

## **INDEPENDENCE IN THE INTERIM: THE NEW JERSEY JUDICIARY’S LOST LEGACY**

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I. GOVERNOR CHRISTIE’S DECISION NOT TO REAPPOINT JUSTICE WALLACE.....	134
II. THE 1947 NEW JERSEY CONSTITUTION .....	137
A. The Governor’s Executive Power .....	139
B. The Senate’s Advice and Consent Power.....	141
C. The Chief Justice’s Administrative Power and the Temporary Assignment Power.....	141
III. EACH BRANCH ACTED IN ACCORDANCE WITH ITS TEXTUALLY GRANTED POWERS.....	142
A. Governor Christie Acted Within His Authority .....	142
B. The Senate Acted Within its Authority .....	145
C. Chief Justice Rabner Acted Within his Authority.....	146
IV. EACH BRANCH ACTED WITH POOR FORESIGHT BECAUSE THE POLITICAL REPERCUSSIONS HAVE DAMAGED AND COULD CONTINUE TO CAUSE GREATER DAMAGE TO THE NEW JERSEY POLITICAL SYSTEM. ....	150
A. The Current Situation in New Jersey Represents a Classic Case of Separation of Powers with the Three Co-Equal Branches of Government at Odds with Each Other, Thereby Threatening Judicial Independence.....	150
B. These Actions Threaten Legitimacy and Have Politicized the Court.....	153
V. THERE ARE A VARIETY OF POSSIBLE SOLUTIONS TO REMEDY THE SITUATION AND PREVENT A REOCCURRENCE OF THIS STALEMATE .....	157
VI. CONCLUSION .....	162

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“A fair and impartial judiciary is a cornerstone of the rule of law and democracy.”<sup>1</sup> Since 1947, the New Jersey Supreme Court<sup>2</sup> has served as a model for the nation. This is primarily because its judges have historically been “evaluated on their merits, their legal ability, their demonstrated understanding of the law and their integrity.”<sup>3</sup>

The Court’s national reputation as a judicial leader is also in large part because its judges are appointed, rather than elected.<sup>4</sup> While politics have always been relevant to judicial selection, the framers of the 1947 New Jersey Constitution built a system where ‘partisan gamesmanship’ did not “interfere with the ability of judges to be impartial and independent.”<sup>5</sup>

Recently, New Jersey Governor Chris Christie’s decision not to “reappoint a sitting Supreme Court justice,” the first time any New Jersey governor has done so, “marks a critical turning point that is an affront to the integrity” of the State’s justice system.<sup>6</sup> His actions sparked a period of political controversy pitting all three branches of the state government against each other in a struggle to fill the empty seat on the bench and shape the Court.

This incident interjected the topic of judicial independence into the focus of many lawyers and judges across New Jersey.<sup>7</sup> This is a pivotal moment for the modern New Jersey judiciary; the independence and legitimacy of the Court is in jeopardy.<sup>8</sup> Governor Christie’s decision deeply shook the pillars of the state’s legal establishment.

No governor before now attempted “to control the Third Branch of government through” the judicial reappointment process.<sup>9</sup> In the

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<sup>1</sup> The Bar Report: Weekly News from the New Jersey State Bar Association, *A Case for Independence on the Bench*, 200 N.J. L. J. 18, 18 (2010).

<sup>2</sup> 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.

<sup>3</sup> Allen A. Etish, *A Suffocating Message to the Judiciary*, 200 N.J. L. J. 407, 407 (2010).

<sup>4</sup> The Bar Report, *supra* note 1.

<sup>5</sup> *Id.*

<sup>6</sup> Etish, *supra* note 3.

<sup>7</sup> The Bar Report, *supra* note 1.

<sup>8</sup> Etish, *supra* note 3.

<sup>9</sup> Statement by Retired Justices of the New Jersey Supreme Court: Robert L. Clifford, James H. Coleman, Jr., Marie L. Garibaldi, Alan B. Handler, Stewart G. Pollock, Deborah T. Poritz, Gary S. Stein and James R. Zazzali (May 13, 2010), *available at* [http://pdfserver.amlaw.com/nj/Retired\\_%20Justices\\_on\\_Wallace.pdf](http://pdfserver.amlaw.com/nj/Retired_%20Justices_on_Wallace.pdf).

aftermath of the Governor's actions, Chief Justice Stuart Rabner appointed Justices on an *ad hoc* basis to fill the empty seat. The Senate, in turn, initiated a political stalemate by refusing to confirm Governor Christie's candidate, Anne Patterson, for a recess appointment nomination.<sup>10</sup> Though each branch acted within the realm of its authority, these actions reflect poor foresight and temperance because the political repercussions damaged, and could further harm, the New Jersey political system. The 1947 state constitution ascribes a role to each branch of government; these roles must be honored to preserve the dignity of each. Concurrently, it is appropriate to ask if the time has arrived to alter the system after sixty-four years of experience under the current constitution. Is the present method as good as any for placing new justices on the State Supreme Court expeditiously and effectively? What are the alternatives to improving the administration of justice? Can we determine whether one of these alternatives would be more workable in New Jersey? The time is ripe for reconsideration.

The state constitution sets forth the respective roles of New Jersey's "Governor and Senate in the nomination and appointment of members of the judiciary."<sup>11</sup> The Constitution retains "the state's traditional method of judicial selection for judges: . . . gubernatorial appointment with the advice and consent of the Senate."<sup>12</sup> This system has been "in effect since 1844,"<sup>13</sup> and "proposed changes were unheeded."<sup>14</sup>

A plethora of issues can, however, arise in conjunction with this rule, especially if the governor makes an unpopular decision. What happens if the Senate continues to refuse to act on the Governor's nomination? Can the Governor circumvent the Senate's refusal and appoint any Justice he so chooses? Can the Chief Justice continue to use retired or lower court Justices to fill the vacancy until the Senate confirms the Governor's appointee? With a gubernatorial-senatorial

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<sup>10</sup> Richard Pérez-Peña, *Appointment Fight Divides Judges*, N.Y. TIMES, Dec. 10, 2010, at A19.

<sup>11</sup> *Passaic Cnty. Bar Ass'n v. Hughes*, 108 N.J. Super. 161, 164 (N.J. Ch. Div. 1969) (quoting N.J. Const. art. VI, § 6, para. 1).

<sup>12</sup> Margaret Gordon Seiler, *Judicial Selection in New Jersey*, 5 SETON HALL L. REV. 721, 721 (1974) (referencing N.J. Const. art. VI, §6, para. 1).

<sup>13</sup> *Id.* at 721 (quoting N.J. Const. art. VII, §2, para. 1 (1844)).

<sup>14</sup> *Id.* For an analysis of the successes and failures of court reformers at the 1947 convention and an appraisal of their goals, see Wolinsky, Arthur T. Vanderbilt: The Amending Hand (1958) (unpublished Honors thesis, Princeton University) (on file with the State Library at Trenton).

standoff, the Court could ultimately become null if it fails to issue legitimate opinions. It is imperative that any future action is mindful of the doctrines of separation of powers, constitutional interpretation, and democratic accountability.<sup>15</sup>

This Note begins in Part I with an overview of the New Jersey Supreme Court as it stands today, beginning with Governor Chris Christie's decision not to renominate Justice Wallace for life tenure. Part II presents the New Jersey State Constitution and governing rules for composition of the Court. Part III inquires whether each of the branches of government has the power to take action in the manner that occurred. Part IV proposes that the branches have this textual power, yet they should refrain or proceed with caution because the political repercussions could cause grave damage to the New Jersey political system. This Note concludes in Part V with a critique of the existing processes and proposals for a new solution. New Jersey needs new laws and a new system to prevent this situation from happening again. The problem exists here because it is unclear which branch of government would be best to accomplish such a move. Most importantly, each branch must exercise its legitimate power to produce a logical, working result.

### ***I. GOVERNOR CHRISTIE'S DECISION NOT TO REAPPOINT JUSTICE WALLACE***

On May 3, 2010, Governor Christopher J. Christie declined to reappoint sitting Justice John E. Wallace, Jr. to the New Jersey Supreme Court.<sup>16</sup> Justice Wallace became the first New Jersey Supreme Court Justice to seek reappointment but be denied by a governor since the state constitution was adopted sixty-four years ago.<sup>17</sup> Justice Wallace, at age sixty-eight, would have faced mandatory retirement in a mere two years<sup>18</sup> because of the state's mandatory retirement age.<sup>19</sup>

Governor "Christie's decision not to reappoint Wallace to a tenured term was widely criticized as undermining judicial

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<sup>15</sup> Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 ALB. L. REV. 1417, 1427 (1998).

<sup>16</sup> Richard Pérez-Peña, *Christie, Shunning Precedent, Drops Justice From Court*, N.Y. TIMES, May 4, 2010, at A22.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> N.J. Const. art. VI, § 6, para. 3. The mandatory retirement age is 70.

independence.”<sup>20</sup> During his gubernatorial campaign, Governor Christie vowed to nominate “conservative justices who would interpret the law rather than legislate from the bench.”<sup>21</sup> As a result of his actions, six of the seven members of the Governor’s advisory panel for prospective candidates for state trial courts resigned.<sup>22</sup> Retired justices also voiced their opinion on the matter, vilifying Governor Christie.<sup>23</sup> Among their criticisms was that, without a seventh justice, the Court is more likely to decide cases in a tie, effectively making the Appellate Division the deciding level.<sup>24</sup>

Governor Christie subsequently chose attorney Anne Patterson to replace Justice Wallace. The nomination was stalled for over one year, however, by the refusal of Senate Majority Leader Stephen Sweeney to hear this nomination; Senator Sweeney accused the governor of favoring “rank politics and ideology [over] practical experience” to hold confirmation hearings.<sup>25</sup> The Democratic majority in the state senate, which holds the power to approve or reject judicial nominees, said it would not consider Patterson’s nomination until Wallace’s tenured term

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<sup>20</sup> Mary Pat Gallagher, *Constitution, Rules in Conflict Over Way To Temporarily Fill Court Seat*, 201 N.J. L. J. 553, 553 (2010). See also Henry Gottlieb, *One of Wallace’s Closing Opinions Is A Broadside at Intrusive Police Searches*, 201 N.J. L. J. 1, 1 (2010) (“[I]n a break with tradition that ignited a protest by eight former justices and other members of the state’s legal establishment, Christie declined to renominate Wallace to the tenured seat.”).

