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MODELING THE GARDEN: HOW NEW JERSEY BUILT THE MOST PROGRESSIVE STATE SUPREME COURT AND WHAT CALIFORNIA CAN LEARN

Kevin M. Mulcahy*

I. INTRODUCTION

State supreme courts decide over ten thousand cases each year.¹ Litigants rarely appeal decisions of state supreme courts; further, for those that do appeal, the U.S. Supreme Court declines to hear or lacks jurisdiction in the majority of these cases.² Thus, for thousands of litigants, state supreme courts provide final decisions. Nonetheless, state supreme courts receive little attention from legal scholars, popular culture, and even law school curriculums.³ This comment focuses on two of these tribunals: the New Jersey Supreme Court, which stands as arguably the most activist, progressive, and, especially in area of individual rights, important state supreme court; and the California Supreme Court, which during the middle part of the twentieth century also excelled as an activist tribunal. However, since its overhaul in the retention election of 1986, the high court of the Golden State has failed to continue its tradition of activism.⁴ This comment discusses why the New Jersey court receives praise as an activist tribunal and why California’s reputation has

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2. See id.
changed from progressive to stagnant. More importantly, this comment discusses what steps California, and other jurisdictions, should take to model the New Jersey court and attain a similar activist reputation.

This comment begins with an overview of the New Jersey and California supreme courts. In particular, Part II discusses the decisions and individuals credited with each court's successes and, in California's case, failures. This background is meant to highlight, rather than exhaustively spell out, the activist nature of each state's court of last resort. In light of this background, the key question emerges: why has the New Jersey Supreme Court replaced California as the most active and progressive state supreme court? The analysis section attempts to answer this question by focusing on (1) the method of selecting and retaining justices in each state; (2) the support, or lack thereof, of the individual state's constitution; and (3) the leadership and attitudes of each court's members. Finally, this comment proposes that modeling after the New Jersey system in these three areas will help transform the California Supreme Court, and high courts in other jurisdictions, into progressive, activist tribunals.

II. BACKGROUND

A. The New Jersey Supreme Court

1. History and Structure

Prior to the New Jersey constitutional convention of 1947, the high court of New Jersey was hardly activist or progressive. In fact, the American Judicature Society declared New Jersey to have, “the nation's worst court system.”

5. See infra Part III.
6. See infra Part IV.
7. See infra Part V. This comment asserts that an activist, progressive state supreme court is desirable. While many regard judicial activism as a problem rather than a solution, this comment attempts to identify how to create, or, in the case of California, recreate an activist state supreme court. Obviously, these jurisdictions modeling the Garden State must first determine that a progressive, active tribunal is beneficial.

8. Prior to the 1947 convention, the high court of New Jersey was known as the Court of Errors and Appeals. See TARR & PORTER, supra note 1, at 188.
9. Glenn R. Winters, New Jersey Goes to the Head of the Class, 31
One scholar characterized the problems in the New Jersey courts this way: "If you want to see the common law in all its picturesque formality, with its fictions and its fads, its delays and uncertainties, the place to look for them is not London, not in the Modern Gothic of the Law Courts in Strand, but in New Jersey." Highlighting this judicial ineffectiveness and formality in New Jersey, the high court had sixteen justices at the time of the constitutional convention in 1947.

The 1947 constitutional convention took aim at establishing a more prominent judicial system, focusing on a strong state supreme court. Article VI of the revised New Jersey State Constitution vests judicial power in a "Supreme Court, Superior Court, and other courts of limited jurisdiction." The supreme court consists of a chief justice and six associate justices. The governor nominates and appoints these justices, with the advice and consent of the New Jersey Senate. The justices hold office for an initial term of seven years and, upon reappointment, continue in office during good behavior until they reach the mandatory retirement age of seventy. Thus, after reappointment, each supreme court justice enjoys "lifetime" tenure, with impeachment and incapacity as the only forms of involuntary removal.

2. Activist Decisions of the Court

While a complete survey of the New Jersey Supreme Court's decisions and policies is beyond the scope of this comment, the following sections highlight the progressive decisions of the New Jersey Supreme Court in the areas of

JUDICATURE 131 (1948); see also John B. Wefing, Symposium: The "New Judicial Federalism" and New Jersey Constitutional Interpretation, 7 SETON HALL CONST. L.J. 823 (1997).

10. TARR & PORTER, supra note 1, at 187 (quoting DENIS W. BROGAN, THE ENGLISH PEOPLE: IMPRESSIONS AND OBSERVATIONS 103 (1943)).

11. See TARR & PORTER, supra note 1, at 188.


13. N.J. CONST. art. VI, § 1, para. 1, cl. 1.
14. See id. art. VI, § 2, para. 1, cl. 1.
15. See id. art. VI, § 6, para. 1, cl. 1.
16. See id. art. VI, § 6, para. 3, cl. 1.
17. See id. art. VI, § 6, para. 3, cl. 3.
18. See id. art. VI, § 6, para. 4, cl. 1.
19. See N.J. CONST. art. VI, § 6, para. 5, cl. 1.
criminal procedure, the right to refuse medical treatment, sexual assault standards, and education reform.20

a. Criminal Procedure in the New Judicial Federalism

The past quarter-century has witnessed an upsurge in state court decisions predicated upon state, as opposed to federal, constitutional law.21 This movement has been termed the "new judicial federalism."22 With its origins in a Harvard Law Review article by U.S. Supreme Court Justice William J. Brennan,23 the essence of the new judicial federalism is the reliance on state constitutional law for deciding issues with parallel provisions in the federal and state constitutions.24 The most frequently cited rationale for the new judicial federalism is the perception that federal courts, under the leadership of Chief Justices Burger and Rehnquist, are no longer as committed to protecting individual rights as they were during

20. One of the more recognized New Jersey cases, Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) (establishing the Mount Laurel doctrine, which requires that municipalities' land use regulations provide realistic opportunity for low and moderate income housing), was left out of this discussion because of its sufficient coverage in law texts and journals. It should be noted, however, that Mount Laurel provides as good an example of the New Jersey Supreme Court's activism as any of the cited cases. There are many academic discussions of the New Jersey Supreme Court's activism. See Lawrence Baum & Bradley C. Canon, State Supreme Courts as Activists: New Doctrines in the Law of Torts, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM 83, 98 (Mary Cornelia Porter & G. Alan Tarr eds., 1982) (ranking New Jersey as the most innovative state supreme court in propensity to tort law activism in the postwar years); TARR & PORTER, supra note 1, at 194-236; John B. Wefing, The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism, 29 RUTGERS L.J. 701 (1998). For further case law regarding the activism of the New Jersey Supreme Court, see Woolley v. Hoffmann-La Roche, Inc., 491 A.2d 1257 (N.J. 1985) (holding that when an employer distributes an employment manual to its workers, the manually contractually binds the company); Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1965) (expanding the application of strict liability to residential housing). Interestingly, the California courts have praised the New Jersey Supreme Court decision in Schipper for leading the application of the doctrine of strict liability to the residential home setting. See Oliver v. Superior Court of San Diego, 259 Cal. Rptr. 160 (Ct. App. 1989); Kriegler v. Eichler Homes, Inc., 74 Cal. Rptr. 749 (Ct. App. 1969).


22. See id. at 190.


the Warren Court era. Most decisions under the new judicial federalism involve criminal procedure issues. In cases where the Burger and Rehnquist Courts did not accord sufficient protection to criminal defendants, Brennan called upon state courts to rely on their own constitutions to protect the individual rights of those accused of crimes.

