

**FROM PORITZ TO RABNER: THE NEW JERSEY
SUPREME COURT’S STATUTORY
JURISPRUDENCE, 2000-2009**

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“[W]e continue to believe that our primary function in statutory interpretation is effectuating the legislature’s intent, but we recognize that that is often a difficult assignment.”¹

- The Honorable Virginia A. Long, Associate Justice, Supreme Court of New Jersey (1999-Present)

“Do not expect anybody’s theory of statutory interpretation, whether it is your own or somebody else’s, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”²

- Henry M. Hart, Jr. & Albert M. Sacks, Law Professors, Harvard Law School

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¹ Virginia A. Long, *The Purple Thread: Social Justice as a Recurring Theme in the Decisions of the Poritz Court*, 59 RUTGERS L. REV. 533, 538 (2007).

² HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

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INTRODUCTION

In the lead-up to the hotly contested 2009 governor’s race in New Jersey, both sides tried to rally their supporters by mentioning the coming Supreme Court³ vacancies. Under the New Jersey Constitution, the governor has the power to “nominate and appoint, with the advice and consent of the Senate, the Chief Justice and associate justices of the Supreme Court”⁴ Once confirmed, justices “shall hold their offices for initial terms of 7 years and upon reappointment shall hold their offices during good behavior . . . [but] shall be retired upon attaining the age of 70 years.”⁵ As a result of the multi-faceted judicial appointment system, the newly-elected governor would have the opportunity to fill four openings on the seven-member court, which has hardly been a passive actor in state government. “For decades, the court, which has the final word on interpreting state law and the New Jersey Constitution, has been a driving force in New Jersey.”⁶ Both major candidates offered the requisite platitudes associated with their respective parties. Republican nominee Chris Christie, however, was particularly outspoken in his denunciation of the “activist” court. Critical of all the sitting justices, including the Republicans, Christie

³ All references to the “Supreme Court” or to the “court” refer to the New Jersey Supreme Court. The United States Supreme Court is only referenced in full.

⁴ N.J. CONST. art. VI, § 6.

⁵ *Id.*

⁶ Mary Fuchs, *Next Governor Will Reshape N.J. Supreme Court*, STAR LEDGER (Newark, N.J.), Oct. 29, 2009, http://www.nj.com/news/index.ssf/2009/10/next_nj_governor_could_impact.html.

said that none of the justices embodied the type of jurist he would appoint. Describing his ideal nominee, Christie said: “I want someone who is extraordinarily bright, and I want someone who will interpret the laws and the Constitution, not legislate from the bench.”⁷ Then-candidate, and now Governor, Christie was referring to an appointment in the vein of United States Supreme Court Justice Antonin Scalia.⁸ Scalia, who along with his colleague Justice Clarence Thomas is a constitutional originalist, is perhaps most famous for his outspoken textualism. Textualism, as a method of statutory interpretation, proclaims: “The text is the law, and it is the text that must be observed.”⁹ Grounded in the theory that the courts are the faithful agents of the legislature, textualism frowns upon the use of legislative history and rejects the notion that there is a discernable legislative “intent.”¹⁰

In this Article, I demonstrate that in the complex arena of statutory interpretation, the situation is not nearly as black and white as Christie claims. The Governor may rightfully criticize the court’s constitutional jurisprudence for producing purpose-driven, “activist” decisions.¹¹ However, the court in the past ten years, especially under Chief Justice Stuart Rabner, has in fact employed a quasi-textualist approach to statutory interpretation. The justices may not adhere to Scalia-like textualism¹² — especially since legislative “intent” continues to drive

⁷ *Id.*; see also Robert P. George, *In Replacing Supreme Court Justice John Wallace, NJ Gov. Chris Christie Made Good on His Promise*, STAR LEDGER (May 9, 2010, 6:14 AM), http://blog.nj.com/njv_guest_blog/2010/05/in_replacing_supreme_court_jus.html (quoting candidate Christie as saying, “I will remake the court and I will remake it on this one simple principle. If you (want to) legislate, (then) run for the Legislature, don’t put on a black robe and go to the Supreme Court . . . (T)here won’t be any justices that I either reappoint or put on that court that do that.”).

⁸ Republican Chris Christie defeated Democratic incumbent Jon Corzine to capture the governor’s mansion on November 3, 2009. See David M. Halbfinger & Ian Urbina, *Republicans Bask in Glow of Victories in N.J. and Va.*, N.Y. TIMES, Nov. 4, 2009, http://www.nytimes.com/2009/11/05/nyregion/05elect.html?_r=1.

⁹ ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 22 (Amy Gutmann, ed., 1997).

¹⁰ See *id.* at 31 (“As I have said, I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law.”).

¹¹ I do not attempt to address whether or not I agree with the popular critiques of the court’s constitutional jurisprudence, but I accept the fact that the court has such a reputation for Constitutional “innovation.”

¹² Yet even Scalia’s rigid textualism includes an exception for absurdities. See *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring in judgment) (reaffirming “the venerable principle that if the language of a statute is clear, that language must be given effect — *at least in the absence of a patent*

the court's statutory decisions, which are filled with references to legislative history — but neither are they flagrantly disregarding the text. The court's general reputation for policy-driven activism and innovation¹³ is just not as applicable to its statutory jurisprudence.

In my study of the court, I compared the final six years of the Poritz Court to the first three years of the Rabner Court, disregarding the cases decided during the brief tenure of Chief Justice James R. Zazzali.¹⁴ Deborah Poritz, who was nominated to the court by Republican Governor Christine Todd Whitman and then re-nominated by Democratic Governor James McGreevey following the completion of her initial seven-year term, served as Chief Justice from 1996 to 2006.¹⁵ The first female Attorney General of New Jersey, Poritz earlier served as chief counsel to Republican Governor Thomas Kean.¹⁶ Stuart Rabner, who was nominated to the court by Democratic Governor John Corzine, began his current tenure as Chief Justice in 2007. Rabner previously served as Corzine's chief counsel and Attorney General.¹⁷ Although slight, there is a perceptible shift between the more purpose-driven Poritz Court and the more textually-anchored Rabner Court. Yet neither court has exhibited the same degree of purposivism that animated earlier constitutional decisions, such as *Abbott*¹⁸ and *Mount*

absurdity") (emphasis added). For a more complete discussion of Scalia's concurrence in the case, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 621-23 (1990) [hereinafter Eskridge, *The New Textualism*].

¹³ For a brief discussion of the development of judicial activism on the New Jersey Supreme Court, see CHARLES S. LOPEMAN, *THE ACTIVIST ADVOCATE: POLICY MAKING IN STATE SUPREME COURTS* 119 (1999) (describing the influence of New Jersey Supreme Court Chief Justice Vanderbilt in the development of a judicial philosophy of activism that permeated the New Jersey Supreme Court and survived his retirement to influence future justices). According to Lopeman, "[j]udicial policy making by the New Jersey court is now an integral part of the state's governing apparatus." *Id.* (citation omitted).

¹⁴ Justice James R. Zazzali served as Chief Justice for one year between Chief Justices Poritz and Rabner. See David W. Chen, *Corzine Elevates a Supreme Court Justice and Taps Another Judge to Succeed Him*, N.Y. TIMES, Sept. 22, 2006, <http://travel.nytimes.com/2006/09/22/nyregion/22court.html?scp=6&sq=zazzali&st=cse> ("By elevating Justice Zazzali, who turns 70 next June, Mr. Corzine is effectively giving himself more time to pick a new chief justice.").

¹⁵ See *Biography: Deborah T. Poritz*, DRINKERBIDDLE, <http://www.drinkerbiddle.com/dporitz/> (last visited Apr. 20, 2011); see also Michael Booth, *Avoiding Constitutional Confrontation, Governor Renominates Poritz as Chief Decision Allays Fears of Loss of Judiciary's Independence*, 172 N.J. L.J. 341 (2003).

¹⁶ See *Biography: Deborah T. Poritz*, *supra* note 15.

¹⁷ See *Chief Justice Stuart Rabner*, N.J. JUDICIARY, <http://www.judiciary.state.nj.us/supreme/rabner.htm> (last visited Apr. 20, 2011).

¹⁸ *Abbott v. Burke*, 100 N.J. 269 (1985). For a brief history of the landmark education

Laurel,¹⁹ which have brought such acclaim and notoriety to the New Jersey Supreme Court.²⁰ In fact, throughout the past decade, the court has been carrying out a remarkably similar version of the more measured approach to statutory interpretation that was first ascribed to New Jersey courts in an editorial note in the 1954 *Rutgers Law Review*.²¹ Addressing the use of extrinsic aids, which generally consisted of different forms of legislative history,²² the author concluded that the consultation of such sources depended on an initial finding of statutory ambiguity.²³ Although the author noted that “the test of ambiguity [was] not a hard and fast rule”²⁴ and that the courts did not shy away from considering such extrinsic sources strictly as a means of corroboration,²⁵ the need to first identify textual ambiguity still functioned as a focal

case that has spanned three decades, see *History of Abbott*, EDUC. LAW CENTER, <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottHistory.htm> (last visited Apr. 20, 2011).

¹⁹ *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 67 N.J. 151 (1975). For a brief history of the groundbreaking affordable housing case, see *History of the Mount Laurel Decisions*, N.J. DIGITAL LEGAL LIBR., <http://njlegallib.rutgers.edu/mtlaurel/aboutmtlaurel.php> (last visited Apr. 20, 2011).

²⁰ See David Voreacos & Terrence Dopp, *N.J. Supreme Court Weighs School Cuts Amid Impasse*, BLOOMBERG BUS. WK., Jan. 5, 2011, <http://www.businessweek.com/news/2011-01-05/n-j-supreme-court-weighs-school-cuts-amid-impasse.html> (“New Jersey’s top court . . . developed a reputation for liberal decisions through such cases as the so-called Mount Laurel rulings. In that decision, the justices held that zoning that resulted in exclusion of minorities was the same as racial discrimination.”).

²¹ See Serena Perretti Bowen, Editorial Notes, *Extrinsic Aids to Statutory Interpretation — The New Jersey View*, 8 RUTGERS L. REV. 486, 486 (1954) (arguing that the New Jersey courts at all levels did not accept “[t]he radical view” that rejected “the plain meaning rule and permit[ted] the admission of extrinsic aids even if they raise[d] an ambiguity in an otherwise clear statute”). For more general discussions of the New Jersey court system’s handling of statutory cases, see C. Dallas Sands, *Developments in the Field of Legislation*, 10 RUTGERS L. REV. 2 (1955) (discussing different theories of statutory interpretation adopted by judges at all levels of the New Jersey judiciary) and GEORGE STILES HARRIS, *CASES ON STATUTES OF NEW JERSEY* (1925) (providing early statutory case citations with brief explanations).

²² Bowen addresses: “Journals of the Legislature;” “Amendments Made During Consideration of the Original Bill;” “Committee Reports;” “Debates;” “Constitutional History;” “Introducer’s Statement;” “Testimony of a Legislator;” “Commission and Agency Reports;” “Message of the Executive;” “Title and Marginal Notes;” and “Preamble.” See Bowen, *supra* note 21.

²³ See *id.* at 500 (“The admission of extrinsic aids to the interpretation of statutes in New Jersey seems to rest on a preliminary finding by the court that the statute is ambiguous.”).

²⁴ *Id.*

²⁵ *Id.* (“Despite the fact that a statute has been found to be clear, the courts have considered the extrinsic materials and used them as a corroboration of the interpretation.”).

point of the interpretive process.

In order to compare and analyze the court's statutory jurisprudence under the two chief justices, I focused on the role of legislative history.²⁶ Legislative history is particularly illuminating because of its controversial role²⁷ in statutory opinions as a flashpoint that tends to divide conservative textualists²⁸ and more liberal, purpose-driven jurists.²⁹ In the most comprehensive study to date of the United States Supreme Court's use of legislative history, David S. Law and David

²⁶ For a timeline of the role legislative history has played in the United States, primarily in the United States Supreme Court, see WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 208-29 (1994). [hereinafter ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION]. In her 1954 Note, Bowen differentiates between legislative history at the federal level, which she argues "refers to the process through which a bill goes from its introduction to its passage," and New Jersey's definition of legislative history, which she argues "is the legal history of the statute, *i.e.* previous statutes on the same subject." Bowen, *supra* note 21, at 487 (citations omitted). Yet the current court, under both chief justices, generally relies upon what Bowen would refer to as legislative history at the federal level. See, e.g., Owens v. Feigin, 194 N.J. 607 (2008) (referencing signing statements, Senate Judiciary Committee Statement, sponsors' statement, and gubernatorial signing statement); Serrano v. Serrano, 183 N.J. 508 (2005) (reviewing sponsors' statement, gubernatorial conditional veto, and meeting of the Joint Committee on Automobile Insurance Reform). Thus my coding for legislative history combines the two concepts, except in instances in which the court specifically resorts to the separately coded judicial canon of construction *in pari materia* to analyze earlier statutes on the same or related topic. See, e.g., State v. Hodde, 181 N.J. 375, 379 (2004) ("Statutory provisions, however, cannot be read in isolation. They must be construed in concert with other legislative pronouncements on the same subject matter so as to give full effect to each constituent part of an overall legislative scheme." (citations omitted)).

²⁷ See James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 119 (2008) ("Critics of legislative history have long maintained that it lacks neutrality as an interpretive resource. Unlike the dictionary or the canons of construction, committee reports and floor statements are produced by partisans — actors with a stake in the legislative contest to which they are contributing."); see also OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION (1989) (attacking certain uses of legislative history by highlighting the theoretical weaknesses of intentionalism); Alex Kozinski, *Should Reading Legislative History be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 812 (1998) (describing the "widespread misuse of legislative history to achieve substantive ends").

²⁸ See Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371 (decrying excessive reliance on legislative history by fellow judges).

²⁹ Differentiating between text-oriented judges and purpose/consequence judges, United States Supreme Court Justice Stephen Breyer notes that the former try to avoid making use of "the legislative debates that compose the history of the statute's enactment in Congress." STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 89 (2010) [hereinafter BREYER, DEMOCRACY WORK].

Zaring found that ideology is a crucial factor in determining whether or not a Justice will cite legislative history.³⁰ Although legal concerns regarding a statute's form and content were the primary forces driving legislative history citations, the liberal Justices still relied upon legislative history more often than their conservative counterparts.³¹ Justice Scalia, a conservative textualist, opposes the use of legislative history³² because it is not subject to Article I, Section VII's bicameralism and presentment requirement³³ and therefore is not law.³⁴ Scalia has not been shy about voting with the majority on the outcome of the case but writing a separate concurrence voicing his displeasure with the majority's use of legislative history in reaching its decision.³⁵ Justice Breyer, Scalia's intellectual and ideological counterweight, on

³⁰ See David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. AND MARY L. REV. 1653 (2010).

³¹ *Id.* at 1739 (confirming what earlier studies have found: "liberal Justices are generally more inclined than conservative Justices to make use of legislative history.").

³² In spite of his trenchant criticism of legislative history, Justice Scalia has been more than willing to sign on to *conservative* opinions that include extensive references to legislative history. See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (signing on to the O'Connor majority opinion's use of legislative history in the form of the "rejected proposal rule"). See Brudney & Ditslear, *supra* note 27, at 117 ("Intriguingly, Justice Scalia's strong resistance to legislative history when used by liberal Justices does not extend to majorities authored by his conservative colleagues.").

³³ See U.S. CONST. art. I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States[.]").

³⁴ See SCALIA, *supra* note 9, at 35 (arguing that unlike legislative history, such as committee reports, a statute "has a claim to our attention simply because Article I, section 7 of the Constitution provides that since it has been passed by the prescribed majority . . . it is law"); see also *Chisom v. Roemer*, 501 U.S. 380 (1991) (Scalia, J., dissenting) ("We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law . . ."). Justice Scalia is not alone; his primary conservative partner in advocating this viewpoint is the Honorable Frank H. Easterbrook, Chief Judge of the Seventh Circuit Court of Appeals. See *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989) ("The Constitution establishes a complex set of procedures, including presidential approval (or support by two-thirds of each house). It would demean the constitutionally prescribed method of legislating to suppose that its elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some *evidence* about the law, while the *real* source of legal rules is the mental process of legislators.").

³⁵ See, e.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 219 (1994) (Scalia, J., concurring in part and concurring in the judgment) ("I join all except Parts III-B, IV, and V of the Court's opinion. The first of these consists of a discussion of the legislative history of the Federal Mine Safety and Health Amendments Act of 1977 . . . I find that discussion unnecessary to the decision. It serves to maintain the illusion that legislative history is an important factor in this Court's deciding of cases, as opposed to an omnipresent makeweight for decisions arrived at on other grounds." (citations omitted)).

the other hand, has been the United States Supreme Court's most vocal supporter of the use of legislative history.³⁶ In his most recent book, Justice Breyer argues that judges interpreting statutes can look to "a wide range of relevant legislative materials."³⁷ Although not advocating for the use of legislative history in every case, Breyer argues that it can be very helpful in discerning the meaning of statutes in difficult cases.³⁸ He explains that most of the cases that reach the Supreme Court involve complicated statutory language and therefore benefit from judicial consultation of legislative history.³⁹

This Article also focuses on legislative history because of how easily accessible it is to New Jersey Supreme Court justices and their clerks.⁴⁰ According to a forthcoming study by recent Yale Law School graduate and current D.C. Circuit Court of Appeals Clerk Brian Barnes, New Jersey is one of a minority of states that makes such material accessible on-line.⁴¹ Even prior to the rise of the Internet, the State

³⁶ See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) [hereinafter Breyer, *Legislative History*] (providing examples of the usefulness of legislative history in rendering decisions).

³⁷ BREYER, *DEMOCRACY WORK*, *supra* note 29, at 92.

³⁸ See Breyer, *Legislative History*, *supra* note 36, at 848 ("Using legislative history to help interpret unclear statutory language seems natural. Legislative history helps a court understand the context and purpose of a statute."). For a more in-depth discussion of Justice Breyer's views on statutory interpretation, see STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 85-110 (2005).

³⁹ See BREYER, *DEMOCRACY WORK*, *supra* note 29, at 88. A number of scholars have attempted to trace the ebb and flow of legislative history references in Supreme Court decisions. Compare Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (noting a marked decline over the past decade in the use of legislative history in statutory interpretation decisions), with Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205 (describing the success of Justices Breyer and Stevens in combating Scalia's attempted purge of legislative history).

⁴⁰ See WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 304 (2d ed. 2006) [hereinafter EFG LEGISLATION] (exploring potential criteria for using legislative history, the authors write: "A moderate position would be that legislative history should be consulted only if it is readily available to the average lawyer" and "can be routinely discerned by interpreters at reasonable cost" (citations omitted)).

⁴¹ See Brian Barnes, *The Transformation of State Statutory Interpretation* (May 28, 2010) (unpublished manuscript) (on file with author). The New Jersey State Library's website contains complete legislative histories dating back to 1998 and is currently in the process of scanning and updating legislative histories from 1974-1997. See *Legislative Histories*, N.J. STATE LIBR., <http://law.njstatelib.org/njlh> (last visited Apr. 26, 2011). New Jersey and Illinois are the only two states "to retrospectively make previously public materials electronically accessible." Barnes, *supra*, at 16 n.80 (citations omitted).