<sup>21</sup> *Justice John E. Wallace OUSTED: Anne M. Patterson Picked to Replace Only Black Justice on NJ Supreme Court by Chris Christie*, HUFFINGTON POST (May 14, 2010), available at [http://www.huffingtonpost.com/2010/05/04/justice-john-e-wallace-ou\\_n\\_562640.html](http://www.huffingtonpost.com/2010/05/04/justice-john-e-wallace-ou_n_562640.html). Justice Wallace was also the only African-American justice appointed to the Supreme Court at the time, causing Governor Christie’s decision to receive much criticism beyond the scope of the focus of this Note.

<sup>22</sup> Editorial, *Judicious Advice*, 200 N.J. L. J. 856, 856 (2010).

<sup>23</sup> “Gov. Christie’s assault on the independence of the judiciary, a co-equal branch of our government, should be offensive to every lawyer who values separation of powers and who was taught to believe that cases are decided on the facts and the law and not because a judge is afraid that if the governor disagrees with his decision his reappointment will be in jeopardy.” Peter C. Paras, Letter to the Editor, *Christie’s Action on Wallace was Poor Governance*, 200 N.J. L. J. 469, 469 (2010). In 2006, by Executive Order No. 36, Gov. Jon Corzine established a judicial advisory panel, whose mission is to evaluate and to provide confidential advice to the governor on the abilities of potential judicial candidates. Recently, six of the seven members of that panel, including retired Chief Justice Deborah Poritz and three other retired justices, resigned in protest over Gov. Chris Christie’s refusal to reappoint Justice John Wallace Jr. to the Supreme Court. Editorial, *Judicious Advice*, 200 N.J. L. J. 856, 856 (2010).

<sup>24</sup> Gallagher, *supra* note 20.

<sup>25</sup> Pérez-Peña, *supra* note 16.

would have expired in 2012.<sup>26</sup>

In the interim, Chief Justice Rabner utilized lower court and retired judges on an *ad hoc* basis.<sup>27</sup> Following this routine practice, Rabner recalled Justice Wallace as a just-retired judge for a short period so he could assist with cases argued while he was still on the bench.<sup>28</sup> On September 8, 2010, Chief Justice Rabner assigned Edwin Stern of the Appellate Division to fill Justice Wallace's vacant Supreme Court seat during this political standoff and "to participate in new matters presented for the Court's consideration."<sup>29</sup>

On December 10, 2010, Justice Roberto A. Rivera-Soto stated in an abstaining opinion in an otherwise non-controversial case that he would abstain from all Supreme Court decisions for an indefinite period, due to his belief that the then-current Court membership violated the state constitution.<sup>30</sup> Justice Rivera-Soto reasoned that the temporary appointment is not "necessary" and is therefore unconstitutional.<sup>31</sup> Senator Sweeney subsequently called on Justice Rivera-Soto to resign due to his announced intention to refrain from participating in Court decisions;<sup>32</sup> this move "appear[ed] to be driven by politics, not principle."<sup>33</sup> On January 3, 2011, Rivera-Soto sent a letter to Governor Christie indicating that he did not wish to be reappointed upon expiration of his initial seven-year term on the Court in September 2011.<sup>34</sup> On January 12, 2011, Rivera-Soto did participate in a decision of

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<sup>26</sup> May Rao, *N.J. Justice Roberto Rivera-Soto says he will not seek reappointment*, PHILADELPHIA INQUIRER (Jan. 4, 2011), available at [http://articles.philly.com/2011-01-04/news/26357874\\_1\\_reappointment-christie-conservative-judges](http://articles.philly.com/2011-01-04/news/26357874_1_reappointment-christie-conservative-judges).

<sup>27</sup> *Id.*

<sup>28</sup> Gallagher, *supra* note 20, at 553 (quoting Robert Williams of Rutgers Law School-Camden).

<sup>29</sup> Mary Pat Gallagher, *Top Appeals Court Judge Stern To Fill Justice Wallace's Seat Temporarily*, 201 N.J. L. J. 857, 857 (2010).

<sup>30</sup> *Henry v. N.J. Dep't of Human Servs.*, 204 N.J. 320, 354-72 (2010) (Rivera-Soto, J. abstaining).

<sup>31</sup> *Id.* at 354.

<sup>32</sup> Tom Hester, Sr., *N.J. Supreme Court Justice Rivera-Soto abstaining from decisions in protest*, NEWJERSEYNEWSROOM.COM (Dec. 10, 2010), available at <http://www.newjerseynewsroom.com/state/nj-supreme-court-justice-rivera-soto-abstaining-from-decisions-in-protest>.

<sup>33</sup> Editorial, *The Politicization of a Respected Court*, N.Y. TIMES, Dec. 16, 2010, at A23.

<sup>34</sup> Chris Magerian, *N.J. Supreme Court Justice Roberto Rivera-Soto tells Gov. Christie he doesn't want to be renominated*, NJ.COM (Jan. 3, 2011), available at [http://www.nj.com/news/index.ssf/2011/01/nj\\_supreme\\_court\\_justice\\_rober.html](http://www.nj.com/news/index.ssf/2011/01/nj_supreme_court_justice_rober.html).

the Court and wrote an opinion indicating that he reconsidered his position and would participate in future cases where Judge Stern's vote does not affect the outcome of the case.<sup>35</sup> The State Senate passed a nonbinding resolution on February 24, 2011 calling for the resignation of the Justice.<sup>36</sup>

Governor Christie and Democrats in the State Senate reached a truce of sorts on May 2, 2011, after a yearlong battle, agreeing to have Anne Patterson, the governor's nominee, considered for a different vacancy.<sup>37</sup> Senate Democrats refused "to consider the nomination until March 2012, when Justice Wallace" would have reached the mandatory retirement age.<sup>38</sup> Governor Christie simultaneously withdrew Ms. Patterson's initial nomination and instead nominated her for another seat on the bench that became vacant on September 1, 2011, calling the arrangement "an end to the impasse of the last year."<sup>39</sup> The "stalemate over Justice Wallace's seat continues," however, and this negotiation "bypassed it with a rare tactical retreat."<sup>40</sup> For example, Governor Christie said "he would not name any new justices until the Senate . . . voted on Ms. Patterson for the Wallace seat,"<sup>41</sup> thereby continuing the battle over who will sit on the State Supreme Court and defying precedent.<sup>42</sup>

## II. THE 1947 NEW JERSEY CONSTITUTION

The founders of the 1947 Constitution purported to replace an outmoded charter for state governance with a simplified and balanced framework that became an archetype for other states.<sup>43</sup> New Jersey became "a leader in court reform when it" adopted a "unified" court

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<sup>35</sup> Michael Symons, *Rivera-Soto reverses course, will vote in some Supreme Court cases*, ASBURY PARK PRESS (Jan. 12, 2011), available at <http://blogs.app.com/capitolquickies/2011/01/12/rivera-soto-reverses-course-will-vote-in-some-supreme-court-cases/>.

<sup>36</sup> S.J. Res. 105, 214th Leg. (N.J. 2011).

<sup>37</sup> Richard Pérez-Peña, *Christie and Democrats Agree to Truce Over Court Seat*, N.Y. TIMES, May 3, 2011, at A18.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Richard Pérez-Peña, *New Tangle in Battle Over Court in Trenton*, N.Y. TIMES, Jan. 5, 2011, at A17.

<sup>43</sup> Statement by Retired Justices of the New Jersey Supreme Court, *supra* note 9.

plan.<sup>44</sup> The members of the Committee on the Judiciary looked to the U.S. Constitution for guidance to restructure the multiple courts system with overlapping jurisdictions into a flexible, yet streamlined, dichotomy and to ensure independence similar to the federal system through the process of judicial appointments.<sup>45</sup>

The New Jersey Judiciary was plagued with problems prior to the adoption of the 1947 constitution.<sup>46</sup> Its predecessor, the poorly functioning 1844 Constitution, “divided courts and concepts of law and equity, to the disadvantage of litigants, and lacked any unifying administrative power.”<sup>47</sup> Claimants were unsure of the proper forum for their assorted petitions in the absence of a unified statewide court system.<sup>48</sup> The various courts, including their divisions and judges, lacked continuity in practice, procedure, and administration.

The third state constitution<sup>49</sup> marked a pivotal moment for the state judiciary, allowing the Court to be both revered and reviled.<sup>50</sup> The

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<sup>44</sup> Seiler, *supra* note 12, at 741. See also J. GAZELL & H. RIEGER, *THE POLITICS OF JUDICIAL REFORM* 10 (1960). The other state was Delaware. *Id.*

<sup>45</sup> Statement by Retired Justices of the New Jersey Supreme Court, *supra* note 9.

<sup>46</sup> 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 1947, New Jersey’s judicial system was described as the worst in the country.”). See also Adam G. Yoffie, *From Poritz to Rabner: The New Jersey Supreme Court’s Statutory Jurisprudence over the Past Decade, 2000-2009*, 35 SETON HALL LEGIS. J. 302, 320 (2011).

<sup>47</sup> Symposium, *supra* note 46; Yoffie, *supra* note 46, at 320.

<sup>48</sup> Yoffie, *supra* note 46, at 320.

<sup>49</sup> New Jersey established its first state constitution in 1776 and ratified new constitutions in 1844 and 1947. See generally N.J. Const. (1776); N.J. Const. (1844); N.J. Const. (1947). See THE OFFICIAL WEBSITE FOR THE STATE OF NEW JERSEY, <http://www.state.nj.us/> (last visited Mar. 2, 2011).

<sup>50</sup> 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, 769 (2001) (noting that “[i]n 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). 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). 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.” Virginia A. Long, Assoc. Justice, N.J. Supreme Court, *The 2006 Chief Justice Joseph Weintraub Lecture: The Purple Thread: Social Justice as a Recurring Theme in the Decisions of the*

constitution'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."<sup>51</sup> The new Court is comprised of seven justices, with five justices constituting quorum.<sup>52</sup> Upon initial appointment, Justices sit for seven years but then must be reappointed and reconfirmed to continue sitting on the bench until the age of seventy,<sup>53</sup> thereby allowing the governor and the senate a potential opportunity to remove judges whose performance may not warrant reappointment.<sup>54</sup> Additionally, the current constitution protects the Court from blatant political interference and permits it to establish its own court rules.<sup>55</sup>

#### A. The Governor's Executive Power

The New Jersey State Constitution vests the executive power in a governor.<sup>56</sup> The governor has discretionary power to "nominate and appoint, with the advice and consent of the Senate, the Chief Justice and associate justices of the Supreme Court. No nomination to such an office shall be sent to the Senate for confirmation until after [seven] days' public notice by the Governor."<sup>57</sup> Several stipulations limit the

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*Poritz Court* (Apr. 18, 2006), in 59 RUTGERS L. REV. 533, 548 (2007); see also Yoffie, *supra* note 46.

