no plausible argument that section 83 does not mean what it says as the express language is concise, direct, and unambiguous. As noted above, the longstanding New Jersey Supreme Court precedent provides that courts do not resort to alternative sources to interpret statutes when the language is unambiguous and clear on its face.[184] Moreover, even the State asserted in *NJEA* that the expiration in section 83 was indeed valid and thus sections 39 through 44 would expire and prevent the plaintiffs from suffering a harm. Additionally, sections 40 through 44[185] and sections 77 through 79[186] all expressly acknowledge section 83's clear expiration. Even the most strained reading of section 83 would provide but one interpretation—sections 39 through 44 expired on June 28, 2015.

While section 40(c) acknowledges section 83, it attempts to defeat the expiration date by utilizing the term "notwithstanding."[187] Read in isolation, section 40(c) is also unambiguous as it instructs the employees to disregard the expiration and continue contributions until the section 39

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[181] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (West ed., 2012)
[182] *Id.* at 180 (2012).
[183] Dunbar Homes, Inc. v. Zoning Bd. of Adjustment of Twp. of Franklin, 233 N.J. 546, 559 (2018) (internal quotations omitted) (quoting Koch v. Dir., Div. of Taxation, 157 N.J. 1, 7 (1999)).
[184] *See* DiProspero v. Penn, 183 N.J. 477, 492–93 (2005).
[185] *See* Chapter 78, c. 78, §§ 40–44, 2011 N.J. Laws 551, 625–37.
[186] *See id.* §§ 77–79 at 673–75.
[187] *See id.* § 40(c) at 628–29.

scale is fully-implemented. But when read simultaneously with section 83, a quandary arises that simply cannot be cured. The sections are mutually exclusive and either "shall" expire or "shall" continue, but both simply cannot be true. There is no way to achieve a "harmonious-reading" as the sections are unambiguous and mutually exclusive.

D. Interpreting Chapter 78 as a Whole to Determine Which Section Should Prevail

Since the "harmonious-reading cannon" does not resolve the conflict the court should analyze Chapter 78 as a whole to determine which section should prevail.[188] Looking at Chapter 78 as a whole suggests that the Legislature intended for the statutorily required health care contribution to end four years after the effective date. Although not analyzed in this comment, recall that one of the main goals of Chapter 78 was to shore-up the failing pension system, hence the sweeping pension changes in the law.[189] It is important to highlight that all of Chapter 78's pension-related changes are permanent and the *only* sections of the law that expire are section 40 through 44.[190] Considering that an overwhelming majority of the law, seventy-seven of eighty-three sections (approximately 92%), was expressly permanent in nature, it is hard to even conceive a plausible argument why the legislature would insert a definitive, mandatory expiration date on only six select sections if they did not intend for those specific sections to expire.

As noted in Part IV, Professors Roberts and Chemerinski highlighted that sunset provisions often indicate a slim majority on a controversial issue, or a temporary solution to a specific problem that legislators are uncertain will work.[191] Either of those reasons provide a convincing explanation for the inclusion of the expiration date.

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[188] *See Dunbar Homes*, 233 N.J. at 559 (declaring that the court should assess the legislation as a whole, rather than sections in isolation, to resolve conflicts in statutory interpretation).
[189] *See* S. 2937, 214th Leg. (N.J. 2011) Senate statement indicates that the pension changes included: mandating state contributions; increasing public employee contributions; changing retiree eligibility dates; suspending cost of living adjustments; and changing the pension board.
[190] *See* Chapter 78, c. 78, § 83, 2011 N.J. Laws 551, 675.
[191] Roberts & Chemerinski, *supra* note 94, at 1808.

First, Chapter 78 was indeed a controversial issue and the sunset provision was likely included to appease the apprehensive democrat legislators to garner enough support for the bill to become a law. While Chapter 78 was dubbed a "bi-partisan bill" by the media, it was staunchly opposed by many democrat legislators.[192] Labor unions throughout the state emphatically denounced the bill and pressured democrat senators to oppose the bill.[193] Incorporating a conspicuous, unambiguous, mandatory expiration date as the last section of the law would likely have assuaged the concerns of enough democrat senators to enable the requisite number of "yes" votes to pass the controversial law.

Next, assessing other legislation enacted around the time Chapter 78 was enacted provides insightful context as to the specific problems the state was facing. In 2010 and 2011 the State was in the midst of a financial crisis and was seeking to alleviate some of the mounting financial pressure through property tax relief measures.[194] In July 2010, the State enacted a law which reduced school district, county, and municipal property tax levy cap from 4% to 2%.[195] This 2% property tax levy cap was permanent legislation and is still in place today. In December 2010, the State enacted a law that implemented a 2% cap on salaries for all arbitration awards for police

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[192] Salvador Rizzo, *Some N.J. Democrats Tell Protesters They Will Not Vote for Public Worker Pension Overhaul*, NJ.COM (June 16, 2011), https://www.nj.com/news/2011/06/nj_democrats_tell_protesters_t.html. ("Assembly members Wayne DeAngelo, Daniel Benson, Patrick Diegnan, Reed Gusciora, Vincent Prieto and Connie Wagner, and state Sen. Ray Lesniak, blasted the legislation and said the changes being proposed should be negotiated, not legislated.").