Library was busy compiling in-depth legislative materials in hard copy. Barnes found that the rather inclusive records contain (where applicable) statements of intent, committee statements, floor amendments, and gubernatorial veto messages or press releases. From a comparative standpoint, New Jersey's legislature is one of only twelve in the nation that generates committee reports similar to those created by congressional standing committees.⁴² New Jersey is also only one of twenty-nine states that maintains records of floor proceedings⁴³ and one of twenty-eight states that records or transcribes committee hearings.⁴⁴ Thus the absence of any references to legislative history in New Jersey Supreme Court opinions cannot be attributed to inaccessibility.⁴⁵

Yet the State Library's maintenance of such comprehensive records inevitably leads justices to consider the relative interpretive value of different forms of legislative history. Committee statements and floor amendments, for example, are both part of the legislative process as it takes place in "real time," but the former purportedly represents the views of multiple members whereas individual representatives often introduce the latter. A gubernatorial veto message, on the other hand, is generated *after* the bill has already passed both houses and thus is not contemporaneous with the actual legislative debate. Should it be afforded less weight? Although it is beyond the scope of this Article to address what types of legislative history were available to the justices in each case, the Appendix lists the different forms of legislative history referenced in each majority opinion in order to provide a baseline for further research.⁴⁶

This Article contains seven Parts. Part I offers a brief overview of the dominant theories in the field of statutory interpretation, with an emphasis on the role of legislative history. Part II addresses the development of the modern New Jersey judiciary system, beginning

⁴² See Barnes, *supra* note 41, at 6. New Jersey is also the only state that makes its standing committee reports dating back to 1980 electronically accessible. The other states with such reports online only provide more recent ones. *See id.* at 7.

⁴³ *See id.* at 9.

⁴⁴ *See id.* at 12.

⁴⁵ If not yet available on-line, the New Jersey State Library has hard copies of all codified enactments dating back to the early 1970s. *See* WILLIAM H. MANZ, *GUIDE TO STATE LEGISLATIVE AND ADMINISTRATIVE MATERIALS* 267 (7th ed. 2008).

⁴⁶ *See* Appendix. For a hierarchy of legislative history sources, see *The New Textualism*, *supra* note 12, at 636-40 (listing from most authoritative to least authoritative: Committee Reports; Sponsor Statements; Rejected Proposals; Floor & Hearing Colloquy; Non-legislator Drafters and Sponsors; Legislative Silence and Subsequent History).

with the adoption of the state's current Constitution in 1947. Part III considers the relative lack of statutory interpretation scholarship at the state level and Columbia Law Professor Abbe R. Gluck's theory of "Modified Textualism." Outlined in Gluck's recent *Yale Law Journal* article, "Modified Textualism" is a rigid hierarchical method of statutory interpretation that attempts to find common ground between textualism and purposivism.⁴⁷ Part IV advances an explanation for the Poritz Court's approach to statutory interpretation during the first half of the decade, and Part V analyzes the statutory jurisprudence of the Rabner Court. Part VI discusses the general institutional factors influencing the Rabner Court's decision-making process and potential areas for future research. Part VII comments on the brief and moderate tenure of former New Jersey Supreme Court Justice William J. Brennan, Jr. and delves into the broader strategic and normative question regarding the importance of decisional outcome versus interpretive methodology.

I. STATUTORY INTERPRETATION & THE ROLE OF LEGISLATIVE HISTORY

The significance of the court's approach to statutory interpretation is best captured by the work of former Yale Law School Dean and current Second Circuit Court of Appeals Judge Guido Calabresi. In *A Common Law for the Age of Statutes*, Calabresi observed that during the twentieth century, "we have gone from a legal system dominated by the common law . . . to one in which *statutes* . . . have become the primary source of law."⁴⁸ The New Jersey court system, including the supreme court, is no exception. In his 1955 *Rutgers Law Review* article, *Developments in the Field of Legislation*, Professor C. Dallas Sands noted the relatively low number of "strictly 'common law' cases" and the strikingly high percentage of statutory cases decided by the New Jersey courts.⁴⁹ Thus prior to delving into New Jersey Supreme Court

⁴⁷ See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *YALE L.J.* 1750 (2010) [hereinafter Gluck, *States as Laboratories*].

⁴⁸ GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982) (emphasis added).

⁴⁹ See Sands, *supra* note 21, at 14 ("Statistics establish that the business of determining and declaring the operative effect of written law is a major vocation of the New Jersey courts. . . . Among 483 decisions reported with opinions (including per curiam opinions wherever they stated the grounds of decision) during the past year, only 113 were strictly

cases, it is important to address different theories and methods of statutory interpretation advanced by leading legislation scholars. Although current scholarship is almost exclusively based on United States Supreme Court case law, the justices in Trenton are engaged in statutory interpretation nearly every day and inevitably encounter many of the same statutory questions faced by their counterparts on the United States Supreme Court.

Unfortunately, even if a newly confirmed New Jersey Supreme Court justice were inclined to adopt a so-called dominant theory of interpretation, she would soon realize that there is far from universal agreement within the academy. There is even less of a consensus over the proper nomenclature. Whereas some scholars focus on New Textualism, Intentionalism, and Pragmatism,⁵⁰ others discuss Textualism, Purposivism, and Intentionalism.⁵¹ Based on a review of the scholarly literature and analysis of New Jersey Supreme Court statutory decisions over the past decade, the most relevant theory is Intentionalism, followed by a combination of Textualism and Purposivism. Unlike Textualism, however, which in its most basic form prescribes a text-based method of interpretation, Intentionalism and Purposivism suggest interpretive objectives that do not necessarily require specific judicial maneuvers. Yet even Textualism is subject to interpretive variations.

A. *Textualism & Modified Textualism*

Textualism revolves around the primacy of the statute's text, grounded in the opacity and complexity of the legislative process.⁵² The exact language of a statute may have been the key to ensuring its passage and thus textualism calls on judges to focus on the text itself.⁵³ But more importantly, from a theoretical perspective, textualists are

'common law' cases in the sense that they involved no apparent issues of written law. By way of contrast there were 370, or nearly three-fourths of the cases (not counting constitutional law cases), which involved written-law issues in one form or another.'").

⁵⁰ See Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010).

⁵¹ See Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, The Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. (forthcoming 2011).

⁵² See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 450 (2005).

⁵³ See *id.*

skeptical of judges' attempt to divine legislative "intent." According to leading textual scholar John Manning, legislatures comprised of multiple representatives do not share an unexpressed intent on contested issues.⁵⁴ United States Supreme Court Justice Antonin Scalia sums up this viewpoint when he writes: "It is the *law* that governs, not the intent of the lawgiver."⁵⁵ Instead of trying to divine the legislature's "subjective" intent, textualists aim to identify "a sort of 'objectified' intent — the intent that a reasonable person would gather from the *text* of the law . . ."⁵⁶ The quest for a so-called "objectified" intent leads textualists to scorn the use of legislative history and instead rely on judicially-crafted canons of statutory interpretation to help them decide difficult cases.⁵⁷

Like any theory, textualism has evolved over time.⁵⁸ And just like any theory's believers, textualism's adherents fall at different points along the text-based spectrum. Traditional textualism was grounded in the "plain meaning rule" in which the text was the best indicator of a statute's meaning, but the legislative history was consulted for confirmation.⁵⁹ "New Textualism," on the other hand, advances a "harder plain meaning rule."⁶⁰ Championed by Justice Scalia, "New Textualism" represents a significant shift in the use of legislative history. By the end of Scalia's second term, the United States Supreme Court had nearly halved the number of instances in which it looked to legislative history to confirm the plain meaning of a statute.⁶¹ The text

⁵⁴ *Id.* at 420 ("[M]ulti-member legislatures do not have an actual but unexpressed 'intent' on any materially contested interpretive point" (citations omitted)).

⁵⁵ SCALIA, *supra* note 9, at 17.

⁵⁶ *Id.* (emphasis added).

⁵⁷ *Id.* at 29-30 ("My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning."); see also Eskridge, *The New Textualism*, *supra* note 12, at 643 (describing the work of leading New Textualist Frank Easterbrook as "assert[ing] that judges' reliance on legislative history to discern legislative intent amounts to nothing more than 'wild guesses'" (citing Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 548 (1983))).

⁵⁸ For a historical overview of textualism, see Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 5-43 (2006) (discussing different aspects of textualism, including "Textualism's Roots;" "Textualism's Precursors;" "The Emergence of Modern Textualism;" "Textualism's Reign;" and "Textualism's Missteps").

⁵⁹ William Eskridge has argued that "the plain meaning rule has traditionally been a 'soft' rule — the plainest meaning can be trumped by contradictory legislative history." Eskridge, *The New Textualism*, *supra* note 12, at 626 (citations omitted).

⁶⁰ *Id.* at 656.

⁶¹ *Id.* at 657 (noting a decrease from eighteen instances in the 1986 Term when Justice

became truly paramount and legislative history did not necessarily have any role to play.⁶² Although extreme in terms of its disregard for legislative history,⁶³ “New Textualism” embraces context,⁶⁴ especially in regards to statutory structure,⁶⁵ and select canons of judicial construction.⁶⁶

New Textualism may be influential on the nation’s highest court,⁶⁷ but Abbe Gluck argues that “Modified Textualism” is more influential on some of the states’ highest courts. Discussed in greater detail in Part III, *infra*, “Modified Textualism” also focuses on the primacy of the text and does not permit citations to legislative history for the sole purpose of confirmation.⁶⁸ Yet in the presence of textual ambiguity,⁶⁹ which even

Scalia joined the United States Supreme Court to eleven instances in the 1988 Term in which legislative history was used to confirm a statute’s plain meaning).

⁶² *Id.* at 658 (“More recent opinions of the [United States Supreme] Court by Justices sympathetic to the new textualism are more rigid: Not only does the Court not begrudge legislative history any legitimate role, but the Court does not even stoop to analyze legislative history arguments.”).

⁶³ That being said, Scalia has not uniformly abstained from consulting legislative history. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J. concurring) (allowing for potential absurdity to justify the consultation of “all public materials, including the background of [the rule] and the *legislative history* of its adoption” (emphasis added)).

⁶⁴ See William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1532 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)) (“It is a truism that interpreting a text requires context. Scalia seeks to turn this truth to his advantage.”).

⁶⁵ See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 64 (1994) (“Because interpretation is a social enterprise, because words have no natural meanings, and because their effect lies in context, we must consult these contexts.”).

⁶⁶ See Eskridge, *The New Textualism*, *supra* note 12, at 663 (resorting to substantive policy canons reluctantly, the new textualists “seek a revival of canons that rest upon precepts of grammar and logic, proceduralism, and federalism”).

⁶⁷ *But see* Elliot M. Davis, Note, *The Newer Textualism: Justice Alito’s Statutory Interpretation*, 30 HARV. J.L. & PUB. POL’Y 983, 983-84 (2007) (arguing that Justice Alito’s “newer textualism,” which does not advocate for the categorical exclusion of legislative history, is more likely to have a greater influence on the United States Supreme Court’s statutory jurisprudence in the coming years).

⁶⁸ See Gluck, *States as Laboratories*, *supra* note 47, at 1758 (“Modified textualism has two salient differences from the original: it ranks interpretive tools in a clear order — textual analysis, then legislative history, then default judicial presumptions — and it includes legislative history in the hierarchy.”).

⁶⁹ For a critique of “Modified Textualism,” see Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 60 (2010), http://yalelawjournal.org/2010/7/30/leib_serota.html (“The unwillingness of modified textualism to allow legislative history to be utilized for *confirmatory* rather than

Scalia recognizes does occur on occasion,⁷⁰ judges will resort to legislative history to attempt to divine a statute's meaning.⁷¹ If, and only if, the legislative history does not provide clarity, the judges will next turn to judicial canons of statutory construction.⁷² Gluck may disagree with the New Textualists about the role of legislative history, but she is in agreement with them over intentionalism's relative lack of importance. According to Gluck, the current divide is between textualism and purposivism.⁷³ Yet her broad strokes obscure the fine differences between intentionalism and purposivism — the former of which has a far greater impact on the New Jersey Supreme Court's statutory jurisprudence.

B. Intentionalism⁷⁴ & The Funnel of Abstraction⁷⁵

The quest for statutory intent by American judges can be traced all the way back to John Marshall. Unwilling to limit the United States Supreme Court's interpretive toolbox to strict textualism, but uncomfortable with the exercise of unrestrained equitable powers, Marshall aimed to strike a balance by focusing on discerning legislative intent.⁷⁶ Victoria Nourse, a legal scholar and Obama nominee to the

expansionary uses is a quite substantial cost that may very well impair decisionmaking in easy cases.”).

⁷⁰ See *United States v. R.L.C.*, 503 U.S. 291, 307-08 (1992) (Scalia, J., concurring) (finding the language of 18 U.S.C. § 5037(c)(1)(B) to be ambiguous).

⁷¹ See Gluck, *States as Laboratories*, *supra* note 47, at 1758.

⁷² See *id.*

⁷³ See *id.* at 1762 (devoting Part I, Section A to the methodological debate of “Textualism Versus Purposivism”).

⁷⁴ For a broader and more theoretical discussion of intentionalism, see ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 26, at 14-25; see also FRANK B. CROSS, *THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION* 59 (2009) (noting that under 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”).

⁷⁵ See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 *STAN. L. REV.* 321, 353 (1990) [hereinafter Eskridge & Frickey, *Practical Reasoning*].

⁷⁶ See John Choon Yoo, Note, *Marshall’s Plan: The Early Supreme Court and Statutory Interpretation*, 101 *YALE L.J.* 1607, 1615 (1992). For a more recent example from the New Jersey Supreme Court, see Michael Booth, *Zazzali, Named Chief Justice, Says He’s a Realist about Caretaker Term*, *N.J. L.J.*, Sept. 25, 2006 (taking issue with critics who claim judges legislate from the bench, former New Jersey Supreme Court Chief Justice said upon his elevation from Associate Justice to Chief Justice: “That’s an incorrect perception . . . Above all the Court seeks to determine what the Legislature intended. The Court makes

Seventh Circuit Court of Appeals,⁷⁷ writes that such intentionalism carried into the twentieth century. According to Nourse, for most of the past century, courts were generally expected to handle statutory interpretation cases by searching for the legislature's intent.⁷⁸ Courts employed an "eclectic" approach that generally included looking at the statute's text *and* legislative history.⁷⁹ In their leading textbook on statutory interpretation, William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett add that the eclectic approach included more than just text and legislative history: courts would examine "the statute's text, canons of statutory interpretation, the common law, the circumstances of enactment, principles of equity, and so forth."⁸⁰ Regardless of how exhaustive the list of extrinsic sources may be, legislative history is a crucial component of any form of intentionalism. From an intentionalist's perspective, it would only seem strange for judges not to look to the legislative materials that accompany the statute in question.⁸¹ Intentionalists resort to extrinsic sources because they fundamentally believe that a legislative majority, like an individual person, can have "coherent, but unexpressed background intentions" that can inform the meaning of their statutorily-uttered words.⁸²

Intentionalist-eclecticism is best understood through the prism of the Eskridge/Frickey Funnel of Abstraction.⁸³ The two scholars move

painstaking efforts to divine the legislative intent").

⁷⁷ See Press Release, White House Office of the Press Sec'y, President Obama Names Victoria F. Nourse to U.S. Court of Appeals (July 14, 2010), <http://www.whitehouse.gov/the-press-office/president-obama-names-victoria-f-nourse-us-court-appeals>; see also Larry Sandler, *Obama Again Nominates Butler to Federal Bench*, J. SENTINEL (Milwaukee), Jan. 5, 2011, <http://www.jsonline.com/news/wisconsin/112973059.html> (announcing Obama's re-nomination of Nourse to the Seventh Circuit following the Senate's failure to vote on her appointment during the 111th Congress).

⁷⁸ See Nourse, *supra* note 51; see also WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 691, 998 (4th ed. 2007) [hereinafter EFG CASES] ("American courts in the eighteenth and early nineteenth centuries generally proclaimed their fidelity to legislative 'intent'" (citations omitted)).

⁷⁹ See Nourse, *supra* note 51.

⁸⁰ See EFG CASES, *supra* note 78, at 691 (citations omitted).

⁸¹ See *id.* at 58.

⁸² See Manning, *supra* note 52, at 423-24.

⁸³ It is worth noting that Eskridge and Frickey do not view their Funnel of Abstraction as an extension of intentionalism but rather as a concrete representation of "Aristotle's theory of practical reasoning." Eskridge & Frickey, *Practical Reasoning*, *supra* note 75, at 323. The authors actually dismiss the three grand theories of statutory interpretation (intentionalism, purposivism, and textualism) before advancing their "positive model of

away from the grand theory of intentionalism to advance a methodology for statutory interpretation that takes into account the competing values influencing judicial decision-making. Building on the complexity of human reasoning, Eskridge and Frickey describe a nonlinear approach in which the problem solver takes into consideration all of the potential solutions and then weighs them against his internal value system.⁸⁴ Legal arguments, they posit, are like cables in that the arguments are strongest when they weave together as multiple threads⁸⁵ — threads that do not operate in a vacuum but rather interact with one another.⁸⁶ The different threads, however, are not equal in strength. Although their relative value will depend upon the nature of the statute under consideration, their base values are generally established from the outset. Thus a textual thread may not determine the outcome all by itself, but it starts off as more influential than a general-purpose thread.⁸⁷ Eskridge and Frickey divide these threads into three broad categories that judges look to when rendering their interpretation. On a spectrum ranging from the funnel's more concrete base to its more abstract mouth, the categories include "Textual Considerations,"⁸⁸ "Historical Considerations,"⁸⁹ and "Evolutive Considerations."⁹⁰ Regardless of how

practical reasoning." *Id.* at 345. Yet I am including their model in my discussion of intentionalism because it's pragmatism does not fit as well with the rigidity of textualism or the more free-flowing approach of purposivism. As will be discussed *infra*, the New Jersey Supreme Court has been moving towards a textually-anchored funnel of abstraction approach to statutory interpretation under the overarching, theoretical umbrella of intentionalism.

⁸⁴ *Id.* at 348 ("When solving a problem, we tend to test different solutions, evaluating each against a range of values and beliefs we hold as important."). Eskridge and Frickey simply recognize the reality that judges cannot completely prevent their own values and beliefs from influencing their statutory decisions.

⁸⁵ *See id.* at 351 (building on the work of CHARLES SANDERS PEIRCE, 5 COLLECTED PAPERS para. 264 (C. Hartshorne & P. Weiss eds., 1960)).

⁸⁶ *Id.* at 351.

⁸⁷ *Id.* ("For most of the [United States] Supreme Court Justices, a persuasive textual argument is a stronger thread than an otherwise equally persuasive current policy or fairness argument, because of the reliance and legislative supremacy values implicated in following the clear statutory text." (footnote omitted)).

⁸⁸ *Id.* at 354 ("Our practical reasoning model starts with the prevailing Supreme Court assumption that the statutory text is the most authoritative interpretive criterion.").

⁸⁹ Eskridge & Frickey, *Practical Reasoning*, at 356 ("In accordance with the [United States Supreme] Court's practice, our practical reasoning model also considers the original expectations of the Congress that enacted the statute," which is best represented by legislative history, followed by legislative purpose).