The New Jersey Supreme Court responded to Brennan's call and, in some cases, construed the New Jersey Constitution to afford greater rights to those accused of crime than under the federal Constitution. Most notably, the New Jersey court interpreted New Jersey's own constitution to provide broader rights in search and seizure cases than the Fourth Amendment of the federal Constitution, as interpreted by the U.S. Supreme Court. In State v. Hunt, the New Jersey Supreme Court found that the state constitution creates a privacy interest in telephone billing records, contrary to the U.S. Supreme Court decision of Smith v. Maryland. Therefore, the New Jersey court struck down the seizure of such records without a search warrant. The New Jersey court also found a privacy right in curbside garbage, whereas the U.S. Supreme Court found none. Again, the New Jersey decision required police to obtain a warrant before searching an individual's curbside garbage. Further, in State v. Smith, the New Jersey Supreme Court rejected the U.S. Supreme Court decision of Pennsylvania v. Mimms, to the extent that Mimms allowed police to require that passengers exit from a stopped vehicle. Instead, the New Jersey court requires an officer to articulate facts that warrant heightened suspicion to justify ordering a passenger out of a

25. See id.; see also Latzer, supra note 21, at 190.
27. See id. at 856.
31. See Hunt, 450 A.2d at 956.
34. See Hempele, 576 A.2d at 814.
37. See Smith, 637 A.2d at 166.
lawfully stopped vehicle.\textsuperscript{38} These cases provide a few examples of the New Jersey court taking an approach opposite to the federal courts on search and seizure issues.\textsuperscript{39}

In addition to search and seizure issues, the New Jersey Court also provides greater protection against self-incrimination\textsuperscript{40} than certain federal decisions. In \textit{State v. Hartley},\textsuperscript{41} the New Jersey Supreme Court found that after a cessation of a custodial interrogation, police must administer fresh \textit{Miranda} warnings before interrogation resumes.\textsuperscript{42} The U.S. Supreme Court does not require such “refresher” warnings.\textsuperscript{43} Further, in \textit{State v. Reed},\textsuperscript{44} the New Jersey court found that when the police know an attorney is present, and the attorney communicates a desire to confer with the suspect, the police must make the attorney’s presence known to the suspect before custodial interrogation may proceed or continue.\textsuperscript{45} The court recognized that the U.S. Supreme Court’s decision of \textit{Moran v. Burbine}\textsuperscript{46} did not require the police to notify a suspect in similar circumstances. However, the New Jersey court relied specifically on the state privilege against self-incrimination to require notification to the suspect.\textsuperscript{47} By relying on state, rather than federal, law, the New Jersey Supreme Court protects criminal defendants where the U.S. Supreme Court is unwilling to and, at the same time, insulates

\textsuperscript{38} See id. at 167.


\textsuperscript{40} It is interesting to note that in New Jersey the right against self-incrimination is founded on a common law and statutory—rather than a constitutional—basis. See \textit{State v. Reed}, 627 A.2d 630, 636 (N.J. 1993).


\textsuperscript{42} See id. at 88. See generally \textit{Arizona v. Miranda}, 484 U.S. 436 (1986).

\textsuperscript{43} \textit{Michigan v. Mosley}, 423 U.S. 96 (1975).

\textsuperscript{44} \textit{Reed}, 627 A.2d at 630.

\textsuperscript{45} See id. at 643.


\textsuperscript{47} See \textit{Reed}, 627 A.2d at 646.
its decisions from scrutiny by the federal Court.

While the New Jersey Supreme Court is certainly not the only high state court to rely on its state constitution to establish greater rights for criminal defendants, the decisions of the New Jersey court are among the most progressive in the country. In fact, Professor Yale Kamisar of the University of Michigan Law School has dubbed the New Jersey Supreme Court the “most innovative [court] in the country.” Further recognition of the court’s activism in this area comes from two separate studies of the new judicial federalism, both involving criminal procedure issues. Each study ranked New Jersey among the nation’s leading courts in reliance on its state constitution as a basis for deciding cases. Couple these studies with the decisions outlined above, and New Jersey stands out among the most progressive courts in the area of criminal procedure.

b. Right to Refuse Medical Treatment

Another progressive decision of the New Jersey Supreme Court involved the right to refuse medical treatment. In 1976, fourteen years before the U.S. Supreme Court granted terminally ill patients the constitutional right to refuse medical treatment, the New Jersey Supreme Court recognized such a right. The In re Quinlan decision provided relief for Karen Quinlan, a comatose patient, and her family, while establishing a constitutional precedent for other courts and

50. See Esler, supra note 3, at 26–27 (studying a set of issues related to the right against self-incrimination); Latzer, supra note 21, at 192 (studying all criminal procedure cases based upon state constitutional law decided from the late 1960s to the end of 1989).
51. See Latzer, supra note 21, at tbl. 2; Esler, supra note 3, at tbl. 2.
52. For further recognition of New Jersey’s activism in criminal procedure areas, see Mary Cornelia Porter & G. Alan Tarr, The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure, 45 OHIO ST. L.J. 143 (1984); Donald E. Wilkes, Jr., The New Federalism in Criminal Procedure Revisited, 64 KY. L.J. 729 (1976).
55. The Cruzan decision emphasized the importance of the Quinlan decision, calling it the seminal case in this area of the law. See Cruzan, 497 U.S. at 270.
the public to follow.\textsuperscript{56}

On April 15, 1975, Karen Quinlan ceased breathing, lapsed into a coma, and was placed on a respirator.\textsuperscript{57} While Karen was not brain dead by definition, the experts believed she could not survive without the respirator.\textsuperscript{58} The litigation began when "Karen Quinlan's father sought judicial authority to withdraw the life-sustaining mechanisms temporarily preserving his daughter's life, and his appointment as guardian of her person to that end."\textsuperscript{59} The trial court\textsuperscript{60} granted guardianship of Karen's person to a guardian at litem,\textsuperscript{61} while Mr. Quinlan received guardianship over Karen's property.\textsuperscript{62}

In a unanimous decision, the Supreme Court of New Jersey reversed the trial court.\textsuperscript{63} The justices centered their decision on Karen's right to privacy.\textsuperscript{64} The court began by recognizing New Jersey's two legitimate governmental interests: (1) the preservation of human life, and (2) defense of the right of a physician to administer medical treatment according to his or her best judgment.\textsuperscript{65} The court then noted that the res-

\textsuperscript{56} For a complete review of the briefs, arguments, and facts of this case, see \textit{Joseph Quinlan, In the Matter of Karen Quinlan: The Complete Briefs, Oral Arguments, and Opinion in the New Jersey Supreme Court} (Univ. Publications of Am. 1976).

\textsuperscript{57} \textit{See Quinlan}, 355 A.2d at 653–54. Karen remained, throughout the legal process, in the intensive care unit receiving 24-hour care by a team of nurses. She required nourishment by a nasal-gastro tube, lost at least forty pounds, and had a "fetal-like and grotesque" posture. \textit{See id.} at 655.

\textsuperscript{58} \textit{See id.} at 654–55.

\textsuperscript{59} \textit{Id.} at 653. Mr. Quinlan requested the court appoint him guardian of both the person and property of his daughter. \textit{See id.} at 651. Karen's doctors, hospital, the Morris County prosecutor, the state of New Jersey, and her guardian at litem opposed Mr. Quinlan's request. \textit{See id.} at 650–53.


\textsuperscript{61} \textit{See Quinlan}, 355 A.2d at 670.

\textsuperscript{62} \textit{See id.} The trial court found that although Mr. Quinlan was sincere, moral, ethical, and religious, the obligation to concur in the medical care and treatment of his daughter would be a source of anguish for him and would distort his "decision-making processes." \textit{See id.} at 671.

\textsuperscript{63} \textit{See id.} at 671–72.

\textsuperscript{64} \textit{See id.} at 662–64. The court immediately rejected Mr. Quinlan's claims for guardianship based on the Eighth Amendment's prohibition against cruel and unusual punishment and the First Amendment's freedom of religion. As for the latter, the court held that, in light of the State's interest in the preservation of life, the impingement of religious belief does not reflect a constitutional question. \textit{See id.} at 661. As for the former, the court found the Eighth Amendment's protection irrelevant to situations other than the imposition of penal sanctions. \textit{See id.} at 662.

