STATUTORY INTERPRETATION: SOME COMMENTS ON TWO JUDICIAL VIEWPOINTS

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The retirements of Chief Justice Hughes and Justice Mountain provide an occasion to pay tribute to them for their many contributions to the bench and bar. They are fully deserving of the accolades in this special issue and I join wholeheartedly in those expressions. Their retirements also serve as an occasion to consider their approaches to statutory interpretations.

A large part of any judge's legacy is of course found in his reported opinions. Even a perfunctory scanning of the relevant volumes of the *New Jersey Reports* indicates that both the Chief Justice and Justice Mountain have made substantial contributions to the state of the law. A more thorough perusal reveals that their respective accomplishments have been the product of contrasting judicial philosophies and styles, particularly with respect to problems of statutory construction. There is, however, a basic core of agreement between them.

I think it fair to say that neither the Chief Justice nor Justice Mountain adheres to the view, now more archaic than venerable, that judges never "make" but always "find" the law.[1] Both would agree with Justice Holmes that "judges do and must legislate,"[2] and both would also agree, at least in principle, with his qualification that "they can do so only interstitially."[3] That is, they reject the opposite extreme that only judges make law,[4] and believe instead that, at least in areas where the Legislature has spoken, a court should only "legislate" when a "gap" in the statutory scheme is perceived. Such a gap exists when the situation before the court is not included in the ex-

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[1] Benjamin Cardozo observed in 1921 that "[s]ince the days of Bentham and Austin, no one, it is believed, has accepted this theory [that judges never legislate] without deduction or reserve, though even in modern decisions we find traces of its lingering influence." B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 125 (1921). *See also* J. FRANK, LAW AND THE MODERN MIND 33 (1930).

[2] Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

[3] *Id.* For an expression of concurrence, see B. CARDOZO, *supra* note 1, at 69–70, 129.

[4] *See* J.C. GRAY, THE NATURE AND SOURCES OF THE LAW 125, 170–72, 283–84 (2d ed. 1921).

press terms of the statute. When the void is the result of circumstances not foreseen by the Legislature, it falls upon the courts to "legislate" to fill the gap, either by extending the statute to cover the new situation or by declining to do so. In those cases where the court finds that the gap reflects a deliberate choice by the Legislature, it need go no further.[5]

Even where an unintended void is found to exist, the courts in filling the gap do not possess unbridled discretion. The entire process necessarily requires a willingness to suppress personal policy preferences for those of the Legislature. A notable example where Justice Mountain deferred to a legislative pronouncement with which he did not necessarily agree is *Donaldson v. North Wildwood Board of Education*.[6] There the majority of the Court expressly engaged in a balancing of competing interests in determining that a nontenured school teacher was entitled to a statement of reasons why her contract was not renewed.[7] In his dissent, Justice Mountain clearly articulated his position that matters of policy are to be left to the Legislature, even where the Court might choose to resolve the competing considerations differently if given the opportunity.[8] Chief Justice Hughes, too, has on occasion evoked similar principles of judicial deference to the Legislature's "wisdom."[9]

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[5] As Justice Frankfurter observed, the courts are obligated

> to enforce what is within the power of Congress to declare. Inevitable difficulties arise when Congress has not made clear its purpose, but when that purpose is made manifest in a manner that leaves no doubt according to the ordinary meaning of English speech, this Court in disregarding it is disregarding the limits of the judicial function which we all profess to observe.

Commissioner v. Estate of Church, 335 U.S. 632, 677 (1949) (Frankfurter, J., dissenting). Note that this statement is not equivalent to the "plain meaning" rule, in that Congress occasionally makes its purpose very clear in some way other than the express language of the statute. *See generally* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947).

[6] 65 N.J. 236, 320 A.2d 857 (1974).

[7] *Id.* at 245, 320 A.2d at 861.

[8] *Id.* at 249, 320 A.2d at 864. Justice Mountain stated:

> My dissent in this case does not rest upon a belief that the result reached by the majority is wrong as a matter of policy, but rather upon the conclusion I have reached that a controlling legislative enactment governs the issue now before the Court, and that this being so, there is no room for judicial intervention.

Id.

[9] *See, e.g.*, White v. Township of North Bergen, 77 N.J. 538, 554, 391 A.2d 911, 919 (1978). Chief Justice Hughes noted:

> It goes without saying that the wisdom, good sense, policy and prudence (or otherwise) of a statute are matters within the province of the Legislature and not of the Court.

