Center for American Progress

AP PHOTO/ERIC THAYER, POOL

Chris Christie's War on Judicial Independence

An Unprecedented Effort to Pack the State Supreme Court

By Billy Corriher and Alex Brown February 2014

Center for American Progress

Chris Christie's War on Judicial Independence

An Unprecedented Effort to Pack the State Supreme Court

By Billy Corriher and Alex Brown January 2014

Contents

1 Introduction and summary

4 A constitutional right to housing and education

8 History of Abbott litigation

14 History of Mt. Laurel litigation

16 The suburban backlash

20 Christie rocks the foundation of judicial independence

27 Is Christie violating the state constitution?

30 Conclusion

35 Endnotes

Introduction and summary

In the wake of the New Jersey Supreme Court's recent decision granting same-sex couples the freedom to marry, social conservatives called on Gov. Chris Christie (R) to make good on his pledges to rein in a state supreme court they perceive as "activist" and "liberal."[1] Brian Brown, president of the National Organization for Marriage, criticized the court for "redefining our most important social institution with no regard to the wishes of voters or even elected officials."[2] Carrie Severino, chief counsel and policy director at the Judicial Crisis Network, dubbed the tribunal "Chris Christie's court" and referred to it as "lawless" and "out of control."[3] She also alleged that Christie "has completely squandered the opportunity to appoint highly qualified judges who faithfully adhere to the text and original meaning of the law."[4] Severino called on Christie to fulfill his campaign pledge to appoint judges who do not "legislate from the bench."[5] This call for action is odd, considering that it comes in the midst of Christie's years-long quest to do just that. Christie is engaged in an unprecedented effort to augment the governor's influence over the fiercely independent New Jersey Supreme Court.

Christie is the only New Jersey governor since the ratification of the state constitution in 1947 who refused to nominate a sitting state supreme court justice for tenure.[6] This led to a standoff with the Democratic state senate, which must confirm the governor's nominees. The seat formerly occupied by Justice John Wallace has remained vacant since May 2010,[7] and Chief Justice Stuart Rabner has appointed lower-court judges to temporarily fill the vacant seats. But Rabner himself is up for tenure in June 2014. Since Rabner authored the court's recent marriage equality opinion, some pundits expect that Christie will again throw a respected justice off the bench because he does not like his rulings.[8]

This unprecedented attempt to pack the state supreme court is the culmination of a battle over two cases decided decades ago—cases in which the New Jersey Supreme Court recognized and protected low-income residents' rights to adequate housing and education. In a series of cases, the court has interpreted

the New Jersey Constitution as requiring state and local governments to provide affordable housing and equitable education financing.[9] As with other constitutional rights, the high court then ensured that the state complied with its interpretation of the state constitution.

Just as many state and local governments resisted desegregation after the decision in *Brown v. Board of Education*,[10] New Jersey legislators at all levels of government resisted the state supreme court's calls to adequately fund education and ensure affordable housing in compliance with the state constitution.[11] Like federal courts in the aftermath of *Brown*, the state supreme court became more intimately involved in implementing its rulings after years of inaction and inadequate measures from legislators and governors. The court repeatedly professed its preference for legislative action,[12] but when the political branches failed to act in accordance with the state constitution, the court stepped in to order specific actions. The court often ordered the legislature to fix poorly funded schools or required that local governments do more to allow for affordable housing.[13]

Some suburbanites fiercely resisted the idea of sending their tax dollars to failing urban schools.[14] A blogger in the suburbs of Paterson said, "Hundreds of millions of our tax dollars have been redistributed from New Jersey's suburban and rural towns to failing school systems like Newark and Camden." He claimed the court's education jurisprudence is "one of the main reasons our income taxes are so high."[15] Conservatives have long charged that these court decisions tie the hands of conservative New Jersey legislators who have been looking for ways to cut the state's spending. Christie said it is not proper for the court to "determine what programs the state should and should not be funding."[16] He argued the court's rulings presume that the solution is to "throw more money at failing schools."[17] The governor was elected on a platform that included changing the ideology of the so-called activist state supreme court.

Although he now enjoys wider support, Christie relied on huge margins of victory in the New Jersey suburbs to win his first gubernatorial election.[18] A local commenter noted, "The suburban voters who elected Christie are fed up [with] a rising tax burden due to expanding welfare, wasteful spending on education, and ineffective social programs with little to no provable results. There will certainly be a severe reduction in these types of funds."[19]

Suburban voters who were tired of sending their money to poor school districts elected the gubernatorial candidate who pledged to change the state supreme court into one that would not force them to do so. In the housing context, the court's rulings required New Jersey suburbs to accommodate affordable housing, prompting a backlash—fueled by a "not in my backyard" mentality—against having low- and moderate-income people living in the suburbs.[20] These sentiments found a voice in Christie's anti-court rhetoric.

The standoff between the governor and state senate continues, and Christie shows no signs of relenting in his effort to pack the court with judges who will rule his way. In declining to renominate Justice Wallace, Christie claimed that the state constitution allows the political branches to review justices' records after their initial seven-year terms.[21] He refused, however, to name any of Justice Wallace's decisions which led him to refuse to grant tenure.[22]

Moreover, every governor before Christie—even a Republican governor who served as his mentor—did not view the executive appointment power in this way.[23] Christie's attempts to make the court more conservative run afoul of traditions that have ensured the high court's independence from the political branches of government since the ratification of the state constitution. Until now, the political branches renominated every sitting justice for tenure, regardless of whether they agreed with the justice's rulings, and maintained a partisan balance in which neither Republicans nor Democrats had more than a 4–3 majority on the court.[24] The tradition of partisan balance even predated the state's 1947 constitution.

Christie is trying to change all of this. He wants a conservative court that will rule in his favor and against middle-class families and poor school districts.

A constitutional right to housing and education

Before the ratification of the 1947 constitution, New Jersey's court system was a mess. Judicial authority was dispersed over a complicated system.[25] The new constitution promised to simplify the system by centralizing authority over lower courts in a single high court.[26] *Judicature,* a journal focusing on courts, commented that the people of New Jersey exchanged "America's worst court system for America's best."[27]

The judiciary committee at the constitutional convention looked to the federal Constitution for guidance on establishing a high court that was independent from the political branches. The prior New Jersey Constitution, ratified in 1844, required that the governor appoint the justices for six-year terms, subject to senate confirmation.[28] Under the new constitution, the justices are still nominated by the governor and confirmed by the senate, but they are subject to reappointment and reconfirmation by the political branches after an initial seven-year term.[29] Once the justices are granted what the New Jersey Constitution refers to as "tenure" after the initial term, they remain on the bench until the mandatory retirement age of 70.[30]

The drafters of the constitution stressed the importance of judicial independence. During the judiciary committee's deliberations, Republican Gov. Alfred Driscoll said, "Our primary, our basic purpose in the drafting of a new Constitution is to secure beyond any question a strong, competent, easily functioning, but always independent, judiciary."[31] The governor said this independence would allow the court to "curb any tendency on the part of the other two branches of government to exceed their constitutional authority. Without independent courts, the whole republican system must surely fail."[32] One delegate said of the reappointment process, "If they are qualified, they have no fear of not being reappointed."[33] Years later, one participant reportedly told a law professor that "the purpose of the reappointment process was only to exclude someone who turned out to be incompetent and was not intended to allow any consideration of a judge's judicial opinions."[34]

Under the leadership of the esteemed Chief Justice Arthur Vanderbilt, the reconstituted New Jersey Supreme Court quickly asserted itself as an independent and vibrant institution. The court was known for its innovative approaches to interpreting the state constitution, offering greater protection for some individual rights than the U.S. Constitution.[35] The court also led the way in tort-law innovations that increased liability for negligence and abrogated long-standing immunities, although the legislature sometimes rolled back these decisions.[36] One scholar said the court "has been compared to the Warren Court due to its desire to effectuate social change."[37]

At one point, the high court included future U.S. Supreme Court Justice William Brennan, who—along with his colleagues on the Warren Court—interpreted several provisions of the Bill of Rights as protecting Americans from state governments. As an increasingly conservative U.S. Supreme Court begin to whittle away these constitutional rights, Justice Brennan encouraged state supreme courts, such as his previous employer, to interpret state constitutions to provide greater protection for individual rights than the U.S. Constitution.[38] The justices of the New Jersey Supreme Court took their former colleague's advice.

Abbott cases

The people of New Jersey first required the state government to provide their children with an education in 1875, when voters ratified a constitutional amendment that required the legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years."[39] The drafters maintained the language of the education provision from the 1875 amendment when the current constitution was adopted in 1947.[40]

In recent decades, the New Jersey Supreme Court has interpreted this constitutional imperative as requiring the state to provide the state's poorest children with a sufficient education. In a series of cases decided between 1973 and 1975, the court explained that the constitution requires the "educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market" and that when local school districts fail to provide this opportunity, "the State must assure the delivery of the constitutionally-required education programs and facilities."[41] In response to these

decisions, the legislature adopted the Public School Education Act, or PSEA, of 1975.[42] A constitutional challenge to the act resulted in the *Abbott* cases, a series of 21 decisions—the most recent in 2011—characterized by interactions between New Jersey's legislative, executive, and judicial branches that attempt to define a constitutionally sufficient education.[43]

Throughout the *Abbott* cases, the New Jersey Supreme Court has maintained that the legislature is better suited to create a system that provides a "thorough and efficient education," and the court often delayed the implementation of remedies to allow the legislature time to correct the deficiencies in the state's education system without judicial intervention.[44] The court has also maintained, however, that the deprivation of constitutional rights must be remedied in order to give those rights meaning. The most recent *Abbott* decision noted that "remedial orders were imposed to provide the education funding and services required to ameliorate the pupils' constitutional deprivation."[45]

In *Abbott I*, the court ruled that the school-financing issue was too complicated for the court to make a decision without an extensive administrative record, sending the case before an administrative law judge, or ALJ.[46] Five years later, after the ALJ found that "the inequality of education opportunity statewide constituted denial of a thorough and efficient education" and the New Jersey State Board of Education declined to accept any of the ALJ's recommendations, the court ruled in *Abbott II* that the school-financing statute was unconstitutional as applied to the poor urban districts that came to be known as the *Abbott* districts.[47]

The court in *Abbott II* ordered that funding in the *Abbott* districts equal the funding of wealthier districts.[48] The court also decided that the extreme disadvantages faced by students in the *Abbott* districts must be redressed through funding for their special educational needs.[49] But the court left the specifics of the remedy to the political branches of government, allowing the legislature to devise any remedy they saw fit.