\textsuperscript{65} \textit{See id.} at 663.
pirator used by Karen could not cure or improve her condition, but rather only prolong her death. This fact distinguished Karen’s situation from previous cases in which the court ordered treatments, because Karen had no realistic chance for recovery. The court applied a balancing test of sorts: “the State’s interest contra weakens and the individual’s right to privacy grows as the degree of bodily invasion increases and the prognosis dims.” The court concluded that the bodily intrusion—twenty-four hour intensive nursing care, antibiotics, the assistance of a respirator, a catheter, and a feeding tube—favored Karen’s interests over the state’s. Therefore, the court granted Joseph Quinlan full guardianship of his daughter, and allowed him to discontinue the use of the respirator.

Both state and federal courts widely accepted this watershed opinion by the New Jersey court. Prior to the 1976 Quinlan decision, no state had recognized a patient’s right to set limits on life-prolonging medical treatment. Since Quinlan, over forty states have passed “living will” statutes that give effect to a person’s choice of medical treatment in the event of incompetency. The New Jersey decision not only influenced the law, but public opinion on the issue as well. Since the Quinlan decision, public opinion polls reveal an impressive shift from a majority opposed to “pulling the plug” on permanently comatose patients, to a large majority, sometimes nearing ninety percent, in favor of such measures. Thus, the New Jersey Supreme Court influenced the legal

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66. See id. at 663–64.
68. See Quinlan, 355 A.2d at 663–64.
69. Id. at 664.
70. See id.
71. See id. at 670–72 (holding that Mr. Quinlan could order discontinuation of medical treatment only if the doctors and ethics committee at the hospital determined there was no reasonable possibility of Karen ever emerging from her comatose state).
73. See id. at 861.
74. See id.
75. See id. at 860–61.
community, and the public at large, regarding how to treat terminally ill patients.

c. Sexual Assault/Rape Standard

The New Jersey Supreme Court has progressively exposed many contradictions in rape law. The seminal case is *State of New Jersey in the Interest of M.T.S.* In *M.T.S.*, the New Jersey Supreme Court defined the essential elements of the crime of sexual assault, with specific emphasis on the perplexing and controversial role of force in that crime. More specifically, the court focused on the role of force in the context of “acquaintance rape.”

The case stemmed from an encounter between a seventeen-year-old defendant and a fifteen-year-old victim. The trial court determined that, while the victim had consented to a session of kissing and heavy petting with the defendant, she did not consent to the actual sexual act. Accordingly, the court found the defendant guilty of second-degree sexual ass-

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78. The New Jersey sexual assault statute, N.J. STAT. ANN. § 2C:14-2c (West 1999), reads as follows:

An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:

(1) The actor uses physical force or coercion, but the victim does not sustain severe personal injury;
(2) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor’s legal, professional or occupational status;
(3) The victim is at least 16 but less than 18 years old and:
   (a) The actor is related to the victim by blood or affinity to the third degree; or
   (b) The actor has supervisory or disciplinary power over the victim; or
   (c) The actor is a foster parent, a guardian, or stands in loco parentis within the household;
(4) The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim.

Id.
79. See *M.T.S.*, 609 A.2d at 1267.
80. See id.
81. See id. at 1267–68.
82. See id. at 1269. The trial court concluded that rape had occurred, without believing the testimony of the victim, who claimed to be asleep at the time of penetration. See id.
sault. On appeal, the New Jersey appellate court reversed the trial court, determining that the absence of force precluded a finding of sexual assault.

The New Jersey Supreme Court reinstated the trial court's ruling. The court found the statutory term "physical force" to have no obvious or plain meaning, leaving it up to the court to define. Reviewing the history of American and English rape law, the court criticized the requirement of physical resistance by the victim in sexual assault cases, stating that "the law put the rape victim on trial." The court then attempted to define "physical force" without putting the victim on trial. The court determined that when the legislature defined sexual assault, it intended to align rape with the law of assault and battery, rather than with traditional rape law. Citing scholarship, research, and legislative intent, the court declared that "any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault." Specifically, in redefining "physical force," the court stated that "physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful." In the most striking phrase of the decision, the court concluded, "reasonable people do not engage in acts of penetration without permission, and it is unlawful to do so.

The M.T.S. decision changed rape law in New Jersey and those jurisdictions adopting the New Jersey standard. First,
the decision effectively reads the "physical force" requirement out of the rape statute. Second, the court protects the victims of acquaintance rape from having their sexual history become the focus of criminal investigations and trials. The M.T.S. decision forces courts to focus only on the incident in question and whether the defendant reasonably believed, based on the defendant's knowledge at the time, that the victim consented. Focusing on the allegedly unlawful incident removes the victim's past sexual history with the defendant from judicial and public scrutiny. Third, the decision places the crime of sexual assault, standing alone, in the category of violent crime. "Implicit in such a holding is the concept that any sexual conduct is potentially violent because it can be an infringement of personal autonomy. It is the meaningful consent of both parties that defeats the presumption of violence and saves the conduct from criminal sanction." Finally, and most significantly for rape victims, the M.T.S. decision evaluates sexual assault based on the consent, rather than resistance, of the victim. As the court stated, "[i]n defining force by measuring the degree of resistance by the victim, [courts had reintroduced] the resistance requirement, when the proper focus ought to have been on whether the contact was unpermitted." Thus, in New Jersey, rape inquiries now center on the consent of the victim, instead of the degree of

98. See M.T.S., 609 A.2d at 1279 ("In short, in order to convict under the sexual assault statute in cases such as these, the State must prove beyond a reasonable doubt that there was sexual penetration and that it was accomplished without the affirmative and freely-given permission of the alleged victim.").


100. See id. at 314–15.

101. See id. at 315.

102. The crime of rape had its legal origins in laws designed to protect the property rights of men in their wives and daughters. See M.T.S., 609 A.2d at 1273. Although the crime evolved into an offense against women, reformers argued that vestiges of the old law remained, particularly in the understanding of rape as a crime against the purity or chastity of a woman. See id.; see also Lewis Bossing, Note, Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement, 73 N.Y.U. L. REV. 1205 (1998).

103. Bossing, supra note 102, at 1224–25.

104. See M.T.S., 609 A.2d at 1276.

105. Id. at 1275–76 (quoting People v. Patterson, 410 N.W.2d 733 (Mich. 1987)).
his or her resistance.\textsuperscript{106}

d. Education Reform

As with its criminal procedure decisions, where the New Jersey Supreme Court relied on the state constitution to protect individual rights,\textsuperscript{107} the court used independent state constitutional grounds to strike down the state's system of financing public education.\textsuperscript{108} Before 1973, advocates of school-finance reform depended solely on the U.S. Supreme Court and the Equal Protection Clause of the Fourteenth Amendment to provide the basis for eliminating disparities in funding among school districts.\textsuperscript{109} However, in \textit{San Antonio Independent School District v. Rodriguez},\textsuperscript{110} the U.S. Supreme Court considered Texas' school financing system, which relied heavily on local property taxes and therefore disproportionately affected children in poor districts, and found it constitutional.\textsuperscript{111} Since most state education finance systems resembled that of Texas,\textsuperscript{112} \textit{Rodriguez} effectively closed the door on further challenges under the federal Constitution.\textsuperscript{113}

Just thirteen days later,\textsuperscript{114} the New Jersey Supreme Court reopened the door for school reformers\textsuperscript{115} in \textit{Robinson v. Cahill}.\textsuperscript{116} The court held that the New Jersey school finance

\begin{thebibliography}{11}
\item \textsuperscript{107} \textit{See supra} Part II.A.2.a.
\item \textsuperscript{108} \textit{See} Robinson v. Cahill, 303 A.2d 273 (N.J. 1973) [hereinafter Robinson I].
\item \textsuperscript{109} \textit{See} G. Alan Tarr, Robinson v. Cahill and the New Judicial Federalism, 59 Alb. L. Rev. 1753 (1996).
\item \textsuperscript{111} \textit{See} Tarr, \textit{supra} note 109, at 1753.
\item \textsuperscript{112} \textit{See id.}
\item \textsuperscript{113} \textit{See id.}
\item \textsuperscript{114} The first Robinson decision was handed down on April 3, 1973. \textit{See} Robinson I, 303 A.2d 273 (N.J. 1973).
\item \textsuperscript{115} \textit{See} Tarr, \textit{supra} note 109, at 1753.
\item \textsuperscript{116} In total there were seven separate Robinson v. Cahill decisions: Robinson I, 303 A.2d at 273; Robinson v. Cahill, 306 A.2d 65 (N.J. 1973) [hereinafter Robinson II]; Robinson v. Cahill, 335 A.2d 6 (N.J. 1975) [hereinafter Robinson III]; Robinson v. Cahill, 351 A.2d 713 (N.J. 1975) [hereinafter Robinson IV];
\end{thebibliography}
system violated the Education Clause\textsuperscript{117} of the New Jersey Constitution,\textsuperscript{118} which requires that the state provide all children with a “thorough and efficient system of free public schools.”\textsuperscript{119} Beyond providing the opportunity for school-finance reform, the \textit{Robinson} series of decisions\textsuperscript{120} reflect perhaps the best example of the New Jersey Supreme Court’s activism.\textsuperscript{121}