<sup>51</sup> WILLIAMS, *supra* note 48, at xv; see also Yoffie, *supra* note 46, at 320.

<sup>52</sup> N.J. Const. art. VI, § 2, para. 1.

<sup>53</sup> N.J. Const. art. VI, § 6, para. 3. See also Edward A. Stelzer, *Bearing The Judicial Mantle: State Court Enforcement Of The Guarantee Clause*, 68 N.Y.U. L. REV. 870, 874 (1993).

<sup>54</sup> Robert J. Martin, *Reinforcing New Jersey's Bench: Power Tools for Remodeling Senatorial Courtesy and Refinishing Judicial Selection and Retention*, 53 RUTGERS L. REV. 1, 61 (2000). Instead of one fixed term, another means for ending lifetime tenure would be to require judges to undergo reappointment for a series of terms until they eventually reached mandatory retirement age. *Id.* Like the proposal for one fixed term, this concept has also been broached in Trenton, but without much enthusiasm. *Id.* Unless the terms of service were shortened significantly from the present length of seven years, this method of reoccurring evaluation would not impact many judges in a meaningful way. Even with only one reappointment, judges could serve fourteen years. For those who were appointed after age fifty-six, one reappointment would suffice to allow them to reach mandatory retirement age. For those who were appointed at an earlier age, chances appear good that most would be able to continue their judicial careers without fear of termination, since the governor and the Senate would likely feel reluctant to remove them after they had already completed fourteen years of service. *Id.*

<sup>55</sup> See *id.*

<sup>56</sup> N.J. Const. art. V, § 1, para. 1.

<sup>57</sup> N.J. Const. art. VI, § 6, para. 1.

governor regarding who can sit on the Supreme Court.<sup>58</sup>

The recess appointment power allows the governor to “fill any vacancy occurring in any office during a recess of the Legislature, appointment to which may be made by the Governor with the advice and consent of the Senate.”<sup>59</sup> Such an “ad interim appointment” terminates at “the end of the next regular session of the Senate or when” a newly confirmed Justice takes office, whichever occurs first.<sup>60</sup> The U.S. Constitution provides a similar model for this power, which is regularly used by presidents to make recess appointments.<sup>61</sup> In 1889, the New Jersey Supreme Court held, in *Fritts v. Kuhl*,<sup>62</sup> that the “state’s recess appointment clause should be interpreted consistently with federal practice,” noting that the “history of the federal government had shown frequent disagreement between the president and the federal senate, and the convention could not have supposed that the experience of our state government would be different.”<sup>63</sup> The drafters of the 1844 Constitution “prudently adopted the language of that clause” of the U.S. Constitution, “which authorizes the President to fill vacancies” that occur during the recess of the U.S. Senate.<sup>64</sup>

Accordingly, where a statute or a constitutional provision of doubtful importance is adopted in one state from the statutes or constitution of another state, it will be presumed that the interpretation adopted in the state from which it is taken has been accepted as well as the words after a practical construction has been given to the language by judicial decision.<sup>65</sup> When the members of the 1947 Convention borrowed provisions from the constitutions of other states, which had already received a judicial construction, they adopted them in view of such construction and relied on its correctness.<sup>66</sup>

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<sup>58</sup> N.J. Const. art. VI, § 6, para. 2 & 3.

<sup>59</sup> N.J. Const. art. V, § 1, para. 13.

<sup>60</sup> Edward Hartnett, *Conventional Wisdom Is Wrong on N.J. Supreme Court Appointments*, 201 N.J. L. J. 631, 631 (2010).

<sup>61</sup> *Id.*

<sup>62</sup> 51 N.J.L. 191 (N.J. Sup. Ct. 1889).

<sup>63</sup> Hartnett, *supra* note 60, at 631 (referencing *Fritts*, 51 N.J.L. at 191).

<sup>64</sup> *Fritts*, 51 N.J.L. at 198.

<sup>65</sup> *Id.* at 198-99.

<sup>66</sup> *Id.* at 199-200.

### *B. The Senate's Advice and Consent Power*

The New Jersey Constitution vests the Legislative Branch with the power to make the laws of the state.<sup>67</sup> In addition, the “Constitution requires the state Senate to render its ‘advice and consent’ on gubernatorial appointments” to the Supreme Court bench.<sup>68</sup> Under the formal Senate rules, the Governor must refer all nominations to the Senate Judiciary Committee, “unless the Senate President directs the nomination differently.”<sup>69</sup> The Senate Judiciary Committee then considers the nomination and recommends either rejection or acceptance of the nomination to the senate.<sup>70</sup> After receiving due consideration by the Senate,<sup>71</sup> the entire “Senate then votes on the nomination.”<sup>72</sup>

### *C. The Chief Justice's Administrative Power and the Temporary Assignment Power*

“The Chief Justice of the Supreme Court shall be the administrative head of all the courts in the state.”<sup>73</sup> This provision grants the Chief Justice full power to assign all Superior Court judges.<sup>74</sup> The constitution also grants the Chief Justice the power to appoint interim judges, known as the “temporary assignment power,”<sup>75</sup> by recalling

<sup>67</sup> N.J. Const. art. IV, § 1, para. 1.

<sup>68</sup> Stelzer, *supra* note 53, at 874. See N.J. Const. art. VI, § 6, para. 1 (“The governor shall nominate and appoint, with the advice and consent of the Senate, the Chief Justice and Associate Justices of the Supreme Court, the Judges of the Superior Court, the Judges of the County Courts and the judges of other inferior courts ....”). It should be noted, however, that the Senate has the prerogative not to act on a nomination at all. See *De Vesa v. Dorsey*, 134 N.J. 420, 433 (1993) (Pollock, J., concurring); Rules of the Senate of the State of New Jersey, r. 154b (1993) (“All nominations neither confirmed nor rejected during an annual session of the Senate shall not be acted upon in a subsequent annual session without being again made to the Senate by the Governor.”).

<sup>69</sup> *De Vesa*, 134 N.J. at 427 (quoting *Rules of the Senate*, r. 150).

<sup>70</sup> *Id.* (quoting *Rules of the Senate*, r. 151).

<sup>72</sup> Ricardo Castro, Letter to the Editor, *End Impasse Over Patterson's Nomination To N.J. Top Court*, 201 N.J. L. J. 688, 688 (2010).

<sup>72</sup> *De Vesa*, 134 N.J. at 427 (quoting *Rules of the Senate*, r. 152).

<sup>73</sup> N.J. Const. art. VI, § 7, para. 1. The constitution further provides: “He shall appoint an Administrative Director to serve at his pleasure.” *Id.*

<sup>74</sup> John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L. J. 701, 724-25 (1998).

<sup>75</sup> “When necessary, the Chief Justice shall assign the Judge or Judges of the Superior Court, senior in service, as provided by the rules of the Supreme Court, to serve temporarily in the Supreme Court.” N.J. Const. art. VI, § 2, para. 1.

retired justices<sup>76</sup> or lower court judges.<sup>77</sup> Neither “[t]he circumstances in which such a temporary replacement will actually be made” nor are the candidacy requirements for such a position clear.<sup>78</sup> Further, the “Supreme Court is empowered to adopt such rules as it deems necessary or appropriate for the prompt and efficient administration of justice in furtherance of the purposes of this act.”<sup>79</sup>

### **III. EACH BRANCH ACTED IN ACCORDANCE WITH ITS TEXTUALLY GRANTED POWERS**

The constitution clearly vests certain powers within each government actor; here, it seems that the Governor, the Senate, and the Chief Justice all acted within their respective powers. The Governor - and only the Governor - has the ability to decide who to appoint to a permanent position on the Supreme Court. The Senate’s influence lies in its advice and consent power exercised upon receipt of the governor’s nomination, but this is not a mandatory action. The constitution merely contemplates that the nomination will not proceed without the advice and consent of the Senate. The Constitution also clearly grants the Chief Justice the power to utilize a judge for a single case, and no textual restriction on a continuance of this method exists. Scholars differ on whether the Chief Justice’s power should have a broad or narrow interpretation. The present issue does not seem to be whether the branches are acting outside of their powers but whether this is an effective approach to governance.

#### *A. Governor Christie Acted Within His Authority*

The constitution clearly vests in the Governor - and only the Governor - the ability to decide who to appoint to the Supreme Court. The Constitution also empowers the Governor to “fill any vacancy occurring in any office during a recess of the Legislature, appointment

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<sup>76</sup> N.J. STAT. ANN. § 43:6A-13(a) (West 2010) (“Subject to rules of the Supreme Court, any justice of the Supreme Court who has retired on pension or retirement allowance may, with his consent, be recalled by the Supreme Court for temporary service in the Supreme Court or elsewhere within the judicial system.”).

<sup>77</sup> N.J. Const. art. VI, § 2, para. 1 (“When necessary, the Chief Justice shall assign the Judge or Judges of the Superior Court, senior in service, as provided by rules of the Supreme Court, to serve temporarily in the Supreme Court.”).

<sup>78</sup> Edward Hartnett, *Ties in the Supreme Court of New Jersey*, 32 SETON HALL L. REV. 735, 738 (2003).

<sup>79</sup> N.J. STAT. ANN. § 43:6A-13(d) (West 2010).

to which may be made by the Governor with the advice and consent of the Senate.”<sup>80</sup> This is known as the recess appointment power.<sup>81</sup>

Is the Governor within his rights to assert the need for “balance” in the respective roles of our government’s three branches? The Governor of New Jersey holds “one of the broadest appointment powers of any chief executive” in the country.<sup>82</sup> Federal recess appointments are not uncommon and occur under constitutional language comparable to that of New Jersey’s.<sup>83</sup> This method of judicial appointment and its constitutional provision were adopted directly from the United States Constitution, which provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”<sup>84</sup> Under this approach, Governor Christie could have acted during a recess this summer. Alternatively, the Governor could have acted when the Senate adjourned for the year,<sup>85</sup> but he

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<sup>80</sup> N.J. Const. art. V, § 1, para. 13.