After years of inaction, the court found that delays in the legislative process were unjustifiable:

> *The inadequacy of poorer urban students' present education measured against their needs is glaring. Whatever the cause, these school districts are failing abysmally, dramatically, and tragically. Poorer students need a special supportive educational effort in order to give them a chance to succeed as citizens and workers. Their educational needs are often dramatically different from those of students in affluent districts. They are getting the least education for the greatest need.*[50]

The legislature's response to *Abbott II* was the Quality Education Act, or QEA, of 1990. The QEA was intended to achieve funding parity between the *Abbott* districts and the wealthier districts by the 1995–96 school year and was accompanied by a $2.8 billion tax increase to help pay for increases in school funding.[51] But the legislature partially defunded the QEA in 1991, diverting $360 million in school funding to property tax relief.[52] Three years later in *Abbott III*, the New Jersey Supreme Court ruled that the QEA was unconstitutional, as the statute failed to guarantee funding sufficient to achieve parity.[53] No specific remedies were ordered, because the state claimed that the QEA would no longer control school-funding decisions.[54] The court warned in *Abbott III* that it would intervene if the state did not achieve parity by the 1997–98 school year.[55]

The Comprehensive Education Improvement and Financing Act, or CEIFA, was proposed and passed under Gov. Christine Todd Whitman (R) in 1996. But because its funding mechanism had no relationship to the actual costs of achieving the educational standards created by the law, the bill was found unconstitutional in *Abbott IV*.[56] The court imposed an interim remedy of requiring parity between the *Abbott* districts and high-performing, property-rich districts for the next school year but still left the creation of a long-term remedy to the legislative and executive branches.[57]

Thirteen years after *Abbott I*, the court for the first time required the state to take specific actions beyond providing additional funding to remedy its failure to provide a constitutionally sufficient education to the children in the *Abbott* districts. The specific remedies ordered in the 1998 *Abbott V* ruling—such as full-day kindergarten, preschool for all 3- and 4-year-olds, the provision of health and social services, increased security, technology alternative education, school-to-work programs, after-school programs, and summer school classes—were adapted from a proposal by the state education commissioner.[58] Between 2000 and 2008, 11 *Abbott* cases clarified the requirements of the preschool program, handled issues with school-construction funding, and allowed the state to freeze the funding amount required to implement *Abbott* remedies.[59]

History of *Abbott* litigation

Action by the political branches		Action by the state supreme court
1875: The state constitution is amended to require the state to provide a "thorough and efficient" education.	1875	
	1947	
1947: The current state constitution is ratified with the education clause intact.		
	1970s and 1980s	**1973:** In *Robinson v. Cahill*, the court defines the requirements of a thorough and efficient education and rules that school funding driven by local property taxes discriminates against poor students.
1975: The legislature passes the PSEA to comply with *Robinson*.		
		1985: In *Abbott I*, the court remands a constitutional challenge to the PSEA to an administrative agency due to the fact-sensitive nature of the constitutional issues.
	1990	
July 1990: The QEA aims for funding parity between rich and poor districts.		
	1991	
1991: An amendment to the QEA diverts $360 million to property tax relief.		
	1992	
		July 1990: In *Abbott II*, the court rules the PSEA unconstitutional as applied to urban districts without sufficient property tax revenue and orders the legislature to remedy the funding inequities.
	1993	
	1994	
		July 1994: In *Abbott III*, the court rules the QEA unconstitutional.
1996: The CEIFA is adopted.	1995	
	1996	
September 1997: To comply with the ruling, the state for the first time allocates enough money to the 28 *Abbott* districts to achieve parity.		
	1997	
		May 1997: In *Abbott IV*, the court rules the CEIFA unconstitutional and orders the state to increase funding in *Abbott* districts to achieve parity with wealthy districts.
	1998	
		1998: In *Abbott V*, the court orders a variety of reforms, including full-day kindergarten and preschool in the *Abbott* districts.
July 2000: A statute funds construction for schools in *Abbott* districts and other districts.	1999	
	2000	
		March–May 2000: In *Abbott VI* and *VII*, the court clarifies its orders regarding preschool construction.

Action by the political branches		Action by the state supreme court
	2001	**October 2001:** *Abbott VIII* Part One clarifies the teacher qualifications and class size for preschools.
	2002	**February 2002:** *Abbott VIII* Part Two orders funding for school renovations and construction in *Abbott* districts. **June 2002:** In *Abbott IX*, the court grants the state's request for a one-year freeze on implementing *Abbott* remedies.
March 2003: The governor asks the court to revoke the mandates for reform and supplemental programs.	2003	**June–July 2003:** In *Abbott X* and *XI*, the court approves a mediation agreement between the parties and another one-year freeze on implementing *Abbott* remedies.
	2004	**June 2004:** In *Abbott XII*, the court modifies the deadline for certification of preschool teachers. **November 2004:** In *Abbott XIII*, the court orders mediation.
	2005	**December 2005:** In *Abbott XIV*, the court orders estimates on future school-construction costs.
January 2006: The New Jersey State Board of Education rules that 16 rural districts are not receiving a "thorough and efficient" education under CEIFA.	2006	**May 2006:** In *Abbott XV* and *XVI*, the court grants a one-year freeze on funding for *Abbott* districts and clarifies a deadline for district budget appeals.
2007: The School Funding Reform Act, or SFRA, eliminates the "*Abbott*" distinction and creates a new funding formula for all districts.	2007	**May 2007:** In *Abbott XVII*, the court declines to order more school-construction funding, because the request was premature.

Action by the political branches		Action by the state supreme court
July 2008: The legislature allots $2.9 million for schools in *Abbott* districts.	**2008**	**February 2008:** In *Abbott XVIII*, the court declines to order more school-construction funding, because the state committed to authorizing additional funds.
		November 2008: The court in *Abbott XIX* orders a full trial on whether the SFRA is constitutional.
	2009	**2009:** In *Abbott XX*, the court finds the SFRA constitutional, as long as it is fully funded for three years, and it lifts its orders on funding remedies for *Abbott* districts.
May 2010: Christie denies tenure to Justice John Wallace after criticizing *Abbott* and promising to appoint justices who do not "legislate from the bench."	**2010**	
June 2010: The legislature adopts Christie's proposed budget, which cuts $1 billion in education funds.		
		May 2011: In *Abbott XXI*, the court rules that Christie's cuts to education funding violate the state's obligation to provide an education and orders full funding under the SFRA for the 31 *Abbott* districts.
May 2011: Christie responds to the latest *Abbott* ruling by arguing the court should not "determine what programs the state should and should not be funding."	**2011**	

Sources: LexisNexis database of New Jersey Supreme Court opinions; Roslyn F. Martorano, "The Three-Ring Circus: New Jersey's 2010 Judicial Retention Crisis," *Albany Law Review* 75 (4) (2012): 1837–1854, available at http://www.albanylawreview.org/Articles/Vol75_4/75.4.0018_martorano.pdf; GovChristie, "Governor Christie on New Jersey Supreme Court's Abbott Ruling," May 24, 2011, available at http://www.youtube.com/watch?v=9c-jQ25JID8.

Mount Laurel cases

The New Jersey Supreme Court's *Mount Laurel* decisions represent a nearly 40-year struggle to ensure that the state's most politically powerless residents—the poor—have access to adequate housing and are not systematically excluded from the most desirable places to live. The *Mount Laurel* doctrine dates back to a 1975 state supreme court decision that established a constitutional obligation on the part of state municipalities to provide opportunities for the development of affordable housing.[60] The decision was based on a broad and inclusive reading of the state constitution that requires municipalities creating land-use regulations to consider the "general welfare" of the state as a whole, not just the welfare of the population within its boundaries.[61]

Mount Laurel I was the culmination of efforts by Mount Laurel Township to evict and exclude low-income residents. Between 1940 and 1970, Mount Laurel's population quadrupled, and the township was considered part of the suburbs surrounding Camden by 1975.[62] Development in Mount Laurel was controlled by local zoning ordinances that established a minimum lot size and square footage, limited most areas to single-family detached dwellings, limited most apartments to one bedroom, and restricted the number of school-age children who could live in apartments.[63] Together, the zoning ordinances effectively excluded low- and moderate-income families from the township. The exclusionary zoning disproportionately affected communities of color but also tended to exclude "young and elderly couples, single persons and large, growing families not in poverty."[64] The only type of housing realistically permitted by these zoning limitations was "relatively high-priced, single-family detached dwellings on sizeable lots" and the occasional "expensive apartment."[65]

Mount Laurel was not alone in excluding low- and moderate-income families. Many municipalities surrounding the metropolitan areas of North and South Jersey utilized similar restrictions.[66] In *Mount Laurel I*, the court ruled that municipalities' zoning regulations must affirmatively provide the opportunity for low- and moderate-income housing to be developed.[67] Mount Laurel and many other municipalities had used their zoning power to maximize tax revenue sources and limit costs for education and government services. After *Mount Laurel I*, municipalities could no longer exclude low- and moderate-income residents just to save money.[68]

Mount Laurel Township failed to sufficiently improve its zoning ordinances, and the supreme court agreed to hear *Mount Laurel II*, a consolidation of six different affordable-housing cases, in 1978. Eight years after *Mount Laurel I*, the court ruled in *Mount Laurel II* that "Mount Laurel remains afflicted with a blatantly exclusionary ordinance."[69] The court reaffirmed its commitment to affordable housing, explaining that without the constitutional obligation, "poor people [could be] forever zoned out of substantial areas of the state, not because housing could not be built for them but because they are not wanted," an idea that violates "all concepts of fundamental fairness and decency that underpin many constitutional obligations."[70]

The court noted that it "preferred legislative to judicial action," but the "enforcement of constitutional rights cannot await a supporting political consensus."[71] Reacting to widespread noncompliance with the principles laid out in *Mount Laurel I*, the court created specific requirements for all municipalities to effectuate the constitutional mandate. *Mount Laurel II* required every municipality that the state designated as a growth area to "provide a realistic opportunity for a fair share of the region's present and prospective low- and moderate-income housing need."[72] Moreover, a "realistic opportunity" was not limited to eliminating restrictive zoning laws; municipalities would also have to utilize affirmative measures such as bonuses for constructing high-density housing and requirements to include affordable units in proposed housing developments.[73] The decision also allowed "builder's remedies," a type of lawsuit that permits a developer to sue a municipality to receive an exemption from zoning regulations for projects that include affordable housing.[74]

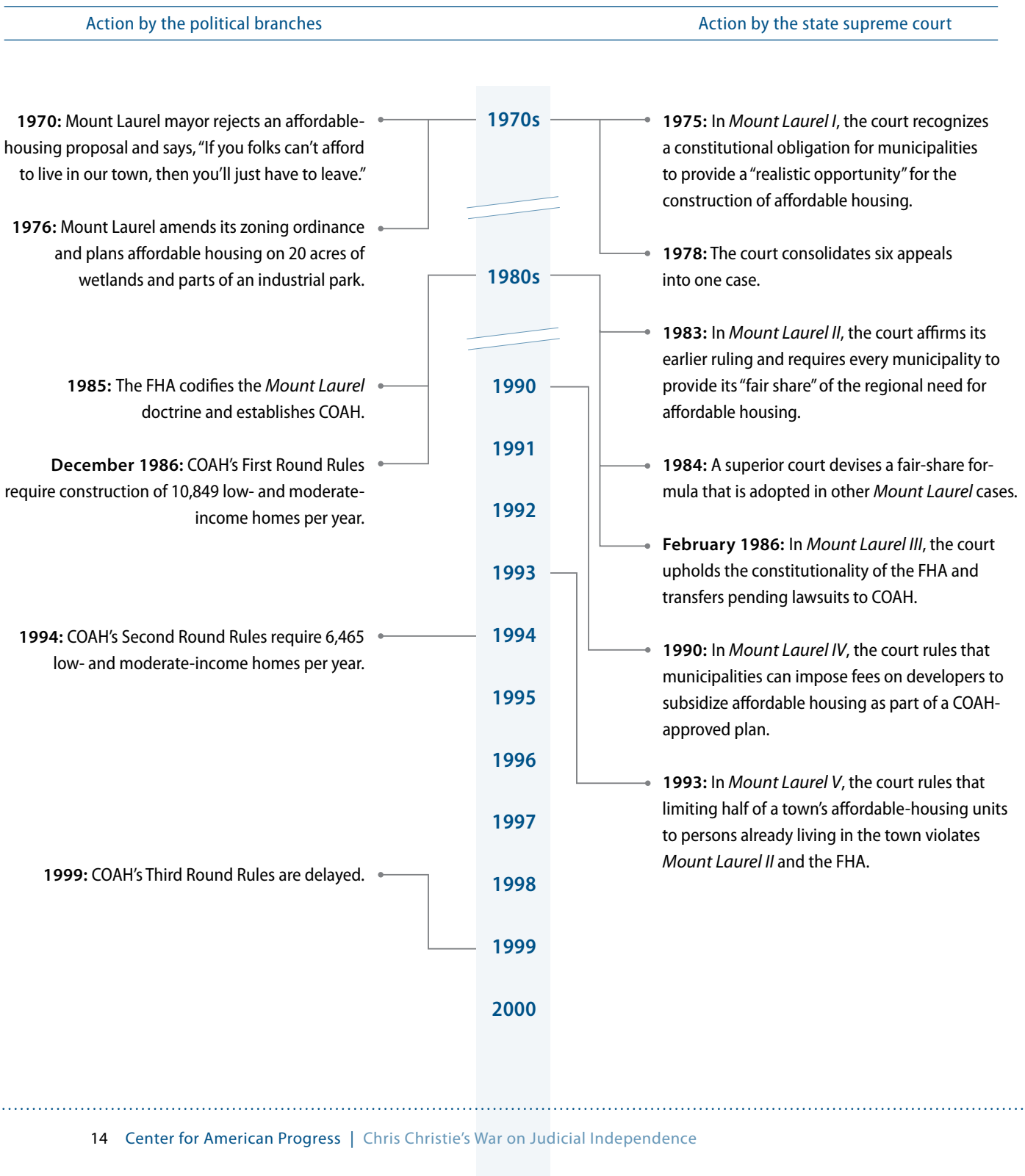
In 1985, the state legislature passed the New Jersey Fair Housing Act, or FHA, which codified the *Mount Laurel* doctrine and established the Council on Affordable Housing, or COAH.[75] COAH is an administrative agency that writes and enforces fair housing regulations. In *Mount Laurel III*, the state supreme court upheld the constitutionality of the FHA and transferred pending cases to COAH.[76]