Id.

The approaches of the Chief Justice and Justice Mountain begin to diverge in their eagerness or reluctance to find a gap in a statute. The split widens with their willingness, once they have found such a gap, to rely explicitly on their own policy preferences rather than on a policy which might be inferred from the tenor of the Legislature's act. Reluctance to find legislative gaps is likely to be accompanied by restraint in filling them when they are found to exist. Both traits relate to a justice's view of the proper role of the Court vis-à-vis the Legislature.

Justice Mountain's concept of the proper judicial role gives rise to certain techniques of statutory construction which are designed to restrain the Court from substituting its own policy choices for those of the Legislature. One such technique requires that, whenever the literal language of a statute can be applied without producing an anomalous or clearly unreasonable result, the Court should assume that the Legislature had considered such a case when it enacted the legislation. No detailed examination of legislative purpose is required.[10]

An obvious advantage of this approach is that it avoids searching further for the legislative intent—a process which lends itself to an articulation of the Court's preference under the guise of finding the legislative purpose.[11] Rather than deciding what purposes prompted the legislation and whether those purposes are served by applying the statute to the case before it, the Court simply assumes that the purposes are furthered by strict construction.

A corollary to this plain-meaning principle is the assumption that the Legislature, being aware of the judiciary's interpretation of a statute, will remedy any misconstruction by appropriate amendment. The interplay between these two principles is illustrated by Justice

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[10] One commentator has observed:

> When Holmes declares, "We do not inquire what the legislature meant; we only ask what the statute means," [Holmes, "The Theory of Legal Interpretations." 12 Harv. L. Rev. 417, 419 (1899)] he may be simply suggesting the application of a phase of the analytical or plain-meaning approach. That is, if the meaning is plain, the meaning is applied. However, it does not help much to say that when a meaning is plain, one need not search for legislative intent. If the meaning is plain, then the intent has been found.

Day, *Why Judges Must Make Law*, 26 CASE W. RES. L. REV. 563, 586 & n.84 (1976).

[11] The Court does not avoid promoting certain policies by strictly construing statutes. Nevertheless, strict construction fosters particular policies only indirectly, without involving the Court in a consideration of the relative merits of competing policies. *Cf.* Nelson, *Judge Weinfeld and the Adjudicatory Process: A Law Finder in an Age of Judicial Lawmakers*, 50 N.Y.U. L. REV. 980, 997 (1975) (making same point with respect to reliance on legal precedent). It is only when the Court takes upon itself the task of balancing the competing policies that it engages in judicial "activism" or "judicial legislation."

Mountain's opinion for the Court in *City of Plainfield v. Courier-News*.[12] While the primary issue in *Plainfield* was whether a newspaper could be "published" in more than one locale for purposes of being an "official newspaper,"[13] Justice Mountain's method of disposing of a secondary issue is particularly illuminating. This issue involved whether the *Courier-News* was a "legal newspaper" under the terms of the relevant statute.[14] Strictly applying the statutory requirement that a newspaper "shall have been published continuously in the municipality where its publication office is situated for not less than 2 years,"[15] Justice Mountain held that the *Courier-News* became disqualified when it moved its publication office. The Court reached this result despite conceding that the purpose of the two-year requirement was "to assure that a qualified newspaper would not be a fly-by-night" operation,[16] a purpose hardly furthered by disqualifying the *Courier-News* (a paper published since 1894).[17]

Justice Mountain ultimately avoided the harsh result dictated by a strict reading of the statute by applying an amendment adopted after the suit had arisen which expressly granted a two-year grace period to established newspapers which relocated.[18] What *Plainfield* seems to exemplify for Justice Mountain is the interaction between the courts and the Legislature at its best. In anticipation of or response to[19] judicial construction of statutory language which, read literally, apparently went beyond the legislative intent, the Legislature amended the statute to better reflect that intent. So long as this interplay between the courts and the Legislature works properly, the Court might be justified in this approach to gap finding and filling.

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[12] 72 N.J. 171, 369 A.2d 513 (1976).