⁹⁰ *Id.* at 358 ("These are highly abstract inquiries having less connection to text and legislative expectations, and hence less authority in a democracy. Yet these inquiries are

one groups the different categories, the key is that the interpreter moves back and forth along the funnel-shaped spectrum,⁹¹ reviewing and passing judgment on the varying sources.⁹²

C. Purposivism

Former President of the Israeli Supreme Court and world-renowned jurist Aharon Barak writes: “[e]very statute has a purpose, without which it is meaningless.”⁹³ Comprised of both objective and subjective factors, such purpose is often difficult for a judge to discern.⁹⁴ According to Eskridge, Frickey, and Garret, the theory of purposivism is actually a manifestation of legislative intent, which can be divided into three separate categories.⁹⁵ In addition to “specific intent”⁹⁶ and “imaginative reconstruction,”⁹⁷ the authors also include “purposivism,” which is a bit more abstract and speaks to the legislature’s “general intent.”⁹⁸ The theory is attributed to Legal Process scholars Henry M. Hart and Albert M. Sacks, both former Harvard Law School professors.

pertinent, because the enactment of statutes is part of a dynamic process.” (footnotes omitted)). The authors define this category as “social and legal consequences not anticipated when the statute was enacted” and “current values, such as ideas of fairness, related statutory policies, and (most important) constitutional values.” *Id.* at 359.

⁹¹ The spectrum is superimposed against a theoretical funnel, which the authors chose for the following reasons:

First, the model suggests the hierarchy of sources that the Court has in fact assumed Second, the model suggests the degree of abstraction of each source Third, the model illustrates the pragmatistic and hermeneutical insights explained above: In formulating and testing her understanding of the statute, the interpreter will move up and down the diagram, evaluating and comparing the different considerations represented by each source of argumentation.

Id. at 353-54.

⁹² *Id.* at 354.

⁹³ AHARON BARAK, THE JUDGE IN A DEMOCRACY 136 (2006) (arguing that this purpose “is made up of the objectives, the goals, the interests, the values, the policy, and the function that the statute is designed to actualize”).

⁹⁴ *See id.*

⁹⁵ EFG LEGISLATION, *supra* note 40, at 222 (“The trouble starts when you try to determine what is meant by legislative intent . . .”).

⁹⁶ *Id.* (explaining the *specific intent* of legislators as “how they actually decided a particular issue of statutory scope or application”).

⁹⁷ *Id.* (explaining *imaginative reconstruction* as “what the legislators would have decided had they thought about the issue”).

⁹⁸ *Id.* at 229 (“Purposivism sets the originalist inquiry at a higher level of generality. It asks, ‘What was the statute’s goal?’ rather than ‘What did the drafters specifically intend?’”).

Citing Hart and Sacks' seminal work, Nourse writes that in the "post-war" era, the two eminent professors taught their law students to "[d]ecide what purpose ought to be attributed to the statute . . . and then [to] . . . [i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can . . ."⁹⁹ The leading proponents on the modern United States Supreme Court are Justice Stephen Breyer and recently retired Justice Paul Stevens.¹⁰⁰ Unlike textualists, who view themselves as the faithful agents of the legislature, purposivists envision a more collaborative partnership in which the judges work together with the legislators to determine statutory meaning.¹⁰¹ As equal, or at least near-equal partners, purposivists are able to take on a more assertive role when interpreting statutes. Legislative history, moreover, forms the foundation of their "interaction" with legislators and thus purposivists generally do not limit themselves to the statutory text. As Professor Abbe Gluck observes, there are many different types of purposivists, but they all share a willingness to consult a broad array of sources to determine statutory meaning and to bend "formalistic methodological rules."¹⁰² In the end, legislative "purpose" provides judges with the best opportunity to claim the mantle of intent while utilizing legislative history to advance their own policy goals.¹⁰³

II. EVOLUTION OF "JERSEY JUSTICE:"¹⁰⁴ A CONSTITUTIONAL STORY

Prior to the adoption of the 1947 state constitution, the New Jersey judiciary was plagued with problems.¹⁰⁵ The poorly functioning 1844

⁹⁹ Nourse, *supra* note 51 (citing HART & SACKS, *supra* note 2, at 1374-80).

¹⁰⁰ Gluck, *States as Laboratories*, *supra* note 47, at 1764 (citing Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 86-87 (2007)).

¹⁰¹ *Id.* (citing Peter L. Strauss, *The Common Law and Statutes*, 70 U. COLO. L. REV. 225, 243 (1999)).

¹⁰² *Id.*

¹⁰³ See EFG LEGISLATION, *supra* note 40, at 230 (citing *United Steelworkers v. Weber*, 443 U.S. 193, 254 (1979) (Rehnquist, J., dissenting)); see also WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 222 (2007) ("Purposivism allows judges some discretion to be creative in elaborating legislative purpose while claiming, with some justification, that they are deferring to what the legislature might have wanted to accomplish.").

¹⁰⁴ CARLA VIVIAN BELLO & ARTHUR T. VANDERBILT II, *JERSEY JUSTICE: THREE HUNDRED YEARS OF THE NEW JERSEY JUDICIARY* (2d ed. 1996).

¹⁰⁵ See Symposium, *The "New Judicial Federalism" and New Jersey Constitutional Interpretation*, 7 SETON HALL CONST. L.J. 823, 823 (1997) ("Prior to the convention in

Constitution “divided courts and concepts of law and equity, to the disadvantage of litigants, and lacked any unifying administrative power.”¹⁰⁶ Seventeen state courts bereft of clearly defined jurisdictional boundaries led to judicial gridlock. In the absence of a unified statewide court system, parties did not know which court was the proper forum for their assorted petitions, especially since judges served on multiple courts and failed to adhere to any standardized procedure. The New Jersey judicial system was rightfully derided as “the most antiquated and intricate that exist[ed] in any considerable community of English speaking people.”¹⁰⁷ The third state constitution,¹⁰⁸ however, marked a turning point for the state judiciary. The document’s “centerpiece was the Judicial Article, which gave the new Supreme Court unprecedented administrative authority, vested in the Chief Justice, to control the administration of all courts in New Jersey.”¹⁰⁹ The 1947 constitution protected the court from overt political interference and allowed it to establish its own rules.¹¹⁰ The appointment of Arthur T. Vanderbilt, a past president of the American Bar Association and former dean of New York University Law School, as the court’s first chief justice solidified the transition and paved the way for a statewide judicial renaissance.¹¹¹ By the time of Vanderbilt’s death in 1957, the entire New Jersey judicial system — and especially the supreme court — was respected throughout the nation with a reputation for effective administration and progressive decision-making.¹¹² Vanderbilt’s steady hand at the helm enabled future justices to take bold action. In his study of judicial behavior on six state supreme courts, Professor John Patrick Hagan

1947, New Jersey’s judicial system was described as the worst in the country.”).

¹⁰⁶ Richard J. Hughes, *Foreword* to ROBERT F. WILLIAMS, *THE NEW JERSEY CONSTITUTION: A REFERENCE GUIDE*, at xv (2d ed. 1997).

¹⁰⁷ Alan V. Lowenstein, *The Legacy of Arthur T. Vanderbilt to the New Jersey Bar*, 51 RUTGERS L. REV. 1319, 1332 (1999) (citing Richard Hartshore, *Progress in New Jersey Judicial Administration*, 3 RUTGERS L. REV. 161, 162 (1949)).

¹⁰⁸ New Jersey established its first state constitution in 1776. The state ratified new constitutions in 1844 and 1947. See Robert F. Williams, *New Jersey’s State Constitutions: From Ridicule to Respect*, N.J. LAW., June 1997, at 8, 8-9.

¹⁰⁹ Hughes, *supra* note 106, at xv.

¹¹⁰ See *id.*

¹¹¹ See Symposium, *supra* note 105, at 824 (“[W]ith the appointment of Arthur T. Vanderbilt as Chief Justice, the perception of the New Jersey courts changed drastically.”). See generally ARTHUR T. VANDERBILT II, *CHANGING LAW, A BIOGRAPHY OF ARTHUR T. VANDERBILT* (1976) (discussing the life and career of Chief Justice Vanderbilt).

¹¹² See G. ALAN TARR & MARY CORNELIA ALSIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 194 (1988).

selected New Jersey because of its national reputation for activism and innovation.¹¹³ Describing the state's highest court forty years after its third reincarnation, Professors Alan Tarr and Mary Porter wrote: "Since World War II, the New Jersey Supreme Court has assumed a role of leadership in the development of legal doctrine, thereby earning for itself a national reputation for activism and legal reformism."¹¹⁴

The New Jersey Supreme Court has been both revered and reviled for such a noted record of "judicial activism."¹¹⁵ In a speech at Rutgers Law School in Newark, New Jersey, Associate Justice Virginia Long proudly stated that the court "has made clear to all New Jerseyans that our state constitution is a separate, valid, and important source of rights for the people of New Jersey."¹¹⁶ Justice Long listed a number of the court's cutting-edge constitutional decisions that addressed controversial social issues ranging from racial profiling¹¹⁷ to parental notification for abortion.¹¹⁸ Long is not the only prominent voice to focus on the court's progressive constitutionalism.¹¹⁹ Harvard Law

¹¹³ See John Patrick Hagan, *Patterns of Activism on State Supreme Courts*, 18 PUBLIUS 97, 97 (1988) ("Three of the courts — California, Michigan, and New Jersey — have been the subjects of extensive prior analysis; they are also widely regarded as being among the three most active and innovative state supreme courts in the nation." (citations omitted)).

¹¹⁴ TARR & PORTER, *supra* note 112, at 184; see also John B. Wefing, *The Performance of the New Jersey Supreme Court at the Opening of the Twenty-First Century: New Case, Same Script*, 32 SETON HALL L. REV. 769 (2001) [hereinafter Wefing, *Performance*] ("In the years after the Constitution of 1947 was adopted, the New Jersey Supreme Court earned a national reputation as an activist, progressive and generally liberal state supreme court." (citations omitted)).

¹¹⁵ In his 1971 study on the role of judges in four state supreme courts (Louisiana, Pennsylvania, New Jersey, and Massachusetts), Henry Glick found that New Jersey judges have a fairly expansive view of their role. According to Glick, "[t]he New Jersey judges believe courts make policy and they tend to innovate and even make proposals to the state legislature . . . In this way, the New Jersey Supreme Court appears to contribute frequently to policy *change* in the state." HENRY ROBERT GLICK, *SUPREME COURTS IN STATE POLITICS: AN INVESTIGATION OF THE JUDICIAL ROLE* 47 (1971).

¹¹⁶ Long, *supra* note 1, at 548.

¹¹⁷ *State v. Carty*, 170 N.J. 632, 635 (2002) (requiring police officers to have "reasonable suspicion" before asking a driver stopped on the highway to agree to a search).

¹¹⁸ *Planned Parenthood of Cent. N.J. v. Farmer*, 165 N.J. 609 (2000) (holding the Parental Notification for Abortion Act, requiring a minor woman to notify her parents before obtaining an abortion, to be unconstitutional).

¹¹⁹ See John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 705 [hereinafter Wefing, *Fifty Years*] ("Additionally, the court has enthusiastically embraced the New Federalism movement. As the United States Supreme Court has become more conservative in recent years, many state courts have chosen to use their state constitutions to grant greater rights than given under the United States Constitution. The New Jersey Supreme Court has regularly done this.")

Professor Duncan Kennedy once described it as the “quintessential liberal activist reformist court in the country,”¹²⁰ and University of Michigan Law Professor Yale Kamisar called the New Jersey Supreme Court “the most innovative in the country.”¹²¹ These comments largely stem from the court’s well-known *Abbott*¹²² and *Mount Laurel*¹²³ decisions,¹²⁴ which attempted to overhaul the state’s educational system and affordable housing program, respectively, through controversial interpretations of the state constitution.¹²⁵ As a result of these high-profile cases, a significant portion of the legal scholarship analyzing the New Jersey Supreme Court has focused on the justices’ “innovative”¹²⁶ constitutional decisions.¹²⁷

(citations omitted)).

¹²⁰ See Symposium, *supra* note 105, at 824 (citing Duncan Kennedy’s speech to New Jersey Judicial College).

¹²¹ Bruce S. Rosen, *A Bold Court Forges Ahead*, NAT’L L.J., Nov. 5, 1984, at 1.

¹²² *Abbott v. Burke*, 100 N.J. 269 (1985).

¹²³ *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 67 N.J. 151 (1975).

¹²⁴ See Wefing, *Fifty Years*, *supra* note 119, at 703 (“The court’s activism and liberalism were particularly evident in the court’s decisions dealing with school funding and low and moderate income housing.”).

¹²⁵ See, e.g., TARR & PORTER, *supra* note 112, at 233 (“Although they have rarely challenged the [United States Supreme] [C]ourt’s authority directly, the justices in Trenton have declined to defer to its judgment and have exploited the leeway available to them to pursue their own constitutional vision.” (emphasis added)).

¹²⁶ See JOHN B. GATES & CHARLES A. JOHNSON, *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 111 (1990) (writing that New Jersey “appears on every list of innovative or prestigious courts”). Even Karen Foster, who argues in a 1999 article in the *Albany Law Review* that the New Jersey Supreme Court is not as independent and progressive as it is portrayed in the popular and scholarly literature, focuses exclusively on the Court’s constitutional jurisprudence. See Karen L. Foster, *High Court Studies: The New Jersey Supreme Court in the 1990s: Independence is Only Skin Deep*, 62 ALB. L. REV. 1501, 1501, 1541 (1999) (analyzing the New Jersey Supreme Court from the Brennan perspective that the United States Supreme Court sets the floor, and not the ceiling, for the protection and advancement of individual rights — thereby allowing state high courts to use their state constitutions to advance individual civil rights and liberties — Foster argues that “there have certainly not been many shining examples of independent state constitutional adjudication from the New Jersey Supreme Court”). Foster adds: “While it has gone farther than many state high courts by consistently recognizing that the opportunity for greater rights exists under the state constitution, it has taken few strides to develop these rights.” *Id.* at 1541.

¹²⁷ See, e.g., Lawrence Berger, *Inclusionary Zoning Devices as Takings: The Legacy of the Mount Laurel Cases*, 70 NEB. L. REV. 186 (1991); John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665 (1996); see also Paul L. Tractenberg, *Beyond Educational Adequacy: Looking Backward and Forward through the Lens of New Jersey*, 4 STAN. J. C.R. & C.L. 411 (2008); Jeremiah Lenihan, Note, *Lurking Behind the Shadow of Enduring Reform?*

III. WHAT ABOUT THE STATUTES? — DEARTH OF STATE SCHOLARSHIP & RISE OF MODIFIED TEXTUALISM

The court's docket, however, is not only comprised of constitutional cases.¹²⁸ Like most high court dockets in the nation, the New Jersey Supreme Court hears a large number of statutory cases.¹²⁹ Yet in spite of the significance and pervasiveness of statutory cases before the court, there has been no systematic analysis of such decisions. Although law students and scholars have touched upon the subject,¹³⁰ I am not aware of any recent, scholarly attempt to dissect the court's interpretive toolbox in order to discern its methodology — or lack thereof — for deciding statutory cases.¹³¹ The lack of scholarship in

School Funding and New Jersey's School Funding Reform Act of 2008, 34 SETON HALL LEGIS. J. 119 (2009). Outside of constitutional law, there has been some scholarship focusing on the New Jersey Supreme Court's innovations in the realm of tort law. See, e.g., TARR AND PORTER, *supra* note 112, at 225 (discussing the New Jersey Supreme Court's groundbreaking tort rulings regarding products liability); Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975, 978 (1981) (ranking the New Jersey judicial system as the most innovative in tort law during the post-War era); Wefing, *Performance*, *supra* note 114, at 814-18 (covering the New Jersey Supreme Court's liberal constitutionalism in the areas of tort reform, the death penalty, school funding, and criminal procedure).

¹²⁸ For a novel discussion of the impact statutes have on modern-day constitutionalism, see WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 6 (2010) ("The Constitution pervasively depends upon statutes to fill in the huge holes in our governance structure and norms.").

¹²⁹ See Judith S. Kaye, *State Courts at the Dawn of a New Century*, 70 N.Y.U. L. REV. 74 (2000); see also ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION*, *supra* note 26, at 1 (arguing that statutory cases are so pervasive because "[t]hroughout Western history, obeying the law has depended on the interpretation of statutes"). State courts are not only busy interpreting state statutes but most interpretation of *federal* statutes also takes place in state courts. See Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. (forthcoming June 2011) (manuscript at 108 n.12) [hereinafter Gluck, *Intersystemic Statutory Interpretation*] (citing Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 362 (2002)), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680020.

¹³⁰ See Note on the Norplant Case and State Court Reliance on Committee and Bill Reports, in EFG CASES, *supra* note 78, at 998 [hereinafter Note]; see also Scott Fruehwald, *Pragmatic Textualism and the Limits of Statutory Interpretation: Dale v. Boy Scouts of America*, 35 WAKE FOREST L. REV. 973, 974 (2000) (criticizing the New Jersey Supreme Court for "exceed[ing] the limits of statutory interpretation" in the highly controversial decision regarding homosexuals and the Boy Scouts of America organization). Right before the timeframe of my dataset, the New Jersey Supreme Court handed down *Dale v. Boy Scouts of America*, which was eventually overturned by the United States Supreme Court. *Dale v. Boy Scouts of Am.*, 160 N.J. 562 (1999), *rev'd*, 530 U.S. 640, 661 (2000).

¹³¹ For a less recent analysis that focuses on the entire New Jersey judicial system's use

this area is not overly surprising. Gluck notes in her recently published *Yale Law Journal* article on statutory interpretation in state courts that current legislation scholars are obsessively focused on the tiny fraction of cases in the federal court system.¹³² In fact, Gluck and Mercer Law Professor Linda Jellum¹³³ are the only two scholars who have attempted any comprehensive study of *modern* statutory interpretation at the state level.¹³⁴ Jellum, however, focused on legislative interpretive rules and their ramifications for the separation-of-powers debate.¹³⁵ Gluck, on the other hand, analyzed cases from five state supreme courts (Oregon, Texas, Connecticut, Wisconsin, and Michigan) to support her thesis regarding the use of “Modified Textualism” in state high courts across the nation. Under Gluck’s “Modified Textualism,” courts first look to the text to divine a statute’s meaning. If the meaning is clear, the interpretive process ends there, without any reference to extrinsic sources. The justices only move to the second tier to consult the statute’s legislative history if they find the text ambiguous. The rigid analytical framework concludes with tier three, judicial canons of statutory construction, which the justices only resort to if the text *and* legislative history fail them.¹³⁶ Gluck argues that the theory of “Modified

of extrinsic aids in statutory interpretation, see Bowen, *supra* note 21.

¹³² See Gluck, *States as Laboratories*, *supra* note 47, at 1753-55 (providing the “first close study of modern statutory interpretation in several state courts of last resort,” she writes: “The vast majority of statutory interpretation theory is based on . . . the mere two percent of litigation that takes place in our federal courts”).

¹³³ Linda D. Jellum, “Which is to be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 875 (2009). For scholarship focusing on legislative interpretive rules, see Scott, *supra* note 50 (providing a comprehensive fifty-state survey of the codified canons of statutory interpretation).

¹³⁴ For an analysis of the use of legislative history by Wisconsin state courts, see Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161, 219 (1996) (noting that the state’s courts have not repudiated the use of legislative history but have become more careful about referencing it in the age of Scalia).

¹³⁵ For scholarship analyzing earlier periods, see Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501 (2006) (focusing on early American statutory interpretation in the state courts); William N. Eskridge, Jr., *All About Words: Early Understandings of the ‘Judicial Power’ in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001) [hereinafter Eskridge, *All About Words*] (highlighting early New Jersey statutory decisions to be discussed *infra*).