<sup>81</sup> Hartnett, *supra* note 60, at 631 (quoting N.J. Const. art. V, § 1, para. 13). “Such an ‘ad interim appointment’ expires at the end of the next regular session of the Senate or when a confirmed successor takes office, whichever occurs first. . . . The interim appointment is good until the end of the next regular session of the Senate, unless a successor shall be sooner appointed and qualify . . . This provision is modeled on a similar provision of the U.S. Constitution, and presidents regularly use their power to make recess appointments.” *Id.*

<sup>82</sup> Martin, *supra* note 54, at 18-19; Stephen B. Wiley, *Senatorial Courtesy*, 97 N.J. L. J. 65, 65 (1974). Because the governor of New Jersey is the only statewide, state-elected official, he or she has extensive appointment powers, including the power to appoint officials who, in many other states, are popularly elected. *Id.* As previously noted, the governor appoints all judges in the state, except for judges of individual municipalities (who handle essentially nonindictable criminal and quasi-criminal matters, such as motor vehicle and local ordinance violations). *Id.* Although not quite coextensive with the governor’s appointment power, the state Senate’s corresponding power of advice and consent is also one of the broadest of any state. *Id.* For a discussion of the extensive appointment and other powers of the chief executive in New Jersey, see CHARLES E. JACOB, *THE GOVERNOR, THE BUREAUCRACY, AND STATE POLICY MAKING, IN POLITICS IN NEW JERSEY* 176-78 (Alan Rosenthal & John Blydenburgh eds., 1979).

<sup>83</sup> Article II, Section 2 of the United States Constitution reads: “The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.” U.S. CONST. art. II, § 2, cl. 3.

<sup>84</sup> *Passaic Cnty. Bar Ass’n v. Hughes*, 108 N.J. Super. 161, 169 (N.J. Ch. Div. 1969) (quoting U.S. CONST. art. II, § 2).

<sup>85</sup> Hartnett, *supra* note 60, at 631. See also *Fritts v. Kuhl*, 51 N.J.L. 191, 193 (N.J. Sup. Ct. 1889). The court held that the state’s recess appointment clause should be interpreted in light of federal practice:

declined to do so.

This power allows Governor Christie to reshape the court in his image with new appointments.<sup>86</sup> The Governor, in exercising his or her executive power, has the power to overcome gridlock and prevent complete paralysis.<sup>87</sup> Governor Christie's actions were a poor choice in the exercise of his gubernatorial power, however, because his lack of respect for state tradition led to unnecessary discord among the other branches, state officials, and New Jersey residents.<sup>88</sup>

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In order, therefore, to ascertain its true meaning, in accordance with the recognized rules of interpretation, we must seek for the reason and spirit of it, having regard to the effects and consequences of the construction adopted, and the source from which the language employed was derived. Was it intended merely to prevent those offices from remaining vacant, which became so during the recess of the legislature by some casualty, or was it to prevent any of the enumerated offices from remaining vacant during the recess of the senate, without regard to when or how the vacancy occurred? The latter clause of section 2, article 2, of the federal constitution, adopted in 1787, provides that "the president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

*Id.*

<sup>86</sup> Pérez-Peña, *supra* note 16.

<sup>87</sup> *Fritts*, 51 N.J.L. at 203. The court elaborated on the Governor's executive power, as articulated in Article 5 of the state constitution:

Without detriment to the public, there are times when the legislature is not in session to pass laws, and the courts not in session to interpret and administer them, but it is absolutely necessary that the executive power shall always be capable of exercise. There is no point of time when the governor may not be called upon to enforce the laws, and there should be no time when he is incapable of acting. He cannot exercise all the executive power himself; he must act through the agency of others. He cannot hold the courts or perform the duties required of his appointees. When, therefore, we reflect that that the constitution has most carefully guarded against a vacancy in the office of governor, and vested in him alone the power to appoint certain officers to perform the most essential functions of government, and that upon him alone the duty is imposed to see that the laws are faithfully executed, we must be persuaded that the power conferred was intended to be commensurate with the duty required.

*Id.*

<sup>88</sup> *See Paras*, *supra* note 23 ("Gov. Christie's assault on the independence of the judiciary, a co-equal branch of our government, should be offensive to every lawyer who values separation of powers and who was taught to believe that cases are decided on the facts and the law and not because a judge is afraid that if the governor disagrees with his decision his reappointment will be in jeopardy.").

*B. The Senate Acted Within its Authority*

The Senate's advice and consent power is a "procedural device that the framers of the United States Constitution conceived of as a means to curb the excesses of the executive."<sup>89</sup> The New Jersey Constitution provides that "[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts."<sup>90</sup> The clause "subject to the law" grants the Legislature the power of molding procedure.<sup>91</sup> However, when the issue first arose in court, Chief Justice Vanderbilt interpreted the provision to apply only to "substantive law" and not subject to "procedural law."<sup>92</sup>

Senators "could assert that confirmation is an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."<sup>93</sup> The governor's broad appointment power further enhances "[s]enators' concern about placing limits on the appointment power of the executive."<sup>94</sup> The "Senate's confirmation process provides an effective and constitutionally authorized restraint against arbitrary or ill-conceived gubernatorial appointments" as a method of employing the well-recognized constitutional doctrine of checks and balances.<sup>95</sup> Thus, Senators must ensure that nominees are well-qualified and have been nominated on their merits, as opposed to favoritism or for political reasons, for this "noble and essential role."<sup>96</sup>

The state constitution simply suggests that the nomination will not proceed without the advice and consent of the Senate; it does not command that "the Senate 'shall' advise on and consent to an

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<sup>89</sup> U.S. CONST. art. II, § 2, cl. 2. *See also* Martin, *supra* note 54, at 18.

<sup>90</sup> N.J. Const. art. VI, § 2, para. 3.

<sup>91</sup> Wefing, *supra* note 74, at 702-03.

<sup>92</sup> *Id.*; Winberry v. Salisbury, 5 N.J. 240, 245 (1950).

<sup>93</sup> Martin, *supra* note 54, at 18 (quoting ALEXANDER HAMILTON, THE FEDERALIST NO. 76 (Jacob E. Cooke ed., 1961)). However, Hamilton also believed that an independent judiciary, protected by life tenure, was the best way to secure a steady "and impartial administration of the laws." *See* ALEXANDER HAMILTON, THE FEDERALIST NO. 78 (Jacob E. Cooke ed., 1961)).

<sup>94</sup> Martin, *supra* note 54, at 18-19; Wiley, *supra* note 81, at 65.

<sup>95</sup> Martin, *supra* note 54, at 19; *Senatorial Courtesy Commission Report*, reprinted in 99 N.J. L. J. 505, 518 (1976) (noting Senatorial Courtesy Commission's recognition of important constitutional role in maintaining system of checks and balances).

<sup>96</sup> Martin, *supra* note 54, at 18-19; Wiley, *supra* note 81, at 71.

appointment.”<sup>97</sup> Consistent with the plain language of the constitution, the Senate Rules recognize that the Senate President may prevent the referral of a nomination to the Judiciary Committee.<sup>98</sup> The Rules likewise instruct that without Senate action, a nomination will lapse.<sup>99</sup> The text of the Constitution places restraints on “ordering the Senate to confirm a nomination,” just as there is a restraint from “ordering the Governor to submit one.”<sup>100</sup> Thus, the Senate acted within its textually granted authority.

### *C. Chief Justice Rabner Acted Within his Authority*

Efforts to preserve the integrity of the judiciary or to safeguard its independence have led to many state inter-branch issues: “[c]ourts occasionally have been placed in the unenviable position of having to define their own status in the tripartite constitutional scheme . . . [this includes] needing to draw lines of demarcation consistent with accepted conventions and a system of checks and balances.”<sup>101</sup> Accusations of judicial overreach and internal clashes result from judicial operations.<sup>102</sup> State courts hold both the burdens and the responsibility “for rule-making and routine day-to-day management” of the courts.<sup>103</sup> The members of the judiciary specifically “play an active, even aggressive, part in the governance of the state and . . . take a leadership role in legal development.”<sup>104</sup>

The Constitution grants the Chief Justice the power to utilize, or “bring up,” someone for a single case; yet the Constitution places no

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<sup>97</sup> *De Vesa v. Dorsey*, 134 N.J. 420, 433 (1993).

<sup>98</sup> *Id.* See Rules of the Senate, R. 150 (providing that “[w]hen nominations shall be made by the Governor to the Senate, they shall, unless otherwise ordered by the Senate President, be referred to the Judiciary Committee.”).

<sup>99</sup> *De Vesa*, 134 N.J. at 433. See Rules of the Senate, r. 154b (stating that “[a]ll nominations neither confirmed nor rejected during an annual session of the Senate shall not be acted upon in a subsequent annual session without being again made to the Senate by the Governor.”).

<sup>100</sup> *De Vesa*, 134 N.J. at 433.

<sup>101</sup> Friedelbaum, *supra* note 15, at 1429-30.

<sup>102</sup> *Id.* at 1430.

<sup>103</sup> *Id.*

<sup>104</sup> Wefing, *supra* note 74, at 712. See also Michael Booth, *Christie’s Ouster of Justice Wallace Tests State Constitution and it Passes*, 200 N.J. L. J. 313, 313 (2010) (“If neither Christie nor the Senate blinks, the Court can carry on business as usual provided its constitutional quorum of five appointed members is maintained.”).

textual restriction for a continuance of this method.<sup>105</sup> Chief Justices “have not considered themselves constrained” from making “nonquorum-related assignments” in the past.<sup>106</sup> Because the rule that grants this authority has been established for decades, it constitutes a longstanding, unchallenged gloss on the constitutional language and is therefore entitled to some weight.<sup>107</sup> The provision in New Jersey allowing the Chief Justice to “temporarily assign a judge to sit for an absent member of the Supreme Court”<sup>108</sup> stands in contrast to the inability of the Supreme Court of the United States “to temporarily replace one of its absent justices.”<sup>109</sup> It is unclear, however, when a temporary replacement may be effectuated.<sup>110</sup>

At a minimum, the constitution permits the Chief Justice to assign a Superior Court judge for temporary service on the Court, but it is not clear whether that can be done for a purpose other than to meet the quorum requirement of five justices. As such, it is imperative to clarify whether the Chief Justice is permitted to recall retired Supreme Court justices and temporarily assign them to the Supreme Court, and whether a justice can even “decide cases after reaching the mandatory retirement age of seventy.”<sup>111</sup> There are two competing views on this matter.

Under a liberal interpretation, the court rules expressly allow the Chief Justice to utilize lower court and retired justices under a great variety of circumstances. As such, the Chief Justice may do so to “replace a justice who is absent or unable to act, or to expedite the business of the court,” circumstances beyond constituting quorum.<sup>112</sup> New Jersey Court Rule 2:13-2 grants the Chief Justice the power to temporarily assign an Appellate Division judge or a retired Supreme Court justice in order to “expedite the business of the court”<sup>113</sup> but does

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<sup>105</sup> Gallagher, *supra* note 20, at 553 (quoting Frank Askin, Director of Rutgers Law School-Newark’s Constitutional Litigation Clinic, that “I don’t know that they can’t bring them up for all cases....”).