Throughout its *Mount Laurel* decisions, the court recognizes that other remedies are available to effectively promote inclusive zoning while also taking into account sound planning objectives and environmental considerations. It also recognizes that "development merely for development's sake is not the constitutional goal."[77] Yet "if sound planning of an area allows the rich and middle class to live there, it must also realistically and practically allow the poor."[78] The court recently acknowledged that changes in New Jersey since *Mount Laurel II* may require a revamped system for delivering affordable housing, but taking account of the

"current economic condition, the building that has occurred already in this state, the present-day space availability and redevelopment option, and the wisdom of requiring building in all municipalities of the state within fixed periods" is the job of the legislature, not the court.[79]

The first and second rounds of regulations promulgated by COAH were relatively successful, resulting in thousands of new units of affordable housing every year with little judicial involvement.[80] The third round of rules, however, led the court to resurrect its involvement in affordable housing.[81] The regulations were supposed to be in effect from 2000 to 2006, but they were delayed until 2004.[82] The new rules halved the statewide requirement for units of low- and moderate-income housing.[83] It also changed the fair-share requirement by only requiring municipalities to produce what the rules referred to as the "growth share" of their region's affordable-housing needs. The growth share only required municipalities to produce low- and moderate-income housing as a percentage of their actual growth.[84] Thus, the regulations created a loophole through which municipalities could limit or exclude low- and moderate-income housing by limiting all development. The New Jersey Supreme Court ruled in 2013 that the new growth-share rule was facially inconsistent with the Fair Housing Act and the constitutional obligations laid out in *Mount Laurel II*.[85]

History of *Mt. Laurel* litigation



Action by the political branches		Action by the state supreme court
	2001	
2004: COAH's proposed Third Round Rules reduce the required affordable units to 3,515 per year, allotting units through the growth-share method	2002	
	2003	
	2004	
	2005	**2007:** An appeals court rules that COAH's Third Round Rules violate *Mount Laurel II* and the FHA.
2008: COAH's Third Round Rules are adopted.	2006	
	2007	
2011: Christie eliminates COAH through executive reorganization and transfers its functions, powers, duties, and staff to the Department of Community Affairs.	2008	
	2009	
July 2013: Christie responds to the COAH decision: "The chief justice's activist opinion arrogantly bolsters another of the failures he and his colleagues have foisted on New Jersey taxpayers. This only steels my determination … to bring common sense back to New Jersey's judiciary."	2010	**July 2013:** The court rules that Christie cannot unilaterally abolish COAH, an independent agency created by the legislature.
	2011	**September 2013:** The court rules that COAH's Third Round Rules are facially inconsistent with the FHA and the remedies ordered in *Mount Laurel II*.
	2012	
	2013	

Sources: LexisNexis database of New Jersey Supreme Court opinions; Salvador Rizzo, "N.J. Supreme Court blocks Christie's plan to abolish affordable-housing agency," *The New Jersey Star-Ledger*, July 10, 2013, available at http://www.nj.com/politics/index.ssf/2013/07/nj_supreme_court_blocks_christies_plan_to_abolish_affordable-housing_agency.html.

The suburban backlash

The results of these decisions have been billions of dollars in additional funding for poor urban schools[86] and 40,000 apartments and homes that are affordable for moderate- and low-income New Jersey residents.[87] More than 15,000 units of affordable housing have also been refurbished.[88]

The cost was too high for some. A report from the conservative Federalist Society said, "According to some estimates, New Jersey spent $37.7 billion on the Abbott districts between 1998 and 2008 alone."[89] The massive transfer of wealth from the New Jersey suburbs to poor city schools generated a political backlash. The Federalist Society report concluded that *Abbott* and *Mount Laurel* "have had profound economic effects on the New Jerseyans' tax burden, as well as the state's economy more generally and … it is most appropriate to have a vigorous debate about the proper role of our courts in a democratic society."[90]

Some conservative critics argue that the *Mount Laurel* doctrine encourages sprawl and increases local tax rates by raising a municipality's expenses more than its revenue.[91] Following that logic, however, the best practice for all of New Jersey's municipalities would be to exclude poor people in order to maximize their revenue streams and minimize the costs of services. Without the state supreme court enforcing their constitutional right to housing access, poor people could be walled out of New Jersey entirely.

Critics of the court have also argued that some of the *Abbott* districts wasted the additional resources. Gov. Christie asked in 2011, "Those special 31 districts have gotten the lion's share of the money over the last nearly three decades. And what are we getting in return?"[92] Steven Malanga, a fellow at the conservative Manhattan Institute, argues that *Abbott* led the state to spend much more money per pupil on urban students than other students, even though some urban districts have not been wise stewards of their funding.[93] "The court's typical solution to such corruption and waste was to spend *more* money," Malanga said.[94]

The New Jersey Supreme Court has consistently acknowledged that more funding alone will not satisfy the state's constitutional obligation to educate students in these schools.[95] But the court rejected the argument that school funding should not be equal because of the risk of waste. In the most recent *Abbott* ruling, Justice Barry Albin said, "the challenge to our Court … is a challenge not to sacrifice the rights of some affected group—here, the disadvantaged children of this State—because of the felt necessities of the moment."[96] Justice Albin said the constitutional right to a "thorough and efficient" education "cannot be denied based on the 'vicissitudes of political controversy' or the outcome of a poll."[97]

In *Abbott II*, the court referred to New Jersey as "a state that has regarded home rule in the area of education, including gross disparity in expenditures between the rich and the poor, as an accepted part of the system."[98] While the politicians in Trenton dragged their feet after the first *Abbott* ruling, schools in New Jersey cities continued to fail in educating their students. The named plaintiff in the case, Raymond Abbott, dropped out of high school and developed a drug habit.[99] He was in prison by the time the court ruled in *Abbott II* that the legislature had still not complied with the *Abbott I* decision after nine years.[100] Abbott told *The New York Times* in 1990 that he had trouble in school after his father died when he was 9 years old. "I was never an A or B student. … I got C's, and it was a struggle. Some teachers tried to help. Others didn't. I wanted to know why I didn't get a question right, and they'd say, 'Come back later,' stuff like that."[101]

When Abbott was 15 years old, his family moved out of Camden[102] and into a community that built affordable housing after *Mount Laurel*.[103] Abbott's new school diagnosed him with a learning disability.[104] *The New York Times* said Abbott's mother was "not bitter" over the Camden school's failure to detect her son's disability. "Raymond's problem was so minute compared to the other problems they see every day," she said.[105] The next year, Abbott dropped out of school. "Soon afterward, he began using and selling cocaine and stealing from his grandparents to support his habit."[106] Although Abbott was behind bars by then, his mother reacted to the *Abbott II* ruling with joy: "My rejoicing is for all the children in the 28 cities. We could have a Picasso or a president among them and, until this ruling, we've been writing them off before they started."[107]

Although the *Abbott* rulings were celebrated in urban schools, the political branches began to push back. Suburban voters did not appreciate being forced to build affordable housing or send their tax dollars to poor urban schools. Republicans and some Democrats representing the suburbs began criticizing the court for infringing on the functions of the political branches and costing the state too much money.[108]

The backlash grew so strong by 1986 that one justice was nearly denied reconfirmation by the state senate.[109] Chief Justice Robert Wilentz—the author of a crucial opinion in the *Mount Laurel* cases—was up for tenure. Even though Republican Gov. Tom Kean called the justice's opinion "communistic," he renominated the chief justice, resisting calls from Republicans in the state legislature to replace him.[110] One Republican legislator said that Chief Justice Wilentz was "worse than a criminal … Criminals steal money and goods; Wilentz steals democracy from the people."[111] In addition to the *Mount Laurel* opinion, Republican legislators noted that the chief justice appointed a tiebreaker to the state's redistricting commission, which was split down party lines.[112]

To justify his decision, Kean said, "If any judge in the state is worried about how he should make a decision that would affect his or her renomination, then the quality of justice is not going to be what you and I would want it to be in the state of New Jersey."[113] Chief Justice Wilentz was reconfirmed in a 21–19 vote, and the Senate president said the winning vote was secured only through Kean's personal involvement.[114] Even though Kean vehemently disagreed with the court's decisions, he understood that it was the price to be paid for judicial independence. Kean refused to be the first governor under the New Jersey Constitution to deny tenure to a state supreme court justice.