¹³⁶ Gluck, *States as Laboratories*, *supra* note 47, at 1758 (describing Modified Textualism’s “strict hierarchy,” which “emphasizes textual analysis (step one); limits the use of legislative history (only in step two, and only if textual analysis alone does not suffice); and dramatically reduces reliance on the oft-used policy presumptions, the ‘substantive canons’ of interpretation (only in step three, and only if all else fails)”).

Textualism” is unique in that it not only establishes a clear methodological order for approaching statutory cases but also elevates text while still allowing for the use of Scalia’s *bête noir*: legislative history.¹³⁷

Trying to weave together the statutory case law from five state high courts, Gluck understandably provides only one New Jersey Supreme Court case citation.¹³⁸ The reference to *Pizzullo v. New Jersey Manufacturers Insurance Co.* is included in a long footnote, along with cases from a number of other jurisdictions, to support her preliminary view that most state high courts similarly embrace some form of Modified Textualism.¹³⁹ Yet Gluck admits that her broader findings (in states other than Oregon, Texas, Connecticut, Wisconsin, and Michigan) are extremely premature and require verification.¹⁴⁰ Accepting Gluck’s challenge, I turned my focus to the New Jersey Supreme Court,¹⁴¹ which is hardly known for its rigid adherence to

¹³⁷ *Id.* at 1759.

¹³⁸ *Id.* at 1844 n.353 (citing *Pizzullo v. N.J. Mfrs. Ins. Co.*, 196 N.J. 251 (2008)).

¹³⁹ *Id.* at 1844 (“The majority of state courts may now routinely apply the basic modified textualist rule: first step, text only; if ambiguity is found, then second step, legislative history.”).

¹⁴⁰ *See id.* (“These observations are extremely tentative; close readings of cases across the fifty states are required to confirm them and to determine if the courts are acting consistently.”).

¹⁴¹ Adapting Gluck’s case selection methodology to Westlaw Next, I read the entire population of cases located through the following search strategy: Restricting my “Advanced Search” to New Jersey Supreme Court cases (accessed through the “State Materials” tab), I entered “legislative history” into “Find documents that have – All of these terms” and entered the date range 01-01-2000 – 12-31-2009 into “Document Fields – Date.” The advanced search returned 203 cases, which I then sorted by date. In order to confirm the size of my dataset, I ran a similar search in LexisNexis. I restricted my search to New Jersey Supreme Court cases within the same date range (01-01-2000 – 12-31-2009) and then inserted “leg! hist!” under “terms and connectors.” The search returned 207 cases, which I deemed sufficiently similar in size to proceed. In regards to the selection of ten years, I was looking for a manageable time period that would take into account the increasing influence of Justice Scalia’s textualism at the federal level and the appointment of New Jersey Supreme Court Chief Justices by both political parties. By focusing on “legislative history,” I admit that my search process was somewhat flawed in that the best examples of “modified textualism” may not include any references to “legislative history” because the majority strictly relied on unambiguous text. Thus, in order to ensure a more complete dataset, I ran a supplemental Westlaw Next search in which I kept the same timeframe for New Jersey Supreme Court cases but removed “legislative history” and instead inserted “statutes” in the “Document Fields – Headnote.” The advanced search returned ninety cases, which I then sorted by date. Of the ninety cases, I read, coded, and included the forty-six that did not appear in my initial search, thus providing a complete dataset of 249 cases. Not surprisingly, many of the forty-six cases involved disputes over the application of statutes of limitations.

textualism.¹⁴²

In the now decade-old case *Perez v. Wyeth*,¹⁴³ which restricted the application of the learned intermediary doctrine to products *not* directly marketed to consumers, Justice Pollock sharply criticized the court in his dissent: “The majority opinion sustains itself only by ignoring the plain language of an unambiguous statute, the New Jersey Products Liability Act, and by substituting its own policy preference for that of the Legislature.”¹⁴⁴ Citing the court’s own precedent, Pollock argued for adherence to Modified Textualism’s first tier: “When a statute is clear, a court need not look beyond the statutory language to discover the legislative intent.”¹⁴⁵ Yet even Justice Pollock, in the midst of his heated dissent, cited the “passed bill memorandum” prepared for Governor Kean to support his argument regarding the true legislative intent.¹⁴⁶ Although the fact that he was writing in dissent may have influenced his choice of sources,¹⁴⁷ Justice Pollock was nonetheless unsatisfied with what he himself adamantly declared to be “the plain language of an

See, e.g., *Price v. N.J. Mfrs. Ins. Co.*, 182 N.J. 519, 525 (upholding an equitable tolling of the statute of limitations related to the recovery of uninsured motorist benefits). As noted above, I separated out the opinions handed down under Chief Justice Zazzali, who served as Chief Justice for approximately one year in between the terms of Chief Justice Poritz and Chief Justice Rabner. In order to be thorough, I made sure to read the Zazzali Court’s decisions to avoid missing any potentially glaring inconsistencies in the court’s statutory jurisprudence. Not surprisingly, I did not find anything out of the ordinary during Zazzali’s short tenure. The twenty-eight Zazzali cases run from Rows 55-82 in the Appendix.

¹⁴² *See Note, supra* note 130 (“New Jersey courts are among the most willing to rely on legislative history to construe statutes; judges in that state are willing to consider committee reports whether or not the statute’s text is ambiguous.” (citations omitted)).

¹⁴³ *Perez v. Wyeth Labs., Inc.*, 161 N.J. 1, 32 (1999). The court’s approach in *Perez* is so well known that it is one of the only state supreme court decisions in the leading casebook on statutory interpretation. *See EFG CASES, supra* note 78, at 814-18.

¹⁴⁴ *Perez*, 161 N.J. at 33 (Pollock, J., dissenting) (citations omitted); *see also id.* at 42 (“To conclude, when enacting the NJPLA, the Legislature chose to confine the expansion of product liability law. The majority’s preference for a different policy does not justify ignoring the one chosen by the Legislature.”).

¹⁴⁵ *Id.* at 35 (citing *State v. Kittrell*, 145 N.J. 112, 123 (1996)).

¹⁴⁶ *Id.*

¹⁴⁷ Justice Pollock also cited the Senate Committee statement that accompanied the bill. *See id.* at 35-36. Yet the New Jersey Product Liability Act was somewhat unique in that it specifically provided that “committee statements that may be adopted or included in the legislative history of this act shall be consulted in the interpretation and construction of this act.” N.J. STAT. ANN. § 2A:58C-1a (West 2011). Given that aspect of the bill, I did not include Justice Pollock’s citation to the Senate committee statement as an example of a non-textual reference and instead relied upon a non-committee statement to demonstrate his use of an extrinsic source. It is beyond the scope of this Article to address the role of legislative history in statutes that require justices to consult such sources in conjunction with the text.

unambiguous statute.”¹⁴⁸ *Perez*, decided right before the timeframe of my study, reveals the court’s internal struggle between purposivism and textualism — both of which are carried out in the name of intentionalism.

IV. THE PORITZ COURT’S EMBRACE OF THE “FUNNEL OF ABSTRACTION”¹⁴⁹

The Poritz Court,¹⁵⁰ led by Chief Justice Deborah Poritz, was first and foremost committed to carrying out the legislature’s intent. In repeated statutory decisions, the court made clear that the most important “goal in interpreting statutes is to discern and to give effect to the underlying legislative intent.”¹⁵¹ Yet the court sought to “effectuate the legislative intent in light of the language used *and the objects sought to be achieved.*”¹⁵² Thus, the court did not generally announce a

¹⁴⁸ *Perez*, 161 N.J. at 33.

¹⁴⁹ The Poritz Court may have implicitly accepted the Eskridge/Frickey premise that “standing alone, textualist and archeological approaches to statutory interpretation are overly simplistic techniques” that lack a certain degree of legitimacy. Eskridge & Frickey, *Practical Reasoning*, *supra* note 75, at 383. But the Poritz Court, which rarely referred to general societal norms or evolving public standards in its decisions, did not go so far as to utilize “all the relevant factors and all [the] problem-solving skills” associated with the Eskridge/Frickey funnel. *Id.* (emphasis added).

¹⁵⁰ The Poritz’s Court more free-wheeling interpretive methodology, as compared to that utilized by the Rabner Court (discussed *infra*) may help explain the court’s lower percentage of unanimous decisions (49.7% vs. 53.7%) and higher percentage of opinions in which concurrences were filed (23.4% vs. 11.1%) (Separately written decisions that concurred in part and dissented in part were coded as if a concurrence and a dissent had been filed in the case). Needless to say, the Rabner Court calculations are based on a smaller sample size. By focusing on the last decade, moreover, I measured the end of the Poritz Court’s tenure and the beginning of the Rabner Court’s tenure, when the latter was more susceptible to the common “honeymoon” period experienced under a new chief justice. See Pamela Corley, Amy Steigerwalt & Artemus Ward, *The Chief Justice of the United States: Uniter or Divider?* (July 25, 2007) (unpublished manuscript), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/1/8/1/6/9/p181694_index.html (discussing the “honeymoon effect” experienced by new chief justices). Nonetheless, the percentages of cases in which dissents were filed were nearly identical (43.1% for the Poritz Court and 44.4% for the Rabner Court). Thus, there does not appear to have been much of a honeymoon for the Rabner Court.

¹⁵¹ *James v. Bd. of Trs. of Pub. Emps. Ret. Sys.*, 164 N.J. 396, 404 (2000) (citation omitted); see also *Stryker Corp. v. Dir., Div. of Taxation*, 168 N.J. 138, 157 (2001) (“[T]he paramount purpose of construing a statute [is] to ascertain the legislative intent.” (citations omitted)).

¹⁵² *McCann v. Clerk of City of Jersey City*, 167 N.J. 311, 320 (2001) (emphasis added) (citation omitted).

commitment to Modified Textualism.¹⁵³ In the cases in which it did, moreover, the majority usually created a more expansive tier two that not only included legislative history but also general statutory purpose.¹⁵⁴ In a 2004 decision dealing with New Jersey's Consumer Fraud Act, the court cited its own precedent to state: "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."¹⁵⁵ Writing for a unanimous court, Justice Zazzali added: "[I]f 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. The court considers extrinsic factors, *such as the statute's purpose, legislative history, and statutory context* to ascertain the Legislature's intent."¹⁵⁶ A broader second tier is not overly surprising given that the Poritz Court was ultimately less interested in text-driven intentionalism and more committed to a looser form of purpose-driven intentionalism that simply began with the text.¹⁵⁷ In *New Jersey v.*

¹⁵³ The Poritz Court had plenty of modified textualist-driven precedents to cite, especially *DiProspero v. Penn* (discussed in Part V *infra* as one of the key citations for the Rabner Court), which was decided during its tenure. *DiProspero v. Penn*, 183 N.J. 477, 492-93 (2005); *see also* *Lozano v. Frank Deluca Constr.*, 178 N.J. 513, 522 (2004) ("Interpretation of a statute begins with 'the plain meaning of the provision at issue.' When 'the statutory language is clear and unambiguous, and susceptible to only one interpretation, courts should apply the statute as written without resort to extrinsic interpretative aids.' However, if two interpretations of the language are plausible, a reviewing court must interpret the statute to effectuate the legislative intent, utilizing extrinsic evidence when it is helpful." (citations omitted)).

¹⁵⁴ *See, e.g., State v. Livingston*, 172 N.J. 209, 218 (2002) ("As a general rule of statutory construction, we look first to the language of the statute. 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.' If the text is susceptible to different interpretations, we look beyond the literal words of the statute and consider 'extrinsic factors, *such as the statute's purpose, legislative history, and statutory context* to ascertain the [L]egislature's intent.'" (emphasis added) (citations omitted)).

¹⁵⁵ *State v. Pena*, 178 N.J. 297, 307 (2004) (citing *State v. Thomas*, 166 N.J. 560, 567 (2001)) (dealing with the purchase of prepaid long distance phone cards that did not provide the advertised savings on rates).

¹⁵⁶ *Id.* (emphasis added); *see also* *Clymer v. Summit Bancorp.*, 171 N.J. 57, 66 (2002) ("If the text . . . is susceptible to different interpretations, the court considers extrinsic factors, such as the statute's purpose, legislative history, and statutory context to ascertain the legislature's intent." (citations omitted)).

¹⁵⁷ *See, e.g., Lafage v. Jani*, 166 N.J. 412, 431 (2001) ("When all is said and done, the matter of statutory construction . . . will not justly turn on literalisms . . . or the so-called formal rules of interpretation; it will justly turn on the breadth of the objectives of the legislation and the commonsense of the situation." (citations omitted)); *In re Distrib. of Liquid Assets upon Dissolution Reg'l High Sch. Dist. No. 1*, 168 N.J. 1, 17-18 (2001) ("To

Bunch,¹⁵⁸ the court had to determine whether a second-degree eluding statute applied to a defendant who only endangered himself during the chase.¹⁵⁹ In the unanimous opinion, the majority dutifully began with the statute's text and indicated the court's obligation to end its analysis in the face of unambiguous text.¹⁶⁰ The majority proceeded to determine that "there [was] no facial ambiguity in the eluding statute," and therefore, the court "[had] no reason to resort to extrinsic aids such as legislative history."¹⁶¹ Yet the very next sentence indicated that the justices did in fact look to the legislative history. How else could the court have known that "in this case the legislative history provided no meaningful assistance in resolving the question before [them]?"¹⁶² In *State v. Crawley*,¹⁶³ the court declared its fidelity to legislative intent and began with the text, which the majority determined was ambiguous. As a result of the competing textual interpretations, the majority consulted judicial canons and legislative history, which comprise Gluck's second and third tiers, respectively¹⁶⁴ — thus creating a super-second tier. The

hold otherwise would be to ignore the clear overriding purpose of the statutory framework in favor of ritualistic application of statutory language divorced from context."). Whether she realized it or not, Chief Justice Poritz was in many ways adhering to the state courts' early judicial practice of "tempering statutory words with factual, common law, and other contexts." Eskridge, *All About Words*, *supra* note 135, at 1011. In his article analyzing early judicial practice in the states following the American Revolution, Eskridge writes that New Jersey judges — like their late 18th century counterparts in the other states he studied — did not restrict themselves to the statutory text but rather "considered statutory goals and spirits, the common law, natural law and common sense, and constitutional values relevant to the application of statutes." *Id.* at 1012 (citing *Ex'rs of Barracliff v. Admin. of Griscom*, 1 N.J.L. 224 (Sup. Ct. 1793); *Smith v. Minor*, 1 N.J.L. 16 (1790)).

¹⁵⁸ *New Jersey v. Bunch*, 180 N.J. 534 (2004).

¹⁵⁹ *Id.* at 538 ("Under N.J.S.A. 2C:29-2b, a person is guilty of second-degree eluding if, 'while operating a motor vehicle on any street or highway in this State,' the driver 'knowingly flees or attempts to elude any police or law enforcement officer after having received any signal from such officer to bring the vehicle . . . to a full stop . . . [and] the flight or attempt to elude creates a risk of death or injury to *any person*.' The primary issue in this appeal is whether the term 'any person' . . . includes the eluding defendant.").

¹⁶⁰ *Id.* at 543 ("Consistent with our well-established rules of statutory construction, we begin with the *text* of the statute. If the statutory language lends itself to only one interpretation and that interpretation is consistent with the overall legislative scheme, we must 'apply the statute as written *without resort to extrinsic interpretive aids*.' Embedded in that canon of construction is the recognition that the terms used in a statute, if unambiguous in meaning, are the clearest indicators of legislative *intent*." (emphasis added) (citations omitted)).

¹⁶¹ *Id.* at 546 (citations omitted).

¹⁶² *Id.* at 547.

¹⁶³ *State v. Crawley*, 187 N.J. 440, 452-53 (2006).

¹⁶⁴ *See id.* at 453 ("Because the face of the statute might suggest plausible alternative

court, moreover, did not feel the need to find ambiguity in one before moving on to the other, but rather considered both reliable extrinsic aids in the face of textual ambiguity.

The Poritz Court, therefore, had actually adopted a method far closer to William Eskridge and Phillip Frickey's "practical reasoning approach" to statutory interpretation.¹⁶⁵ According to Eskridge and Frickey (and as discussed in Part I.B. *supra*), judges do not limit themselves to one piece of evidence but rather look to a number of reference points that together form a "Funnel of Abstraction."¹⁶⁶ The hierarchical funnel begins with more concrete sources and then becomes increasingly abstract as it proceeds from the specific "rule of law" category to the more general grouping of "democratic values," and finally, to the even more malleable "justice norms." Like Gluck's model, the method of interpretation begins with text and includes legislative history,¹⁶⁷ but the modality differs in that it does not contain strict tiers.¹⁶⁸ Instead of stopping at any one point — as Gluck adherents will, at step one in the case of unambiguous statutory text or at step two in the case of ambiguous statutory text but unambiguous legislative history — "the interpreter will move up and down the diagram, evaluating and comparing the different considerations represented by

interpretations, we next look at related statutes and legislative history to shed light on the contested language" (citing 2B Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 51.03 (5th ed. 1992) ("Statutes are considered to be in *pari materia* when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object.")) (footnote omitted)).

¹⁶⁵ Eskridge & Frickey, *Practical Reasoning*, *supra* note 75, at 351.

¹⁶⁶ *Id.* at 353.

¹⁶⁷ The funnel is formally comprised of the following levels (from "most concrete" to "most abstract"): Statutory Text; Whole Act and Integration into Structure of Law; Imaginative Reconstruction and Legislative History; Legislative Purpose; Evolution of Statute; Current Values. Eskridge & Frickey, *Practical Reasoning*, *supra* note 75, at 353-62. However, I took a more expansive view of the funnel and coded for additional external factors, as long as they fell under the three broad categories of "textual, historical, and evolutive" considerations. Needless to say, I did not re-code for the Gluck tiers but rather only included additional factors consulted according to the funnel.

¹⁶⁸ Although text forms the concrete foundation of the funnel, it is still more paramount in Gluck's model in which it is the sole component of Modified Textualism's first tier. The Poritz Court often began with the text but also lumped it together with other funnel components when interpreting statutes. *See, e.g., Liberty Mut. Ins. Co. v. Land*, 186 N.J. 163, 168 (2006) (looking to the Insurance Fraud Protection Act's "plain language, statutory purpose, and penalties to determine whether the Legislature addressed the question. Finally, we examine prior case law addressing the issue.").

each source of argumentation.”¹⁶⁹ This does not mean that the judges will necessarily apply every funnel component, but rather that they will weigh the relative value of each in the individual cases before them and then consult where applicable. The majority’s “funnel” in *State v. Pena* may not have been an exact replica of the Eskridge/Frickey model, but it similarly moved beyond the text to include statutory purpose, legislative history, and statutory context — the latter of which often includes structure and precedent.¹⁷⁰ In *Miah v. Ahmed*,¹⁷¹ a unanimous Poritz Court determined that a displaced tenant was entitled to relocation assistance, calculated at six times his regular rent based on the “unambiguous statutory language.”¹⁷² Far from stopping at the text, however, the court also considered the statute’s “public-policy objectives.”¹⁷³ The purpose-driven inquiry included an examination of the statute’s evolution in the legislature,¹⁷⁴ use of the judicial canon “*noscitur a sociis*,”¹⁷⁵ references to legislative history,¹⁷⁶ deference to state agency interpretations,¹⁷⁷ and consideration of “the remedial goals of the section’s statutory scheme.”¹⁷⁸ Although the court did not necessarily “slide up and down the funnel,”¹⁷⁹ it also did not limit itself to Gluck’s rigid regime. In *Mani v. Mani*,¹⁸⁰ an alimony case, the

¹⁶⁹ Eskridge & Frickey, *Practical Reasoning*, *supra* note 75, at 353.