<sup>106</sup> *Id.* (quoting Robert Williams, Constitutional Law professor at Rutgers Law School-Camden).

<sup>107</sup> *Id.* (quoting Earl Maltz, Constitutional Law professor at Rutgers Law School-Camden).

<sup>108</sup> See N.J. Const. art. VI, § 2, para. 1; N.J. STAT. ANN. § 2:13-2 (West 2010); Hartnett, *supra* note 78, at 738.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Hartnett, *supra* note 78, at 741.

<sup>112</sup> Gallagher, *supra* note 20, at 553.

<sup>113</sup> N.J. STAT. ANN. § 2:13-2 (West 2010).

not expound on what qualifies as “temporary.” Thus, the constitution does not say the temporary assignment power exists only to regain quorum, and this provision authorizes the Court to promulgate rules fleshing out power, which may refer to other unforeseen circumstances. This has potential to implicate the supremacy of the State Constitution, were there a clear constitutional provision on the matter.<sup>114</sup> Section 43:6A-13 allows the Chief Justice to call up retired Supreme Court justices who are not practicing law.<sup>115</sup> The mandatory retirement age<sup>116</sup> does not “prevent the utilization of such senior judges on a special assignment basis” at the direction of the Chief Justice.<sup>117</sup>

Alternatively, the Temporary Assignment Provision can be read as a narrow, mandatory duty only applicable for making quorum; thus, the Chief Justice may not bring the court to seven members.<sup>118</sup> Under this reasoning, a “temporary assignment should be made only when necessary to make a quorum,” and the “judge or judges assigned should be senior in service in the Superior Court.”<sup>119</sup> Furthermore, the Chief Justice would not have the constitutional authority to fill a court seat on a temporary basis for any reason other than to make quorum.<sup>120</sup> The text, in its context and its implementation for the first two decades of practice under the 1947 Constitution, could be said to support this proposition because the sentence allowing such assignments follows directly after the one stating the five-member quorum requirement.<sup>121</sup> As originally

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<sup>114</sup> *George Siegler Co. v. Norton*, 8 N.J. 374, 380-81 (1952) (“Where a statute, wholly procedural in its operation, is in conflict, either directly or by necessary implication, with a rule of procedure promulgated [by the Supreme Court] pursuant to the authority delegated to it under the Constitution, the latter must prevail.”).

<sup>115</sup> N.J. STAT. ANN. § 43:6A-13 (West 2010).

<sup>116</sup> N.J. Const. art. VI, § 6, para. 3.

<sup>117</sup> Hartnett, *supra* note 78, at 765; Statement accompanying Assemb. B. No. 1419 (introduced April 1, 1974).

<sup>118</sup> Hartnett, *supra* note 60, at 631.

<sup>119</sup> Hartnett, *supra* note 78, at 741, 768.

Not only are both the original and the revised Supreme Court rule consistent with interpreting the temporary assignment provision of the constitution as available only when necessary to make a quorum, but the very change made to the original rule by the revised rule confirms the appropriateness of treating the identical change made by the Judiciary Committee of the convention as stylistic.

*Id.*

<sup>120</sup> Gallagher, *supra* note 20, at 553 (quoting Earl Maltz, Constitutional Law professor at Rutgers Law School-Camden) (“Based on the language of Article VI, it ‘doesn’t say if the seat is vacant for a while that the Chief Justice can appoint someone.’”).

<sup>121</sup> Gallagher, *supra* note 20, at 553 (“The rule, which would appear to allow Chief Justice Stuart Rabner to name a interim justice, is not valid because it goes beyond what the

drafted, the paragraph specifically referred to using the power when necessary to make quorum, and the paring of the quorum reference from the final version was a stylistic change.<sup>122</sup> Also, Court Rule 2:13-2 first included “language about replacing absent justices and expediting court business” in 1967, but “the provision allowing appointment of retired justices” was not added until 1978.<sup>123</sup>

New Jersey later adopted the requirement that justices do not receive tenure until they are reappointed, which could be interpreted to indicate that the framers “intended to permit the Governor and the Senate to consider the justices’ judicial decisions before reappointment.”<sup>124</sup> Thus, based in part on its history, the constitution does not allow the Chief Justice to fill the vacancy as he chooses.<sup>125</sup> Furthermore, the constitution only authorizes temporary usages of senior Superior Court judges.<sup>126</sup> Since 1971, justices have “participated in cases after retirement, ostensibly on the ground that the case was argued and submitted prior to retirement,”<sup>127</sup> but there is no provision expressly allowing retired justices to be called up for any duties beyond completing their work in progress.

Moreover, it could be said that this rule should be applied narrowly because it is wrong to allow the Supreme Court to take license with the constitution, particularly with those provisions designed to cabin its own members’ power.<sup>128</sup> The Chief Justice would essentially be granted “unfettered authority” if he or she were allowed to make “temporary assignments for nonquorum purposes, such as expediting court business as the rule states.”<sup>129</sup> Accordingly, the Governor and Senate are

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Constitution allows. . . Instead, it is Gov. Chris Christie who has the constitutional power to fill the seat temporarily through a recess appointment.”).

<sup>122</sup> Hartnett, *supra* note 60, at 631.

<sup>123</sup> Gallagher, *supra* note 20, at 553.

<sup>124</sup> Wefing, *supra* note 74, at 712.

<sup>125</sup> See N.J. Const. art. VI, § 2, para. 1. See also Hartnett, *supra* note 60, at 631 (“Adopted in 1947, it reads: ‘Five members of the court shall constitute a quorum. When necessary, the Chief Justice shall assign the Judge or Judges of the Superior Court, senior in service: as provided by rules of the Supreme Court, to serve temporarily in the Supreme Court.’”).

<sup>126</sup> N.J. Const. art. VI, § 2, para. 1. (“When necessary, the Chief Justice shall assign the Judge or Judges of the Superior Court, senior in service . . . to serve temporarily in the Supreme Court.”). See also Hartnett, *supra* note 60, at 631 (quoting N.J. Const. art. VI, § 2, para. 1).

<sup>127</sup> Hartnett, *supra* note 78, at 766.

<sup>128</sup> Hartnett, *supra* note 60, at 761.

<sup>129</sup> Gallagher, *supra* note 20, at 553 (quoting Earl Maltz, Constitutional Law professor

responsible for filling the Supreme Court bench, not the judges.<sup>130</sup>

***IV. EACH BRANCH ACTED WITH POOR FORESIGHT  
BECAUSE THE POLITICAL REPERCUSSIONS HAVE  
DAMAGED AND COULD CONTINUE TO CAUSE GREATER  
DAMAGE TO THE NEW JERSEY POLITICAL SYSTEM***

The three branches of the New Jersey political system each acted within their textual authority; however, in doing so, each branch failed to take into account the best interests of the state, especially the court system. There is simply no question about the intent of the framers of the Constitution: reappointment would be denied only when a judge was deemed unfit, a standard that ensured the independence of the state's judiciary. Governor Richard J. Hughes, who was involved in the 1947 Constitutional Convention, stated that "the purpose of the reappointment process was only to exclude someone who had turned out to be incompetent and was not intended to allow any consideration of a judge's judicial opinions."<sup>131</sup> That standard, embraced and followed for almost seventy years, is imbued with constitutional value.<sup>132</sup> No governor before now sought to control the third branch of government through the reappointment process; the threat to the New Jersey Judiciary and overall state system will inevitably suffer because of the Governor's actions.

*A. The Current Situation in New Jersey Represents a Classic Case of Separation of Powers with the Three Co-Equal Branches of Government at Odds with Each Other, Thereby Threatening Judicial Independence*

The state constitution employs the separation of powers doctrine as a means of distinguishing between the three branches of government.<sup>133</sup> There exists an underlying general recognition that this tripartite system "was intended to allocate to the political branches of government a

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at Rutgers Law School-Camden).

<sup>130</sup> Hartnett, *supra* note 78, at 631.

<sup>131</sup> Wefing, *supra* note 74, at 712-713 (quoting John B. Wefing, *Richard J. Hughes--Public Servant*, 23 SETON HALL L. REV. 411, 415 (1993)).

<sup>132</sup> Statement by Retired Justices of the New Jersey Supreme Court, *supra* note 9.

<sup>133</sup> N.J. Const. art. III, § 1, para. 1. (stating that the "powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.").

competence to reach ultimate decisions and to engage in practices that are not subject to judicial supervision or review.”<sup>134</sup> The “exercise of separated power” by the three branches is complimented and mediated by a system of checks and balances that has the potential to intermingle the powers of one branch with another.<sup>135</sup> Thus, counter-balancing devices guard against an excessive accumulation of power in any one branch, while “the rigors of separation are qualified and government is more workable.”<sup>136</sup> Because this framework is “beset by incongruities and confining modifiers,” the separation principle has evolved and resolved a commingling of responsibilities.<sup>137</sup>

Despite this framework’s protection, the separation of powers of the three branches of New Jersey’s government is in jeopardy. Each branch is attempting to usurp power from one another, instead of working together and utilizing each other to reach a positive result. Here, the system of checks and balances is successfully limiting any one branch from gaining complete control: the Governor is asserting control over the court by using his appointment power; the Senate is defiant regarding its decision to not affirm the governor’s nomination; and the Court is utilizing judges as it sees fit. However, this excessive entanglement is not what the framers of the 1947 Constitution envisioned; these separate branches should be working through conflict, rather than exacerbating it.

The independence of courts holds a special place in the institution of American government,<sup>138</sup> as there is a “fundamental relation between the quality of judges and the proper administration of justice.”<sup>139</sup> The maintenance of judicial independence was of primary concern in the late eighteenth century when Alexander Hamilton “warned of the ‘natural feebleness of the judiciary’” and of the “need to ensure that courts are not overawed by the other branches,” and that concern remains the same

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<sup>134</sup> Passaic Cnty. Bar Ass’n v. Hughes, 108 N.J. Super. 161, 167 (N.J. Ch. Div. 1969).

<sup>135</sup> Friedelbaum, *supra* note 15, at 1422. See PROXIMATE SOLUTIONS: CASE-PROBLEMS IN STATE AND LOCAL GOVERNMENT 150-206 (G. Theodore Mitau & Harold W. Chase eds., 1964) (providing brief case excerpts of state delegation issues).

<sup>136</sup> Friedelbaum, *supra* note 15, at 1422. PROXIMATE SOLUTIONS, *supra* note 137, at 150-51 (discussing the evolution and judicial acceptance of congressional delegation).

<sup>137</sup> Friedelbaum, *supra* note 15, at 1422.