Just before Christie took office more than 20 years later, the court and political branches had seemed to reach an agreement on how to strike the right balance with education funding. In 2007, the legislature passed the School Funding Reform Act, or SFRA, the legislature's third attempt to design a comprehensive school-funding law that complied with its constitutional responsibility to provide a "thorough and efficient" education to all of New Jersey's children.[115]

The SFRA created a new funding formula based on several years of study by school-finance experts.[116] The bill eliminated the distinction between *Abbott* and non-*Abbott* districts and assigned funds based on a district's number of special needs students.[117] The state asked the New Jersey Supreme Court to declare the SFRA constitutional and eliminate the court-ordered remedies from *Abbott IV* and *Abbott V*. In *Abbott XX*, the court granted the state's request and found that the SFRA as funded at the time was constitutional.[118] The decision lifted the parity and supplemental-funding remedies in the *Abbott* districts.[119]

The truce between the court and the political branches would not last long. The constitutional rights recognized in *Mount Laurel* and *Abbott* took a pummeling in the aftermath of the Great Recession, as New Jersey and its localities saw their tax revenues plummet. The newly elected Gov. Christie proposed and signed a budget that cut funding for the SFRA,[120] and he completely broke with the traditions of judicial independence that had insulated the justices from political pressure since the ratification of the state constitution.[121]

Christie rocks the foundation of judicial independence

One year before Raymond Abbott's mother filed a lawsuit on his behalf, Chris Christie graduated from Livingston High School in the New Jersey suburbs. The school is now recognized as the 29th best school in the state, and more than half of its students take Advanced Placement courses.[122] Only 1 percent of its students today are "economically disadvantaged," according to *U.S. News and World Report*.[123] While Christie was in high school, he volunteered for Gov. Kean, who became his mentor.[124] Christie went on to become a federal prosecutor and a county legislator.[125]

During his campaign for governor, Christie criticized the *Abbott* and *Mount Laurel* decisions and accused the state supreme court of "legislating from the bench."[126] He claimed that "the Supreme Court in this state has seen itself as a superior branch of government, not a coequal branch of government. They are not a superior branch of government."[127] Christie also made clear that he believes the state constitution allows the governor to decide whether to reappoint a justice based solely on whether the governor agrees with the justice's decisions.[128] He pledged to use this authority to change the composition of the state supreme court.[129] "The constitution gives us seven years to judge somebody, and my view is that each of those judges get their seven year record to make their case for reappointment," Christie said.[130]

Once he took office, the New Jersey legal community waited for Christie's first move to fulfill his campaign promise. One commentator laid out different options Christie could pursue to change the court's ideology, suggesting that Christie's campaign promises could spur a justice who soon faced renomination to rule Christie's way so that the justice could stay on the bench.[131]

When Justice John Wallace's initial seven-year term ended five months into Christie's first term, the new governor did not disappoint critics of the court. Christie refused to renominate Justice Wallace—the court's only African American member and a widely respected jurist—and instead nominated Anne Patterson, an attorney without any judicial experience.[132] *The New Jersey Star Ledger* noted that

Christie did not specify the reasons for his decision: "The governor did not cite specific cases, but conservatives have long been bitter about court rulings such as the Mount Laurel housing and Abbott school funding decisions. Wallace was not on the court for those cases."[133] Christie accused the justice of contributing to "out of control" activism on the court but refused to specify how he had done so.[134]

The New Jersey legal establishment was harshly critical of Christie's decision. A professor of law at Rutgers University called the move "a step backwards."[135] The head of the state bar noted Justice Wallace's record of public service and called him "a dedicated jurist and public servant whose decisions have been incisive, well-reasoned and impartial."[136] One Democratic legislator said, "The off-handed dismissal of this jurist shows a lack of respect for the co-equal branches of government and offends every governor who has preceded [Christie]."[137]

Eight former members of the court called on Christie to reconsider. The retired justices quoted the framers of the 1947 state constitution and concluded, "There is simply no question about the intent of the framers of our Constitution: reappointment would be denied only when a judge was deemed unfit, a standard that ensured the independence of the State's judiciary."[138] The justices quoted Republican Gov. Alfred Driscoll, who told the framers that "our basic purpose" in drafting a new constitution was to create a court that was so independent of political pressure that it could "curb any tendency on the part of the other two branches of government to exceed their constitutional authority."[139] For this reason, every governor since 1947 had reappointed the justices after their initial terms, even when they disagreed with the justices' decisions.[140]

The Democrats on the Senate Judiciary Committee were furious and refused to even consider Patterson's appointment until Justice Wallace's term would have expired. Senate President Steve Sweeney, a friend of Justice Wallace, was livid and said that the New Jersey Senate "cannot in good conscience play a role in the governor's reckless politicization of the courts. … I will not allow the dismantling of New Jersey's independent judiciary."[141] A Christie spokesman responded with a claim that the Christie administration had "fulfilled out [sic] constitutional duties. All we ask is that Senator Sweeney now fulfill his and provide a hearing for the nominee."[142]

The stalemate lasted through 2010. In the meantime, Chief Justice Stuart Rabner appointed a retired lower-court judge to fill Justice Wallace's former seat.[143] Justice Roberto Rivera-Soto complicated this arrangement with his declaration in December 2010 that he believed the chief justice did not have the authority to appoint the judge on a temporary basis.[144] Justice Rivera-Soto pledged to abstain

from every decision until the chief justice removed the judge.[145] He backtracked on this stance after harsh criticism, but the damage was done. Justice Rivera-Soto stated that he would not seek reappointment when his initial seven-year term ended in the summer of 2011.[146] Christie and Sweeney worked out a deal to confirm Patterson for Justice Rivera-Soto's seat instead of Justice Wallace's seat.[147]

Justice Patterson's confirmation left the court with no racial diversity. In 2012, Christie nominated Phillip Kwon, who would have been the court's first Asian American justice, and Bruce Harris, an African American who is openly gay.[148] Although Democratic legislators commended the diversity of the nominees, they objected to the fact that they would have upset the long-standing tradition of a 4–3 partisan split.[149] If confirmed, the nominees would have been part of a court with three Republican justices, two independent justices who had been Republicans at some point before their nominations, and only two Democratic justices.[150]

Christie's actions were inconsistent with the bipartisan tradition of keeping a roughly even political balance on the court—a tradition that predates the 1947 state constitution. The eight retired justices who urged Christie to reappoint Justice Wallace stated that this tradition is "a powerful restraint on court 'packing' or other means of exerting political pressure on an independent judiciary."[151] The justices noted that this "unwritten rule" even applied to lower-court judges. Christie is determined to break this tradition, warning the state senate that, "If they're waiting for me to appoint a Democrat … they'll be waiting a long time."[152] The Senate Judiciary Committee rejected the nominations of both Kwon and Harris.[153]

In the midst of this "three-ring circus"—in the words of one law review article[154]—the New Jersey Supreme Court deliberated the latest case stemming from *Abbott*. After the legislature and the court finally seemed to have concluded their 25-year battle over school funding in 2010, Christie's first budget cut more than $1.1 billion in state aid from the SFRA formula.[155] The court said its 2009 decision "was, in no small way, a matter of trust between the branches of government."[156] After asking the attorney general whether the program would be funded, the court was "persuaded to give the State the benefit of the doubt" that it would be funded.[157] The cuts violated the condition that the SFRA be fully funded, and the state supreme court ruled in *Abbott XXI* that the funding reduction was a "real, substantial, and consequential blow to the right to the achievement of a thorough and efficient system of education," ordering the state to fully fund the SFRA formula in the *Abbott* districts.[158]

Caving to political pressure?

Justices Rivera-Soto and Helen Hoens dissented in the *Abbott XXI* decision. Justice Rivera-Soto was critical of the entire line of *Abbott* decisions, calling them "an initially well-intentioned but now fundamentally flawed and misguided approach to addressing" the constitutional right to education.[159] He said the facts of the case "cry out for the exercise of judicial restraint" and warned that "it ill-becomes the judiciary—the unelected branch of government—to engage in an unseemly power-grab under the guise of unnecessary constitutional adjudication."[160] Echoing his complaints about the appointment of lower-court judges to fill vacancies, Justice Rivera-Soto argued that the majority's decision was invalid because of a technicality.[161]

Justice Hoens joined Rivera-Soto's opinion and wrote her own dissent. Justice Hoens emphasized that the court was presented with the option to more explicitly condition its 2009 ruling on full funding, but it did not do so: "The language that the Court actually, and deliberately, chose was limited."[162] Justice Hoens also noted the "considerable belt-tightening" and "shared sacrifice" that resulted from diminished tax revenues.[163] She said the plaintiffs were "asking this Court to close its collective eyes to the reality of an unprecedented and unforeseen fiscal calamity."[164] Finally, she praised the SFRA for dispersing aid to at-risk students across the state, not just the *Abbott* districts, and criticized the court for resurrecting the "outmoded distinction" that predated the statute.[165]

Observers noted that the two justices in dissent—Justices Hoens and Rivera-Soto—were the two justices who would soon face renomination by Christie. The justices heard this case in the midst of Christie's unprecedented attempt to influence the court's decisions. Justices Hoens and Rivera-Soto must have known that they could share Justice Wallace's fate if Christie believed they were part of the so-called activist majority.

By the time the court revisited its affordable-housing jurisprudence in the summer of 2013, Justice Patterson had replaced Justice Rivera-Soto. In two decisions, the court ruled unconstitutional a new system for assigning each locality's "fair share" of affordable housing and rejected Christie's attempt to unilaterally abolish the state's affordable-housing agency.[166]

The supreme court ruled that the state's new growth-share methodology for affordable-housing requirements was facially inconsistent with both the Fair Housing Act and the constitutional obligation laid out in *Mount Laurel II*.[167] After Christie attempted to eliminate COAH through an executive reorganization plan, the court ruled in 2013 that the governor could not eliminate an independent agency without legislative action.[168]

In both 2013 *Mount Laurel* cases, the two dissenters were Justice Hoens, who faced a tenure decision by Christie the same year, and Justice Patterson, Christie's only appointee at the time.[169] Justice Hoens argued that the state's "growth share" system passed constitutional muster, and her dissent warned that the alternative approach would result in "a never-ending cycle of forced growth everywhere" and "an endless, self-fulfilling prophesy of sprawl."[170]

Even after Justice Hoens voted the way Christie wanted in the most recent housing and education cases, the governor declined to renominate her.[171] Christie alleged that senate Democrats would not give Justice Hoens a "fair hearing" for reconformation.[172] He said he did not want Democrats to "rake her over the coals."[173] Sen. Ray Lesniak, a Democrat on the judiciary committee, said that Christie's comments were "presumptuous," but he conceded that, "There's no doubt she was going to have difficulty because her opinions on the bench showed absolutely no independence from the governor's views."[174]

Lesniak's comments imply that Justice Hoens may have caved to political pressure from Christie. She dissented in the court's most recent versions of the *Mount Laurel* and *Abbott* cases, voting for the state when the majority ruled against it. If Lesniak was correct in saying that Justice Hoens lacked "independence" from the governor, then the question arises: Are the Democrats in the state senate playing the same game as Christie by refusing to approve tenure for a justice because of her votes in certain cases?

The key difference, of course, is that the Democratic senators are staking out their position in the name of judicial independence. On October 17, the judiciary committee unanimously confirmed Justice Faustino Fernandez-Vina, who Christie said was a Republican.[175] This suggests that the Democrats' opposition to Justice Hoens's reconfirmation was not based on her party affiliation. If Lesniak was right to imply that Justice Hoens caved to Christie's political pressure, then the members of the judiciary committee might not have blocked her if Christie had not applied political pressure in the first place. That is not to say that senators were right to oppose her or to think that she lacked "independence," but at least they were fighting for the court's independence.

Christie, on the other hand, is denying tenure for the exact opposite reason. He is seeking to rein in the court's independence and expand his own authority over the nonpolitical branch of government. When the people of New Jersey ratified a new constitution in 1947, they chose a system of governing themselves that granted more independence to the judiciary and required the legislature to provide a decent education to every child in New Jersey. Christie is doing everything in his power to turn back the clock. Before Christie took office, the system insulated the high-court justices from pressure from the political branches. But if Christie gets his way, this will no longer be the case.

Despite Christie's efforts, all of the justices recently ruled against his administration in one politically charged case. On October 18, 2013, the court ruled that the state constitution requires New Jersey to allow same-sex couples to marry.[176] The ruling stemmed from a unanimous 2006 decision—long before Christie began exerting political pressure on the court—in which the court ruled that "the unequal dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution."[177] As in the *Mount Laurel* and *Abbott* cases, the court initially did not order a specific remedy and invited legislative action.[178]

The legislature responded with a bill allowing civil unions for same-sex couples, but once the U.S. Supreme Court ruled the federal Defense of Marriage Act unconstitutional in June 2013, civil unions no longer granted same-sex couples the same federal benefits as married same-sex couples.[179] For this reason, the court concluded in October 2013 that Christie's arguments against marriage equality could not "overcome this reality: same-sex couples who cannot marry are not treated equally under the law today."[180] The court rejected the Christie administration's attempt to stop marriage for same-sex couples during the appeals process, and the state dropped the appeal.[181]

A spokesman for the governor stated:

> *Although the governor strongly disagrees with the court substituting its judgment for the constitutional process of the elected branches or a vote of the people, the court has now spoken clearly as to their view of the New Jersey Constitution and, therefore, same-sex marriage is the law.*[182]

Just days after the decision, Christie won re-election in a landslide—a victory which he could have interpreted as a mandate to continue his quest to pack the court. Yet the state senate remained in the hands of Democrats, who have criticized the governor for politicizing the courts.[183]

It seems the question of marriage equality is settled at the New Jersey Supreme Court. This means that if Christie succeeds in his attempt to appoint judges who will rule the way he wants, same-sex couples will not be the ones who suffer. Instead, kids in poor school districts will suffer—as will their families, who cannot afford to move somewhere with better schools.