¹⁷⁰ See *State v. Pena*, 178 N.J. 297, 308 (2004).

¹⁷¹ *Miah v. Ahmed*, 179 N.J. 511, 515 (2004).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 518. “Evolution” is one of the funnel’s more abstract components. See Eskridge & Frickey, *Practical Reasoning*, *supra* note 75, at 358.

¹⁷⁵ *Miah*, 179 N.J. at 521 (“[T]he meaning of words [used in a statute] may be indicated and controlled by those [words] with which they are associated.” (citing *Germann v. Matriss*, 55 N.J. 193, 220 (1970))).

¹⁷⁶ *Id.* at 523 (citing Assemb. 2267, 1993 Sess., 205th Leg., at 1 (N.J. 1993)).

¹⁷⁷ *Id.* at 524 (noting that the Department of Community Affairs’ “interpretation of section h provides even further support for [the court’s] conclusion” and referencing the Agency’s May 1995 memorandum to its relocation officers). The unanimous court explained: “Although we are not bound by an agency’s interpretation of a statute, we generally accord it substantial deference when the Legislature has entrusted the agency with the statute’s enforcement.” *Id.* (citation omitted).

¹⁷⁸ *Id.* at 523.

¹⁷⁹ ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 26, at 56 (“The interpreter does not view the statutory text in isolation, but reads it in connection with the legislative history, statutory practice and precedents, and current norms and values.”).

¹⁸⁰ *Mani v. Mani*, 183 N.J. 70, 72 (2005) (reversing the holding of the intermediate appellate court, the court found that marital fault should not be taken into consideration when calculating alimony under § 2A:34-23(b) unless the fault had an adverse effect on the

majority similarly engaged in a fairly eclectic analysis that examined “the purposes underlying alimony, the words of the alimony statute, [and] the legislative history behind the act”¹⁸¹ The decision, particularly the discussion of certain forms of “outrageous” conduct that “violate the social contract,” represented the funnel’s most abstract “norms” component.¹⁸² Yet the most notable aspect of the decision was that the opinion *began* with a discussion of the history of alimony dating back to “early England.”¹⁸³

In some instances, although few and far between, the court began with the text but then disregarded the literal reading in the name of carrying out the statute’s spirit or purpose.¹⁸⁴ In *Perez v. Rent-A-Center, Inc.*,¹⁸⁵ for example, the court examined the rent-to-own industry in which consumers can rent household appliances and other retail goods with the option to purchase them at the end of their lease. In order to determine the validity of the contracts under the Retail Installment Sales Act (hereinafter “RISA”), the court began with the statutory text.¹⁸⁶ Yet once the court determined that the contracts were “not a perfect fit with the words of the statute,” and therefore, not subject to regulation under RISA, it cited a 1957 decision by former Chief Justice Joseph Weintraub in which he declared: “[C]ases inevitably arise in which a literal application of the language used would lead to results incompatible with the legislative design.”¹⁸⁷ The court proceeded to cite

finances of either party or was especially egregious).

¹⁸¹ *Id.* at 92-93.

¹⁸² *Id.* at 92 (noting that certain examples, such as “[d]eliberately infecting a spouse with a loathsome disease,” embody “the concept that some conduct, by its very nature is so outrageous that it can be said to violate the social contract, such that society would not abide continuing the economic bonds between the parties”).

¹⁸³ *Id.* at 78.

¹⁸⁴ *See, e.g.,* *DeLisa v. Cnty. of Bergen*, 165 N.J. 140, 147 (2000) (ruling in favor of the employee in a Conscientious Employee Protection Act case, the court explained, “A settled principle is that ‘statutes are to be read sensibly rather than literally and the controlling legislative intent is to be presumed as ‘consonant to reason and good direction’” (citations omitted)). The court also justified its non-textual decision via the doctrine against absurd results. *Id.* Instead of relying on the text, the court employed a funnel approach, relying on “statutory purpose, CEPA’s legislative history and precedents from other jurisdictions.” *Id.* at 146.

¹⁸⁵ *Perez v. Rent-A-Ctr., Inc.*, 186 N.J. 188, 193 (2006).

¹⁸⁶ *Id.* at 205 (“At issue is whether Perez’s transaction with Rent-A-Center constitutes a retail installment sales contract. RISA defines a “retail installment contract” as follows” (citations omitted)).

¹⁸⁷ *Id.* at 208 (citing *New Capitol Bar & Grill Corp. v. Div. of Emp’t Sec.*, 25 N.J. 155, 160 (1957) (“It is frequently difficult for a draftsman of legislation to anticipate all

RISA's overall legislative purpose of protecting the public in order to hold that the contracts in question were covered, thereby reinstating Perez's claims under the statute.¹⁸⁸ Yet even in this decision, the court did not restrict itself to text and purpose but also utilized judicial canons of construction¹⁸⁹ and referenced other funnel factors, such as legislative history,¹⁹⁰ to address Rent-A-Center's arguments.¹⁹¹

Critics of the Poritz court's funnel-driven approach may argue that it is not an approach at all but rather a free-wheeling methodology bereft of logical consistencies. Some of the justices on the court advocated for greater fidelity to the literal text. In his *Trinity Cemetery Association, Inc. v. Township of Wall* concurrence, Justice Verniero agreed with the majority's two holdings but took issue with his colleagues' reliance on legislative history in reaching them.¹⁹² Justice Verniero did not dispute that the legislative history supported the majority's conclusion; he just felt that "one need look no further than the plain language of the Act to reach that result."¹⁹³ Arguing for the literal enforcement of the statute's terms, Verniero even took a passing shot at the majority by citing United States Supreme Court Justice Felix

situations and to measure his words against them.")). The court, citing its own precedent, added: "It is not the meaning of isolated words, but the internal sense of the law, the spirit of the correlated symbols of expression, that we seek in the exposition of a statute." *Id.* at 209 (citing *Caputo v. Best Foods, Inc.*, 17 N.J. 259 (1955)).

¹⁸⁸ *Id.* at 209 ("In enacting RISA, the stated legislative purpose was protection of the public interest through the regulation of the charges associated with the time sale of goods.").

¹⁸⁹ *See id.* at 209 (construing remedial statutes liberally); *id.* at 211 ("[W]hen the Legislature utilizes words that have previously been the subject of judicial construction, it is deemed to have used those words in the sense that has been ascribed to them." (citations omitted)).

¹⁹⁰ *See id.* at 215 (citing Governor Brendan Byrne, Statement in Signing S. 3005 and S. 3101 (Mar. 31, 1981)). The court explained, "[I]t is well-established that the governor's action in approving or vetoing a bill constitutes a part of the legislative process, and the action of the governor upon a bill may be considered in determining legislative intent." *Id.* (citations omitted).

¹⁹¹ The court put heavy emphasis on the fact that Senate bill 3005, which removed interest rate caps in RISA, was passed during the same legislative window, by the same sponsors, as Senate bill 3101, which amended the criminal usury statute to create a new interest rate cap ceiling that trumped the language of S. 3005. In addition to the court's textual argument regarding the explicit interaction of the two statutes, it also noted "that statutes that are adopted on the same day should be read *in pari materia*" *Perez*, 186 N.J. at 214 (citations omitted).

¹⁹² *Trinity Cemetery Ass'n, Inc. v. Wall*, 170 N.J. 39, 44-47 (2001).

¹⁹³ *Id.* at 49 (citing *State v. Butler*, 89 N.J. 220, 226 (1982) to support his point that "legislative history need not be considered when [the] statute is ambiguous on its face").

Frankfurter: “Construction, no doubt, is not a mechanical process But there is a difference between reading what is and rewriting it.”¹⁹⁴ In *Marshall v. Klebanov*, Justice Rivera-Soto offered a stinging dissent in which he chastised the majority for disregarding the unambiguous, plain language of the statute.¹⁹⁵ In an emotionally charged case involving a suicide and claims of psychiatric malpractice, the majority made no attempt to hide its preference for the statute’s spirit over the text;¹⁹⁶ Justice Rivera-Soto, who opened his dissent with the statutory text, refused to go along with his peers.¹⁹⁷

Yet the Poritz Court’s adoption of the Eskridge/Frickey Funnel of Abstraction is in accord with Todd Rakoff’s essay in the *Northwestern University Law Review* in which the Harvard Law Professor attacks restrictive monolithic approaches to statutory interpretation.¹⁹⁸ Rakoff is primarily concerned with the rise of methodological *stare decisis*, a theory advanced by Gluck,¹⁹⁹ arguing that such restrictive and

¹⁹⁴ *Id.* (citing *Shapiro v. United States*, 335 U.S. 1, 42-43 (1948) (Frankfurter, J., dissenting)).

¹⁹⁵ *Marshall v. Klebanov*, 188 N.J. 23, 42 (2006).

¹⁹⁶ *Id.* at 37 (“[W]ords may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms.” (citations omitted)).

¹⁹⁷ *Id.* at 42 (“The application of the legislative construct to this case is simple and direct. Because the majority agrees that defendant did not incur a duty to ‘warn and protect,’ the mandated conclusion is self-evident from the plain language of the statute”).

¹⁹⁸ See Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV 1559, 1560 (2010).

¹⁹⁹ For the purposes of this paper, I do not address the issue of methodological *stare decisis*, which is a major component of Abbe Gluck’s work on statutory interpretation at the state level. She notes that “[i]n the watershed case, *Portland General Electric Co. v. Bureau of Labor and Industries*, [859 P.2d 1143 (Or. 1993)], the [Oregon Supreme] [C]ourt unanimously announced a three-step methodology to control all future statutory interpretation questions.” Gluck, *States as Laboratories*, *supra* note 47, at 1775. Although the court later appeared to reverse course in *Gaines v. State*, 169 P.3d 1268 (Or. 2007), the “sixteen-year period” represented a bold step in the field of statutory interpretation. See Gluck, *States as Laboratories*, *supra* note 47, at 1776. Similar to the United States Supreme Court, however, the New Jersey Supreme Court has never attempted to bind itself methodologically. Although my dataset reveals a heavy reliance on case law precedent (to the point where I stopped coding for it because it was so ubiquitous), I did not see any attempt by the court to institute a system of methodological *stare decisis* for statutory cases. From a normative standpoint, I am also torn between the benefits of methodological *stare decisis* outlined by Gluck and the drawbacks of such an approach outlined by Leib and Serota. Compare Gluck, *States as Laboratories*, *supra* note 47, at 1798 (noting the rule-of-law benefits, including predictability and consistency for all involved actors, offered by methodological *stare decisis*), with Leib & Serota, *supra* note 69, at 48 (arguing that “there are distinctive, underappreciated benefits that result from methodological diversity and

unpredictable approaches stifle the interpretive process.²⁰⁰ But Rakoff's emphasis on the existence of many different kinds of statutes is not as relevant as his normative description of "[s]tatutory interpretation [as] more open-ended, more dependent on wisdom — and . . . more interesting — than the search for a comprehensive but monistic theory allows."²⁰¹ The Poritz Court's funnel bridges the gap between Rakoff's two poles, combining a wide range of sources capable of offering wisdom to the interpreters with an overarching structure. Poritz would agree with Rakoff that judges should and "are pursuing their craft by choosing the right tool for the varying tasks at hand."²⁰² That broad range of tools can be located in the funnel, which offers choice within a restricted framework. The funnel, and by extension the Poritz Court's methodological approach, may not neatly fit with one form of textualism or another, but that does not mean it lacks methodological ordering. The funnel itself, like Modified Textualism, is simply another interpretive option for judges.

V. THE RABNER COURT'S EMBRACE OF "MODIFIED TEXTUALISM-LITE"

Abbe Gluck read *Pizzullo* (her one New Jersey case citation) correctly: in a unanimous decision, Justice Hoens explained that the court looks "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."²⁰³ But when "the language is not clear and unambiguous on its face, [the justices] look to other interpretive aids to assist [them] in [their] understanding of the

make our current regime of dissensus a more desirable approach."'). For a forceful defense of the normative benefits of *stare decisis* in the realm of statutory interpretation, see Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1863 (2008) (arguing "not only that courts should give doctrines of statutory interpretation methodology *stare decisis* effect, but also that courts should give even stronger *stare decisis* effect to doctrines of statutory interpretation than they give to doctrines of substantive law").

²⁰⁰ Rakoff, *supra* note 198, at 1560 (arguing that "there are many legitimate and useful modes of statutory interpretation" and that "no theory that would justify its being the 'consistently applied theory of statutory interpretation'").

²⁰¹ *Id.* at 1586.

²⁰² *Id.* at 1560.

²⁰³ *Pizzullo v. N.J. Mfrs. Ins. Co.*, 196 N.J. 251, 264 (2008) (citing *Roberts v. State Police*, 191 N.J. 516, 521 (2007)).

Legislature's will."²⁰⁴ Deeming the term "election" to be ambiguous, Hoens proceeded to quote from the Senate Sponsor's Statement and from the Commerce Committee's Statement to help craft her opinion.²⁰⁵ Thus, the justice's decision represents the very embodiment of Gluck's "Modified Textualism," at least in terms of the first two rigid tiers. Gluck's footnote, however, does not mention that intentionalism,²⁰⁶ bordering on purposivism, drove the decision. Hoens stated that the justices' statutory "analysis requires that [they] first consider the meaning and intent of [the] Legislature in enacting the statute that is at the heart of the dispute."²⁰⁷ In a case pitting a greedy insurance company against a married couple severely injured in a car accident, the court had no problem engaging in a tortured analysis of the allegedly ambiguous term. Hoens also cited the "fundamental principles" of insurance policy analysis, including the court's "role in ensuring their conformity to public policy and principles of fairness."²⁰⁸

Nonetheless, the court still felt the need to declare that the statute was ambiguous before looking to the statute's legislative history. And *Pizzullo*, decided under Chief Justice Rabner,²⁰⁹ was not an anomaly but

²⁰⁴ *Id.* (citations omitted).

²⁰⁵ *Id.* at 266-67 (citing *Sponsor's Statement to Senate Bill No. 804*, 1992 Sess., 205th Leg. (N.J. 1992); *Senate Commerce Committee Statement to Senate Bill No. 804*, 1992 Sess., 205th Leg. (N.J. 1992)). Like Brudney and Ditslear, I do not attempt to differentiate between the various forms of legislative history. In keeping with the Brudney/Ditslear method, "so long as legislative history [was] expressly identified and discussed by the majority as either an affirmatively probative or a determining factor, [I] conclude[d] that it was relied upon by the Court." Brudney & Ditslear, *supra* note 27, at 128 (citations omitted). This also implies that an isolated reference in the majority opinion to the phrase "legislative history" did not serve as proof that the justices moved beyond Gluck's text-only tier one. For the sake of clarity, I created a scale from 0-3 (0: no factor; 1: contributing factor; 2: partial reliance; 3: decisive factor) that measured the extent to which the court relied on legislative history in rendering its decision. In a few instances, I included an N/A ranking, which usually indicated an out-of-context reference to the phrase "legislative history" that came up in my search but was in no way related to the court's decision. See Appendix. For an overview of the different forms of legislative history most commonly used by both the Rabner and Poritz Courts and the frequency with which they were referenced in majority opinions, see the two charts included at the beginning of the Appendix.

²⁰⁶ Like the Poritz Court, the Rabner Court is committed, first and foremost, to carrying out the legislature's intent. See, e.g., *Lee v. First Union Nat. Bank*, 199 N.J. 251, 259 (2009) ("The goal when interpreting a statute is to determine and effectuate the Legislature's intent." (citing *D'Annunzio v. Prudential Ins. Co. of Am.*, 192 N.J. 110, 119 (2007))).

²⁰⁷ *Pizzullo*, 196 N.J. at 263.

²⁰⁸ *Id.* at 270 (citing *Gibson v. Callaghan*, 158 N.J. 662, 669-70 (1999)).

²⁰⁹ Stuart Rabner was nominated as Chief Justice in 2007. See Jennifer Moroz & Elisa Ung, *Corzine Taps Rabner for Top Court Position*, PHILA. INQUIRER, June 5, 2007,

rather symbolic of the Rabner Court's preferred methodological approach to statutory interpretation: "Modified Textualism-lite."²¹⁰ Unlike the Poritz Court's more purpose-driven approach, the Rabner Court²¹¹ repeatedly declares its fidelity to modified textualism, primarily through its citations²¹² to *DiProspero v. Penn*:

A court should not 'resort to extrinsic interpretative aids' when 'the statutory language is clear and unambiguous, and susceptible to only one interpretation On 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.'²¹³

In *State v. Baker*,²¹⁴ the court outlined its commitment through a reference to the section of *Daidone v. Buterick Bulkheading* that cites the above language from *DiProspero*.²¹⁵ Beginning with the text, the *Baker* court also stopped with the text, finding the plain language of the statute under consideration (Interstate Agreement on Detainers, *N.J.S.A.*

http://www.philly.com/inquirer/home_top_stories/20070605_Corzine_taps_Rabner_for_top_court_position.html.

²¹⁰ Although a bit of a cross between Gluck's "Modified Textualism" and Eskridge/Frickey's "Funnel of Abstraction," Fruehwald's "Pragmatic Textualism" is also applicable to the Rabner Court for the theory's recognition of the text as supreme but willingness to look to extrinsic sources in the event that the text lacks clarity. See Fruehwald, *supra* note 130, at 997-1013.

²¹¹ In *Hardy ex rel. Dowdell v. Abdul-Matin*, the dissent acknowledged that "the PIP statute does not explicitly require knowledge of lack of permission," but then criticized the Rabner Court majority for ruling against the injured high school student based on the statute's literal interpretation. *Hardy ex rel. Dowdell v. Abdul-Matin*, 198 N.J. 95, 106 (2009) (Long, J., dissenting). According to the dissent, which was concerned with "social necessity," the majority's literal reading was "'inconsistent with the overall purpose' of the Act." *Id.* (citations omitted). Yet on occasion, even the Rabner Court majority falls victim to the sympathetic facts of the case and disregards the clear statutory text for a higher purpose. See, e.g., *Maglies v. Estate of Guy*, 193 N.J. 108, 126 (2007) (rejecting the plain language of the Anti-Eviction Act in order to uphold "the spirit of the law" and protect the impoverished tenant who lost her mother). The dissent specifically criticized the majority for "fail[ing] to adhere to and apply the plain language of the Act . . ." *Id.* at 128 (Hoens, J., dissenting).

²¹² See, e.g., *Patel v. N.J. Motor Vehicle Comm'n*, 200 N.J. 413, 419 (2009); *In re Attorney Gens. Directive on Exit Polling: Media & Non-Partisan Pub. Interest Grps.*, 200 N.J. 283, 297 (2009); *Burnett v. Cnty. of Bergen*, 198 N.J. 408, 421 (2009); *Mason v. City of Hoboken*, 196 N.J. 51, 68 (2008); *State v. Froland*, 193 N.J. 186, 194 (2007).

²¹³ *DiProspero v. Penn*, 183 N.J. 477, 492-93 (2005) (citations omitted).

²¹⁴ *State v. Baker*, 198 N.J. 189, 193 (2009).