<sup>138</sup> *Id.* at 1441-42. See also Maryellen Fullerton, *No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOK. L. REV. 207, 212 (1983) (“This function of judicial independence plays an important role in the overall constitutional structure.”).

<sup>139</sup> ARTHUR VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 3 (1949).

today.<sup>140</sup>

The method of appointment is “the most important factor supporting the independence of the Judiciary.”<sup>141</sup> With the advice and consent of the senate, the governor appoints members of the judiciary for a seven-year term.<sup>142</sup> Reappointment uses the same system, and if the Governor reappoints the justice, the justice remains on the court until the mandatory retirement age of seventy.<sup>143</sup>

A “system of appointment rather than election” allows for a more independent judiciary.<sup>144</sup> Only nine states, including New Jersey,<sup>145</sup> lack any election element within the judicial appointment process.<sup>145</sup> The large majority of states that “have appointment by the Governor for the initial selection include a retention election,” and many more “have partisan or non-partisan elections.”<sup>146</sup> While in a sense more democratic, those systems have the tendency to impede the judiciary’s independence.<sup>147</sup> The founders understood “the importance of strong, co-equal branches of government to best serve the people of [the] State [and] those guiding principles remain vital today.”<sup>148</sup>

An independent judiciary is necessary to our form of government, and no judge should have to fear that the outcome of a specific case will be used as a standard for reappointment.<sup>149</sup> Citizens who turn to the courts for relief are entitled to have their cases resolved by impartial judges who focus only on the evenhanded pursuit of justice. Litigants

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<sup>140</sup> Friedelbaum, *supra* note 15, at 1430-31 (quoting ALEXANDER HAMILTON, THE FEDERALIST NO. 78, at 523 (Jacob E. Cooke ed., 1961)).

<sup>141</sup> Wefing, *supra* note 74, at 714.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* (Justices after retirement can be recalled but do not serve on the Supreme Court).

<sup>144</sup> *Id.* at 715 (“It is not surprising that the New York and the New Jersey state courts are activist bodies. Their judges are appointed by the Governor, not elected, and that offers them some protection from irate voters.” W. John Moore, *In Whose Court?*, 23 NAT’L J. 2396 (1991).

<sup>145</sup> Wefing, *supra* note 74, at 714.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> Statement of Chief Justice Stuart Rabner issued to all justices and judges of New Jersey. Evan H. Krinick, *Governor’s Replacement of Justice Wallace Bucks More Than Half a Century of Constitutional Tradition*, 200 N.J. L. J. 329, 329 (2010).

<sup>149</sup> Chief Justice Rabner said, in a statement to justices and judges, “[w]e have entered a phase when judges of this state may begin to fear political retribution depending on how they decide a case.” Editorial, *Justice John E. Wallace OUSTED*, *supra* note 21; *Battle over Justice John Wallace puts a lot at risk*, THE STAR LEDGER EDITORIAL PAGE (May 17, 2010, 6:56 PM), [http://blog.nj.com/njv\\_editorial\\_page/2010/05/post\\_8.html](http://blog.nj.com/njv_editorial_page/2010/05/post_8.html).

should never have to worry that a judge may be more concerned about how a decision could affect his or her appointment.<sup>150</sup> Contrarily, proper considerations of judicial restraint should require that every judge think about each decision in the context of its impact on the state's system of government and whether it will serve to undermine the respect and deference that is required for a court to be truly independent.

Judicial independence is a democratic precept that is "critical to maintain the rule of law, unaffected by political concerns."<sup>151</sup> The framers of the 1947 constitution intended to create a "powerful, independent judiciary, free to interpret the law using its best judgment without regard to the political considerations of the moment;" this independence reinforces "protections for individual rights and acts as a check on the worst" temptations of democracy.<sup>152</sup>

*B. These Actions Threaten Legitimacy and Have Politicized the Court*

Governors generally select justices with their same ideological viewpoints.<sup>153</sup> But how deeply has Governor Christie's decision shaken the pillars of the state's legal establishment? Not only has his decision been a "radical and unprecedented assault on judicial independence, [but i]t sets a precedent that will allow governors of both parties eventually to reduce the Court to a body of temporary appointees with membership fluctuating in accord with the political cycle."<sup>154</sup> Governor Christie is sending the message that "there will be no judicial independence during his administration" unless things are done his way.<sup>155</sup> He argued that if justices fear not getting reappointed, then "they care more about keeping their job than doing their job."<sup>156</sup> Nevertheless,

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<sup>150</sup> *Justice John E. Wallace OUSTED: Anne M. Patterson Picked to Replace Only Black Justice on NJ Supreme Court by Chris Christie*, HUFFINGTON POST (May 14, 2010), available at [http://www.huffingtonpost.com/2010/05/04/justice-john-e-wallace-ou\\_n\\_562640.html](http://www.huffingtonpost.com/2010/05/04/justice-john-e-wallace-ou_n_562640.html).

<sup>151</sup> Statement of Chief Justice Stuart Rabner, *supra* note 149; Krinick *supra* note 149, at 329.

<sup>152</sup> Editorial, *Judicial Independence*, 200 N.J. L. J. 334, 334 (2010).

<sup>153</sup> Wefing, *supra* note 74, at 723.

<sup>154</sup> Editorial, *Judicial Independence*, *supra* note 152, at 334.

<sup>155</sup> Robert A. Fall, J.S.C. (Ret.), *Governor, in Rejecting Wallace, Misrepresented Justice's Record, Says Former Judge*, 200 N.J. L. J. 401, 401 (2010).

<sup>156</sup> *Christie: Justices Too Concerned With Keeping Jobs Shouldn't Be on Court*, 200 N.J. L. J. 393, 393 (2010).

justices must be permitted to adjudicate without fear of retaliation.<sup>157</sup>

Politically critical cases will “inevitably come before the Supreme Court.”<sup>158</sup> Rampant discretion “in choosing a lower court judge to fill an ad hoc vacancy” will certainly diminish respect for the court and could lead to discord among current justices.<sup>159</sup> For example, on December 10, 2010, Justice Roberto Rivera-Soto issued an opinion calling the length of Judge Stern’s temporary assignment unconstitutional.<sup>160</sup> Explaining why he was not taking part in the unrelated ruling on a racial discrimination case, Justice Rivera-Soto wrote that he would abstain from all decisions as long as Judge Stern was on the Court.<sup>161</sup> Justice Rivera-Soto reasoned that “any such assignment at this juncture simply is not necessary” because the Court had a quorum.<sup>162</sup> Senate President Sweeney called on Justice Rivera-Soto to resign.<sup>163</sup> Justice Helen E. Hoens of the Supreme Court wrote that she, too, had “grave reservations

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<sup>157</sup> Henry Gottlieb, *N.J. Governor Rebuffs Former Justices’ Request That He Rethink Ouster of High Court Judge*, 200 N.J. L. J. 313, 313 (2010) (quoting retired justices: Former Chief Justices Deborah Poritz and James Zazzali and Associate Justices Robert Clifford, James Coleman Jr., Gary Stein, Marie Garibaldi, Alan Handler and Stewart Pollock).

<sup>158</sup> Hartnett, *supra* note 78, at 760.

<sup>159</sup> *Id.*

<sup>160</sup> *Henry v. N.J. Dep’t of Human Servs.*, 204 N.J. 320, 354-72 (2010) (Rivera-Soto, J. abstaining). Justice Rivera-Soto then stated that he would “cast a substantive vote in every case in which the judge of the Superior Court temporarily assigned to serve on the Supreme Court participates except for those in which the temporarily assigned judge casts a vote that affects the outcome of the case.” *Hopewell Valley Citizens’ Group, Inc. v. Berwind Prop. Group Dev. Co., L.P.*, 204 N.J. 569, 587 (2011) (Rivera-Soto, J., dissenting).

<sup>161</sup> *Henry*, 204 N.J. at 354 (Rivera-Soto, J. abstaining). Justice Rivera-Soto explained the reason for his abstention:

Today, while constituted as one Chief Justice, five Associate Justices and a Judge of the Appellate Division selected unilaterally by the Chief Justice, the Court has rendered a decision in this matter. The Court as so constituted is unconstitutional and its acts are ultra vires for three principal reasons. First, the Constitution allows the assignment of a Superior Court Judge to serve on the Supreme Court only when necessary, and any such assignment at this juncture simply is not necessary. Further, the methodology this Court has adopted for the selection of who is to serve on assignment to the Supreme Court does not comport with the clear constitutional mandate. Finally, the assignment of a Superior Court Judge to serve on this Court to fill a vacancy resulting from a political impasse between the Executive and the Legislative Branches thrusts the Judiciary into that political thicket, all the while improperly advancing one side’s views in preference over the other’s. For each of those reasons, I abstain.

<sup>162</sup> *Id.* at 354.

<sup>163</sup> Richard Pérez-Peña, *Appointment Fight Divides Judges*, N.Y. TIMES, Dec. 10, 2010, at A19.

about the temporary appointment but did not formally oppose it.”<sup>164</sup> After an extended period of refusal, Justice Rivero-Soto voted on a case, an act which seemed to attract more criticism than his initial protest; critics argued that he came and went as he pleased, with little regard for the integrity of the justice system.<sup>165</sup>

In *Lewis v. Harris*,<sup>166</sup> Chief Justice Rabner and Justices Rivera-Soto and Hoens, who all face renomination and reconfirmation,<sup>167</sup> voted to deny the motion to recognize same-sex marriage in New Jersey.<sup>168</sup> The dissents came from three justices tenured until mandatory retirement at age seventy: Virginia Long, Jaynee Lavecchia and Barry Albin.<sup>169</sup> The majority recognized that this case raised a matter of “general public importance” and “constitutional significance,”<sup>170</sup> yet nothing resulted because a majority of four votes were required to grant the motion. Assemblyman John McKeon said that “he did not want to besmirch the integrity of the court,” but “when split rulings are handed down in this manner, it is inevitable that individuals would be left with the view that

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<sup>164</sup> *Id.*

<sup>165</sup> Democrats, already enraged by Rivera-Soto’s earlier decision to abstain, renewed calls for him to step down. “This is as bad as it could get. . . [h]e is making a mockery out of his position as justice of the New Jersey Supreme Court and putting himself above the law, as he alone determines. . . . Sen. Raymond Lesniak (D-Union), one of the justice’s harshest critics, called the decision ‘bizarre.’” Chris Megerian, *N.J. Supreme Court Justice Rivera-Soto Tempers Stance on Abstention*, NJ.COM (Jan. 13, 2011, 6:00 AM), [http://www.nj.com/news/index.ssf/2011/01/shell\\_supreme\\_court\\_justice\\_ri.html](http://www.nj.com/news/index.ssf/2011/01/shell_supreme_court_justice_ri.html).