[13] 72 N.J. at 174, 369 A.2d at 514. An official newspaper is one designated by the governing body of a municipality, pursuant to N.J. STAT. ANN. § 40: 53-1 (West 1967), for the publication of advertisements and notices which the municipality is required by law to publish.

[14] N.J. STAT. ANN. § 35:1-2.2 (West 1968).

[15] *Id.*

[16] 72 N.J. at 179, n.4, 369 A.2d at 517.

[17] 72 N.J. at 175, 369 A.2d at 515.

[18] N.J. STAT. ANN. § 35:1-2.2 (West 1968) (amended by [1973] N.J. Laws, ch. 332, § 1).

[19] Prior decisions may well have alerted the Legislature to the possibility of a court strictly construing the two-year requirement to reach a result not intended by the Legislature. *Compare In re* Bond Printing Co., Inc., 135 N.J.L. 478, 52 A.2d 762 (Ct. Err. & App. 1947) (when newspaper moves all of its operations from one municipality to another it cannot transfer its previously acquired status as "legal newspaper" to new municipality) *with* Hunterdon County Democrat v. Recorder Publishing Co., 117 N.J. Super. 552, 285 A.2d 258 (Ch. Div. 1971) (court construed term "published" as contained in section 35:1-2.2 so as to avoid finding that newspaper which had moved most of its operations to another municipality had lost its "legal newspaper" status in original municipality).

Another aspect of Justice Mountain's faith in the legislative process is exemplified by his dissenting opinion in *Robinson IV*,[20] where the majority ordered the closing of the State's public schools unless a new financing scheme was legislated. Justice Mountain, keenly aware of the state constitutional admonishment of separation of powers, concedes that the Court must not shirk from its responsibility to tell the other branches of government that they have exceeded the scope of their authority.[21] As illustrated by his *Robinson* opinion, however, it is simply not appropriate for the Court to force the Legislature's hand. His *Robinson* opinion evinces a certain patience and faith in the legislative process. If left to itself, with occasional correction but not explicit coercion from the courts, the Legislature can and will eventually reach satisfactory solutions.

Chief Justice Hughes' opinion for a unanimous Court in *White v. Township of North Bergen*[22] provides an interesting contrast to Justice Mountain's approach in *Plainfield*.[23] *White* held that the statute authorizing awards of back pay to civil service employees subsequently found to have been improperly discharged[24] required that the lost salary be mitigated by income earned in the interim. In reaching this interpretation of the statute, the Chief Justice relied extensively on the similar construction given by Justice Mountain to a similar statute in *Township of Springfield v. Pedersen*.[25] The *White* decision was complicated, however, by the need to overrule the Court's earlier decision precluding mitigation.[26] The ease with which the Chief Justice was able to overcome the apparent legislative acquiescence[27] to the earlier judicial construction belies the suggestion implicit in Justice Mountain's *Plainfield* opinion that the Legislature will correct judicial misconstructions.[28] To the extent that Justice

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[20] Robinson v. Cahill, 70 N.J. 155, 161, 358 A.2d 457, 460 (Mountain, J., dissenting), *injunction dissolved*, 70 N.J. 465, 360 A.2d 400 (1976).

[21] *See* Vreeland v. Byrne, 72 N.J. 292, 370 A.2d 825 (1977).

[22] 77 N.J. 538, 391 A.2d 911 (1978).

[23] For a discussion of *Plainfield*, see notes 12–19 *supra* and accompanying text.

[24] N.J. STAT. ANN. § 40A:14-51 (West 1972).

[25] 73 N.J. 1, 372 A.2d 286 (1977).

[26] McGrath v. City of Jersey City, 38 N.J. 31, 183 A.2d 7 (1962), *aff'g* 70 N.J. Super. 143, 175 A.2d 278 (App. Div. 1961). In *McGrath*, the New Jersey Supreme Court in a per curiam opinion affirmed a lower court decision which interpreted N.J. STAT. ANN. § 40:46-34 (West 1972) as allowing an illegally suspended municipal employee to recover back pay without mitigation for the period of suspension. The court stated that "the judicial function in the instant matter is but to apply the pertinent terms of *N.J.S.A.* 40:46-34." 38 N.J. at 32, 183 A.2d at 8. Justice Mountain avoided any discussion of *McGrath* in his *Pedersen* opinion.