Is Christie violating the state constitution?

In his unprecedented effort to control the New Jersey Supreme Court, Christie is violating the spirit—if not the letter—of the state constitution. He seeks to curtail the court's independence and enlarge his own authority over the nonpolitical branch of government—all in the name of spending less money on affordable housing and the education of poor kids. The traditions standing in Christie's way have ensured the independence of the court throughout its history, and eight retired justices said these traditions are "imbued with constitutional value."[184]

New Jersey's Constitution was enacted long after the populist and progressive movements pushed for judicial elections, and many states had already moved away from contested judicial elections.[185] The people of New Jersey made a decision in 1947 to establish a system of government in which the state supreme court was largely free from political pressure. This freedom was crucial to ensure that courts could protect the rights of unpopular litigants and serve the function of judicial review, which sometimes requires judges to strike down popular statutes.[186]

This system allowed the New Jersey Supreme Court to look out for the interests of politically powerless groups, even at the expense of a powerful majority of citizens. Even when politicians disagreed with the court's decisions, they did not try to change its membership. This had been true since the creation of the state supreme court. But now, a politically powerful majority of New Jersey suburbanites is trying, through Christie, to limit the constitutional rights of the state's middle- and working-class citizens.

People without political power cannot expect the political branches of government to protect their interests. If judges cannot stand up for individual rights against the elected branches of government, then constitutional rights mean nothing in the face of a majority of voters' contrary opinion.[187] If political branches can pressure the court, then constitutional rights are vulnerable to the whims of a majority of citizens. Even if a majority of legislators or those voting for Christie disagree with the *Mount Laurel* and *Abbott* decisions, the rights protected by the New Jersey Constitution should be beyond political pressure.[188]

The answer to the question of whether Christie is violating the constitution may depend on the importance of the framers' intent in interpreting it. The framers of the U.S. and New Jersey Constitutions understood that judicial independence is vital if judges are to serve the role of protecting individual rights.[189] The delegates to the New Jersey constitutional convention looked to the federal system for guidance.[190]

To the extent that the framers discussed how legislators should make a tenure decision, it seems they did not interpret it to allow legislators to kick a judge off the bench for decisions they do not like. A judge who served on the constitutional convention's judiciary committee said the tenure decision would allow legislators to "test our new judges to see whether they are fit to preside."[191] Sen. Frank Farley told the judiciary committee that the tenure decision would "insure [sic] that men who are appointed … have the proper temperament, background and ability" and that the reconfirmation process allows legislators to "determine whether they are qualified as a judge."[192]

"If they are qualified, they have no fear of not being reappointed," he said.[193] Many of the drafters of the constitution remained involved in the judicial selection process, and their actions suggest that they interpreted the constitution to mean that justices were granted tenure unless they were unfit for office.[194]

These statements may not convince some who support Christie's effort to reshape the court. Textualists believe that courts should not rely on the framers' intent and constitutions should be interpreted primarily by the words of which they are comprised.[195] One scholar concluded that when it comes to interpreting statutes, the New Jersey Supreme Court has recently become "more textually-anchored" and less reliant on legislative history.[196]

But in a 2012 case about judicial independence, the court noted several times that the framers of the state constitution intended to prevent the political branches from exerting control over judges "who might be required to oppose their actions."[197] The court said, "The public is the ultimate beneficiary of a fearless and independent judiciary, for a timid and subservient judiciary will be an uncertain guarantor of fundamental rights."[198] Constitutional rights should not be subject to political pressure.

The battle over the New Jersey Supreme Court is part of a larger debate over how to balance independence and democratic accountability in selecting judges. In Christie's view, his decision to examine a justice's decisions in deciding whether to grant tenure means more democratic accountability for the court.[199] Christie

believes that if New Jersey citizens do not like the decisions of the court, they can vote for a governor who will refuse tenure to sitting justices who do not rule the way that citizens want.

One problem with Christie's logic is that unless a governor is explicit about why a justice was denied tenure, there is no democratic accountability. Although he has generally spoken about the court as being "activist," Christie has repeatedly declined to name a single one of Justice Wallace's votes that led him to deny tenure.[200] If governors deny tenure for reasons that are unknown to voters, how does that involve voters in the decision?

Although he has mentioned *Abbott* and *Mount Laurel* when discussing the problems with the court, Christie may be reluctant to explicitly state that he wants judges on the bench who will overturn or weaken those precedents. Christie's criticism of the court implies that its decisions contradict the desires of New Jersey voters, but a 2008 poll found that respondents were largely unaware of the decisions, and to the extent they had an opinion on the cases, they approved of them by wide margins.[201]

Moreover, the pre-Christie system, similar to the federal system, still included means for voters to influence the selection of those who interpret their constitution. The political branches of government are exclusively responsible for appointing and confirming judges.[202] A 2012 article in *The Seton Hall Legislative Journal* suggested that the court's approach to statutory interpretation "indicates at least a subconscious awareness of the changing political winds in New Jersey."[203] If Christie had simply waited another two years, Justice Wallace would have reached the mandatory retirement age, Justice Patterson may have been easily confirmed, and two seats may not have had to remain vacant for years.[204]

Conclusion

Christie's effort to influence the court comes as Republican governors and legislatures across America are trying to exert more control over state supreme courts. Supreme courts in other states have ordered legislatures to spend more money on education, and these decisions have often prompted backlash from conservative legislators.[205] According to *The Wichita Eagle*, Republican Gov. Sam Brownback and Senate President Susan Wagle of Kansas said on November 7, 2013, that a Kansas Supreme Court ruling requiring more education funding "could push lawmakers toward trying a constitutional amendment to change the way justices are selected."[206] This is a blatant attempt by politicians to pressure the court to rule in favor of the state. In North Carolina, where the state supreme court has also required the legislature to spend more money on public education, the 2012 state supreme court election saw advocates for privatization and school vouchers contribute more than $100,000 to an independent group that ran ads supporting the conservative candidate.[207]

Other courts have faced a backlash for rulings that were unpopular with conservative politicians. After the Florida Supreme Court threw out a referendum against the Affordable Care Act, the Republican state legislature flirted with a shameless court-packing plan in 2011.[208] Conservative legislators in Florida and Arizona placed referendums on the ballot in 2012 that would have granted the political branches more control over their respective supreme courts.[209] Fortunately, voters rejected these attempts to politicize the judiciary.[210] In the same vein, New Hampshire legislators proposed a constitutional amendment in 2012 that would completely eliminate the judiciary's authority to declare statutes unconstitutional, leaving the legislature to judge the constitutionality of its own actions.[211] Luckily, the proposal was defeated in a legislative committee.[212]

If the citizens of New Jersey want to protect their supreme court's independence, they should consider ways to ensure that the state constitution's system of checks and balances survives Christie's power grab. The state could benefit from a constitutional amendment that either changes the system or clarifies how the political branches decide whether to grant tenure.

Citizens might ask themselves: Should the political branches be making the decision on whether to grant tenure in the first place? If the constitution only envisions denial of tenure when a judge is unfit for office, why should the political branches even make this decision? It may be difficult to decide whether one agrees with a justice's decisions, but asking whether judges can do their jobs seems like an easier question to answer.

Some states leave this decision to independent commissions. Hawaii's justices, for example, are chosen through a merit selection system in which a commission appointed by all three branches of government and the state bar composes a list of candidates from which the governor chooses a nominee, who is then subject to senate confirmation.[213] The Hawaii Constitution specifies that no more than four of the commission's nine members can be attorneys, and it requires that the commission "be selected and … operate in a wholly nonpartisan manner."[214] After the justices serve a 10-year term, the commission decides whether they should be reconfirmed.[215]

Although the Hawaii Constitution does not specify the criteria by which the commission makes its initial recommendations, it grants the commission the authority to promulgate rules. The commission passed a rule stating that it "shall" consider background, character, and professional skills, along with a list of optional criteria.[216] The commission also passed a rule detailing the procedure for deciding whether judges should be retained after their initial terms.[217]

New Jersey's neighbors New York and Delaware give their respective merit-selection commissions a role in the reconfirmation process, but the governor and state senate must also approve.[218] In Vermont, the legislature alone decides whether to keep the justices on the bench.[219]

New Jersey could also consider doing away with the initial seven-year term and instead appoint judges to serve for life or until a mandatory retirement age. The high-court justices in New Hampshire and Massachusetts are appointed by the governor from a list compiled by a merit-selection commission, and they serve until age 70.[220] Every federal judge is appointed for life.[221] Rhode Island is the only state that still appoints its judges for life,[222] but there is no reason why New Jersey could not emulate the U.S. Constitution. Some delegates to the 1947 constitutional convention favored this approach.[223]

If New Jersey citizens are concerned about maintaining the tradition of partisan balance on the court, they could also consider a constitutional amendment similar to Article IV, Section 3 of the Delaware Constitution, which mandates that no more than three of the five justices on the state supreme court can belong to the same political party.[224] This would give New Jersey's unwritten rule the force of law and compel Christie to abandon his plan to pack Republicans onto the court.

Constitutional amendments are hard to enact in New Jersey, another measure that protects the high court from political pressure.[225] Legislators can propose a constitutional amendment, but it must be either approved by "three-fifths of all the members" of both houses of the state legislature or a majority in both houses during two consecutive legislative sessions.[226] The proposed amendment must then be approved by a majority of voters in the next election.[227]

Despite these high hurdles to amendment, many voters in New Jersey are alarmed at the loss of judicial independence and the high-court vacancies that have resulted from Christie's battle with the state senate. If a constitutional amendment is not feasible, legislators could consider a statute that specifies the criteria by which the tenure decision should be made or involves an independent commission in the decision. Although legislators might be concerned that such a statute does not conform to the state constitution's provisions on choosing judges, the New Jersey Supreme Court would ultimately decide whether such a bill is constitutional.

Christie would not likely sign a statute that limits his authority over choosing judges, but the legislature can override his veto with a supermajority.[228] Alternatively, legislators could wait to see if Christie leaves office to run for president.

The recent confirmation of a justice could mean that Christie and the state legislature are working out their differences, but two vacancies still remain on the court.[229] Chief Justice Rabner, the author of the recent marriage equality decision, is up for tenure in June, giving Christie another opportunity to use the tenure process to pressure the court.[230]

Some New Jersey conservatives are pushing for even more explicit means of applying political pressure to the court. Americans for Prosperity, the hub of the Koch brothers' dark-money network, funded a short-lived and disastrous 2011 campaign for judicial elections in New Jersey.[231] Before considering such an idea, voters should look to the impact of judicial elections on the decision making of courts that have seen millions of dollars in campaign cash.[232]

Before Christie, the court's independence meant that it could protect the rights of politically powerless groups. In the *Mount Laurel* and *Abbott* cases, the court ruled that local governments could not neglect the needs of the state as a whole through zoning laws or school funding systems that only benefit their constituents. These cases are about the nature of the relationship between the state and local governments under the state constitution.