²¹⁵ See *id.* at 193 (citing *Daidone v. Buterick Bulkheading*, 191 N.J. 557, 565-66 (2007) (citing *DiProspero*, 183 N.J. at 492)).

2A:159A-1 to -15) to be unambiguous.²¹⁶ In *Klumb v. Board of Education*, the court similarly followed the methodology it announced in *Pizzulo* by citing to *DiProspero*²¹⁷ and only moving beyond the text after first finding ambiguity.²¹⁸ Yet I refer to the court's interpretive methodology as "Modified Textualism-lite" because it conveniently ignores *DiProspero* when it is not inclined to limit itself to the text.²¹⁹ In some instances, the court will even cite *DiProspero* or *Pizzullo* and yet not strictly adhere to the modified textualist regime outlined in those cases.²²⁰ For example, the New Jersey Supreme Court had to decide whether indicted State Senator Wayne R. Bryant could use funds from

²¹⁶ *Id.* at 193 (rejecting the defendant's argument because it called for a construction of the statute that was "inconsistent with the plain language" of the Interstate Agreement on Detainers).

²¹⁷ *Klumb v. Bd. of Educ. of Manalapan-Englishtown Reg'l High Sch. Dist.*, 199 N.J. 14, 23-24 (2009) ("To discern the Legislature's intent, courts first turn to the plain language of the statute in question." (citing *DiProspero*, 183 N.J. at 492)). The court added: "'If the plain language leads to a clear and unambiguous result, then [the] interpretive process is over.' Where the plain meaning does not point the court to a 'clear and unambiguous result,' it then considers extrinsic evidence from which it hopes to glean the Legislature's intent." *Id.* at 24 (citations omitted).

²¹⁸ *Klumb*, 199 N.J. at 26 ("We view the language as ambiguous and therefore look outside it for clues to its meaning.").

²¹⁹ William Eskridge has commented that the Rabner Court's lack of strict fidelity to *DiProspero*, coupled with its broader list of extrinsic sources for tier two, appears to him to be more indicative of a textually-anchored funnel as opposed to a "Modified Textualism-lite" system of statutory interpretation. See E-mail from William N. Eskridge, Jr., John A. Garver Professor of Jurisprudence, Yale Law School, to Author (May 30, 2010, 15:14 EST) (on file with author). Although there is little practical difference between the two theories, semantics matter, and I have chosen the latter based on the Rabner Court's willingness to restrict itself to Modified Textualism's tier one, and therefore, not consult any sources beyond the text. The funnel, even a textually-anchored one, on the other hand, is predicated on the notion that judges will at least consider extrinsic sources in the face of unambiguous text, even if they do not reference them. Yet I concede that the Rabner Court generally muddles tiers two and three, combining Gluck's tier two legislative history with extrinsic sources other than Gluck's tier three judicial canons of construction. Compare *State v. Ortiz*, 193 N.J. 278, 288 (2008) (noting that in the face of textual ambiguity, the court should "resort to extrinsic interpretive aids, such as *legislative history, canons of construction, or the policy considerations behind the legislation*" (emphasis added) (citations omitted)), with *In re Liquidation of Integrity Ins. Co.*, 193 N.J. 86, 94 (2007) (noting that in the face of textual ambiguity, the court should "turn to extrinsic evidence, including *legislative history, committee reports, and contemporaneous construction*" (emphasis added)). The Rabner Court also generally refrains from demanding ambiguity at tier two, regardless of which extrinsic source(s) it includes, before moving on to tier three.

²²⁰ See, e.g., *Jen Elec., Inc. v. Cnty. of Essex*, 197 N.J. 627, 643 (2009) (declaring the text's plain meaning to be "self-evident" and yet then referencing legislative history to bolster its point).

his candidate committee to cover his legal defense bills.²²¹ Tasked with interpreting the state's Campaign Contributions Act, the court cited *DiProspero* and began with the statute's text. Following an exhaustive review of the statute's language, which included citations to two dictionaries,²²² the majority determined that the language was clear and unambiguous. Yet the majority did *not* stop with the text: in addition to affording *Chevron* deference to the Election Law Enforcement Commission's regulations,²²³ the court also proceeded to review the relevant legislative history "[f]or the sake of completeness."²²⁴ In *State v. Smith*,²²⁵ moreover, the court similarly determined that the statute's language clearly indicated that there was no requisite *mens rea*; proving possession of the defaced weapon, therefore, was sufficient for a guilty verdict.²²⁶ Nonetheless, the court once again resorted to extrinsic sources "for purposes of thoroughness."²²⁷ This was a repeated pattern in which the court seemed torn between Gluck's Modified Textualism and Eskridge/Frickey's Funnel of Abstraction. The court was focused on the statutory text's ambiguity, or lack thereof, but could not quite help itself from seeking additional confirmation. In *Zabilowicz v. Kelsey*, the final case in the dataset, the court was interpreting the "Deemer Statute" regarding its application to a New Jersey car accident involving two out-of-state drivers.²²⁸ The dispute revolved around the provision of

²²¹ See *In re* Election Law Enforcement Comm'n Advisory Op., 201 N.J. 254, 256 (2010). Although the Rabner Court heard this case on November 9, 2009, it did not hand down a decision until March 8, 2010, and thus the case fell just outside of my dataset. Therefore, the case is not coded in the Appendix.

²²² There is some dispute as to whether dictionary citations constitute tier one or tier three, but given their usefulness for textual analysis, I generally considered them to be part of the first tier. Yet I listed the different dictionaries cited in the Eskridge/Frickey funnel column of the Appendix.

²²³ "The regulations, singly and collectively, do not advance Bryant's position that he may use campaign funds to finance his criminal defense." *In re* Election Law Enforcement Comm'n Advisory Op., 201 N.J. at 265.

²²⁴ *Id.* at 266.

²²⁵ *State v. Smith*, 197 N.J. 325, 338 (2009).

²²⁶ *Id.* at 329.

²²⁷ *Id.* at 333 ("And, ordinarily, when a statute's language is clear and unambiguous, we 'need delve no deeper than the act's literal terms'. . . That said, we shall assume for purposes of thoroughness that the language of the statute contains some ambiguity and, therefore, in such circumstances it is permissible to turn to extrinsic evidence for aid in interpreting this statute." (citations omitted)).

²²⁸ *Zabilowicz v. Kelsey*, 200 N.J. 507, 510 (2009) ("N.J.S.A. 17:28-1.4 — known as the 'Deemer Statute' — provides benefits and burdens to out-of-state drivers insured by companies authorized to do business in New Jersey." (citations omitted)).

“personal injury protection benefits” under the state’s “no-fault” insurance system. Yet before the court even introduced the background facts of the case, the majority reversed the Appellate Division’s holding based on the statute’s “plain language.”²²⁹ Nonetheless, after an extensive review of the relevant facts and statutory text, the majority concluded by noting that “[n]othing in the *legislative history* . . . conflict[ed] with [its] plain reading.”²³⁰

Additional support for the Rabner Court’s more restrained interpretive methodology (as compared to that of the Poritz Court) — including its greater commitment to legislative intent — is evident in its higher percentage of citations to the New Jersey legislature’s codified canons of statutory interpretation.²³¹ One of the two codified canons is a glossary of legal terms that includes definitions for words such as “affirmation” and “assessor” and is generally only relevant when one of the specific terms is included in a statute.²³² New Jersey Statute, Section 1:1-1, however, which the court cites in *Bryant*,²³³ provides a more general framework for conducting statutory interpretation:

In the construction of the laws and statutes of this state, both civil and criminal, words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language.²³⁴

Hardly domineering, the statute can be read to provide the justices with some breathing room based on its use of the phrase “generally accepted meaning” and the always-malleable notion of “context.” But

²²⁹ *Id.* at 511 (“We now reverse. Plaintiff is subject to all of the provisions of N.J.S.A. 39:6A-8(a) pursuant to the Deemer Statute. Under the plain language of N.J.S.A. 39:6A-8(a), the limitation-on-lawsuit threshold can be invoked only by a defendant who is eligible to receive New Jersey PIP benefits.”).

²³⁰ *Id.* at 518 (emphasis added) (referencing the Deemer Statute and the related N.J.S.A. 39:6A-8(a)).

²³¹ See generally Scott, *supra* note 50 (providing the first comprehensive fifty-state survey of legislatively enacted rules of interpretation). Gluck explains that some of these laws, such as Connecticut’s “text-focused regime” even stem from “what the legislature perceived as an inappropriate judicial power grab over interpretive methodology.” See Gluck, *States as Laboratories*, *supra* note 47, at 1756. There is no indication, however, that the New Jersey legislature passed these laws as a result of controversial state supreme court decisions.

²³² N.J. STAT. ANN. § 1:1-2 (West 2011).

²³³ See *In re* Election Law Enforcement Comm’n Advisory Op., 201 N.J. at 263.

²³⁴ N.J. STAT. ANN. § 1:1-1 (West 2011).

the underlying message comes across clearly: the legislature is in charge, and therefore, the court should not get creative with the text. Unlike the Poritz Court, which only cited the two codified canons in 2.4 percent of its sample cases, the Rabner Court cited them in 22.2 percent of its sample cases.²³⁵

VI. LOOKING BACKWARDS AND MOVING FORWARDS

A. Institutional Explanations

In his influential article on the New Jersey Supreme Court, Seton Hall Law Professor John B. Wefing outlines twelve institutional factors that have “given the court a willingness and ability to take activist, and independent stands” in its decisions.²³⁶ Wefing is primarily interested in exploring the court’s independence vis-à-vis the United States Supreme Court and other state high courts across the nation and does not specifically address the issue of statutory interpretation. Yet the decline of two interrelated factors on his list appears to shed light on the court’s evolving statutory jurisprudence over the past decade: “political support for the judiciary” and the “moderate position of the Governors of both parties during the last fifty years.”²³⁷ Christine Todd Whitman, a

²³⁵ See Appendix. The Rabner Court includes Rows 1-54, inclusive, for a total of fifty-four cases, and the Poritz Court includes Rows 83-249, inclusive, for a total of 167 cases. The Rabner Court percentage includes citations in three dissents. The Poritz Court dissents did not include any citations to either codified canon. The disparity in citations cannot be attributed to the relative newness of the statute. N.J. STAT. ANN. § 1:1-1 was included verbatim in the 1937 codification of New Jersey Statutes. See N.J. STAT. ANN. § 1:1-1 (West 1937).

²³⁶ See Wefing, *Fifty Years*, *supra* note 119, at 710.

²³⁷ *Id.* (citations omitted). The rest of the list includes:

[T]he method of appointment of the justices; the unwritten but institutionalized requirement that the court be balanced between the political parties; the absence of initiative and referendum; the relative difficulty of constitutional amendment; the absence of an elected attorney general and elected prosecutors; the limited docket of the supreme court; the absence for a long time of the death penalty; the leadership and political clout of the chief justices; the competence, confidence and long tenure of the justices; and the presence of a public advocate.

Id. (citations omitted). Although there is no reason to believe that the following systemic change has impacted the court, it is worth noting that the voters of New Jersey recently amended its Constitution (2005) and elected the state’s first lieutenant governor (2009). See N.J. CONST. art. 5, § 1. Like her boss, Lieutenant Governor Kim Guadagno has a strong prosecutorial background. She has served as a federal prosecutor, assistant attorney general and deputy director of the Division of Criminal Justice, and sheriff of Monmouth County. See *Lt. Governor Kim Guadagno: Biography*, ST. OF N.J.,

moderate Republican governor who was always viewed as a centrist within the Republican Party, appointed Chief Justice Poritz.²³⁸ Poritz was also re-nominated by James McGreevey, a Democratic Governor who styled himself as a “New Democrat” in the vein of President Bill Clinton. McGreevey’s decision to re-nominate the Republican Poritz also ensured popular and centrist support within the political community for the Poritz-led judiciary.²³⁹

The same cannot be said for the rise of Chief Justice Rabner. As noted above, the Rabner Court has been more attentive to text and legislative intent and less devoted to the more abstract theory of purposivism. The Rabner Court’s more systematic approach to interpreting statutes may stem from the circumstances under which then-State Attorney General Stuart Rabner became chief justice. All parties involved expected the Rabner nomination and confirmation process to proceed smoothly,²⁴⁰ but the New Jersey State Senate had other plans. Many African-American senators were furious that the Governor did not give more serious consideration to minority

<http://www.state.nj.us/governor/lt/> (last visited Apr. 20, 2011); see also Teja Anderson, *Kim Guadagno-New Jersey’s First Lieutenant Governor*, LIVING MEDIA (Monmouth Cnty., N.J.), Apr. 26, 2010, http://www.livinginmedia.com/article/kim_guadagno_new_jerseys_first_lieutenant_governor.html. Upon taking office, Governor Christie also eliminated the office of the public advocate. See *New Jersey Department of the Public Advocate*, ST. OF N.J., <http://www.state.nj.us/publicadvocate/> (last visited Apr. 20, 2011) (“On June 29, 2010, Governor Chris Christie signed P.L. 2010, Chapter 34, which officially abolished the Department of the Public Advocate and transferred certain functions, powers and duties to other state Departments.”).

²³⁸ See Christine Todd Whitman, Op-Ed., *It’s Still My Party*, N.Y. TIMES, Apr. 30, 2009, at A27 (describing her disappointment over Senator Arlen Specter’s decision to switch from the Republican Party to the Democratic Party and her belief that his decision is an indication of the dwindling prospects for moderates within the Republican Party). See generally CHRISTINE TODD WHITMAN, *IT’S MY PARTY TOO: THE BATTLE FOR THE HEART OF THE GOP AND THE FUTURE OF AMERICA* (2005) (describing the rightward shift of the Republican Party and decline in stature of moderate Republican national leaders, such as Colin Powell, George Pataki, and herself).

²³⁹ See David Kocieniewski, *Aides Say McGreevey Will Seek Another Term for Chief Justice*, N.Y. TIMES, Apr. 27, 2003, <http://www.nytimes.com/2003/04/27/nyregion/aides-say-mcgreevey-will-seek-another-term-for-chief-justice.html?scp=8&sq=poritz&st=cse>. Only right-wing Republicans angered by her alleged judicial activism and left-wing Democrats angered over her alleged lack of action on racial profiling during her tenure as state Attorney General withdrew their support.

²⁴⁰ See Laura Craven, *Corzine Names Rabner Next Chief Justice*, STAR LEDGER (June 4, 2007, 8:23 PM), http://blog.nj.com/ledgerupdates/2007/06/corzine_names_rabner_next_chie.html.

candidates²⁴¹ and instead nominated his own chief counsel, who had no prior judicial experience. State Senator Nia H. Gill, an African-American Democrat from Essex County, was even rumored to have invoked “senatorial courtesy,”²⁴² in order to block the nomination. Although Gill denied doing so,²⁴³ Rabner had to meet privately with the State Senator before a confirmation hearing could be scheduled,²⁴⁴ and she still refused to vote for his confirmation. Even though Gill was the only senator not to vote for Rabner,²⁴⁵ she and her colleagues made clear that they were not in Trenton simply to “rubber-stamp” the governor’s decisions.²⁴⁶ Thus, Rabner, a Democrat with little experience practicing law in New Jersey state courtrooms,²⁴⁷ began his tenure with tepid political support from his own party. Democratic Governor Jon Corzine, meanwhile, who had made Rabner his chief counsel, attorney general,²⁴⁸ and then chief justice, was widely considered to be more liberal than the historically moderate New Jersey pols from both parties. Writing in *Newsweek* following Corzine’s 2000 election to the United States Senate, David Brooks listed him as one of the main reasons the election shifted the Senate so far to the left, even though Corzine was replacing a fellow Democrat.²⁴⁹ As governor, he did not veer from his liberal principles, attempting to tackle controversial social issues, such as increased funding for stem cell research and legalization of gay marriage — both of which failed.²⁵⁰ Chief Justice Rabner, therefore, not

²⁴¹ See Richard G. Jones, *Nomination of Chief Justice Raises Questions in Trenton*, N.Y. TIMES, June 14, 2007, <http://www.nytimes.com/2007/06/14/nyregion/14justice.html>.

²⁴² “Senatorial courtesy,” also practiced at the federal level, allows for state senators to block nominees (usually judges) from their home districts. Stuart Rabner lived in Caldwell, New Jersey, which is part of Essex County.

²⁴³ See Laura Craven, *Gill Denies Blocking Rabner*, STAR-LEDGER (June 21, 2007, 3:18 PM), http://blog.nj.com/ledgerupdates/2007/06/gill_denies_blocking_rabners_n.html.

²⁴⁴ See *id.*

²⁴⁵ See Richard G. Jones, *After One Objection, Senate Confirms Corzine’s Choice for Chief Justice*, N.Y. TIMES, June 22, 2007, <http://www.nytimes.com/2007/06/22/nyregion/22confirm.html?adxnnl=1&adxnnlx=1274176847-jutJNzm4uLwg+OYk9tngWg>.

²⁴⁶ See *id.*

²⁴⁷ Mr. Rabner worked in New Jersey for years as a federal prosecutor in the U.S. Attorney’s Office for the District of New Jersey in Newark. He worked his way up to chief of the criminal division. But as a result, he primarily practiced law in federal court. See Moroz & Ung, *supra* note 209.

²⁴⁸ Under the New Jersey Constitution, the State Attorney General is not elected but rather appointed by the Governor. See N.J. CONST. art. V, § IV, cl. 3.

²⁴⁹ See David Brooks, *Letter to the Right: Surviving the Coming Clash*, NEWSWEEK, Dec. 25, 2000, at 61.

²⁵⁰ See David Kocieniewski, *Unlucky and Aloof, Corzine Fell Short of Trenton Goals*,

only lacked the traditional political backing of the legislature but also had to deal with the popular conception that “governors look for people with generally the same ideological viewpoints when selecting justices for the court.”²⁵¹ And this is all on top of the fact that Rabner was confirmed at the relatively young age of forty-six, meaning that he could potentially serve on the bench for more than two decades.²⁵² Poritz, on the other hand, was nominated at fifty-nine and knew that she would need to retire in 2006 on her seventieth birthday.²⁵³ Students of the court may not be able to discern what has ultimately led Chief Justice Rabner²⁵⁴ to embrace a more structured approach to statutory interpretation. But the Rabner Court’s increased citations to a “Modified Textualism-lite” system of statutory interpretation and reduced references to a statute’s underlying purpose indicate at least a subconscious awareness of the changing political winds in New Jersey.

Political support for the judiciary, meanwhile, is rapidly declining as Governor Chris Christie, arguably the most conservative Republican ever to capture the governor’s mansion, battles with state Democrats over the future composition of the court.²⁵⁵ Christie sent a strong

N.Y. TIMES, Nov. 6, 2009, at A23. In spite of mixed popular support, Governor Corzine did succeed in achieving his liberal goal of abolishing the death penalty in New Jersey. See Paul Cox, *Corzine Ends Death Penalty in New Jersey*, STAR LEDGER (Newark, N.J.), Dec. 17, 2007, http://www.nj.com/news/index.ssf/2007/12/nj_death_penalty_is_expected_t.html (“[V]oters were opposed to ending the death penalty by a margin of 53 percent to 39 percent.”).

²⁵¹ See Wefing, *Fifty Years*, *supra* note 119, at 723.

²⁵² Following nomination and confirmation to a second seven-year term, a sitting justice can serve with good behavior until reaching the mandatory retirement age of seventy without needing to be re-nominated.