[27] Not only did the Legislature fail to amend the relevent statute to overrule the *McGrath* decision, it reenacted the statute in substantially the same form, albeit as part of a recodification of all of Title 40. 77 N.J. at 556–57, 391 A.2d at 920–21.

[28] Justice Mountain joined in the *White* decision.

Mountain and Chief Justice Hughes entertain different views about the responsiveness of the Legislature, the Chief Justice's extensive political experience suggests that his pragmatism may be more accurate than Justice Mountain's theoretical construct.[29] This is not to say, however, that the Chief Justice has not been willing to accord substantial weight to legislative acquiescence when it supports his position.[30]

Reluctance to find gaps in a statutory scheme and to engage in judicial "legislation" in filling them is reflected in the interpretation or weight given to legislative "inaction." Justice Mountain's willingness to draw significance from such inactivity is nicely illustrated in *Donaldson*.[31] Justice Jacobs, writing for the majority, had little difficulty finding that legislative silence had produced a gap in the relevant statutory scheme which the Court was free to fill.[32] The Court

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[29] *See, e.g.*, State v. DeSantis, 65 N.J. 462, 473–74, 323 A.2d 489, 495 (1974). In *DeSantis* the Court in essence rewrote the state obscenity statute, N.J. STAT. ANN. § 2A:115-2 (West 1967), so that it would furnish "adequate notice and warning " with regard to materials containing "patently offensive representations and descriptions." This was done "pending further legislative action." *Id.* at 473, 323 A.2d at 495. That action did not occur until the Legislature adopted a new code of criminal justice effective September 1, 1979. An Act to adopt a New Jersey Code of Criminal Justice to be known as Title 2C of the New Jersey Statutes, to revise and to repeal portions of the statutory law as amended and supplemented, and to provide for the effect and operation of said Title 2C, [1978] N.J. Laws ch. 95 (eff. Sept. 1, 1979) (codified at N.J. STAT. ANN. §§ 2C:1-1 to :98-7 (West Cum. Supp. 1978-1979)).

The interaction between the relatively activist members of a court and those who prefer to defer to the Legislature can produce an interesting result if the "conservative" members retain unrealistic expectations regarding the responsiveness of the Legislature. If the "activists" can muster a majority in a particular area of legislation, such as workmen's compensation, the more conservative members may eventually be expected to support the activists' broad construction of the statute so long as the Legislature fails to correct the initial construction. The dynamics of this process can escalate as the "activists," encouraged by their newfound support, press their views even further. The likelihood of this dynamic process occurring is probably greatest where, as in workmen's compensation, the statutory language is not so narrow that the strict constructionists feel bound by the literal language. *See* N.J. STAT. ANN. § 34:15-1 (West 1972) (providing that an employee may recover for injuries caused by an accident "arising out of and in the course of his employment").

[30] *See* State v. Cohen, 73 N.J. 331, 340–41, 375 A.2d 259, 263–64 (1977). In noting the significance of legislative inactivity in light of expansion of Port Authority police activities, the Chief Justice stated:

> The narrow interpretation below of *N.J.S.A.* 32:2-25 would seem to create a real and unnecessary danger to public safety at all Authority installations in New Jersey, at some of which, as noted, Authority police officers provided the only police presence.

Id. at 340, 375 A.2d at 263.

[31] For a discussion of *Donaldson*, see notes 6–8 *supra* and accompanying text.

[32] Justice Jacobs noted, with regard to the legislation in issue, that "[i]t must be borne in mind that our Legislature has not at any time said that no reasons need be given when a nontenured teacher is not rehired." 65 N.J. at 240, 320 A.2d at 859. The Court noted further that despite the fact bills had been introduced on this subject "no pertinent legislation has been

went on to fill that gap, finding that "on balance the arguments supporting the teacher's request for a statement of reasons overwhelm any arguments to the contrary."[33] Where the majority found legislative silence, Justice Mountain found a significant manifestation of the Legislature's purpose in Senate amendments made prior to the enactment of the statute which delineated the rights of nontenured teachers.[34] Those amendments expressly deleted all reference to the giving of reasons and the holding of hearings.[35] Arguing that "[s]uch legislative action on proposed amendments to a bill is a well-recognized guide in the interpretation of a statute,"[36] Justice Mountain read the legislative intent as supportive of the proposition that a statement of reasons was not warranted.