The battle over the state supreme court, on the other hand, concerns the balance of power among the three branches of government. Can a political majority, acting through Christie, pressure the court to stop requiring state and local governments to help low- and moderate-income residents? Another case involving *Mount Laurel* could come before the court soon, and one commentator stated, "With a 9-plus percent unemployment rate in New Jersey—despite the so-called economic recovery—the need to unleash all possible means of promoting more-affordable housing could hardly be greater."[233]

About the authors

Billy Corriher is the Associate Director of Research for Legal Progress at American Progress, where his work focuses on state courts and the influence of political contributions on judges. Before joining the Center for American Progress, Corriher wrote a weekly post for the Harvard Law & Policy Review blog on federal appellate court cases and other legal/policy matters. Corriher has also written op-eds and blog posts for the American Constitution Society and the Bill of Rights Defense Committee. Before attending law school, Corriher worked as a local government reporter for the *Clayton News-Daily* in Jonesboro, Georgia.

Alex Brown is a Legal Fellow for Legal Progress at the Center for American Progress, where her work focuses on state and federal courts. Before joining Legal Progress, Alex wrote blog posts on Supreme Court decisions and legal policy news for ThinkProgress Justice and served as a law clerk for Sen. Dianne Feinstein (D-CA). She received her B.A. in political science from the University of Pittsburgh and a law degree and master's in political science from Duke University.

Endnotes

1 National Organization for Marriage, "National Organization for Marriage Sharply Criticizes Activist Judiciary for Redefining Marriage In New Jersey and Christie For Abandoning Voters," Press release, October 21, 2013, available at http://www.nomblog.com/38372/#sthash.r0h2EpUu.dpuf.

2 Ibid.

3 Carrie Severino, "Chris Christie's Court," Bench Memos, October 21, 2013, available at http://www.nationalreview.com/bench-memos/361824/chris-christies-court-carrie-severino.

4 Ibid.

5 Office of the Governor, "Governor Christie on the New Jersey Supreme Court," Press release, May 3, 2010, available at http://www.state.nj.us/governor/news/news/552010/approved/20100503c.html.

6 *The New York Times*, "The Politicization of a Respected Court," December 15, 2010, available at http://www.nytimes.com/2010/12/16/opinion/16thurs3.html.

7 George Amick, "N.J. Supreme Court has been weakened by vacancies from partisan stalemate," *The Times of Trenton*, March 18, 2013, available at http://www.nj.com/times-opinion/index.ssf/2013/03/amick_new_jerseys_supreme_cour.html.

8 Jonathan Capehart, "Look for Christie to replace 'activist' gay-marriage judge," PostPartisan Blog, October 23, 2012, available at http://www.washingtonpost.com/blogs/post-partisan/wp/2013/10/23/look-for-christie-to-replace-activist-gay-marriage-judge.

9 Adam Yoffie, "From Portiz to Rabner: The New Jersey Supreme Court's Statutory Jurisprudence, 2000–2009," *Seton Hall Legislative Journal* 35 (2) (2011): 302–358.

10 Jack Bass, *Unlikely Heroes: A vivid account of the implementation of the* Brown *decision in the South by southern federal judges committed to the rule of law* (Tuscaloosa, Alabama: University of Alabama Press, 1990).

11 A 2000 law review article discussed the "massive resistance to the *Mount Laurel* doctrine," which prompted the court to order more specific remedies in *Mount Laurel II*. See John M. Payne, "Reconstructing the Constitutional Theory of *Mount Laurel II*," *Washington University Journal of Law & Policy* 555 (3) (2000): 555–582, available at http://law.wustl.edu/journal/3/pg555to582.pdf.

12 For example, see *Abbott v. Burke*, 575 A.2d 359, 409 (N.J. 1990); *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel*, 456 A.2d 390, 417 (N.J. 1983).

13 For example, see *Abbott v. Burke*, 710 A.2d 450, 473–74 (N.J. 1998); *Abbott v. Burke*, 751 A.2d 1032, 1035 (N.J. 2000); *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel*, 456 A.2d 390, 417 (N.J. 1983).

14 One conservative blogger based in the Philadelphia suburbs said, "What happened to property tax relief? Well instead of the money raised through income tax going to reduce our property taxes, in its notorious 'Abbott' decision the liberal state Supreme Court decided to send most of it to a handful of urban districts, led by Newark. This money has been wasted—pissed away by big city machine mayors like Cory Booker." Rob Eichmann, "Mr. 'Abbott District' Cory Booker Shills for Chivukula," Conservative New Jersey, October 22, 2012, available at http://conservativenewjersey.com/mr-abbott-district-cory-booker-shills-for-chivukula.

15 The Ridgewood Blog, "New Jersey's runaway Supreme Court," June 23, 2011, available at http://theridgewood-blog.net/new-jerseys-runaway-supreme-court.

16 GovChristie, "Governor Christie on New Jersey Supreme Court's Abbott Ruling," May 24, 2011, available at http://www.youtube.com/watch?v=9c-jQ25JlD8.

17 Ibid.

18 A CNN exit poll found that Christie won 51 percent of suburban votes compared to 26 percent of urban votes. CNN, "CNN Exit Polls – New Jersey Governor," November 3, 2009, available at http://i2.cdn.turner.com/cnn/2009/images/11/04/2009.exit.polls.-.nj.gov.pdf. After the election, political strategist Karl Rove cited Christie's victory as evidence that "suburban and independent voters moved into the GOP column." Karl Rove, "Tuesday's Suburban Vote Swing," *The Wall Street Journal*, November 4, 2009, available at http://online.wsj.com/news/articles/SB10001424052748704013004574515652271599392.

19 Geoff Bailey, "What Does Christie's Election Mean for Urban NJ, Especially Newark, East Orange, & Irvington?", NJ.com, November 11, 2009, available at http://www.nj.com/newark/geoffbailey/index.ssf/2009/11/what_does_christies_election_m.html.

20 Corianne Payton Scally, "Can Better Messaging Overcome NIMBY?", Rooflines, October 17, 2013, available at http://www.rooflines.org/3487/can_better_messaging_overcome_nimby; Phil Morin, "Are Market Conditions, NIMBY Attitudes Leading to More Mt. Laurel Litigation?", New Jersey Zoning Watch, January 26, 2008, available at http://njzoningwatch.com/2008/01/26/are-market-conditions-leading-to-more-mt-laurel-litigation.

21 Office of the Governor, "Governor Christie on the New Jersey Supreme Court."

22 Tom Moran, "Gov. Christie may have picked a fight he's 'almost certain to lose' with N.J. Supreme Court nominee," *The New Jersey Star-Ledger*, May 4, 2010, available at http://blog.nj.com/njv_tom_moran/2010/05/gov_christies_may_have_picked.html.

23 Ibid.

24 Roslyn F. Martorano, "The Three-Ring Circus: New Jersey's 2010 Judicial Retention Crisis," *Albany Law Review* 75 (4) (2012): 1837–1854, available at http://www.albanylawreview.org/Articles/Vol75_4/75.4.0018_martorano.pdf.

25 John Wefing, "The New Jersey Supreme Court 1948–1998: Fifty Years of Independence and Activism," *Rutgers Law Journal* 701 (29) (1998), pp. 711–712.

26 Ibid.

27 The comment attributed to *Judicature* magazine appears in several media accounts of the court. David Margolick, "New Jersey Court Doesn't Keep Its Opinions to Itself," *The New York Times*, July 29, 1984, available at http://www.nytimes.com/1984/07/29/weekinreview/new-jersey-court-doesn-tkeep-its-opinions-to-itself.html.

28 N.J. Const. art. VI, § 1 (1844).

29 N.J. Const. art. VI, § VI (1947).

30 Ibid.

31 Gov. Alfred Driscoll, remarks as published in N.J. Constitutional Convention, vol. 4, p. 428, available at http://slic.njstatelib.org/slic_files/searchable_publications/constitution/constitutionv4/NJConst4n428.html.

32 Ibid., p. 429.

33 Sen Frank Farley, remarks as published in N.J. Constitutional Convention, vol. 1, p. 589, available at http://slic.njstatelib.org/slic_files/searchable_publications/constitution/constitutionv1/NJConst1n589.html.

34 Wefing, "The New Jersey Supreme Court 1948–1998," p. 713.

35 Ibid., pp. 704–705.

36 Ibid.

37 Jonathan Banks, "State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?", *Vanderbilt Law Review* 129 (45) (1992), note 177.

38 Wefing, "The New Jersey Supreme Court 1948–1998," p. 705.

39 N.J. Const. art. IV, § 7 (1844).

40 N.J. Const. art. VIII, § 4 (1947).

41 *Robinson v. Cahill*, 303 A.2d 273, 295–298 (N.J. 1973).

42 Public School Education Act of 1975, N.J. Stat. Ann. § 18A:7A-1 to -52.

43 For example, see *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998); *Abbott v. Burke*, 751 A.2d 1032 (N.J. 2000); *Abbott v. Burke*, 971 A.2d 989 (N.J. 2009).

44 For example, see *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994).

45 *Abbott v. Burke*, 20 A.3d 1018, 1023 (N.J. 2011).

46 *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985).

47 *Abbott v. Burke*, 575 A.2d 359, 364 (N.J. 1990).

48 Ibid., pp. 385–386.

49 Ibid.

50 Ibid., pp. 302–303.

51 Quality Education Act, N.J. Stat. Ann. § 18A:7D-1-3.

52 Gwen Florio, "N.j. Is Finding Equity To Be An Elusive Goal A State Tax Increase Drew A Backlash. And In Poor Districts, The New Funds Aren't Enough", *The Philadelphia Inquirer*, September 27, 1992, available at http://articles.philly.com/1992-09-27/news/26020762_1_state-aid-poorest-districts-qea.

53 *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994).

54 Ibid., pp. 580–581.

55 Ibid., pp. 576–577.

56 *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997).

57 Ibid., pp. 439–443.

58 *Abbott v. Burke*, 710 A.2d 450 (N.J. 1998).

59 For example, see *Abbott v. Burke*, 748 A.2d 82 (N.J. 2000); *Abbott v. Burke*, 832 A.2d 906 (N.J. 2003); *Abbott v. Burke*, 935 A.2d 1152 (N.J. 2007).

60 *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713 (N.J. 1975).

61 Ibid., pp. 727–728.

62 Fair Share Housing Center, "What is the Mount Laurel Doctrine?", available at http://fairsharehousing.org/mount-laurel-doctrine (last accessed November 2013).

63 *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713, 729–731 (N.J. 1975).

64 Ibid., p. 717.

65 Ibid.

66 Ibid.

67 Ibid., p. 734.

68 Ibid.

69 *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel*, 456 A.2d 390, 410 (N.J. 1983).

70 Ibid., p. 415.

71 Ibid., p. 417.

72 Ibid., p. 418.

73 Ibid., p. 419.

74 Ibid., p. 420.

75 Fair Housing Act, N.J. Stat. Ann. § 52:27D-311.

76 *Hills Dev. Co. v. Bernards*, 510 A.2d 621 (N.J. 1986).

77 *In re Adoption of N.J.A.C. 5:96 & 5:97*, 74 A.3d 893, 912 (N.J. 2013).

78 *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel*, 456 A.2d 390, 416 (N.J. 1983).

79 *In re Adoption of N.J.A.C. 5:96 & 5:97*, 74 A.3d 893, 912 (N.J. 2013).

80 Fair Share Housing Center, "What is the Mount Laurel Doctrine?".

81 *In re Adoption of N.J.A.C. 5:96 & 5:97*, 74 A.3d 893 (N.J. 2013).

82 Ibid., pp. 899–901.

83 Fair Share Housing Center, "What is the Mount Laurel Doctrine?".

84 *In re Adoption of N.J.A.C. 5:96 & 5:97*, 74 A.3d 893, 901–902 (N.J. 2013).