²⁵³ See Brett Pulley, *Lawyer at 40 Rises to Chief: Deborah Tobias Poritz*, N.Y. TIMES, June 14, 1996, <http://www.nytimes.com/1996/06/14/nyregion/woman-in-the-news-lawyer-at-40-rises-to-chief-deborah-tobias-poritz.html>.

²⁵⁴ At a personal level, Rabner’s earlier tenure as a federal prosecutor may at least contribute to his more rule-based textualism. He was also working as an Assistant United States Attorney under then-United States Attorney Samuel Alito in Newark, New Jersey.

²⁵⁵ See generally Richard Pérez-Peña, *Christie’s Conservatism is not Just Economic*, N.Y. TIMES, Apr. 18, 2011, at A17 (quoting Ben Dworkin, director of the Rebovich Institute for New Jersey Politics at Rider University, as saying: “[Christie] is absolutely the most conservative governor we have had in the modern history of the state”). The *Philadelphia Inquirer* and the *New York Times* both published editorials in December decrying the heightened politicization of the court. See Editorial, *Court Battle*, PHILA. INQUIRER, Dec. 18, 2010, http://www.philly.com/inquirer/opinion/20101218_Inquirer_Editorial_Court_battle.html; Editorial, *The Politicization of a Respected Court*, N.Y. TIMES, Dec. 16, 2010, at A38. More recently, the *Wall Street Journal Law Blog* published a derisive post on the matter, mocking New York’s “friends across the Hudson River.” See Ashby Jones, *What’s Going*

message to the judiciary by breaking with a half century of precedent and not re-nominating a supreme court justice following his initial seven-year term.²⁵⁶ State Democrats were particularly disturbed by this development since Justice John E. Wallace, Jr. was the lone African-American on the court and would have turned seventy in two years, thus allowing Christie to replace him before the end of his first gubernatorial term. Democratic Senate President Stephen Sweeney, meanwhile, has refused to hold a confirmation vote on Christie's new nominee for Wallace's seat.²⁵⁷ Attempting to deal with the impasse, Chief Justice Stuart Rabner used his state constitutional authority to make a temporary appointment to the bench.²⁵⁸ Yet the political chess match transformed into political warfare when Justice Roberto Rivera-Soto, a conservative Republican, declared that he would abstain from voting in any future cases since he believed Rabner's temporary appointment was unconstitutional.²⁵⁹ Grounding his argument in the scholarly work of Seton Hall Law Professor Edward A. Hartnett, Rivera-Soto claims that the New Jersey Constitution only allows for temporary appointments when necessary for the constitutionally-required quorum of five

on with the New Jersey Supreme Court?, WALL ST. J. L. BLOG (Jan. 4, 2011, 12:27 PM), <http://blogs.wsj.com/law/2011/01/04/whats-going-on-with-the-new-jersey-supreme-court/> ("Take your eyes off of New Jersey for a few days and you'll almost surely miss a strange political dustup or two. The latest to play out . . . involves the New Jersey Supreme Court.").

²⁵⁶ See Voreacos & Dopp, *supra* note 20 ("Christie's rejection of Wallace, a Democrat, upended a bipartisan tradition [in New Jersey] that began after the state's current Constitution was adopted in 1947. Since then, no governor has failed to reappoint a justice . . . even if it meant Democrats appointing Republicans and vice versa.").

²⁵⁷ See Richard Pérez-Peña, *Senate President Vows to Block New Jersey Court Nominee*, N.Y. TIMES, May 5, 2010, at A25. Governor Christie nominated Anne M. Patterson, a well-respected Republican corporate attorney from Morris County. See Richard Pérez-Peña, *Christie, Shunning Precedent, Drops Justice from Court*, N.Y. TIMES, May 4, 2010, at A22.

²⁵⁸ See Peggy Ackerman, *New Jersey Supreme Court Justice Quietly Above the Fray*, GLOUCESTER COUNTY TIMES, Oct. 24, 2010, <http://www.nj.com/gloucester/index.ssf/?base/news-6/1287907824123430.xml&coll=8>. Justice Rabner selected another Democrat, intermediate appeals court Judge Edwin H. Stern. Stern, who will turn 70 in June, is not exempt from the mandatory retirement age. See Matt Friedman & Rohan Mascarenhas, *State Appellate Judge is Appointed Interim N.J. Supreme Court Justice*, STAR LEDGER (Newark, N.J.), Sept. 9, 2010, http://www.nj.com/news/index.ssf/2010/09/nj_supreme_court_appellate_ju.html.

²⁵⁹ See Lisa Fleisher & Chris Herring, *Justice Stymies New Jersey High Court*, WALL ST. J., Dec. 11, 2010, http://online.wsj.com/article/SB10001424052748704457604576011962304920054.html?mod=googlenews_wsj ("A mini-revolt broke out on the New Jersey Supreme Court Friday when an associate justice said he would abstain from all future decisions while a temporary justice is serving, leading top Democrats to call for the associate justice's resignation.").

justices.²⁶⁰ Although the current constitutional crisis overshadows the debate over the future of the court's statutory jurisprudence — especially as the twenty-five-year-old constitutional battle over school funding returns to the court's docket in early January²⁶¹ — the increasing politicization will undoubtedly influence future statutory decisions, perhaps pushing the court further along the textualist spectrum.

B. Additional Areas for Research

The relative lack of scholarship exploring the New Jersey Supreme Court's method of statutory interpretation leaves ambitious young scholars with plenty of material to explore. One area in particular relates directly to the use of legislative history. Practitioners would greatly benefit from a dissection of the different types of legislative history used by the court in order to determine if there is any meaningful pattern to the seemingly arbitrary selection of sources.²⁶² Not surprisingly, my research revealed that committee statements are the most relied-upon source of legislative history.²⁶³ Yet there is also a relatively high number of sponsors' statements²⁶⁴ and multiple

²⁶⁰ See Edward A. Hartnett, *Ties in the Supreme Court of New Jersey*, 32 SETON HALL L. REV. 735, 768 (2001) (“[A] temporary assignment [to the New Jersey Supreme Court] should be made only when necessary to make a quorum. . . .”); see also James Ahearn, Op-Ed., *For Top Court Justice, a Defiant Stance*, BERGEN REC., Dec. 15, 2010, http://www.northjersey.com/news/politics/ahearn_121510.html?c=y&page=1 (“[I]n an unusual attachment to a court decision on an unrelated matter, Rivera-Soto wrote that there was no need for the Stern appointment because the court could still muster the required quorum of five justices.”).

²⁶¹ The New Jersey Supreme Court scheduled the latest round of *Abbott* oral arguments for Wednesday, January 5, 2011, when the Education Law Center “is expected to seek restoration of full state aid in coming years under a formula designed by the Corzine administration in 2008” and rejected by the Christie administration in 2010. See Rita Giordano, *Center to Fight for ‘Abbott’ Restoration*, PHILA. INQUIRER, Jan. 3, 2011, http://www.philly.com/inquirer/local/20110103_Center_to_fight_for__Abbott__restoration.html.

²⁶² Although I made sure to record the different forms of legislative history cited in each case and rank the general degree to which the court relied upon legislative history as a whole, I did not attempt to discern the relative weight assigned to different forms of legislative history.

²⁶³ See EFG LEGISLATION, *supra* note 40, at 311 (“Almost half the Supreme Court’s references to legislative history are to committee reports, and similar documents are the primary legislative history invoked by state courts as well.”) (citing Jorge Carro & Andrew Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 304 (1982)).

²⁶⁴ For a numerical tally, see the two charts listed in the Appendix. The two charts list twenty citations to sponsors’ statements under the Poritz Court and twelve citations to

references to gubernatorial signing statements,²⁶⁵ even though the court²⁶⁶ itself has questioned the use of the latter, which are generally criticized as examples of “subsequent legislative history”²⁶⁷ developed *after* the bill has already been passed by the state legislature.

In any future legislative history studies, scholars may also want to move beyond the state’s highest court. In addition to the New Jersey Supreme Court, the state judiciary system includes the appellate division and state superior trial courts.²⁶⁸ The former is comprised of thirty-five judges who hear appeals in two or three judge panels from the trial courts, tax court, and state administrative agencies.²⁶⁹ The latter is divided into four different divisions (Criminal, Civil, General Equity, and Family) that hear trials depending on the nature of the dispute and the requested relief.²⁷⁰ The sprawling trial court system may be a bit unwieldy for systematic scholarly analysis, but the appellate panels provide a definitive sample size of cases, many of which will inevitably involve questions of statutory interpretation. Just as Abbe Gluck discusses the potential for a normative discussion between state and federal courts grappling with different methods of statutory interpretation, one can easily imagine a similar conversation transpiring

sponsors’ statements under the Rabner Court, for which there is a much smaller sample size of cases.

²⁶⁵ See *id.* (listing ten citations to gubernatorial signing statements under the Poritz Court and seven citations to gubernatorial signing statements under the Rabner Court).

²⁶⁶ See *Owens v. Feigin*, 194 N.J. 607, 617 n.3 (2008) (“In the hierarchy of legislative history, signing statements do not carry the interpretive force afforded to statements from the Legislature.”) (citations omitted). In *Owens*, on top of the gubernatorial signing statement, the court also looked to sponsor and committee statements. When issuing signing statements, New Jersey governors send out press releases that the court will directly cite. See, e.g., *R.A.C. v. P.J.S., Jr.*, 192 N.J. 81, 94 (2007); *State v. D.A.*, 191 N.J. 158, 169 (2007) (“Indeed, the press release issued at the bill’s passage explains that the amendment ‘[e]stablishes a new crime for any person who attempts to hinder his own apprehension, prosecution or conviction by concealing evidence, intimidating witnesses, or by giving false information to a police officer.’ Press Release, Acting Governor Joseph P. Merlino, Senate Bill No. 1537 (Sept. 24, 1981).”).

²⁶⁷ See EFG LEGISLATION, *supra* note 40, at 316.

²⁶⁸ See *An Overview of the Court Process*, N.J. JUDICIARY, http://www.judiciary.state.nj.us/nj_overview.htm (last visited Apr. 20, 2011). The New Jersey judicial system also includes local municipal courts and a tax court, which is a court of limited jurisdiction with twelve judges. See *Tax Court of New Jersey*, N.J. JUDICIARY, <http://www.judiciary.state.nj.us/taxcourt/index.htm> (last visited Apr. 20, 2011).

²⁶⁹ See *Superior Court, Appellate Division*, N.J. JUDICIARY, <http://www.judiciary.state.nj.us/appdiv/index.htm> (last visited Apr. 20, 2011).

²⁷⁰ See *Local Courts in Your County*, N.J. JUDICIARY, <http://www.judiciary.state.nj.us/trial.htm> (last visited Apr. 20, 2011).

between intermediate state courts and the New Jersey Supreme Court.²⁷¹ Yet the sheer absence of statutory interpretation scholarship at the intermediate level prevents the supreme court justices from having any sense of evolving trends in the lower courts.²⁷² The development of methodological patterns at the lower level may help the justices formulate their own interpretive approaches. On the other hand, the justices may want to get a better sense of whether or not their methodologies, such as the use of the Funnel of Abstraction or shift towards Modified Textualism-lite,²⁷³ are being followed by their counterparts in the appellate division.

Another related topic is the extent to which the court defers to state agencies. In a number of opinions, the court made a point of highlighting the traditional deference owed to an agency's interpretation of a statute but did not appear to follow any New Jersey-specific regime.²⁷⁴ In their comprehensive study of the United State Supreme Court's *Chevron* jurisprudence, William Eskridge and Lauren Baer have demonstrated that judges may ascribe to their own deference regime in theory but then fail to apply it in practice.²⁷⁵ Although I noted instances in which the court at least paid lip service to agency interpretations,²⁷⁶ I

²⁷¹ See Gluck, *Intersystemic Statutory Interpretation*, *supra* note 129, at 193 (citations omitted) (raising the prospect that the courts could “embrace a ‘dialectical federalism’ for statutory interpretation — a conversation between state and federal courts that could shape the evolution of interpretive doctrine itself”).

²⁷² For one notable exception, see Judith H. Wizmur, *Judge Michael Patrick King: Judicial Orientation as Reflected by Statutory Construction*, 35 RUTGERS L.J. xv (2004) (analyzing the statutory jurisprudence of Judge Michael Patrick King, who served on the New Jersey Superior Court, Appellate Division, from 1975-2004).

²⁷³ See Gluck, *supra* note 129, at 193-95 (discussing the potential for cross fertilization of interpretive methodologies between the state courts and the federal courts).

²⁷⁴ See, e.g., *N.J. Soc’y for Prevention of Cruelty to Animals v. N.J. Dep’t of Agric.*, 196 N.J. 366, 385 (2008) (upholding the Department of Agriculture’s regulations regarding the treatment of veal calves and the transportation of sick or downed animals).

²⁷⁵ See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1090 (2008) (finding that *Chevron* deference “was applied in only 8.3% of Supreme Court cases evaluating agency statutory interpretations”).

²⁷⁶ See, e.g., *In re Election Law Enforcement Comm’n Advisory Op.*, 201 N.J. 254, 262 (2010) (“Generally, an appellate court should give considerable weight to a state agency’s interpretation of a statutory scheme that the legislature has entrusted to the agency to administer. This deference comes from the understanding that a state agency brings experience and specialized knowledge to its task of administering and regulating a legislative enactment within its field of expertise. Moreover, regulations promulgated by an agency in furtherance of a statutory scheme it is charged with enforcing are presumed to be valid. We will defer to an agency’s interpretation of both a statute and implementing

did not attempt to measure the degree to which the court actually deferred to them.²⁷⁷ The question of deference not only applies to this Article's narrow focus on legislative history (both function as extrinsic sources capable of shedding light on the statutory text under review) but also to the New Jersey Supreme Court as a whole, due to the court's reputation for independence. Thus, further study into the relative influence of different forms of legislative history and state agency interpretations will help reveal where the court stands on the spectrum between independent institutional entity and legislative/executive relational agent. For example, highly deferential acceptance of executive agency statutory interpretations, coupled with heavy reliance on gubernatorial signing statements, would indicate a greater awareness of the executive branch — and its power of appointment. Whereas minimal reliance on sponsors' statements, floor colloquies, and rejected amendment proposals might reveal the court's greater sense of independence vis-à-vis the state legislature.²⁷⁸

At a more meta-level of analysis, this Article also raises the question of the New Jersey Supreme Court's future approach to *constitutional* interpretation. As discussed in Part VII *infra*, the court's Brennan-esque fame comes from its constitutional law holdings. Yet the court's fairly pragmatic approach to statutory interpretation over the past decade — in which even the more purpose-driven Poritz Court afforded great weight to statutory text — may call into question the court's role in the state's separation-of-powers balancing act. The

regulation, within the sphere of the agency's authority, unless the interpretation is 'plainly unreasonable.'" (citations omitted)).

²⁷⁷ Although uncommon, neither the Rabner Court nor the Poritz Court was afraid to reject agency interpretations. *See, e.g.,* Reilly v. AAA Mid-Atlantic Ins. Co. of N.J., 194 N.J. 474, 478 (2008) (holding that the Department of Banking and Insurance "applied its regulations in a manner that exceed[ed] the scope of its statutory authority"); *In re* Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 491 (2004) (holding that the Department of Environmental Protection exceeded its authority when it adopted rules regulating the development of residential projects).

²⁷⁸ Any additional research into the uses of legislative history and, more specifically, into the question of the court's deference, or lack thereof, to the state legislature, should also include a more detailed analysis of the state legislative process. If judges claim they are deferring to legislators, they should make sure they understand the intricacies of the legislative process, including any deliberate attempts on the part of legislators and their staffers to leave language ambiguous. Thus, all parties would benefit from a study similar to that conducted by Victoria Nourse and Jane Schacter at the federal level in which the two scholars did an empirical study of the Senate Judiciary Committee's legislative drafting process. *See* Victoria Nourse & Jane Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 576-77 (2002).

court's recent decision not to revisit the gay marriage issue, written by Chief Justice Rabner, may be indicative of a more restrained constitutional role.²⁷⁹ Only four years earlier, prior to the appointment of Chief Justice Rabner, the New Jersey Supreme Court held that the law banning same-sex marriage violated the equal protection provisions of the New Jersey Constitution.²⁸⁰ Yet the court allowed the legislature to choose between amending the marriage statute to include same-sex couples or passing a statute allowing for civil unions that conferred on same-sex couples the same rights, benefits, and obligations of civil marriage.²⁸¹ The legislature chose the latter, and four years later, six same-sex couples brought suit.²⁸² The plaintiffs alleged that they had been denied the full rights and benefits the court had earlier ruled were guaranteed to them under the New Jersey Constitution.²⁸³ Citing an insufficient trial record, Chief Justice Rabner wrote the decision denying the motion for rehearing. Although he did not reject the application outright, Rabner bought the court time, perhaps hoping the legislature will intervene before the issue works its way back up to the court. Rabner supporters may argue that the Chief Justice was faced with a more monumental decision in that he could not split the difference as his predecessors did in 2006. Therefore, his denial may not be indicative of a reduced constitutional role for the court. Yet in regards to the issue of gay marriage, the year 2006 seems like ancient

²⁷⁹ See Associated Press, *New Jersey Supreme Court Declines Gay Marriage Case*, N.Y. TIMES, July 26, 2010, at A17 (noting that the court did not outright reject the application but rather called for the case to first be argued in the trial court); see also Lewis v. Harris, 202 N.J. 340, 340 (2010) (“This matter cannot be decided without the development of an appropriate trial-like record. Plaintiffs’ motion is therefore denied without prejudice to plaintiffs filing an action in Superior Court and seeking to create a record there. We reach no conclusion on the merits of plaintiffs’ allegations regarding the constitutionality of the Civil Union Act, N.J.S.A. 37:1-28 to -36.”).

²⁸⁰ See Lewis v. Harris, 188 N.J. 415, 422 (2006) (citing N.J. CONST. art. I, para. 1). The court did note, however, that it could *not* “find that a right to same-sex marriage is so deeply rooted in the traditions, history, and conscience of the people of this State that it ranks as a fundamental right.” *Id.* at 441.

²⁸¹ *Id.* at 423 (“The name to be given to the statutory scheme that provides full rights and benefits to same-sex couples, whether marriage or some other term, is a matter left to the democratic process.”).

²⁸² Editorial, *N.J.’s Gay Marriage Debate: Back to Court because Lawmakers Failed*, STAR LEDGER (Mar. 24, 2010, 5:26 AM), http://blog.nj.com/njv_editorial_page/2010/03/nj_gay_marriage_back_to_court.html (discussing the decision by gay rights organizations to ask the court to “reopen the case” following the bill’s demise in the legislature).

²⁸³ See Lewis v. Harris, 202 N.J. at 340.

history. Given all that has taken place across the country over the past four years,²⁸⁴ not to mention the fact that the earlier decision provided the necessary legal framework for granting marriage equality, Rabner could have at least allowed for oral arguments. Regardless of the underlying reasoning driving his decision,²⁸⁵ Rabner exhibited the same mild restraint in the constitutional realm that his court has demonstrated in the statutory realm.