Another example of Justice Mountain's willingness to follow the literal legislative language is found in his dissent in *Hyland v. Borough of Allenhurst*.[37] There he would have held that a statute which gave the governing body of any municipality exclusive control over bathing and recreational facilities precluded the Court from deciding that municipalities could not restrict access to toilet facilities on public beaches. He noted that "[t]he Legislature, which, rather than the courts, has the last word in matters of this sort, has made very clear that the control of a municipal beach is to reside in its governing body."[38]

The issue in *Allenhurst* arose as an outgrowth of the dispute over the scope of the public trust doctrine—a doctrine which has given Justice Mountain particular difficulty in that it represents to him an intrusion by the Court into an area which should properly be the subject of legislative action. His response to the expansion of the doctrine in *Van Ness v. Borough of Deal*[39] exemplifies a concern which accompanies judicial restraint. In his view, courts should be reluctant to move into new areas which have not been addressed by the Legislature or by common law. This stance is consistent with a fear that in such areas the courts, lacking sufficient guidelines or expertise, will engage in the type of decision-making for which the Legislature is far better suited.[40]

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enacted; in the circumstances it is clear that no controlling inference as to intent can be drawn from the legislative silence." *Id.*

[33] *Id.* at 245, 320 A.2d at 861.

[34] N.J. STAT. ANN. § 18A:27-10 to-11 (West 1968 & Cum. Supp. 1978-1979).

[35] 65 N.J. at 251–53, 320 A.2d at 865–66 (Mountain, J., dissenting).

[36] *Id.* at 253, 320 A.2d at 866.

[37] 78 N.J. 191, 197, 393 A.2d 579, 582 (1978) (Mountain, J., dissenting).

[38] *Id.* at 197–98, 393 A.2d at 583.

[39] 78 N.J. 174, 181, 393 A.2d 571, 574 (1978) (Mountain, J., dissenting).

[40] The public trust doctrine presents special difficulties to an advocate of judicial restraint, for its development has frequently precluded legislative action. In this sense, Justice Mountain's

To characterize Justice Mountain as a strict constructionist is, admittedly, to overstate his position. On occasion he will look beyond the literal language of a statute to reach a result which he views as more consistent with the legislative intent in enacting a particular statute[41] or with broader legislative policies.[42] He is, in fact, a master at marshalling legislative materials to support his interpretation of a particular statute, whether he is strictly construing the statutory language,[43] or looking for an unexpressed intent.[44]

Justice Mountain's opinions reflect a judicial philosophy of judicial restraint. The opinions of Chief Justice Hughes, by contrast, reflect what might best be termed a result-oriented approach to judicial decision-making. The Chief Justice serves as a ringing conscience for fairness and justice, for whom policies are marshalled to support a result compelled by the facts of a particular case.[45]

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distaste for the doctrine is similar to his reluctance to rest a decision on constitutional grounds if it can be avoided. The *Mount Laurel* exclusionary zoning decision provides an example. South Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (1975). There, while the majority of the Court based its decision on the state constitution, Justice Mountain preferred to rely on statutory language. *Id.* at 193, 336 A.2d at 735.

The advantage of this approach, from the standpoint of an advocate of judicial restraint, is the Legislature's freedom to alter the Court's resolution of the competing policy issues.

[41] In Mey v. Mey, 79 N.J. 121, 124, 398 A.2d 88, 89 (1979), Justice Mountain justified his interpretation of the provisions of the equitable distribution statute, N.J. STAT. ANN. § 2A:34-23 (West 1952), in these terms: "This construction, we believe, more nearly comports with the apparent intent of the Legislature than would a more literal reading of the phrase 'legally and beneficially,' " 79 N.J. at 124, 398 A.2d at 89.

[42] Township of Springfield v. Pedersen, 73 N.J. 1, 372 A.2d 286 (1977), is an unusual opinion for Justice Mountain in that its analysis of legislative intent is not very rigorous. The holding of the case rested on neither the express language of the statute nor a legislative intent specifically associated with the relevant statute, but rather on "the need—often legislatively expressed—to safeguard and protect public funds." *Id.* at 7, 372 A.2d at 289.

[43] *Cf.* Vreeland v. Byrne, 72 N.J. 292, 370 A.2d 825 (1977) (construction of constitutional provisions).