85 Ibid., p. 908.

86 Frederic J. Giordano, Shauna Peterson, and Robert T. Miller, "Dollars and Sense: Understanding the New Jersey Supreme Court's Role in Education and Housing" (Washington: The Federalist Society for Law and Public Policy Studies, 2009), p. 8, available at http://www.fedsoc.org/doclib/20090901_NJWPOct09.pdf.

87 Fair Share Housing Center, "What is the Mount Laurel Doctrine?"

88 *In re Adoption of N.J.A.C. 5:96 & 5:97*, 74 A.3d 893, 909 (N.J. 2013).

89 Giordano, Peterson, and Miller, "Dollars and Sense," p. 8.

90 Ibid., p. 11.

91 Ibid.

92 Christopher Baxter, "Christie: N.J. Supreme Court's Abbott decision is the latest 'invoice' from an overzealous bench," *The New Jersey Star-Ledger*, May 24, 2011, available at http://www.nj.com/news/index.ssf/2011/05/christie_supreme_court_abbott.html.

93 Steven Malanga, "The Court That Broke Jersey," *City Journal* 22 (1) (2012), available at http://www.city-journal.org/2012/22_1_nj-supreme-court.html.

94 Ibid.

95 For example, see *Abbott v. Burke*, 575 A.2d 359, 364 (N.J. 1990); *Abbott v. Burke*, 643 A.2d 575 (N.J. 1994); *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997).

96 *Abbott v. Burke*, 20 A.3d 1018, 1100 (N.J. 2011).

97 Ibid.

98 *Abbott v. Burke*, 575 A.2d 359, 366 (N.J. 1990).

99 Robert Hanley, "Plaintiff Regards Schools Ruling from a New Jersey Jail," *The New York Times*, June 12, 1990, available at http://www.nytimes.com/1990/06/12/nyregion/plaintiff-regards-schools-ruling-from-a-new-jersey-jail.html.

100 Ibid.

101 Ibid.

102 Ibid.

103 Pennsauken Township, Camden County, "Resolution Granting Third Round Substantive Certification #15-09," June 10, 2009, available at http://www.nj.gov/dca/affiliates/coah/reports/compliance/0427.pdf.

104 Hanley, "Plaintiff Regards Schools Ruling from a New Jersey Jail."

105 Ibid.

106 Ibid.

107 Ibid.

108 One newspaper discussed a housing bill that reduced municipalities' affordable-housing obligations and noted that some Republicans said the bill "still would not relieve towns of the costly mandates created in the past by COAH and the state Supreme Court. They want towns to be able to set their own affordable housing goals." David Levinsky, "Christie likely to veto housing bill," *Burlington County Times*, December 14, 2010, available at http://fairsharehousing.org/pdf/121410_-_Christie_likely_to_veto_housing_bill.pdf. A blog referred to the bill as "an effort by an unholy alliance of Republicans and suburban Democrats" to stop the implementation of *Mount Laurel*. Rick Hills, "Christie's War against the Mount Laurel Doctrine: Do Conservatives Really Like Private Property Rights?", PrawfsBlawg, December 16, 2010, available at http://prawfsblawg.blogs.com/prawfsblawg/2010/12/christies-war-against-the-mount-laurel-doctrine-do-conservatives-really-like-private-property-rights.html.

109 Paul Horvitz, "N.j. Senate Narrowly Confirms Wilentz as Chief Justice," *The Philadelphia Inquirer*, August 1, 1986, available at http://articles.philly.com/1986-08-01/news/26063889_1_new-jersey-senate-senators-of-both-parties-vote.

110 Paul Horvitz, "Kean, Differing with Some in Gop, Says He Will Renominate Wilentz," *The Philadelphia Inquirer*, May 22, 1986, available at http://articles.philly.com/1986-05-22/news/26048777_1_chief-justice-kean-robert-n-wilentz.

111 Alvin Felzenberg, *Governor Tom Kean: From the New Jersey Statehouse to the 9–11 Commission* (New Brunswick, New Jersey: Rutgers University Press, 2006), p. 353.

112 Ibid., p. 351.

113 Horvitz, "Kean, Differing with Some in GOP, Says He will Renominate Wilentz."

114 Felzenberg, *Governor Tom Kean*, p. 357.

115 *Abbott v. Burke*, 971 A.2d 989 (N.J. 2009).

116 Ibid.

117 Ibid.

118 Ibid.

119 Ibid.

120 *Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011).

121 Caroline E. Oks, "Independence in the Interim: The New Jersey Judiciary's Lost Legacy," *Seton Hall Legislative Journal* 36 (1) (2011).

122 *U.S. News & World Report*, "Livingston Senior High School," available at http://www.usnews.com/education/best-high-schools/new-jersey/districts/livingston-township/livingston-senior-high-school-12620 (last accessed November 2013).

123 Ibid.

124 Angela Delli Santi, "NJ Christie's Political Move Disappoints Mentor," Associated Press, November 16, 2013, available at http://bigstory.ap.org/article/nj-christies-political-move-disappoints-mentor.

125 Office of the Governor, "Governor Christie," available at http://www.state.nj.us/governor/admin/about/ (last accessed November 2013).

126 David M. Halbfinger and David Kocieniewski, "Conversations with Christie and Corzine," *The New York Times*, October 29, 2009, available at http://www.nytimes.com/2009/10/30/nyregion/30excerpts.html.

127 Office of the Governor, "Governor Christie on the New Jersey Supreme Court."

128 According to Gov. Christie,"[I] did not subscribe to the theory that people once appointed must be reappointed. I know that's the way it's been in the state, but I don't think we set up the constitution with a method where the executive has to reappoint after seven years before tenure attaches just for fun. I think we did it because they want you to make an evaluation and a judgment." Ibid.

129 Ibid.

130 Ibid.

131 Alan Steinberg noted that Christie could "still achieve a strict constructionist majority" on the court without denying tenure to Justice Helen Hoens if she "follows the example set by former U.S. Supreme Court Justice Owen Roberts during the first two terms of the administration of former President Franklin D. Roosevelt." Steinberg was referring to President Roosevelt's battle with the U.S. Supreme Court over the constitutionality of New Deal legislation, which led to Roosevelt's plan to pack the bench with more liberal justices by adding seats to the court. "In late 1936, however, Roberts began to switch his position on the New Deal. By the time FDR introduced his 'court packing plan' at the beginning of his second term in 1937, Roberts was providing the necessary fifth vote to uphold New Deal legislation." Steinberg argues that Justice Hoens could engage in a similar switch to keep her seat on the bench: "A strict constructionist jurisprudential course on the part of Justice Helen Hoens may well ensure the success of the citizen empowerment, limited government revolution of Governor Chris Christie." Alan Steinberg, "The New Jersey Supreme Court: Christie Has Options," PolitickerNJ, April 26, 2010, available at http://www.politickernj.com/alan-steinberg/38626/new-jersey-supreme-court-christie-has-options.

132 Tony Kurdzuk, "N.J. Senate president blasts Christie for not reappointing Supreme Court Justice Wallace," *The New Jersey Star-Ledger*, May 3, 2010, available at http://www.nj.com/news/index.ssf/2010/05/nj_senate_president_blasts_chr.html.

133 Ibid.

134 *The New York Times*, "The Politicization of a Respected Court."

135 Kurdzuk, "N.J. Senate president blasts Christie for not reappointing Supreme Court Justice Wallace."

136 Ibid.

137 Ibid.

138 Robert L. Clifford and others, "Retired N.J. Justices: We urge Gov. Christie to reconsider his decision not to reappoint Justice Wallace," Newsroom New Jersey, May 13, 2010, available at http://www.newjerseynewsroom.com/commentary/retired-nj-justices-we-urge-gov-christie-to-reconsider-his-decision-not-to-reappoint-justice-wallace.

139 Ibid.

140 Ibid.

141 Adrienne Lu, "Senate Democrats draw line over Christie nomination," *The Philadelphia Inquirer*, May 5, 2010, available at http://articles.philly.com/2010-05-05/news/24958353_1_senate-president-senate-democrats-constitution.

142 Terrence Dopp, "Christie's New Jersey Court Nominee Replacing Wallace May Be Stalemated," Bloomberg, May 3, 2010, available at http://www.bloomberg.com/news/2010-05-03/christie-names-patterson-to-new-jersey-s-supreme-court-replacing-democrat.html.

143 *The New York Times*, "The Politicization of a Respected Court."

144 Ibid.

145 Ibid.

146 Chris Megerian, "N.J. Supreme Court Justice Roberto Rivera-Soto tells Gov. Christie he doesn't want to be renominated," *The New Jersey Star-Ledger*, January 3, 2011, available at http://www.nj.com/news/index.ssf/2011/01/nj_supreme_court_justice_rober.html.

147 Tom Hester Sr., "Christie, Sweeney reach compromise; Anne Patterson to replace Justice Rivera-Soto on N.J. Supreme Court," New Jersey Newsroom, May 2, 2011, available at http://ns1.newjerseynewsroom.com/state/gov-christie-sweeney-reach-compromise-anne-patterson-to-replace-justice-rivera-soto-on-state-supreme-court.

148 Kate Zernike and Nate Schweber, "Legislative Panel Rejects 2nd Christie Pick for State Supreme Court," *The New York Times*, May 31, 2012, available at http://www.nytimes.com/2012/06/01/nyregion/christie-pick-for-new-jersey-supreme-court-bruce-harris-is-rejected.html.

149 Michael Phillis, "Christie Supreme Court nominee approved, but Democrats warn they won't budge on others," *The Record*, November 18, 2013, available at http://www.northjersey.com/news/NJ_Senate_confirms_Supreme_Court_nominee_.html.

150 Ibid.

151 Clifford and others, "Retired N.J. Justices: We urge Gov. Christie to reconsider his decision not to reappoint Justice Wallace."

152 George Amick, "Partisan politics are weakening our courts," *The Times of Trenton*, June 25, 2012, available at http://www.nj.com/times-opinion/index.ssf/2012/06/amick_partisan_politics_are_we.html.

153 Ibid.

154 Martorano, "The Three-Ring Circus: New Jersey's 2010 Judicial Retention Crisis."

155 *Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011).

156 Ibid., p. 1031.

157 Ibid.

158 Ibid., p. 1038.

159 Ibid., p. 1110.

160 Ibid., p. 1114.

161 Justice Rivera-Soto argued that "the rule of practice in fact … has been that, to be granted a motion requires the affirmative vote of four, regardless of the number of Justice voting." Ibid., p. 1111. Justice Rivera-Soto argues this "unwritten" rule was violated because the decision was 3–2 with two justices recusing themselves for conflicts of interest. The majority said, "the dissenters' transparent attempt at nullification of a decision with which they disagree fails on every factual and legal basis." Ibid., p. 1043.

162 Ibid., p. 1116.

163 Ibid., pp. 1116–1117.

164 Ibid., p. 1117.

165 Ibid.

166 *In re Adoption of N.J.A.C. 5:96 & 5:97*, 74 A.3d 893 (N.J. 2013).

167 Ibid.; *In re Plan for the Abolition of the Council on Affordable Housing*, 70 A.3d 559 (N.J. 2013).

168 *In re Plan for the Abolition of the Council on Affordable Housing*, 70 A.3d 559 (N.J. 2013).

169 Ibid.; *In re Adoption of N.J.A.C. 5:96 & 5:97*, 74 A.3d 893 (N.J. 2013).

170 *In re Adoption of N.J.A.C. 5:96 & 5:97*, 74 A.3d 893, 920 (N.J. 2013).

171 MaryAnn Spoto, "Christie says Supreme Court justice Helen Hoens would not get a fair hearing," *The New Jersey Star-Ledger*, September 4, 2013, available at http://www.nj.com/politics/index.ssf/2013/09/gov_christie_helen_hoens_nj_supreme_court.html.