[193] Christopher Baxter, *Hundreds of N.J. Public Workers Descend on Statehouse to Protest Proposed Changes to Pensions, Health Benefits*, NJ.COM (June 16, 2011), https://www.nj.com/news/2011/06/hundreds_of_public_workers_dss.html. ("They came by the hundreds, by bus and by car, jamming the streets and crowding the sidewalks, each with a sign and a cause and a glimmer of hope that they might convince New Jersey's top political leaders to scrap a plan to make them pay more for their pension and health benefits.").

[194] See *Making Sense of Gov. Christie's Local Government Tool Kit*, NJ.COM (Nov. 21, 2010), https://www.nj.com/news/2010/11/making_sense_of_gov_christies.html ("Christie also proposed the state enact a series of measures he calls a tool kit to help local governments keep increases in property tax collections to that 2 percent limit without having to make massive layoffs and cuts to services.")

[195] *See* Act of July 13, 2010, c. 44, § 9, 2010 N.J. Laws 735, 759.

officers and firefighters.[196] Importantly, the 2% arbitration cap law became effective in 2011 and contained a sunset clause stating that the law expired on April 1, 2014.[197] As news sources from the time report, both of these cap-related laws "were key elements of Gov. Chris Christie's signature, first-term 'toolkit' initiative that was aimed at addressing local property-tax increases that were averaging as much as 7 percent at the time."[198]

The arbitration cap law provides an excellent example of sunset provisions at work in New Jersey, but more importantly it provides strong support that Chapter 78 was intended to be temporary. The arbitration cap law expired on April 1, 2014 after the legislators failed to strike a deal for its continuance. But, shortly after the law expired a new compromise was reached in June 2014, and the arbitration cap was reinstated with a new sunset date of December 31, 2017.[199] As noted in Part IV, the legislature essentially has three options with sunsetting laws: recommend allowing the law to sunset; recommend allowing the law to continue with modification; or allowing the law to continue without modification.[200] The law expired again on December 31, 2017, which illustrates the Legislature's refusal to continue statutory intervention on public employee benefits that have historically been the subject of collective bargaining. Most notably, the Legislature could have made the arbitration cap law permanent but elected not to—not only once, but twice. The Legislature could have easily made Chapter 78's health care contributions permanent like the pension reform portions of the law simply by doing nothing. Instead, the Legislature made the intentional decision to include a concise and unambiguous expiration.

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[196] Act of Dec. 21, 2010, c. 105, § 2(b), 2010 N.J. Laws 1204, 1210.
[197] *Id.* § 4 at 1212. *See* John Reitmeyer, *Why NJ's Cap on Raises for Cops and Firefighters Is Set to Expire*, NJ SPOTLIGHT (Sept. 12, 2017), https://www.njspotlight.com/2017/09/17-09-11-explainer-why-nj-s-arbitration-cap-on-raises-for-cops-and-firefighters-is-set-to-expire/. ("[T]o reach agreement on the issue, the cap on the interest-arbitration awards was initially set up to be temporary, with a sunset date of April 2014.").
[198] Reitmeyer, *supra* note 197.
[199] *Id.*
[200] BAUGUS & BOSE, *supra* note 92.

As discussed in Part IV above, the distinction that separates temporary legislation from permanent legislation is that temporary legislation has a definitive end.[201] Temporal limitations permit future legislatures to reassess the need for the law with the most current and up to date information. As Professor Gersen highlighted, sunset provisions often serve as experimentation and sometimes laws are temporary in nature for policy-based reasons.[202] One such policy-based reason is the financial crisis that New Jersey was experiencing when the 2% arbitration cap law and Chapter 78 were enacted.

Whether the intent was to quell political resistance or implement a temporary fix to a specific financial problem, the sunset clause was intentionally included by the Legislature clearly indicating the intent that it must be effective.

Of course, there is a counterargument; the Legislature intended for the employee contributions to persist beyond June 28, 2015, hence the inclusion of the language, "the parties shall be bound to apply the requirements of this paragraph until they have reached the full implementation of the schedule."[203] Proponents of this argument would likely assert this language suggests that the Legislature intended to statutorily bring all public employees to an identical contribution level before reinstating collective bargaining procedures for health care contribution amounts. While this view appears logical on its face, it invites an obvious question; if that was indeed the intent, then why did the Legislature include an unambiguous expiration date for only those specific sections of the law?