[44] *See e.g.*, City of Bayonne v. Port Jersey Corp., 79 N.J. 367, 399 A.2d 649 (1979). This case involved the issue of whether large cargo loading cranes, mounted and movable on railroad type tracks, were to be taxed as realty or as "personal property used in business." The Court, in finding that the cranes fell into the latter category, held that the legislative intent was "to create in New Jersey a fiscal climate that will contribute to the attraction of industry." *Id.* at 378, 399 A.2d at 654. A significant step in the implementation of this legislative endeavor was the removal of the burden of local property taxation from machinery and equipment used in business. *Id.* at 379, 399 A.2d at 655.

[45] The Chief Justice's desire to focus on the desired result suggests certain similarities to the approach to the resolution of legal controversies employed by another governor-turned-justice. Alexander Bickel has observed of Chief Justice Earl Warren:

> When a lawyer stood before him arguing his side of a case on the basis of some legal doctrine or other, or making a procedural point, or contending that the Constitution allocated competence over a given issue to another branch of government than the Supreme Court or to the states rather than to the federal government, the chief justice would shake him off saying, "Yes, yes, yes, but is it

One danger of espousing policy considerations to support a result-oriented decision is that principles set forth in sweeping terms in one case may well conflict with those needed to reach the desired result in a subsequent case. Thus, a purely result-oriented approach runs the risk of ignoring the fact that our system is based upon notions of consistency, *stare decisis*, precedent, and overall fairness.[46] As commentators have noted, a proper balance must be struck between achieving justice in a particular case and adhering to generally applicable principles.

> Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. It may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible; but if a rule continues to work injustice, it will eventually be reformulated. The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.[47]

> [whatever the case exemplified about law or about the society], is it *right*? Is it *good*?" More than once, and in some of its most important actions, the Warren Court got over doctrinal difficulties or issues of the allocation of competences among various institutions by asking what it viewed as a decisive practical question: If the Court did not take a certain action which was *right* and *good*, would other institutions do so, given political realities?

A. BICKEL, THE MORALITY OF CONSENT 120 (1975).

[46] Sometimes those most susceptible to a particular criticism are most anxious to protect themselves from it. In this regard it is interesting to note that the Chief Justice has occasionally alluded to the danger that his approach is particularly likely to create. Recently in *In re* Kozlov, 79 N.J. 232, 398 A.2d 882 (1979), the Chief Justice cautioned that:

> It is occasionally advisable, particularly where a decision rests upon an opinion seeming to chart a new or controversial doctrinal path in state law, that the limitations thereof be emphasized, as by reference to the relevance of the particular circumstances of the case before the Court.

Id. at 245, 398 A.2d at 888.

The Chief Justice's concurring opinion in State v. Christener, 71 N.J. 55, 362 A.2d 1153 (1976), contained an analogous caution against reading his language too broadly. In reconciling the result in that case with the duty to retreat, the Chief Justice emphasized the extraordinary circumstances of the case:

> I think the defendant's conduct would have been judged by a different standard in the "ordinary" case,—if it had occurred, let us say, in a public street with a policeman on a nearby corner, or in a well-lighted parking lot with possible citizen help nearby. But in an isolated home, with unavailing calls for help to reluctant police, after a forcible entry, the imminence of deadly harm was such that the present case is most extraordinary.

Id. at 77, 362 A.2d at 1165. (Hughes, C.J., concurring).

[47] M. SMITH, JURISPRUDENCE 21 (1909), *quoted in* B. CARDOZO, *supra* note 1, at 23.

If Justice Mountain can be characterized as a master of statutory construction, the Chief Justice often seems to have been given the task of reaching a result which requires making an exception to the general rules of statutory construction.[48] In *White*,[49] for example, the Chief Justice was required to avoid the inference associated with legislative silence in the face of prior judicial construction.

In re Heller[50] provides another example. There the Chief Justice concluded that the State Board of Pharmacy had statutory authority to revoke the certificate of a registered pharmacist for dispensing a controlled substance, knowing that the substance was to be used for an illicit purpose. After the sales in question, the statute was amended to give the Board express authority to revoke a certificate on that ground where the initial statute had only provided for revocation for "grossly unprofessional conduct," a term whose definition did not include the conduct in question.[51] The Chief Justice had no difficulty in holding that the subsequent amendment only amounted to a clarification and restatement of the existing law rather than a change in its substance.