In \textit{Robinson I}, the New Jersey Supreme Court addressed the constitutionality of the statutes providing for the financing of elementary and secondary schools.\textsuperscript{122} The funding was derived from local taxation of real property, state aid, and federal aid.\textsuperscript{123} This system caused a disparity in the number of dollars spent per pupil in New Jersey school districts, due to the unequal value of taxable real property within districts.\textsuperscript{124} In short, low-income districts received less money per pupil.\textsuperscript{125} Due to this disparity, the court found a violation of the Education Clause.\textsuperscript{126} While the court noted that reliance on local taxes to cover a portion of the education costs is permissible, it clearly placed the burden of remedying any constitutional violation upon the state government, rather than the local municipalities. According to the court, “[w]hatever the reason for the violation, the obligation is the State’s to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its con-

\textsuperscript{117} See N.J. CONST. art. VIII, § 4, para. 1, cl. 1.
\textsuperscript{118} See Robinson I, 303 A.2d at 294-97.
\textsuperscript{119} See supra note 116.
\textsuperscript{120} See supra note 116.
\textsuperscript{121} For an excellent review of the entire series of \textit{Robinson} decisions and the New Jersey Supreme Court’s progressivism in general, see RICHARD LEHNE, \textit{THE QUEST FOR JUSTICE: THE POLITICS OF SCHOOL FINANCE REFORM} (1978).
\textsuperscript{122} See Robinson I, 303 A.2d at 276.
\textsuperscript{123} Local taxes yielded 67% of the total operating expenses, while the state and federal aid consisted of 28% and 5%, respectively. See id.
\textsuperscript{124} See id.
\textsuperscript{125} The court recognized that equalizing the dollar input would not necessarily assure equality in educational results. See id. at 277. But according to the court, “it is nonetheless clear that there is a significant connection between the sums expended and the quality of the educational opportunity.” Id.
\textsuperscript{126} See id. at 297.
After finding the scheme unconstitutional, the court handed down a series of extraordinary orders. In Robinson II, the court stated that it would not disturb the statutory scheme for school funding immediately. Rather, if the legislature failed to enact legislation compatible with Robinson I by the end of 1974 (eighteen months from the date of Robinson II), then the court vowed to step in. Due to a lack of agreement, the legislature failed to enact legislation by the deadline. Therefore, in Robinson III, the court again faced an unconstitutional scheme. Attempting not to infringe upon the legislature's power, the court permitted the unconstitutional system to continue for the 1975-1976 school year without alteration and ordered another rehearing. When the legislature again failed to adopt an acceptable financing scheme, the court reluctantly acted to prevent another school year's passing under the unconstitutional system. The court altered the distribution of funding under the current system and enjoined state officials from disbursing cer-

127. Id. at 294. The court ended by noting that the state never properly spelled out the content of the constitutionally mandated educational opportunity. The court called the present scheme a "patchy product reflecting provincial contests rather than a plan sensitive only to the constitutional mandate." Id. at 297.
128. See Robinson I, 303 A.2d at 298.
129. At the conclusion of Robinson I, the court granted the legislature time to establish another statutory system and ordered another hearing. See id. The key question the court left open was whether the judiciary may order funds to be distributed upon terms other than legislated ones. See id. The court answered this question in the affirmative with Robinson IV. See infra text accompanying notes 135-38.
131. See id.
132. See Robinson III, 335 A.2d 6, 6-7 (N.J. 1975).
133. See id.
134. See id. The rehearing was scheduled to address four subjects: (1) the method of determining the definition of "a thorough and efficient system of free public schools"; (2) the extent of the power of the court to order relief from, or changes in, the statutory financing scheme on a temporary or permanent basis; (3) to what extent the court should exercise such power; and (4) whether the court should appoint a special master to hear argument and make recommendations to the court as to the definition and its applications. See id. at 7.
136. See id. at 720 ("We forthwith reject the submission that we should do nothing. It is past three years since the system was held unconstitutional in the Law Division. Our position that the court would act at least for 1976-1977 was implicit in the January 23, 1975, order.").
tain funds under the old law.\textsuperscript{137} However, the court limited the applicability of the decision to the 1976–1977 school year.\textsuperscript{138}

Finally, the legislature enacted the Public School Education Act of 1975,\textsuperscript{139} which fundamentally altered the school funding system. In \textit{Robinson V},\textsuperscript{140} the court found the new system facially constitutional under the assumption that it was fully funded.\textsuperscript{141} However, after legislative inaction failed to provide funding for the 1975 Act, the supreme court again enjoined every public officer, state, county, or municipal, from expending funds for the support of free public schools unless the legislature took timely action by July 1, 1976.\textsuperscript{142} As the deadline approached, New Jersey teachers, students, government officials, and justices all held their breath in anticipation of the funding.\textsuperscript{143} Unfortunately, the legislature again failed to provide funding, triggering the injunction and closing the New Jersey school system.\textsuperscript{144} Finally, on July 9, 1976, the court lifted the injunction after the legislature finally passed proper funding for the 1975 Act.\textsuperscript{145}

The seven \textit{Robinson} decisions accounted for more than three years of legislative inaction,\textsuperscript{146} and greatly influenced other jurisdictions.\textsuperscript{147} In fact, \textit{Robinson v. Cahill} was "probably the most important ruling—or set of rulings—in state

\textsuperscript{137} More accurately, the court ordered:

The State Treasurer, the State Commissioner of Education and any other State officers concerned with the receipt or disbursement of monies to be appropriated by the Legislature for local educational purposes for the school year 1976–77 are hereby enjoined from disbursing minimum support and save-harmless funds designated by this opinion in accordance with existing law, and are directed to distribute and disburse said funds in accordance with the incentive equalization aid formula of [the 1970 Act].

\textit{Id. at 724.}

\textsuperscript{138} \textit{See id. at 723–24.}

\textsuperscript{139} \textit{See N.J. STAT. ANN. § 18A:7A (repealed 1996).}

\textsuperscript{140} \textit{Robinson V, 355 A.2d 129 (N.J. 1976).}

\textsuperscript{141} \textit{See id. at 139.}

\textsuperscript{142} \textit{See Robinson VI, 358 A.2d 457, 459 (N.J. 1976).}

\textsuperscript{143} \textit{See LEHNE, supra note 121, at 1–3.}

\textsuperscript{144} \textit{See id. at 2.}

\textsuperscript{145} \textit{See Robinson VII, 360 A.2d 400 (N.J. 1976).}

\textsuperscript{146} \textit{See LEHNE, supra note 121, at 1–2.}

\textsuperscript{147} In the first seven years after \textit{Robinson}, eleven state supreme courts heard state constitutional challenges to school finance systems. \textit{See Tarr, supra note 109, at 1754.}
constitutional law in the last quarter century."\textsuperscript{148} While to some extent the Robinson decisions were a failure,\textsuperscript{149} they nevertheless demonstrated the New Jersey Supreme Court's dedication to upholding the state constitution.\textsuperscript{160}

B. The California Supreme Court

Like the New Jersey Supreme Court today, the California Supreme Court of the middle decades of the twentieth century maintained a reputation for judicial activism and progressivism. However, while the New Jersey Supreme Court has maintained and furthered its progressive reputation,\textsuperscript{161} the California Supreme Court has failed to keep up. This section summarizes the California situation by discussing (1) the history of California Supreme Court chief justices; (2) the activist nature and reputation of the court; (3) the rejection of Chief Justice Bird and two other supreme court justices in the retention election of 1986, which lead to the demise of the court; and (4) the reputation of the court since the Bird controversy.