172 Ibid.

173 Ibid.

174 Matthew Arco, "Lesniak: Gov. gives me too much credit regarding Hoen's impending departure," PolitickerNJ, August 12, 2013, available at http://www.politickernj.com/67676/lesniak-gov-gives-me-too-much-credit-regarding-hoens-impending-departure#ixzz2kXgdYdB.

175 According to *The Philadelphia Inquirer*, "Christie said when he nominated Fernandez-Vina that the judge was a Republican. A Camden County election official, however, said Fernandez-Vina was listed as a Democrat, but said he believed the listing was a mistake. Scutari said Thursday that Fernandez-Vina told him privately that he was a registered Republican." Maddie Hanna, "Senate panel backs Christie pick for N.J. Supreme Court," *The Philadelphia Inquirer*, October 19, 2013, available at http://articles.philly.com/2013-10-19/news/43181020_1_assignment-judge-justice-john-wallace-christie.

176 *Garden State Equality v. Dow*, No. 073328, 2013 N.J. Lexis 1091 (N.J. Oct. 18, 2013).

177 *Lewis v. Harris*, 908 A.2d 196, 200 (N.J. 2006).

178 Ibid.

179 *Garden State Equality v. Dow*.

180 Ibid., p. 4.

181 Kate Zernike and Marc Santora, "As Gays Wed in New Jersey, Christie Ends Court Fight," *The New York Times*, October 21, 2013, available at http://www.nytimes.com/2013/10/22/nyregion/christie-withdraws-appeal-of-same-sex-marriage-ruling-in-new-jersey.html.

182 Ibid.

183 Matt Friedman, "Despite Christie's win, Democrats retain control of N.J. Legislature," *The New Jersey Star-Ledger*, November 6, 2013, available at http://www.nj.com/politics/index.ssf/2013/11/despite_christies_win_democrats_retain_control_of_nj_legislature.html.

184 Clifford and others, "Retired N.J. Justices: We urge Gov. Christie to reconsider his decision not to reappoint Justice Wallace."

185 G. Alan Tarr, *Without Fear or Favor: Judicial Independence and Judicial Accountability in the States* (Stanford, CA: Stanford University Press, 2012), p. 64–66.

186 "It is specifically a function of courts … to overturn the actions of the majority when those actions infringe upon the fundamental rights of minorities. Courts must on occasion make hard decisions that are greatly displeasing to the majority—as in freeing obviously guilty criminals due to violations of due process." Charles Gibson, *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy* (Chicago: University of Chicago Press, 2012), p. 5.

187 Ibid.

188 In *The Federalist Papers*, Alexander Hamilton said that limits on government authority "can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." Alexander Hamilton, "The Federalist No. 78: The Judiciary Department." In *The Federalist Papers* (1788), available at http://www.constitution.org/fed/federa78.htm.

189 Ibid.

190 During the convention, Gov. Driscoll addressed the structure of the judiciary and stated, "I do hope that within reasonable limitations we may follow the example of the Federal Constitution." Gov. Alfred Driscoll, remarks as published in N.J. Constitutional Convention, vol. 4, p. 430, available at http://slic.njstatelib.org/slic_files/searchable_publications/constitution/constitutionv4/NJConst4n430.html.

191 George T. Naame, remarks as published in N.J. Constitutional Convention, vol. 1, p. 587, available at http://slic.njstatelib.org/slic_files/searchable_publications/constitution/constitutionv1/NJConst1n587.html.

192 Sen. Frank Farley, remarks as published in N.J. Constitutional Convention, vol. 1, p. 589.

193 Ibid.

194 Gov. Richard Hughes, for example, was involved in the 1947 constitutional convention and served as governor in the 1960s. A scholar said in 1998 that Hughes told him 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." Wefing, "The New Jersey Supreme Court 1948–1998," pp. 712–713.

195 William Eskridge Jr., "Book Review: The New Textualism and Normative Canons" *Columbia Law Review* 113 (2013): 531–592, available at http://www.columbialawreview.org/wp-content/uploads/2013/03/Eskridge.pdf.

196 Yoffie, "From Poritz to Rabner," p. 305.

197 *DePascale v. New Jersey*, 47 A.3d 690, 692–693 (N.J. 2012).

198 Ibid., p. 693.

199 Christie said in 2011 that decisions regarding funding for education are made by those "who are held accountable by the people." GovChristie, "Governor Christie on New Jersey Supreme Court's Abbott Ruling." Republican Sen. Michael Doherty, who agrees with Christie that the *Abbott* rulings constitute "legislating" from the bench, said "If the members of the Supreme Court want to legislate, then they have the right, like every other citizen, to run for the Legislature. In doing so, they can place their agenda before the voters and the voters will decide. That's democracy. What we have now is judicial tyranny." Michael Doherty, "Distribute School Funds Equally," *The News of Cumberland County*, May 19, 2011, available at http://www.nj.com/cumberland/voices/index.ssf/2011/05/distribute_school_funds_equall.html. A conservative blogger cited Christie's actions as an example of "Americans across the country … rising up and demanding greater accountability from their public servants on the bench." Dan Pero, "Judicial Activism/Imperialism Run Amok in New Jersey," American Courthouse, May 26, 2011, available at http://americancourthouse.com/2011/05/26/judicial-activismimperialism-run-amok-in-new-jersey.html.

200 Amick, "Partisan politics are weakening our courts."

201 Fairleigh Dickinson University PublicMind Poll, "Voters Unfamiliar with Abbott and Mount Laurel" (2008), available at http://publicmind.fdu.edu/nj0806.

202 N.J. Const. art. VI, § VI (1947).

203 Yoffie, "From Poritz to Rabner," p. 344.

204 Oks, "Independence in the Interim," p. 134.

205 The North Carolina Supreme Court ruled in 1997 that students in the state have a constitutional right to an "opportunity to receive a sound basic education." *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997). The court later ruled that this required the state to provide preschool education, and after the governor created a preschool program, the Republican speaker of the North Carolina House of Representatives called it "an expanded entitlement program." North Carolina Republican House Caucus, " GA leaders call for court clarification on pre-K decision," April 4, 2012, available at http://nchouserepublicans.com/81511.

206 Don Lefler, "Brownback, Wagle: School finance ruling could trigger public fight over judge selection," *The Wichita Eagle*, November 7, 2013, available at http://www.kansas.com/2013/11/07/3102607/brownback-wagle-school-finance.html.

207 Chris Kromm, "Justice for sale? Backers of shadow groups pushing money into NC judicial election may have high stakes in outcome," Facing South, October 30, 2012, available at http://www.southernstudies.org/2012/10/justice-for-sale-backers-of-shadow-groups-pushing-money-into-nc-judicial-election-may-have-h.

208 Ian Millhiser, "Florida's GOP House Speaker Pushing Court-Packing Plan to Neutralize Democratic Justices," ThinkProgress, April 18, 2011, available at http://thinkprogress.org/politics/2011/04/18/158908/florida-court-packing.

209 Peter Hardin, "Voters Reject Ballot Items on Merit Selection in Three States," Gavel Grab, November 7, 2012, available at http://www.gavelgrab.org/?p=47490.

210 Ibid.

211 Bill Raftery, "New Hampshire: Constitutional amendment would prohibit all judicial review of legislation, allow legislature to determine constitutionality of its own acts," Gavel to Gavel, January 4, 2012, available at http://gaveltogavel.us/site/2012/01/04/new-hampshire-constitutional-amendment-would-prohibit-all-judicial-review-of-legislation-allow-legislature-to-determine-constitutionality-of-its-own-acts.

212 Patrick Meighan, "Tort reform, limiting power of courts among proposed bills related to judiciary," *The Nashua Telegraph*, February 21, 2012, available at http://www.nashuatelegraph.com/newsstatenewengland/950814-227/tort-reform-limiting-power-of-courts-among.html.

213 Hawaii Const. art. VI.

214 Hawaii Const. art. VI, § 4.

215 Ibid.

216 Supreme Court of the State of Hawaii, "Judicial Selection Commission Rules," Rule 10, available at http://www.courts.state.hi.us/docs/court_rules/rules/jscr.pdf.

217 Ibid., Rule 12.

218 Del. Const. art. IV, § 3; Gov. Jack Markell, Executive Order no. 4, "Preservation of Delaware's Independent Judiciary and Continuance of the Judicial Nominating Commission," March 26, 2009; N.Y. Const. art. VI, § 2.

219 Vt. Const. ch. 2, § 34.

220 American Judicature Society, "Methods of Judicial Selection," available at http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (last accessed November 2013).

221 U.S. Const. art. III, § 1.

222 R.I. Const. art. X, § 5.

223 One delegate on the judiciary committee stated that he supported "life tenure for all judges on original appointment." Nathan Jacobs, remarks as published in N.J. Constitutional Convention, vol. 1, p. 588, available at http://slic.njstatelib.org/slic_files/searchable_publications/constitution/constitutionv1/NJConst1n588.html. A judge who participated in the convention also preferred life tenure, noting that "Life tenure frees him of politics, at least from the time of his appointment and thereafter." Williams Smith, remarks as published in N.J. Constitutional Convention, vol. 4, p. 305, available at http://slic.njstatelib.org/slic_files/searchable_publications/constitution/constitutionv4/NJConst4n305.html.

224 "Three of the five Justices of the Supreme Court in office at the same time, shall be of one major political party, and two of said Justices shall be of the other major political party." R.I. Const. art. IV, § 3.

225 Wefing, "The New Jersey Supreme Court 1948–1998," pp. 717–720.

226 N.J. Const. art. IX, § 1.

227 Ibid., § 6.

228 N.J. Const. art. V, § 1.

229 Salvador Rizzo, "Fernandez-Vina takes the oath and dives into cases at N.J. Supreme Court," *The New Jersey Star-Ledger*, November 19, 2013, available at http://www.nj.com/politics/index.ssf/2013/11/fernandez-vina_takes_the_oath_and_dives_into_cases_at_nj_supreme_court.html.

230 Capehart, "Look for Christie to replace 'activist' gay-marriage judge."

231 KendalJames, "AFP NJ Tries to 'Disrobe' Courts; Gets Caught with Pants Down Instead," Blue Jersey, June 30, 2011, available at http://www.bluejersey.com/tag/NJDisrobed.com.

232 Billy Corriher, "Criminals and Campaign Cash: The Impact of Judicial Campaign Spending on Criminal Defendants" (Washington: Center for American Progress, 2013), available at http://www.americanprogress.org/issues/civil-liberties/report/2013/10/28/78134/criminals-and-campaign-cash; Billy Corriher, "Fixing Wisconsin's Dysfunctional Judicial Elections: A Single, 16-Year Term Could Minimize the Influence of Campaign Cash" (Washington: Center for American Progress, 2013), available at http://www.americanprogress.org/issues/civil-liberties/report/2013/07/29/70765/fixing-wisconsins-dysfunctional-supreme-court-elections.

233 R. William Potter, "Opinion: Appellate Court Ruling Hits the Poor Where They Live," NJ Spotlight, November 13, 2013, available at http://www.njspotlight.com/stories/13/11/12/opinion-appellate-court-ruling-hits-the-poor-where-they-live.

The Center for American Progress is a nonpartisan research and educational institute dedicated to promoting a strong, just, and free America that ensures opportunity for all. We believe that Americans are bound together by a common commitment to these values and we aspire to ensure that our national policies reflect these values. We work to find progressive and pragmatic solutions to significant domestic and international problems and develop policy proposals that foster a government that is "of the people, by the people, and for the people."

Center for American Progress

1333 H STREET, NW, 10TH FLOOR, WASHINGTON, DC 20005 • TEL: 202-682-1611 • FAX: 202-682-1867 • WWW.AMERICANPROGRESS.ORG