When to relax the rules of strict statutory construction should not depend merely on the need to support what is perceived as a desired result. Rather, some principles should govern the degree of adherence given to such rules. This notion is widely accepted in the criminal law, where the threat to a defendant's liberty interest requires strict construction of criminal statutes.[52] Similar considerations would suggest that in *In re Heller* the statutory authority of the Board should have been narrowly construed given the threat to the pharmacist's profession and livelihood.[53] In *Pedersen*,[54] Justice Mountain gave implicit recognition to the principle that the degree of adherence to strict rules of construction should depend upon the nature of the interests affected by the legislation. There he relaxed rigorous

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[48] This is not to suggest that the Chief Justice is not also adept at invoking the traditional rules of statutory construction. *See, e.g.*, State *ex rel.* D.G.W., 70 N.J. 488, 499, 361 A.2d 513, 519 (1976). *In re D.G.W.* was a case involving statutory interpretation with regard to juvenile offenders. In *D.G.W.*, the Court stated that "[h]ere we see no barrier to application of the rule that . . . whenever possible statutes should be considered *in pari materia* so that each may be given effect." *Id.*

[49] For a discussion of *White*, see text accompanying notes 22–28 *supra*.

[50] 73 N.J. 292, 374 A.2d 1191 (1977).

[51] 73 N.J. at 307–08, 374 A.2d at 1191. *See generally id.* at 314–15, 374 A.2d at 1202–03. (Schreiber, J., dissenting).

[52] *See, e.g.*, State v. Fair Lawn Serv. Center, 20 N.J. 468, 120 A.2d 233 (1956).

[53] *See* 73 N.J. at 315, 374 A.2d at 1203 (Schreiber, J., dissenting).

[54] 73 N.J. 1, 372 A.2d 286 (1977).

interpretative analysis in recognition of the policy of protecting public resources.

An area in which competing judicial philosophies frequently clash is where the courts determine that the constitution prohibits certain legislative action. A case in point is *Vreeland v. Byrne*.[55] At issue in *Vreeland* was the interpretation of the constitutional prohibition against appointment of any legislator during his term to any office, for which the emoluments had been increased during that term.[56] The precise question was whether the Legislature could circumvent the constitutional restriction by passing a statute proving, *inter alia*, that a person who was a member of the Legislature which approved a pay raise for Supreme Court justices and who was appointed to the Court would not receive that increase " 'during the term for which he was elected.' "[57] Justice Mountain, applying the approach of strict construction of unambiguous statutory terms to the terms of the relevant constitutional provision, distinguished between those provisions of a constitution with respect to which "the underlying spirit, intent and purpose of the Article must be sought and applied as it may have relevance to the problems of the day" and those in which "literal adherence to the words of the clause is the only way that the expressed will of the people can be assured fulfillment."[58] He placed the constitutional provision in question into the latter category, and thus invalidated the attempted appointment.[59]

While Justice Mountain was undoubtedly correct that the constitutional provision at issue was not one of the "great ordinances of the Constitution,"[60] strict construction of the language may not have been warranted. The escape valve of legislative corrective action available in the statutory field is absent and perhaps greater caution against overly narrow interpretation of even relatively unambiguous constitutional language may be in order. Justice Stone once cautioned that the words of the Constitution must be read

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[55] 72 N.J. 292, 370 A.2d 825 (1977).

[56] N.J. CONST. art. IV § 5, para. 1. The constitutional provision reads:

> No member of the Senate or General Assembly, during the term for which he shall have been elected, shall be nominated, elected or appointed to any civil office or position, of profit, which shall have been created by law, or the emoluments whereof shall have been increased by law, during such term.

[57] 72 N.J. at 303, 370 A.2d at 831 (quoting N.J. STAT. ANN. § 2A:1A-8 (West Cum. Supp. 1978-1979)).

[58] 72 N.J. at 305, 370 A.2d at 832.

[59] In this part of his opinion, Justice Mountain wrote for only three members of the Court. His holding that section 2A:1A-8 constituted special legislation in violation of article IV, section 7, paragraph 9(5) of the New Jersey Constitution commanded a majority of the Court. 72 N.J. at 297–301, 370 A.2d at 828–30.

[60] *Id.* at 304, 370 A.2d at 831.