1. History of Chief Justices: 1940 to 1986

Ironically, as in New Jersey, the 1940s served as an important time in the history of activism of the California Supreme Court.\textsuperscript{162} While New Jersey reformulated its state constitution to create a powerful supreme court, California appointed two new justices to their high court in 1940. Governor Culbert Olson, the first California democratic governor of the twentieth century, appointed Chief Justice Phil S. Gibson\textsuperscript{150} and Associate Justice Roger J. Traynor, who later became chief justice upon Gibson's retirement in 1964.\textsuperscript{154} Chief

\textsuperscript{148} Id. at 1753.
\textsuperscript{149} The rulings did not initiate an equalization of funding among New Jersey school districts, nor did they promote a major increase in funding of education in New Jersey. In fact, in 1990, the New Jersey Supreme Court again invalidated the school finance statutes in Abbott v. Burke, 575 A.2d 359 (N.J. 1990). See generally Tarr, supra note 109, at 1755.
\textsuperscript{150} See Tarr, supra note 109, at 1753–55.
\textsuperscript{151} See supra Part II.A.
\textsuperscript{152} See supra Part II.A.1.
\textsuperscript{153} Originally, Governor Olson appointed Gibson as an Associate Justice in August 1939. After the death of Chief Justice Waste in June 1940, Olson elevated Gibson to the position of Chief Justice. See Preble Stolz, Judging Judges 96 (1981).
\textsuperscript{154} See Stolz, supra note 153, at 95–99.
Justices Gibson, Traynor, and Traynor’s successor, Donald Wright, brought the California Supreme Court to prominence for judicial activism. In fact, when Wright retired in 1977, the court “was generally regarded as the best state court system in the country.”

Before 1940, however, the picture of California judges was not of activist judicial scholars, but rather of chaotic and incompetent jurists. Administratively, the lower courts had overlapping jurisdictions and lacked centralized control. Chief Justice Gibson drafted rules of appeal, reorganized lower courts, and created the Commission on Judicial Performance to expose judicial incompetence. Further, throughout Gibson’s tenure, the court began formulating unique legal decisions and gaining respect as an activist court.

While Gibson brought stability and leadership to a disorganized court, Traynor gained a reputation as an author of “scholarly judicial opinions, which often pioneered doctrinal developments and were followed elsewhere in the country . . . By the time he became chief justice, Traynor was nationally known among lawyers as one of the great judges of his time, ranked with Learned Hand and perhaps a few others.” Traynor’s towering reputation at the time he became chief justice in 1964 only grew during his tenure as the leader of the high court. Like Gibson and Traynor, Chief Justice

155. Id. at 96.
156. See id. at 97.
157. See id.
158. Gibson actually did not write the rules, but rather supervised the work of the court’s reporter of decisions, Bernard E. Witkin. Witkin later rose to prominence in California law after authoring numerous books. See STOLZ, supra note 153, at 97.
159. The Commission on Judicial Performance filled a void in the California system. Until its formation in 1960, removal of judges occurred only by theoretical methods such as impeachment, concurrent resolution of the legislature, recall, and reelection defeat (which later moved from the realm of theory into practice). See id. at 98. Gibson’s commission, composed of judges, lawyers, and non-lawyers, was empowered to hold hearings and make recommendations to the supreme court that the court remove a judge for misconduct. See id. Forty-seven states copied Gibson’s plan. See id.
160. See infra Part II.B.2.
161. STOLZ, supra note 153, at 99.
162. See Baum & Canon, supra note 20, at 99 (describing Traynor as “one of the great figures of the law in [the twentieth] century’’); see infra Part II.B.2.
Wright was also a dynamic leader. While resolving embarrassing issues on the court, the Wright court continued to take an activist approach to judging cases. A larger-than-life figure, Wright “exude[d] dignity, open-mindedness, fairness, and compassion.”

In sum, during the Gibson-Traynor-Wright years, the California Supreme Court “was regarded as an innovative, independent, and activist tribunal.” However, the California court failed to continue the judicial activism after Wright’s retirement, due in large part to the lack of a prominent chief justice to continue the legacy of progressivism left by Gibson, Traynor, and Wright. Unlike her predecessors,


164. Perhaps Wright’s greatest accomplishment involved the removal of a colleague, Associate Justice Marshall McComb. Appointed in 1955, McComb became senile but refused to retire. See id. at 100. McComb often fell asleep on the bench and wrote very few opinions. Adding to the difficulty of the situation, McComb was consistently conservative, making any attempt at removing him from office by his more liberal counterparts suspect on political grounds. See id. Wright persuaded his colleagues to face the problem ignored by both Traynor and Gibson. Wright engineered a constitutional amendment providing that whenever a supreme court justice’s competence is challenged, a special tribunal of seven randomly selected court of appeal justices should determine the issue. See id. at 101. The tribunal recommended that McComb retire because of senility.

Only in the final stages did the case attract public notice but at no point was any suggestion made that McComb’s removal was politically inspired nor were the details of McComb’s bizarre behavior stressed. Removing McComb was the most visible administrative accomplishment of Wright’s tenure. For a liberal court to rid itself of a senile but also blatantly conservative justice without charges of political motivation and without public discussion of his newsworthy misbehavior was a triumph of administrative skill.

Id.

165. See infra Part II.B.2; see also Mary Cornelia Porter, State Supreme Courts and the Warren Court: Some Old Inquiries for a New Situation, in STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM, supra note 20, at 3, 9 (quoting Chief Justice Wright as declaring that “only the judiciary can guarantee that ‘general values’ will endure and that the rights of all, including those of impotent minorities will be protected as the Constitution requires”).

166. STOLZ, supra note 153, at 100. Further descriptions of Wright included, “loved as well as admired . . . . [It was] nearly impossible to get angry with him or to be jealous of his preferment. He led by gentle persuasion more than by force of will or the powers of his office.” Id.


Chief Justice Rose Bird, successor to Wright, came under fire for the progressive decisions of her court. Further, the court "change[d] direction" entirely from liberal activism to a more moderate jurisprudence after Bird's removal from office.

2. Activist Decisions of the Court: 1940 to 1986

"The California Supreme Court has a long tradition of civil-rights activism." For decades during the middle part of the twentieth century, "the California justices... pursued an activist course boldly and openly." While the entire spectrum of the California Supreme Court's activist decisions is beyond the scope of this comment, examples of progressive decisions highlight the significance and prominence of the court. Three main areas of decisions earned the court its reputation as an activist tribunal: (a) tort law; (b) criminal law; and (c) state constitutional law.

a. Tort Law

In the area of tort law, the California Supreme Court pioneered new areas of liability in the middle decades of the twentieth century. In 1944, Justice Traynor wrote a concurring opinion in *Escola v. Coca Cola Bottling Company*, calling for the manufacturer's strict liability (i.e., regardless of negligence) in cases involving defective products. Eventually, the entire court supported Traynor's position, adopting it as the majority decision in the 1963 case of *Greenman v.*

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169. See infra text accompanying notes 250-54. One possible reason for the increased criticism for the Bird court's decisions was the lack of uniformity on the court. Gibson, Traynor, and Wright commanded national attention and thus, their associate justices often fell in line with the decision of the lead justice. Decisions during the Bird era were riddled with dissents and concurring opinions. See Barnett, supra note 168, at 85-86 (“Gibson, Traynor, and Wright may have attracted less opposition to their activist decisions because they often had no in-house critics pointing out how far-reaching those decisions were.”).


171. See infra Part II.B.3-4.


173. Id.

174. See Barnett, supra note 168, at 86.


176. See id. at 440 (Traynor, J., concurring).
Yuba Power Production, Inc. In Greenman, the court held the manufacturer of a defective power tool strictly liable for the injuries it caused. While academic articles had urged strict liability before Traynor's Escola opinion, it was Traynor's receptiveness to creative ideas that gave the doctrine of strict liability judicial support and prominence.