<sup>166</sup> 202 N.J. 340 (2010).

<sup>167</sup> Chief Justice Rabner’s and Justice Hoens’s terms will expire before 2014; Justice Long will reach mandatory retirement in 2012. *Supreme Court of New Jersey: Supreme Court Justices’ Biographies*, NEW JERSEY COURTS ONLINE (2011), <http://www.judiciary.state.nj.us/supreme/index.htm> (last visited Aug. 26, 2011).

<sup>168</sup> See generally *Lewis v. Harris*, 202 N.J. 340 (2010). The claimants in *Lewis v. Harris* motioned for review pursuant to Rule 1:10-3 (“motion in aid of litigants rights”), which, if granted, would bypass the trial stage. If such a motion were granted, the Supreme Court would have granted expedited review to the case arguing for same-sex marriage, but the motion itself does not mean that same-sex marriage would be recognized by granting the motion.

<sup>169</sup> See generally *id.* See also Matt Friedman, *N.J. Supreme Court Declines to Hear Gay Marriage Case Filed by 6 Same-sex Couples*, NJ.COM (Jul. 27, 2010, 6:49 AM), [http://www.nj.com/news/index.ssf/2010/07/nj\\_supreme\\_court\\_declines\\_same.html](http://www.nj.com/news/index.ssf/2010/07/nj_supreme_court_declines_same.html).

Legislators who raised the issue of whether at least three members of the court might have been afraid to touch the gay marriage case because Christie can remove them by appointing other justices. Bob Braun, *N.J. Supreme Court’s refusal to hear gay marriage case raises question of Christie’s influence*, NJ.COM (Aug. 16, 2010, 10:35 AM), [http://blog.nj.com/njv\\_bob\\_braun/2010/08/nj\\_supreme\\_court\\_justices\\_who.html](http://blog.nj.com/njv_bob_braun/2010/08/nj_supreme_court_justices_who.html).

<sup>170</sup> *Lewis*, 202 N.J. at 341.

the court's decision was politicized."<sup>171</sup> Therefore, the lack of a full bench effectively makes the Appellate Division the deciding level, erasing the legitimacy that the New Jersey Supreme Court ought to have.

Judicial appointments may be said to be inevitably political; yet the issue is not whether judicial selection can be removed from politics, but "how the public's interest in obtaining the most competent, disinterested, and independent judges" to the Supreme Court can be met.<sup>172</sup> The New Jersey court system is unique in that the Supreme Court is required to be partisan-balanced; though unwritten, Governors must maintain a "four/three party affiliation split" on the Court, a balance seen as a "powerful restraint on court 'packing' or other means of exerting political pressure on an independent judiciary."<sup>173</sup> Because this tradition is unwritten, there is debate as to how many seats on the bench must be allocated to each party<sup>174</sup>; however, at a bare minimum, it seems there must be no more than three members of a political affiliation sitting as justices.<sup>175</sup> Therefore, the Governor may not completely restructure the court in any one direction because of the restrictions on party balance. As mentioned earlier, governors generally select justices with their same ideological viewpoints.<sup>176</sup> This practice creates a nonpartisan balance because it is bipartisan by design. An independent, nonpartisan judiciary creates a strong backbone of reliable jurisprudence in the court's jurisdiction. For example, in *Bush v. Gore*,<sup>177</sup>

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<sup>171</sup> Friedman, *supra* note 169. Legislators who raised the issue of whether at least three members of the court might have been afraid to touch the gay marriage case because Christie can remove them by appointing other justices. Braun, *supra* note 169.

<sup>172</sup> Seiler, *supra* note 12, at 725.

<sup>173</sup> Statement by Retired Justices of the New Jersey Supreme Court, *supra* note 9.

<sup>174</sup> See Letter from Arthur T. Vanderbilt to the Committee on the Judiciary (July 29, 1947), in 4 N.J. Const. Conv., at 729. There appear to be two different interpretations of the balance: either no more than four from one party, or there must be at least three from each political party and the governor can pick the seventh justice.

<sup>175</sup> Wefing, *supra* note 74, at 715-16 ("One of the virtually unique aspects of the New Jersey system is its unwritten but institutionalized requirement that the court be kept politically balanced. While the Governor theoretically has the power to appoint anyone of any political party, because there is no constitutional or statutory authority restricting his or her choice, the courts in New Jersey, including the supreme court, have always been kept politically balanced. There always will be at least three Republicans and three Democrats on the court, and one additional member from either party. This is virtually unique when looking at states across the country. This balance keeps governors from having the ability to totally reconstruct the court in any one direction.")

<sup>176</sup> *Id.* at 723.

<sup>177</sup> 531 U.S. 98 (2000).

the U.S. Supreme Court had little faith in the Florida Supreme Court, in part because it was Republican-dominated and very partisan.<sup>178</sup> There can, and should, be more trust in the Supreme Court because it is nonpartisan; thus, it is important to retain a partisan balance in order to promote the tradition and reliability for which the New Jersey Supreme Court has gained national recognition.

***V. THERE ARE A VARIETY OF POSSIBLE SOLUTIONS TO REMEDY THE SITUATION AND PREVENT A REOCCURRENCE OF THIS STALEMATE***

The Constitution worked in this situation: “Governor Chris Christie exercised his power not to reappoint Justice John Wallace, Jr.; the Senate exercised its power not to confirm Christie’s choice of replacement, Anne Patterson;” and Chief Justice Rabner’s “power to assign a temporary replacement for Wallace” occurred without official protest.<sup>179</sup> The three governmental branches, however, acted to the overall detriment of the state’s political system. New Jersey is in need of a new approach to remedy the current situation, and perhaps an entirely new system should be considered in order to prevent this novel chain of events from happening again. It is problematic that the decision for this needed change is not currently allocated to the particular branch of government best utilized to accomplish such a move. Most importantly, each branch must practice the exercise of legitimate power to produce a logical, working result.

The most logical solution to remedy this issue would be to enact a constitutional amendment with specific provisions laying out who may or may not appoint an interim justice and the qualifications of that interim justice. To amend the Constitution is a very difficult process,<sup>180</sup> and must be done with great care and specificity so as to be properly applied to future issues that may arise.

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<sup>178</sup> See generally *Bush*, 531 U.S. at 107-08 (stating in dicta that Article II requires the Supreme Court’s revision of the state court’s construction of state laws in order to protect one organ of the State from another). The Supreme Court granted certiorari and vacated the Florida Supreme Court’s decision because of considerable uncertainty as to the grounds on which it was based. *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 78 (2000). Three concurring justices also asserted that the Florida Supreme Court had violated Article II, § 1, cl. 2 of the Constitution, by misinterpreting Florida election law that had been enacted by the Florida Legislature. *Bush*, 531 U.S. at 112-19.

<sup>179</sup> Booth, *supra* note 104, at 313.

<sup>180</sup> N.J. Const. art. IX, § 1, para. 1-7.

To bypass this problem, a constitutional amendment could be adopted providing for the popular election, rather than the appointment, of judges. Many states continue to rely on elections to determine judicial selection, by means of both partisan elections<sup>181</sup> and nonpartisan elections.<sup>182</sup> Proponents of the former contend that “elections make judges more politically accountable.”<sup>183</sup> Advocates of nonpartisan elections assert that “such elections remove the undesirable political factors from the selection process while still retaining popular control over the judiciary.”<sup>184</sup> Unfortunately, elections, whether partisan or nonpartisan, produce their own set of problems. Chief Justice Vanderbilt warned that if New Jersey were to convert to such a system, it would lessen “the independence of the judiciary by making politics a primary element in their [sic] selection and continuance in office.”<sup>185</sup> Critics of this process may also argue “voter selection of judges is impractical because the qualifications of judicial candidates are seldom known or appreciated by many voters.”<sup>186</sup>

Alternatively, the judicial appointment term could be limited to one single term for ten years.<sup>187</sup> The proposal would “partially rein in

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<sup>181</sup> *Id.* Nine states employed partisan elections during the 1990s: Alabama, Arkansas, Illinois, New York, North Carolina, Pennsylvania, Tennessee, Texas, and West Virginia. THE COUNCIL OF STATE GOV'TS. THE BOOK OF THE STATES 135-37 (1998). Under this system, political parties nominate judicial candidates through primaries or party conventions. MARVIN COMISKY & PHILIP C. PATTERSON, THE JUDICIARY - SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE 8 (1987). In the general election, these candidates appear on the voting line with their political party. *Id.*

<sup>182</sup> Martin, *supra* note 54, at 58. In recent years, thirteen states held nonpartisan elections: Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin. COMISKY & PATTERSON, *supra* note 180, at 9. In these states, candidates have been chosen by primaries or nominating conventions but have appeared on the ballot during the general election without a designated party affiliation. *Id.*

<sup>183</sup> Martin, *supra* note 54, at 57. See PHILIP L. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 47-52 (1980).

<sup>184</sup> Martin, *supra* note 54, at 57. See Thomas E. Brennan, *Nonpartisan Election of Judges: The Michigan Case*, 40 SW. L. J. 23, 23-24 (emphasizing the strengths of nonpartisan judicial elections and the superiority of this system over partisan elections).

<sup>185</sup> Martin, *supra* note 54, at 57-58 (quoting Arthur T. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, 36 B.U. L. REV. 1, 36 (1956)).

<sup>186</sup> Seiler, *supra* note 12, at 733.

<sup>187</sup> Martin, *supra* note 54, at 60. See S. Con. Res. 128, 205th Leg., 2d Sess. (N.J. 1993). This Senate Concurrent Resolution was first introduced by Senator Louis Bassano (R-Union) on September 13, 1993. *Id.* No action has ever been taken on Senator Bassano's resolution, although he has continued to seek its passage. *Id.* (citing an interview with Louis Bassano, Senator, New Jersey State Legislature, in Trenton, N.J. (Mar. 20, 2000)).

judicial independence by infusing the bench with a steady influx of judges, presumably judges more attuned to the ideology and concerns of the current governor and senators.<sup>188</sup> This approach could also “more readily alleviate instances of judicial infirmity and incompetence” by institutionalizing a relatively quick and easy turnover.<sup>189</sup> Such an approach, however, “would also deprive New Jersey of a large cadre of knowledgeable and experienced judges.”<sup>190</sup> Moreover, it seems likely that many qualified lawyers would be reluctant to withdraw from their lucrative practices for one single term on the bench, as opposed to judicial service as an admirable career.<sup>191</sup> More likely, those attorneys most inclined to do so would be older, in solo practice or small firms, and “attracted more by the retirement benefits and prestige of serving on the bench than the opportunity for service.”<sup>192</sup>

This appointive approach may be further problematic, however, because although “the judicial function is circumscribed by precedent, rules of procedure, and the character of the cases presented,” judges often do “exert a decisive influence on basic political philosophy,”<sup>193</sup> and the constant turn-around could lead to inconsistent precedent. This may also go against the intent of the framers of the 1947 Constitution.<sup>194</sup>

Regardless of which branch should be the determining factor in appointing an interim justice, the route to implementing such a decision must be examined. The governor is not in a position to propose laws,

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<sup>188</sup> Martin, *supra* note 54, at 60.