> not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government.[61]

The Chief Justice's opinion in *Vreeland* emphasized the importance of due respect to the principle of separation of powers, a principle which Justice Mountain had equally emphasized in *Robinson*.[62] Chief Justice Hughes viewed the Court as interfering with both the Legislature and the Executive in their attempts to comply with the constitution.[63] To avoid such interference, the statute in question was "entitled to the highest judicial respect as a bona fide legislative attempt to comply with the Constitution."[64] The Chief Justice made clear that his touchstone in statutory and constitutional construction was the intent of the writers. Thus, the Chief Justice wrote:

> Even though on its face language may appear to be clear and unambiguous, if in fact, upon examination, the true intent and purpose of the Framers and the people appear, then the language should be read and applied in accordance with such intent and purpose.[65]

Justice Mountain's decision, on the other hand, is reminiscent of Justice Robert's opinion for the majority of the United States Supreme Court that struck down the Agricultural Adjustment Act in 1931. In *United States v. Butler*,[66] Justice Roberts explained that the Court in constitutional litigation "has only one duty—to lay the Article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former."[67] To be sure, the now repudiated decisions striking down

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[61] United States v. Classic, 313 U.S. 299, 316 (1941). *See generally* Wechsler, *Mr. Justice Stone and the Constitution*, 46 COLUM. L. REV. 764 (1946). Justice Cardozo similarly noted this difference in ease of amendment between statutes and constitutional provisions. B. CARDOZO, *supra* note 1, at 83–84.

[62] For a discussion of *Robinson*, see text accompanying note 20 *supra*.

[63] 72 N.J. at 324, 370 A.2d at 842. Chief Justice Hughes stated:

> So it has been the constant thrust of judicial purpose and responsibility to respect legislative action in the adoption of laws, where they are conformable or, as will be seen, potentially comformable to the Constitution. The same respect is due executive action, whose purposeful decision here involved was amplified by the further legislative action of the Senate in confirming the appointment. The Court's decision here accomplishes a very grave governmental eventuality, that of nullification of the action of two other branches of government.

Id.

[64] 72 N.J. at 319, 370 A.2d at 839.

[65] *Id.* at 311, 370 A.2d at 835.

[66] 297 U.S. 1 (1936).

[67] *Id.* at 62.

numerous legislative acts aimed at social reform were based on what Justice Mountain referred to in *Vreeland* as the "great ordinances" of the Constitution.[68] However, even with relatively simple constitutional provisions, there is an ever-present danger in a judge regarding the task before him as one requiring merely the skills of a technician.[69] The Constitution is not, in Professor Bickel's words, "a clear and certain yardstick by which to measure the actions of other branches of the government."[70] A "mechanical application of the yardstick to such actions"[71] should not prevail over a known intent of the drafters.

The relative proclivity of an individual judge to treat a particular case as one necessitating "judicial legislation" depends in large measure on his view of the role of the courts in formulating public policy. In some respects the opinions of Chief Justice Hughes and Justice Mountain reflect divergent positions on this key question of the judiciary's proper function. Despite their contrasting, if not competing approaches or philosophies, they more often than not joined forces.[72] Each has epitomized in his own way valuable guideposts which will serve as enduring landmarks for the bar and bench.

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[68] 72 N.J. at 304, 370 A.2d at 831, *citing* Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

[69] Alexander Bickel has described the attitude of the "strict constructionists" of the 1930's as follows:

> This [checking to see if the statute "squared" with the Constitution] was not an exercise of power; there was no volition in it; it called for a low form of judgment only, a nearly automatic act, very much like something a machine might nowadays do; which in turn gives rise fatally, if unintentionally, to the inference that a nine-man court is an instance of featherbedding.

A. BICKEL, THE LEAST DANGEROUS BRANCH 90 (1962).

[70] *Id.* at 77.

[71] *Id.*

[72] During the 1975-1976 Term, Chief Justice Hughes and Justice Mountain agreed as to the result in 94% of the cases in which they both sat. This was a higher degree of agreement than for any other pair of members of the Court. *The 1975-76 New Jersey Supreme Court Term*, 30 RUTGERS L. REV. 492, 495 (1977).The 1976-1977 Term saw them agree in 86% of the cases. *The 1976-77 New Jersey Supreme Court Term*, 31 RUTGERS L. REV. 370 (1978).