The fall of sovereign immunity furthered the California Supreme Court's reputation as a trailblazer in the area of tort law. Adopted from the English common law rule that "the king can do no wrong," sovereign immunity exempted the government from liability based on the actions of its servants. While other courts attacked sovereign immunity by formulating exceptions to the rule, the California Supreme Court abolished the doctrine entirely in Muskopf v. Corning Hospital. Traynor called the doctrine "mistaken and unjust," and described it as an "anachronism, without rational basis, [that had] existed only by the force of inertia." The California legislature responded to Muskopf by enacting a complex, yet thorough, body of law on the issue of sovereign immunity.

The activist nature of the California court in tort law did not end with Traynor's retirement in 1970. Rather, under the leadership of newly appointed Chief Justice Wright, the court addressed the pitfalls of traditional negligence principles in Li v. Yellow Cab Company. In Li, the court substituted the defense of contributory negligence with comparative negligence. Like Muskopf, caused a reexamination of the tort law structure by the California legislature. Further, although promptly overturned by the legislature, the court's 1978 decision in Coulter v. Superior Court held that a social host who served an obviously intoxicated guest could be liable for damages for injuries caused by the guest. Finally, in 1980, the

178. See id. at 900–01.
179. See STOLZ, supra note 153, at 77–78.
180. See id. at 78.
182. Id. at 460.
185. See Barnett, supra note 168, at 86.
Bird-led California Supreme Court, in Sindell v. Abbott Laboratories, invented the concept of "market share" liability, reopening the entire question of causation in tort law. Taken together, Li, Muskopf, Greenwood, and Sindell demonstrate the California Supreme Court's history of creative and progressive decisions in the area of tort law.

b. Criminal Law

The California Supreme Court's decisions in criminal law provide some of the most controversial examples of judicial activism. These cases divide into two topics: (1) cases where the California Supreme Court preceded, or disagreed with, U.S. Supreme Court decisions; and (2) cases involving the death penalty.

First, the California court showed its activism in cases where it differed from or preceded decisions of the U.S. Supreme Court. For example, California applied the exclusionary rule to evidence illegally obtained by the government in 1955, six years before the U.S. Supreme Court mandate in Mapp v. Ohio. Traynor's opinion in People v. Cahan provides an example of the California court setting the standard for the U.S. Supreme Court to follow. Beyond merely establishing an exclusionary rule for evidence obtained in violation of the Fourth Amendment, the court developed its own search and seizure jurisprudence during the six years between Cahan and Mapp. For example, California refused to apply the exclusionary rule retroactively through the habeas corpus procedure, and permitted legislative revision of the

188. For further discussion regarding the tort law developments of the California Supreme Court during 1962 to 1972 period, see Mathew O. Tobriner, Retrospect: Ten Years on the California Supreme Court, 20 U.C.L.A. L. REV. 5 (1972); see also Baum & Canon, supra note 20, at 98 (ranking California the fourth most innovative state supreme court in propensity to tort law activism in the postwar years).
191. See Barnett, supra note 168, at 86.
192. See STOLZ, supra note 153, at 80 ("In the six-year interval between Cahan and Mapp, the California court, largely through Traynor opinions, developed a California law of search and seizure that was in many ways more coherently focused on the issue of abusive police practices than the federal constitutional law that later emerged."); see also Paulsen, Criminal Law Administration: The Zero Hour Was Coming, 53 CAL. L. REV. 103 (1965).
right. Eventually, however, federal law mandated all state courts to follow a uniform minimum law of search and seizure. The search and seizure cases demonstrated the California court's willingness to not only rule progressively, but also to follow up its rulings with further decisions to pioneer an undeveloped area of law.

The California Supreme Court also preceded the U.S. Supreme Court in prohibiting discrimination in the selection of jurors for capital cases. The California Supreme Court handed down People v. Wheeler in 1978, barring racial discrimination in the use of preemptory challenges to prospective jurors. Wheeler was decided eight years before the U.S. Supreme Court proscribed such discrimination in Batson v. Kentucky. In Wheeler, the court relied on the California, rather than federal, Constitution, and ignored the U.S. Supreme Court's 1965 decision in Swain v. Alabama, which at that time permitted racial discrimination in the use of preemptory challenges. This reliance on the state constitution allowed the California Supreme Court to side-step U.S. Supreme Court precedent and provide criminal defendants protection against discrimination in the use of preemptory challenges.

In addition to ruling contrary to the U.S. Supreme Court, the California Supreme Court also demonstrated its independence by making unpopular decisions that extended greater rights to criminal defendants. Under Chief Justice Bird, the court "steadily extended application of the exclusionary rule, imposed strict standards upon the admissibility of confessions, and broadened its test regarding insanity pleas in a manner favorable to those entering such pleas." The second area of criminal law activism by the California Supreme Court involves capital punishment. In its 1972

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194. See STOLZ, supra note 153, at 80.
199. Culver & Wold, Rose Bird, supra note 172, at 86.
decision of People v. Anderson,\textsuperscript{200} the court declared the state's death penalty unconstitutional, thus anticipating the U.S. Supreme Court's decision in Furman v. Georgia\textsuperscript{201} that same year.\textsuperscript{202} Despite the popularity of the death penalty,\textsuperscript{203} the California court found that capital punishment violated the California Constitution's prohibition on "cruel or unusual" punishment.\textsuperscript{204} Almost immediately after Anderson, California voters approved an initiative changing the California Constitution to reflect the federal Constitution's ban on "cruel and unusual" punishment.\textsuperscript{205}

Even after the voters effectively overturned Anderson, the California Supreme Court took a uniquely anti-death penalty stance.\textsuperscript{206} From 1979 through 1986, the court affirmed only five of sixty-four death sentences.\textsuperscript{207} Chief Justice Bird led the anti-capital punishment charge by dissenting in all five of the affirming cases.\textsuperscript{208} As of 1986, state high courts nationwide had reversed death sentences in only forty-three percent of cases since capital punishment's reinstatement in 1976, while the federal courts reversed such sentences sixty percent of the time.\textsuperscript{209} Comparing these numbers to the nearly ninety-five percent reversal rate for the California Supreme Court makes evident the California court's distinctive position. Beyond reversing death sentences in specific cases, the court also "provided procedural standards highly protective of capital defendants."\textsuperscript{210} These safeguards afforded capital defendants almost limitless legal resources, including the assistance of psychologists and psychiatrists, expert wit-

\textsuperscript{201} Furman v. Georgia, 408 U.S. 238 (1972).
\textsuperscript{203} Data from public opinion polls at the peak of the anti-death penalty period indicate that 75% of California residents supported capital punishment. See Culver & Wold, Rose Bird, supra note 172, at 87.
\textsuperscript{204} See STOLZ, supra note 153, at 81.
\textsuperscript{205} Id.
\textsuperscript{206} See Culver & Wold, Rose Bird, supra note 172, at 86.
\textsuperscript{207} See Uelmen, Review of Death Penalty Judgments, supra note 202, at 237.
\textsuperscript{208} See Culver & Wold, Rose Bird, supra note 172, at 87.
\textsuperscript{209} See id. at 86. The U.S. Supreme Court reinstated capital punishment with its decision in Gregg v. Georgia, 428 U.S. 153 (1976).
\textsuperscript{210} Culver & Wold, Rose Bird, supra note 172, at 86.
nesses, two lawyers, a full-time investigator, and the admission of virtually any evidence in the penalty phase. Professor Gerald F. Uelmen summarized the court’s position regarding the death penalty this way:

The approach of the Bird court in reviewing death penalty judgments reflected a norm of reversal, in which the court paid little heed to principles such as abstention, the substantial evidence rule, and the principle of harmless error. Doubts, particularly those involving choice of sentence, were resolved in favor of reversal because of the severity and finality of the judgment being reviewed.