C. “Exogenous Shocks”

Systemic studies of the court’s historical use of legislative history and application of deference will also help determine the degree to which Christie’s election as governor and subsequent nominations to the court represent what Harvard Law Professor Adrian Vermeule refers to as “exogenous shocks” to the judicial system.²⁸⁶ That is not to say that Christie and his judicial picks are going to have a negligible impact on the future of the court’s approach to statutory interpretation. But such factors may only be playing a role, albeit a leading one, in the overall interpretive drama of methodological cycling.²⁸⁷ Chronicling the

²⁸⁴ Since the court’s 2006 ruling, gay marriage has been legalized in Massachusetts, Connecticut, Vermont, New Hampshire, and Iowa. See Maria Godoy, *State by State: The Legal Battle over Gay Marriage*, NAT’L PUB. RADIO, Dec. 15, 2009, <http://www.npr.org/templates/story/story.php?storyId=112448663>; see also John Schwartz, *Despite Setback, Gay Rights Move Forward*, N.Y. TIMES, Sept. 22, 2010, at A18 (highlighting the fact that “two laws restricting gay rights — the federal Defense of Marriage Act and the California ban on same-sex marriage — have been declared unconstitutional by federal judges in recent months”); Sheryl Gay Stolberg, *Obama Signs Away ‘Don’t Ask, Don’t Tell’*, N.Y. TIMES, Dec. 22, 2010, <http://www.nytimes.com/2010/12/23/us/politics/23military.html?scp=4&sq=dont%20ask%20dont%20tell&st=cse> (marking the end of the ban on gays and lesbians serving openly in the military).

²⁸⁵ See Bob Braun, *N.J. Supreme Court’s Refusal to Hear Gay Marriage Case Raises Question of Christie’s Influence*, STAR LEDGER (Aug. 16, 2010, 10:35 AM), http://blog.nj.com/njv_bob_braun/2010/08/nj_supreme_court_justices_who.html (discussing the possibility that Chief Justice Stuart Rabner and Justices Roberto Rivera-Soto and Helen Hoens voted against rehearing because they are all subject to reappointment by Governor Chris Christie, who has openly expressed his opposition to gay marriage); see also Mary Fuchs, *N.J. Gubernatorial Candidates Address Social Issues, Including Medical Marijuana, Gay Marriage*, STAR LEDGER (Newark, N.J.), Oct. 8, 2009, http://www.nj.com/news/index.ssf/2009/10/nj_gubernatorial_candidates_ad_1.html (“I think civil unions are strong and I think they’re good and I’m a supporter of civil unions and the civil union law in New Jersey. But I am not a supporter of same-sex marriage.”).

²⁸⁶ See Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 181 (2001).

²⁸⁷ There is clearly a difference between short-term shifts and long-term developments in interpretive methodology. Exogenous events may appear to have a greater impact on

evolution of the United States Supreme Court's treatment of general statutory commands,²⁸⁸ Vermeule moves beyond "exogenous disturbances" to examine the internal behavior of repeat players within the system. Vermeule provides the example of "judicial recourse" to legislative history, an interpretive maneuver that may cause elected officials to manipulate legislative history, leading judges to refrain from referencing it out of fear that it is corrupted, thereby causing legislators to stop manipulating it, in turn leading judges to reference it again.²⁸⁹ Thus, the slight but perceptible shift between the Poritz and Rabner Courts may just be a natural reflection of "a cyclical pattern of continuous mutual adjustment," which "never reaches a stable equilibrium."²⁹⁰ The precise crossover influence of the judicial, legislative, and executive branches is difficult to determine, but the system's internal mechanisms may be driving an endless cycle of interpretive adjustment that cannot just be explained by external influences, such as gubernatorial elections and judicial nominations. Although I cannot declare without further study that disequilibrium is endemic to the court's approach to statutory interpretation, I can say that it is something future scholars should take into account in attempting to assess the court's methodology — both historically and during the Christie-era.

VII. NEW JERSEY SUPREME COURT JUSTICE WILLIAM BRENNAN: MODERATE CHAMPION

The New Jersey Supreme Court has the honorable distinction of being the last state court to send one of its members directly to the United States Supreme Court. On September 29, 1956, President Dwight D. Eisenhower nominated New Jersey Supreme Court Associate Justice William J. Brennan, Jr. to fill Justice Sherman Minton's vacated

short-term shifts, but such events may be an outgrowth of long-term, internal developments.

²⁸⁸ Vermeule's cyclical example highlights turning points at *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892) ("flexible treatment of general statutory prohibition"); *Caminetti v. United States*, 242 U.S. 470 (1917) and *Crooks v. Harrelson*, 282 U.S. 55 (1930) ("both of which pronounced that clear statutory text is all-but-conclusive evidence of legislative intent"); *United States v. American Trucking Assocs., Inc.*, 310 U.S. 534 (1940) ("return to purposive interpretation, saturated by extrinsic sources"); *United States v. Locke*, 471 U.S. 84 (1985), *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982); and *TVA v. Hill*, 437 U.S. 153 (1978) (moving toward a "direction of greater formality in famously literalist decisions"). Vermeule, *supra* note 286, at 183-84.

²⁸⁹ Vermeule, *supra* note 286, at 152.

²⁹⁰ *Id.*

seat on the United States Supreme Court.²⁹¹ Brennan, largely selected based on his religious and political affiliations, would go on to serve as one of the United State Supreme Court's leading liberals in the second half of the twentieth century.²⁹² In the realm of statutory interpretation, he authored major purpose-driven opinions in cases such as *Weber*²⁹³ and *K Mart*.²⁹⁴ Brennan, who served as an Associate Justice for thirty-four years, is generally considered to be "the most forceful and effective liberal ever to serve on the [United States Supreme] Court."²⁹⁵ Yet Brennan's early judicial tenure in New Jersey — and not his later work in Washington — better reflects the current state of the New Jersey Supreme Court's statutory jurisprudence.

Brennan's short and fairly non-ideological tenure on the New Jersey Supreme Court was marked more by courtroom efficiency than controversial decisions.²⁹⁶ Chief Justice Vanderbilt primarily admired Brennan for his ability to move cases rapidly through the court system²⁹⁷

²⁹¹ *President Names Jersey Democrat to Supreme Court*, N.Y. TIMES, Sept. 30, 1956, at 1.

²⁹² Having already made two Republican appointments during his first term and facing what appeared at the time to be a strong re-challenge from Adlai Stevenson, Eisenhower sought to burnish his bipartisan credentials and try to win over Catholic Democrats in advance of the 1956 presidential election. See KIM ISAAC EISLER, A JUSTICE FOR ALL 89 (1993); SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 74-75 (2010) (describing the pressure by leading Catholics, including Francis Joseph Cardinal Spellman, the archbishop of the Catholic Archdiocese of New York, to maintain the "Catholic seat" that had been lost upon the death of Justice Fran Murphy in 1949); see also FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 64 (1999) (describing Justice Brennan's democratic liberalism).

²⁹³ *United Steelworkers v. Weber*, 443 U.S. 193, 197 (1979). See ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 26, at 15 ("Justice William Brennan's opinion for the Court slighted the original legislative intent and focused instead on the consistency of voluntary affirmative action with the 'spirit' and 'purpose' of the statute." (emphasis added)).

²⁹⁴ *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 295 (1988) (Brennan, J., concurring). See ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, *supra* note 26, at 117 (describing Brennan's reasoning, Eskridge writes: "Since Congress's core *purpose* in 1922 was to prevent importers from cheating the American holder out of its bargained-for rights, the legislators would probably have excepted common control situations had they presented themselves" (emphasis added)).

²⁹⁵ STERN & WERMIEL, *supra* note 292, at xiii.

²⁹⁶ On a related note, out of the hundreds of cases Brennan handled as a judge in the New Jersey judicial system, only three "turned on the resolution of a federal question, and in all three that question was statutory." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490 (1977) [hereinafter Brennan, *State Constitutions*].

²⁹⁷ See EISLER, *supra* note 292, at 82.

and generally tapped him to make mundane speeches about New Jersey state court reform.²⁹⁸ Brennan's activist jurisprudence²⁹⁹ on the nation's highest court, therefore, should not and cannot be viewed as a mere continuation of his work on the state's highest court.³⁰⁰ It was not until long after Brennan had ascended to the United States Supreme Court that he wrote his infamous federalism article in the *Harvard Law Review*.³⁰¹ The Justice's focus on state constitutionalism as a means for protecting individual rights, moreover, is indicative of the distinction that must be made between the New Jersey Supreme Court's constitutional jurisprudence and statutory jurisprudence.³⁰² Regardless of whether the New Jersey Supreme Court merits its activist reputation³⁰³ due to its creative constitutionalism, the reputation does not fit with the court's more formulaic statutory opinions.³⁰⁴ Brennan may have noted an uptick

²⁹⁸ See STERN & WERMIEL, *supra* note 292, at 66 (noting that Brennan "had become Vanderbilt's public relations man, trumpeting New Jersey's court reforms to audiences throughout the state and beyond").

²⁹⁹ As a United States Supreme Court Justice, "Brennan interpreted the Constitution expansively to broaden rights as well as create new ones for minorities, women, the poor, and the press In the process, he came to embody an assertive vision for the courts in which judges aggressively tackled the nation's most complicated and divisive social problems." STERN & WERMIEL, *supra* note 292, at xiii.

³⁰⁰ See generally William J. Brennan, Jr., *State Supreme Court Judge Versus United States Supreme Court Justice: A Change in Function and Perspective*, 19 U. FLA. L. REV. 225 (1966) (discussing the different judicial responsibilities of those serving on state supreme courts, as opposed to on the United States Supreme Court).

³⁰¹ Brennan, *State Constitutions*, *supra* note 296, at 489.

³⁰² See *id.* at 491 ("But the point I want to stress here is that state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending *beyond* those required by the [United States] Supreme Court's interpretation of federal law." (emphasis added)).

³⁰³ See Kevin M. Mulcahy, Note, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court and What California Can Learn*, 40 SANTA CLARA L. REV. 863, 863 (1999) (focusing on "the New Jersey Supreme Court, which stands as arguably the most activist, progressive, and, especially in area of individual rights, important state supreme court" in the nation).

³⁰⁴ For an example of such creative constitutionalism, see Brennan's discussion of the New Jersey Supreme Court's decision in *State v. Johnson*, 68 N.J. 349 (1975) (expanding the fourth amendment right against illegal searches through a broad reading of the state constitution's analogous provision, which contained nearly identical language to that of the original Bill of Rights). Brennan, *State Constitutions*, *supra* note 296, at 499 (referencing N.J. CONST. art. I, para. 7) ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized."); see also Brennan, *supra*, at 501 (discussing *S. Burlington Cnty. NAACP v. Twp. of Mount*

in expansive readings of state constitutions by state supreme courts eager to counter an increasingly conservative United States Supreme Court. Yet neither he, nor any other scholar since, has noted a similar attempt by state supreme court justices to take such a decidedly expansive approach to *statutory interpretation*.³⁰⁵

Brennan's moderate tenure on the New Jersey Supreme Court also raises the broader normative question of whether conservative critics of the court are more interested in decisional outcome or interpretive methodology. In his characterization of the Poritz Court's performance during the first five years of the Chief Justice's term, Professor Wefing concludes that she was carrying on the court's liberal and progressive tradition.³⁰⁶ Yet Wefing largely bases his definition of the term "liberal" on general issue-based concerns and results — and not on a particular method of jurisprudence, either in the constitutional or statutory realm.³⁰⁷ Although Wefing highlights what he perceived to be the Poritz Court's tendency to read the Constitution liberally in order to expand individual rights, he primarily focuses on the court's signature issues, such as school funding and affordable housing.³⁰⁸ Ultimately, Wefing initiates a broader discussion of what it means to be a progressive court and whether Governor Christie is more concerned with methodological consistency or conservative outcomes. Therefore, Christie's pledge to overhaul the "activist" court does not inevitably pave a path towards stricter textualism since the newly constituted conservative court may not like the statutes passed by the liberal-leaning legislature. Some form

Laurel, 67 N.J. 151 (1975), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975)) (praising the New Jersey Supreme Court's "now famous *Mt. Laurel* decision," not only for its result but also for its preclusion from review by the United States Supreme Court due to its grounding in state constitutional law).

³⁰⁵ See Brennan, *State Constitutions*, *supra* note 296, at 495 ("Of late, however, more and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased.").

³⁰⁶ See Wefing, *Performance*, *supra* note 114, at 771 ("[D]espite the significant change in membership, the Poritz Court has essentially continued the progressive, independent, and generally liberal approach of the Wilentz court."). Chief Justice Robert Wilentz served from 1979 to 1996 and was succeeded by Chief Justice Poritz. See *id.* at 770.

³⁰⁷ See *id.* at 771 ("While the word *liberal* can have many different meanings, for purposes of this article, it reflects society's current perception of the emphasis on individual rights, expansive views of defendant's rights, opposition to the death penalty, support for a woman's right to choose, opposition to all forms of discrimination, broad protection of freedom of speech, and concern for the less powerful members of society, as represented by students in poor school districts, consumers, employees, and plaintiffs." (citations omitted)).

³⁰⁸ *Id.* at 769-70 (citations omitted).

of Gluck's Modified Textualism may actually still reign, with the methodological battle revolving around the presence or absence of textual ambiguity.³⁰⁹

CONCLUSION

The Poritz Court was more Dworkinian³¹⁰ than its Rabner-led successor; its greater comfort with a purpose-driven approach is evident in one of the most controversial decisions authored by Chief Justice Poritz.³¹¹ In *New Jersey State Democratic Party v. Samson*,³¹² a bitterly contested case with national implications, the court had to interpret New Jersey election law to determine if the State Democratic Party could replace Senator Robert Torricelli on the ballot following his withdrawal five weeks before the 2002 election.³¹³ After outlining the basic facts of the case, Poritz opened the unanimous decision by quoting Chief Justice Vanderbilt: "Election laws are to be liberally construed so as to

³⁰⁹ In their *Yale Law Journal Online* response to Gluck's article, *supra* note 47, Ethan Leib and Michael Serota criticize Modified Textualism for merely "replac[ing] the traditional debate over the most appropriate application of legitimate interpretive techniques with a new battle over textual ambiguity." Leib & Serota, *supra* note 69, at 58.

³¹⁰ See generally RONALD DWORKIN, *LAW'S EMPIRE* 345-46 (1986) ("A community of principle does not see legislation the way a rulebook community does, as negotiated compromises that carry no more or deeper meaning than the text of the statute declares; it treats legislation as flowing from the community's present commitment to a background scheme of political morality. The practice of legislative history, of formal declarations of general institutional purpose and convictions made on behalf of the state itself, expresses and confirms that attitude.").

³¹¹ Compare Angelo J. Genova & Jennifer Mazawey, *In the Election of 2002, The Voters of New Jersey were the Winners*, 27 SETON HALL LEGIS. J. 77, 78 (2002) (praising the decision for "preserve[ing] the integrity of the New Jersey electoral system, including the fundamental right of voters to exercise the franchise in a meaningful fashion") with William E. Baroni, Jr., *Administrative Unfeasibility: The Torricelli Replacement Case and the Creation of a New Election Law Standard*, 27 SETON HALL LEGIS. J. 53, 72 (2002) (criticizing the decision for "open[ing] the door to an entirely new area of election law litigation").

³¹² *N.J. State Democratic Party v. Samson*, 175 N.J. 178, 183 (2002).

³¹³ New Jersey Democratic Senator Robert G. Torricelli withdrew from his reelection bid due to increasing pressure from state and national Democratic leaders after he was admonished by the Senate Ethics Committee for "failing to disclose expensive gifts from a former contributor to whom he repeatedly gave help." Tim Golden, *Ethics Committee Faults Torricelli on Gift Violations*, N.Y. TIMES, July 31, 2002, <http://www.nytimes.com/2002/07/31/nyregion/ethics-committee-faults-torricelli-on-gift-violations.html?scp=7&sq=torricelli&st=cse> ("The committee's action [came] six months after federal prosecutors ended a lengthy criminal investigation into Mr. Torricelli's activities without filing criminal charges.").

effectuate their purpose.”³¹⁴ The Chief Justice then proceeded to cite another earlier election law decision, in which the court based its decision on the context of the statute, instead of on its text.³¹⁵ Only then did Poritz address the statute’s text, which deals with vacancies that “occur not later than the 51st day before the general election” and in the event of such an occurrence allows for the selection of replacements “not later than the 48th day preceding the date of the general election.”³¹⁶ Senator Torricelli, however, withdrew thirty-six days before the election, thereby falling outside of the statutory window.³¹⁷ Ultimately ruling in favor of the Democratic Party, Poritz partially grounded her reasoning in statutes from other states that explicitly address what officials should do when such a vacancy arises outside of the statutory timeline — thus highlighting the absence of a similar mandate in New Jersey’s statute.³¹⁸ The Chief Justice explained that when the legislature “has not explicitly addressed the issue . . . the Court must consider the ‘fundamental purpose’ of the enactment”³¹⁹

Nonetheless, Poritz’s penchant for consulting a wider array of sources in the face of clear statutory text (or in rare instances, disregarding the text altogether)³²⁰ does not mean that she was

³¹⁴ *N.J. Democratic Party*, 175 N.J. at 186 (citing *Kilmurray v. Gilfert*, 10 N.J. 435, 440 (1952)).

³¹⁵ *Id.* at 189 (citing *Wene v. Meyner*, 13 N.J. 185, 197 (1953) (“A statute is not to be given an arbitrary construction, according to the strict letter, but rather one that will advance the sense and meaning fairly deducible from the context.”)).

³¹⁶ *Id.* at 191 (citing N.J. STAT. ANN. § 19:13-20 (West 2002)) (“In the event of a vacancy, howsoever caused, among candidates nominated at primaries, which vacancy shall occur not later than the 51st day before the general election . . . a candidate shall be selected in the following manner: a. (1) In the case of an office to be filled by the voters of the entire State, the candidate shall be selected by the State committee of the political party wherein such vacancy occurred A selection made pursuant to this section shall be made not later than the 48th day preceding the date of the general election”).

³¹⁷ The oral arguments before the New Jersey Supreme Court took place on October 2, 2002 — 34 days before the November 5, 2002 general election. *See Genova & Mazawey, supra* note 311, at 78-79.

³¹⁸ *N.J. Democratic Party*, 175 N.J. at 193 n.5 (discussing similar statutes in Alabama, Kansas, Pennsylvania, Michigan and Minnesota).

³¹⁹ *Id.* at 194 (emphasis added) (citations omitted). Chief Justice Poritz also cited legislative history, specifically the Assembly Committee Statement to the 1985 amendments. *See id.* She also added in a footnote: “We observe that the Legislature is presumed to be aware of judicial construction of its enactments. Our cases repeatedly have construed the election laws liberally, consonant with their purpose and with practical considerations related to process.” *Id.* at 195 n.6 (citation omitted).

³²⁰ *See, e.g., Smith v. Fireworks by Girone, Inc.*, 180 N.J. 199 (2004) (ruling in favor of a child injured by left-over fireworks in spite of admitting that its decision did not fit with

attempting to usurp the legislative power from the state's elected officials. Poritz's purposivism represented a collaborative vision in which the court and the legislature were supposed to act as partners. Three years into his tenure, Chief Justice Rabner has not rejected that vision but rather modified it, turning the court into more of a junior partner.

the actual words of the statute). "It is the proper function, indeed the obligation, of the judiciary to give effect to the obvious *purpose* of the Legislature, and to that end 'words used may be expanded or limited according to the manifest reason and obvious *purpose* of the law. The spirit of the legislative direction prevails over the literal sense of the terms.'" *Id.* at 216 (emphasis added) (citations omitted).

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