<sup>189</sup> *Id.* See also William G. Ross, *The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal Without Impeachment*, 35 VILL. L. REV. 1063, 1065 (1990). Ross discusses federal proposals, but the same arguments can be made at the state level in a state like New Jersey, which currently provides lifetime tenure after a judge or justice is successfully reappointed after one seven-year term. *Id.* As the title of his article suggests, Ross takes the position that limiting lifetime tenure creates more problems than it corrects. *See id.*

<sup>190</sup> Martin, *supra* note 54, at 60.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* Under present state law, judges acquire pension and health benefits after ten years of service. N.J. STAT. ANN. § 43:6A-8 (West 2011). One ten-year term would therefore make judges eligible for these benefits. *See id.*

<sup>193</sup> Seiler, *supra* note 12, at 733.

<sup>194</sup> “[I]t is only fair that any new [judicial] appointments under this new constitution shall go through the trial period of one term. If they are qualified they have no fear of not being re-appointed.” N.J. CONSTITUTIONAL CONVENTION, Vol. 1, at 589 (1947) (excerpted statement by state Sen. Frank ‘Hap’ Farley in support of the successful amendment to the judiciary article at New Jersey’s 1947 Constitutional Convention, providing that supreme court justices, like lower court judges, be appointed for a seven-year term subject to reappointment and tenure).

nor does he have the granted authority to directly control the court. Nonetheless, he is the sole administrator of executive authority.<sup>195</sup> It is through this broad provision alone that the governor may be within his right to assert the need for balance between the respective roles of the government's three branches. Maintaining balance between the tripartite systems unfortunately does not lead to issuing an ultimate rule on this situation. At best, the governor can communicate with and make recommendations to the legislature on what measures he recommends.<sup>196</sup>

In the alternative, the Supreme Court retains the right to "make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts."<sup>197</sup> When the case of *Winberry v. Salisbury*<sup>198</sup> came before the Supreme Court in 1950, Chief Justice Vanderbilt, writing for the majority, stated that the constitutional provision giving the Court rule-making powers over practice and procedure was exclusive, except for matters of substantive law.<sup>199</sup> It follows that the Court has the authority to make its own rules. Problems arise, however, in that the Court would be able "to take license with the constitution" by defining its own power, "particularly with those provisions designed" to regulate its own members.<sup>200</sup> This stands in stark contrast to the doctrine of "checks and balances" upon which the nation's democratic principles lay.

Though there may be a concern of justiciability, the New Jersey Constitution, unlike the U.S. Constitution,<sup>201</sup> does not "confine the exercise of the judicial power to actual cases and controversies."<sup>202</sup> Courts "normally will not entertain cases when a controversy no longer exists and the disputed issues . . . become moot," though this is with

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<sup>195</sup> N.J. Const. art. V, § 1, para. 1. *See supra* Part II (A).

<sup>196</sup> N.J. Const. art. V, § 1, para. 12.

<sup>197</sup> N.J. Const. art. VI, § 2, para. 3.

<sup>198</sup> 5 N.J. 240 (1950).

<sup>199</sup> *Id.* at 242-55. *Contra* Allen V. Lowenstein, *The Legacy of Arthur T. Vanderbilt to the New Jersey Bar*, 51 RUTGERS L. REV., 1319, 1340 (1999) ("Later scholars and commentators, including Justice Brennan, have recognized that *Winberry v. Salisbury* essentially was decided on the basis that the end justified the means, and that Case's concurring opinion reflected accurately what the law should have been.").

<sup>200</sup> Hartnett, *supra* note 78, at 761.

<sup>201</sup> *See* U.S. CONST. art. III, § 2, cl. 1. In *City of Boerne v. Flores*, the Court cautioned against rendering advisory opinions or exercising its jurisdiction in the abstract. 521 U.S. 507, 524 (1997).

<sup>202</sup> *See* N.J. Const. art. VI, § 1, para. 1. *See also* *De Vesa v. Dorsey*, 134 N.J. 420, 428 (1993); *In re J.I.S. Indus. Serv. Co. Landfill*, 110 N.J. 101, 104 (1988).

exception.<sup>203</sup> For example, courts will entertain a case that became moot when “the issue is of significant public importance and is likely to recur.”<sup>204</sup> Consequently, this issue would be justiciable, though inevitably controversial.

The Legislative Branch holds the power to make laws<sup>205</sup>; thus, an amendment to the constitution would be the Senate’s most useful and effective strategy.<sup>206</sup> Any such law or amendment should be made in accordance with the state constitution, in order to have a seamless implementation of the law. A constitutional amendment is an overwhelming endeavor and may take a very long time to implement effectively.

The independent New Jersey State Bar Association may be an additional avenue for change. This entity furthered many reforms through the years, and has several committees through which this issue can be addressed.<sup>207</sup> Its mission is “to serve as the voice of New Jersey attorneys to other organizations, governmental entities and the public with regard to the law, legal profession and legal system.”<sup>208</sup> Reform through this channel may be most practical for immediate progress, as it will not have to wait for the procedural hurdles that the three branches may face. This may also be the most viable option because of its general independence from political ties and the strength of its members’ reputations and backgrounds. However, the Association is unelected and un-appointed and essentially accountable to no one but its members.

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<sup>203</sup> *De Vesa*, 134 N.J. at 428. See *Oxford v. New Jersey State Bd. of Educ.*, 344 A.2d 769, 771-72 (1974). A case is technically moot when the original issue presented has been resolved, at least concerning the parties who initiated the litigation. *De Vesa*, 134 N.J. at 428. In some circumstances, however, New Jersey courts will entertain a case despite its mootness. *Id.*

<sup>204</sup> *De Vesa*, 134 N.J. at 428 (citing *In re J.I.S. Indus. Serv. Co. Landfill*, 110 N.J. at 104 (citations omitted)) (“While we ordinarily refuse to examine moot matters due to our reluctance to render legal decisions in the abstract and our desire to conserve judicial resources, we will rule on such matters where they are of substantial importance and are capable of repetition yet evade review.”); *In re Conroy*, 98 N.J. 321, 342 (1985); *Clark v. Degnan*, 83 N.J. 393, 397 (1980).

<sup>205</sup> N.J. Const. art. IV, § 1, para. 1.

<sup>206</sup> N.J. Const. art. IX, § 1, para. 1.

<sup>207</sup> For example, the Judicial Administration Committee is tasked with “ensuring the independence of judges, practicing attorneys and administrators...” NEW JERSEY STATE BAR ASSOCIATION- JUDICIAL ADMINISTRATION COMMITTEE, <http://www.njsba.com/about/standing-committees/judicial-administration-committee.html> (last visited October 2, 2011).

<sup>208</sup> N.J. State Bar Ass’n, Mission Statement, ¶ 2 (2007), available at <http://www.njsba.com/about/index.html>.

Thus, it may be dangerous to give such an entity this power.

## VI. CONCLUSION

It is vital that all three branches of the New Jersey government act together in order to prevent a stalemate such as the current judicial situation from happening again or else new issues and ramifications will arise. All three branches must exercise their legitimate, constitutionally granted power to produce a logical result in the New Jersey political system. This philosophy is critical to preserve the dignity and effectiveness of “all governmental institutions by honoring the role ascribed to each branch by the 1947 state Constitution”;<sup>209</sup> it is also imperative to keep in mind the intent and not solely the textually granted authority transcribed in the constitution. The branches of government ought not to make multifarious or diverging announcements concerning policy; debate adds to the democratic process, but a prolonged stalemate benefits no one.

Ultimately, the Senate ought to propose a bill<sup>210</sup> and subsequently pass a law or amendment directing the interim appointment process and designating the appointer’s role; this would procedurally be the least controversial route. This will inevitably require more than merely writing a bill; to enhance legitimacy, the Senate should appoint a commission to assist in the process.<sup>211</sup> The governor could also publicly enforce the legislative mandate in accordance with the senate’s directive.<sup>212</sup> The Senate, like the governor, is part of a co-equal branch with which the court may disagree, but which, notwithstanding its disagreement, the court must respect.<sup>213</sup> The formulating of uniform rules

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<sup>209</sup> Castro, *supra* note 72, at 688.

<sup>210</sup> See N.J. Const. art. IV, § 4, para. 6.

<sup>211</sup> “The Legislature may appoint any commission, committee or other body whose main purpose is to aid or assist it in performing its functions. Members of the Legislature may be appointed to serve on any such body.” N.J. Const. art. IV, § 5, para. 2. “The Governor shall take care that the laws be faithfully executed.” N.J. Const. art. V, § 1, para. 11.

<sup>212</sup> “To this end he shall have power, by appropriate action or proceeding in the courts brought in the name of the State, to enforce compliance with any constitutional or legislative mandate, or to restrain violation of any constitutional or legislative power or duty, by any officer, department or agency of the State; but this power shall not be construed to authorize any action or proceeding against the Legislature.” N.J. Const. art. V, §1 para. 11.

<sup>213</sup> *De Vesa*, 134 N.J. at 433. In a republican government, the judiciary ought to construe the legislature’s enactments. See THE FEDERALIST NO. 78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

to determine the correct process and decision-making authority based on this potentially recurring circumstance is essential. The governor and lawmakers must hold fast to the highest ideals of integrity and impartiality when evaluating candidates for the bench and those judges eligible for reappointment; the fair administration of justice depends on it.

The time is ripe to remedy this issue because two current justices will be up for reappointment and one will reach mandatory retirement age during the remainder of Governor Christie's term.<sup>214</sup> All of the governmental actors involved must work together to resolve this predicament. The credibility of New Jersey's Supreme Court must be protected.

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<sup>214</sup> Chief Justice Rabner's and Justice Hoens's terms will expire before 2014; Justice Long will reach mandatory retirement in 2012. *Supreme Court of New Jersey: Supreme Court Justices' Biographies*, NEW JERSEY COURTS ONLINE (2011), <http://www.judiciary.state.nj.us/supreme/index.htm> (last visited Aug. 26, 2011).