Whether anticipating decisions of the U.S. Supreme Court, ruling contrary to it, or granting capital defendants expansive rights, the California Supreme Court bucked the judicial trends and popular opinion to rule independently and progressively in criminal law matters.

c. California Constitutional Law

Like the New Jersey Supreme Court, the high court in California determined issues of constitutional law independently of the decisions of the U.S. Supreme Court, often relying on the state constitution. Also as in New Jersey, the most controversial decision in this area related to California’s education finance scheme. In Serrano v. Priest, the court held that the existing system of funding for elementary and secondary education violated the Equal Protection Clause of the California Constitution. The court labeled education as a “fundamental interest,” requiring the legislature to equalize expenditures per public school child throughout the state.

In addition to school finance reform, the California court’s dedication to civil rights activism through the state constitution manifested itself in three other cases involving discrimination. In Mulkey v. Reitman, the court prohibited

211. See id.
212. Uelmen, Review of Death Penalty Judgments, supra note 202, at 239.
213. See supra Part II.A.2.a.
214. See Culver & Wold, Rose Bird, supra note 172, at 83.
215. See supra Part II.A.2.d.
217. See id. at 1258. The U.S. Supreme Court failed to follow California’s lead, ruling against plaintiffs in a similar case. See San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
realtors and apartment managers from discriminating based on race in the sale or rental of housing. That decision, upheld by the U.S. Supreme Court, invalidated an initiative approved by the California electorate in 1964, which permitted such discrimination. Two decisions that preceded similar cases in the federal court also showed the California Supreme Court's dedication to individual rights. In Perez v. Lippold, in 1948, the court invalidated the state anti-miscegenation statute, a result not reached by the U.S. Supreme Court until almost two decades later. Similarly, the California Supreme Court's 1972 decision striking down the state's prohibition of abortion preceded Roe v. Wade.

Via the application of procedural due process, the court reacted "to the plight of the economically downtrodden" by ruling in favor of the poor in many cases. For example, in Blair v. Pitchess and Randone v. Appellate Department, the California Supreme Court declared the claim and delivery law, and a principal element of its prejudgment attachment law, unconstitutional. In cases involving civil rights, the plight of the poor, and discrimination, "the California jurists staked out more activist positions under state law than the U.S. Supreme Court was willing to take under federal law."

These state constitutional law decisions garnered the California Supreme Court praise from commentators. One scholar described the majority position of the court during Chief Justice Bird's tenure as "innovative and activist, sympathetic toward the poor, especially careful of the rights of civil plaintiffs and criminal defendants, inclined toward the expansion of individual rights against government and business enterprises, and less concerned about property and cor-

219. See id. at 827-28.
224. See Tobriner, supra note 188, at 12.
227. See Tobriner, supra note 188, at 12. Specifically, the Randone court held that a creditor's interest could never sufficiently compel the attachment of the debtor's necessities of life without notice and a judicial hearing to determine the actual validity of the claim. See id.
228. Culver & Wold, Rose Bird, supra note 172, at 83.
porate rights. This description also accurately portrayed the court under the leadership of Gibson, Traynor, and Wright. From even the brief outlines of the cases summarized above, the activist, progressive nature of the California Supreme Court of the middle part of the twentieth century is evident.

3. Unraveling the Activist Court: the 1986 Retention Elections

The judicial retention election of 1986 is commonly credited with the demise of the activist California Supreme Court. For example, in the area of criminal law, Professor Uelmen noted, "[t]he revolution which demarcates this dramatic shift [from anti-death penalty to deference to death sentences] was the retention election of November, 1986, in which the voters of California removed Chief Justice Rose Bird and Associate Justices Joseph Grodin and Cruz Reynoso.

Before discussing the election issues resulting in the removal of these three justices, this comment addresses the method of selecting justices for the California Supreme Court and the importance of the 1978 retention election to the change in California.

a. Method of Selecting Judges and the 1978 Retention Election

Under the original California Constitution of 1849, supreme court justices faced contested elections for six-year terms. In 1934, a constitutional initiative changed the selection method to its present form. Appointment of a justice is a three-step process: (1) the governor nominates a candidate for the high court; (2) the Commission on Judicial Ap-

230. See Culver & Wold, Rose Bird, supra note 172, at 85–86.
231. For examples of the California Supreme Court's activism in the area of education law, see id. at 83 n.27; see also Jackson v. Pasadena City Sch. Dist., 382 P.2d 878 (Cal. 1963) (declaring that the California Constitution forbade de facto, as well as de jure, racial segregation in the state's public schools—a position not followed by the U.S. Supreme Court in Keyes v. Denver Sch. Dist. No. 1, 413 U.S. 189 (1973)).
232. See Barnett, supra note 168, at 85.
234. See Culver & Wold, Rose Bird, supra note 172, at 82.
235. See id.
pointments approves the nomination by having at least two of three members affirm the appointment; and (3) finally, the newly appointed justice faces an initial retention vote at the next gubernatorial election. The term of office for justices is twelve years. When a newly appointed justice reaches the end of the term of his or her predecessor on the bench, the justice faces another retention election.

Chief Justice Bird faced her initial confirmation election in November 1978, twenty months after her appointment. Opponents of Bird began a campaign to unseat her based on her lack of qualifications, controversial administrative actions, and, most significantly, the liberal opinions of the court under her leadership. Bird retained her position as chief justice by less than three percentage points. Although ultimately unsuccessful, the 1978 attack against Bird’s retention demonstrated the vulnerability of justices on the California Supreme Court.

236. See id. The non-partisan confirmation/retention ballot asks: “Shall [name of justice] be elected to office for the term prescribed by law?” Id.
238. See id.
239. See Culver & Wold, Rose Bird, supra note 172, at 84.
240. Governor Brown appointed Bird as Chief Justice despite Bird’s never having been a judge at any level. At forty years of age, Bird’s sole experience in high state government was her three-year term as Brown’s administrator of the Agriculture and Services Agency. See STOLZ, supra note 153, at 84–85. Before this assignment, Bird was a public defender in Santa Clara County, California. See Culver & Wold, Rose Bird, supra note 172, at 83.
241. Upon taking office, Bird appointed several of her associates to serve on the Administrative Office of the Courts and on the Judicial Council. Further, Bird hired new law clerks, replacing tenured clerks in these positions. Finally, Bird also changed the locks on the doors at the Supreme Court Building. Some insiders considered this an attempt to isolate the court. See id.
242. See People v. Caudillo, 680 P.2d 274 (Cal. 1978) (holding that the injuries suffered by a young woman during a brutal sexual assault were not severe enough to justify the sentence enhancement for inflicting “great bodily harm”); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1302 (Cal. 1978) (Bird, J., dissenting) (holding that requiring property owners to pay markedly varying taxes on properties of similar market value is unconstitutional). See generally STOLZ, supra note 153, at 193–265.
243. See Culver & Wold, Rose Bird, supra note 172, at 88.
b. Restructuring the California Court

Six of the seven justices on the California Supreme Court faced retention elections in 1986. Justices Edward Panelli, Malcolm Lucas, and Stanley Mosk faced no opposition to their retention. However, politicians, crime victims, and prosecutors actively opposed Chief Justice Bird and Associate Justices Grodin and Reynoso. The campaign against the three justices was organized, well funded, and highly publicized. While most judicial retention elections occur without incident or high voter turnout, the 1986 California retention election actually drew voters to the booth.

As with the 1978 attempt to unseat Bird, the 1986 retention election campaign focused on the liberal decisions of the Bird-led California Supreme Court. "By the early 1980s, the Bird Court was perceived as a tribunal stacked with liberal justices, appointed by a liberal governor (Jerry Brown), whose decisions, particularly in criminal law, collided [with an] increasingly conservative electorate." Although the activist Bird court followed the progressive pattern of previous California Supreme Courts, the California voters would no longer tolerate this liberalism and overwhelmingly voted to remove all three justices.