One possible answer is that this assertion is simply wrong, and the Legislature intended a temporally limited employer reprieve to address the financial crisis. The other possible answer is

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[201] *See supra* Part IV.
[202] Gersen, *supra* note 78, at 274.
[203] *See* Chapter 78, c. 78, § 40(c), 2011 N.J. Laws 551, 629.

that the expiration date was included to appease the opposing political party to attain enough votes to pass the law. If the latter is correct, then section 40(c) is nothing more than the drafting legislators' attempt at "having their cake and eating it too." Implementing the unambiguous expiration in section 83 to garner enough support to pass the law was the Legislature "having their cake." The "eating it too" part of the idiomatic proverb has come in the form of the Appellate Court's approval of section 40(c) in the face of the very expiration that likely induced passage of the law in the first place. If this is indeed the true reason the drafters included the unambiguous expiration date, then the courts should vigorously uphold it. Without its inclusion, the law might have never passed.

IX. Intuitive Statutory Construction

Since section 83 and section 40(c) are both unambiguous yet cannot be construed harmoniously, the textualist plain-meaning approach simply does not work. As the purposivist and intentionalist approaches instruct, the court must turn elsewhere to discern the meaning of the statute. The court should turn to concepts established in contract law for guidance. In 2011, several consolidated plaintiffs sued New Jersey claiming that a 2010 law, P.L.2010, c.2 (Chapter 2), that mandated employee health care contributions was unconstitutional.[204] Judge Linda R. Feinberg of the Mercer County Superior Court Law Division delivered the opinion. One of the plaintiff's claims was that the law usurped the Contracts Clause of the Federal and State Constitutions as they had valid CNA's when the law became effective.[205] Judge Feinberg determined that the constitutional-based claim was not valid.[206] Importantly, Judge Feinberg

[204] N.J. State Firefighters' Mut. Benevolent Ass'n v. State (*Firefighters'*), No. MER-L-1004-10, 2011 LEXIS 154, at *11–36 (N.J. Super. Ct. Law Div. 2011).
[205] *Id.* at *94. *See* U.S. CONST. art. I, § 10, cl. 1; N.J. CONST. art. IV, § 7, ¶ 3.
[206] *Firefighters'*, No. MER-L-1004-10, 2011 LEXIS 154, at *105.

highlighted that Chapter 2 took effect only *after* the CNA's expired,[207] which was vitally important to the assertion that the law violated the Contracts Clause. In assessing whether a contract existed after its express expiration date, Judge Feinberg declared, "[o]nce the CNA has expired, no contract exists and the parties no longer operate under contractual obligations. **The statute cannot impair a contract that, by its terms, has expired.**"[208] Essentially, Judge Feinberg dismissed the plaintiff's claims that the law violated the Contracts Clause because once their contracts expired, they were no longer contracts.[209]

Judge Feinberg's reasoning provides a useful framework of how to treat an expired section of a statute. The judge's reasoning intuitively makes sense and comports with the common understanding of expirations as was illustrated by Jane and her car insurance and credit card woes in the introduction of this comment. The court should apply this same logic to Chapter 78; once sections 39 through 44 expired on June 28, 2015, they should no longer have force and effect. Just like a contract is no longer a contract after it expires, sections of a law should no longer be effective once they expire. Following the logic, section 40(c) simply cannot disclaim the expiration to continue employee and retiree contributions once it has expired.

X. Conclusion

It is undisputed, even the most progressive-minded judges agree, that the court should not insert its opinion for that of the Legislature. This is espoused in the separation of powers doctrine and has deep, longstanding roots in our case law, both in New Jersey and federally. While the Court cannot usurp the Legislature, they are indeed responsible for determining what the law means. This comment was meant to highlight the confusion that the contradictory language in

[207] *Id.* at *103.
[208] *Id.* at *99 (emphasis in original).
[209] *See id.*

Chapter 78 has created. Employees, employers, the State, and the courts alike are all navigating this unsettled law without a precedential determination of what the conflicting sections mean. Amidst all this confusion and litigation, the silence of the New Jersey Supreme Court is deafening. Given the law's glaring contradiction, the New Jersey Supreme Court has an *obligation* to determine how the law should be applied. Although the Supreme Court missed the opportunity in *Pepe*, fortunately there is a chance at vindication with the *Hamilton* case. If the New Jersey Supreme Court fails to act, a parade of similar litigation is likely to follow as thousands of employees might remain bound to the Chapter 78 contribution scheme beyond its clear expiration. The New Jersey Supreme Court should grant certification, overrule *Hamilton*, and determine that the mandated employee/retiree health care contribution scheme contained in section 39 through 44 of Chapter 78 expired on June 28, 2015 and are thus no longer valid.