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244. See Wold & Culver, Defeat of the California Justices, supra note 237, at 349.
245. See id.
246. See id.
247. See id. at 350 (estimating that those opposing retention spent $5.5 million dollars on the campaign).
248. The California retention election of 1986 lacked the typical "voter fatigue," which is the tendency of many voters to leave the portion of the ballots dealing with the judiciary unmarked. See id. at 351.
249. See id. (stating that the issue of Bird's retention was a prominent, if not the most prominent, issue of the entire 1986 California campaign).
250. For an alternative perspective on the motivation for the opposition to the three justices, see the opinion of one of the ousted justices himself, Joseph R. Grodin, Judicial Elections: The California Experience, 70 JUDICATURE 365, 367 (1987) ("The prospect of replacing three members of the court with judges appointed by the current governor—virtually assured of reelection—must have been an appealing one.").
251. Culver, supra note 167, at 1466.
252. See supra Part II.B.2.
253. See Culver & Wold, Rose Bird, supra note 172, at 89 ("In other words, the historical liberal activism of the California Supreme Court merely may have run afoul of the prevailing conservative political environment.").
254. Only 34% of voters voted to retain Chief Justice Bird, 40% voted to retain Reynoso, and 43% to retain Grodin. On the other hand, those justices not
4. Post-Bird California Court: 1986 to Present

The ousting of Bird, Grodin, and Reynoso caused a significant philosophical change in the California Supreme Court. After nearly fifty years of activism, moderate justices took control of the court. Governor George Deukmejian placed Associate Justice Malcolm Lucas in the chief justice’s chair, and added John Arguelles, David Eagleson, and Marcus Kaufman to the court. Today, Stanley Mosk represents the only justice remaining on the bench who took office before the overhaul of the court in 1986. In short, the California Supreme Court underwent a facelift beginning with the retention election of 1986.

With the addition of four moderate justices, the attitude and stature of the California Supreme Court certainly differed during the Lucas era. The Lucas court did not reverse the fifty years of activist decisions, and with the lone exception of the death penalty, the post-Bird court has only overturned a select few of the liberal doctrines created by previous courts. Nevertheless, the post-1986 California Supreme Court “was a cautious court... The Lucas court did not break new judicial ground....” Many praise Lucas for his leadership of the California court under difficult and unique circumstances. Consistently, however, descriptions of the
court hold it as "not creative," solidly conservative, deferential to legislative authority, a return to the mainstream, non-interventionist, non-supervisory, and conflict-avoiding. Although the California Supreme Court remains sound in stature, clearly the progressive era of judicial policymaking, activist decisions, and national prominence is over.

III. IDENTIFICATION OF THE PROBLEM

The pre-1986 California Supreme Court and the New Jersey Supreme Court of the latter half of the twentieth century serve as models of judicial activism. Since the California high court's transformation, New Jersey stands alone as the most progressive, activist state supreme court. With the majority of state supreme courts providing little development of state law, the issue becomes: why has the New Jersey Supreme Court stood apart from other states in its progressivism? Certain attributes of both the New Jersey Supreme Court and New Jersey Constitution afford, at least in part, an explanation for the judicial activism in the Garden State. California—and other jurisdictions wishing to develop an independent, progressive supreme court—should model the New Jersey system. By striving to emulate the unique characteristics of the New Jersey court, the Golden State, and other jurisdictions, can move closer to forming a prominent, independent, progressive supreme court.

168, at 172.
266. Uelmen, The Lucas Legacy, supra note 263, at 29.
267. Id. at 30 (quoting Professor J. Clark Kelso, McGeorge School of Law).
269. See supra Part II.B.3.
270. See supra Part II.A.2.
271. Numerous state supreme courts fail to take an independent, activist approach to decision making. See generally Esler, supra note 3, at 32 ("The conservatism of most state political systems and entrenched legal and institutional barriers work against widespread development of state constitutional law."). Commentators specifically attacked at least two other state supreme courts for their lack of activism. See Porter & Tarr, supra note 52, at 157 ("The high court of Ohio, unlike that of California, Michigan, New Jersey, or Oregon, is neither inclined, nor apparently equipped, to strike out and hold its own"); Ronald K.L. Collins, Reliance on State Constitutions—The Montana Disaster, 63 TEX. L. REV. 1095 (1985) (criticizing the Montana Supreme Court).
272. See infra Part IV.
273. See supra note 271.
274. See supra note 7.
IV. ANALYSIS

A closer look at the disposition of the justices of the New Jersey Supreme Court, the method of their selection and tenure, and the New Jersey Constitution's support of a strong judiciary, partially explains the activism of the New Jersey judiciary. Moreover, throughout the discussion of the attributes of the New Jersey court that contribute to its more progressive, activist nature, this section identifies similar characteristics which changed during the revamping of the California Supreme Court.

A. Selection and Tenure Procedures in New Jersey and Elsewhere

The vanguard decisions of the New Jersey Supreme Court are not without criticism. Commentators and the public disagree with the court's stance on many issues. However, the court has been able to overcome these criticisms, and continue to rule in a progressive manner, due in part to the selection and tenure procedures for New Jersey justices. Unlike the majority of their counterparts in other states, the New Jersey justices do not face popular election. Not being subject to elections permits the court to rule independently of popularity and politics. This independence is crucial to the decisions outlined above, as many of those rulings provide rights and opportunities to historically disadvantaged or ignored groups.

275. See infra Part IV.C.
276. See infra Part IV.A.
277. See infra Part IV.B.
278. See, e.g., Murphy, supra note 106, at 23–24 (criticizing the M.T.S. rape standard put forth by the New Jersey Supreme Court); Boris Moczula, "Submitted to the People": The Authority of the Electorate to Shape State Constitutional Rights, 7 SETON HALL CONST. L.J. 849, 851 (1997) (recognizing that in 1992 the people of New Jersey, dissatisfied with the state supreme court's interpretation of the state constitution regarding the death sentence, amended the constitution to specifically provide that it was not cruel or unusual punishment to impose the death sentence on someone who purposely or knowingly inflicted serious bodily injury that resulted in death).
280. See supra Part II.A.2.
In thirty-eight states, supreme court justices face some type of popular election. Ten states have partisan elections, in which political parties nominate candidates for the bench, and ballots identify each candidate's political affiliation. Supreme court justices in thirteen states face nonpartisan elections. Non-partisan elections involve popular elections with various candidates on the ballot, but without identification of political parties. Both partisan and nonpartisan election of state supreme court justices requires each judge to campaign against other candidates. Not only is the campaigning time consuming and expensive, but it also subjects justices to political pressures. Over time, this scheme creates a bias in favor of judges most responsive to popular opinion.

In an attempt to alleviate the political pressures associated with partisan and non-partisan elections, a reform movement led fifteen states to adopt the “Missouri Plan,” named after the first state to adopt it. The Missouri Plan provides for initial selection by a nominating commission, followed by an unopposed election wherein voters decide whether to retain the judge. This method of selection attempts to balance the competing interests of judicial independence with judicial accountability. Specifically, the plan institutes the unopposed retention election to minimize the political pressures while the public retains the right to remove an ineffective justice. Adoption of the Missouri Plan,

283. See Croley, supra note 279, at 725 (noting that the ten states with partisan judicial elections are Alabama, Arkansas, Illinois, Mississippi, New Mexico, North Carolina, Pennsylvania, Tennessee, Texas, and West Virginia).
284. The states that hold non-partisan elections are Georgia, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin. See id.
286. See Croley, supra note 279, at 728.
287. See id. at 727.
288. The states that adopted the Missouri Plan are Alaska, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, Oklahoma, South Dakota, Utah, and Wyoming. See id. at 725.
289. See id. at 724.
290. See Larry T. Aspin & William K. Hall, Retention Elections and Judicial Behavior, 77 JUDICATURE 306 (1994); see also supra note 236.
291. See Aspin & Hall, supra note 290, at 306–07.
however, has failed to provide the desired judicial independence and de-politicization of the judiciary. A survey of judges who face retention elections concluded, "[e]ven though judges rarely lose retention elections . . . three-fifths believe judicial retention elections have a pronounced effect on judicial behavior." The 1986 removal of three justices from the California Supreme Court provided a clear example of how retention elections remain political institutions and influence judges. In an admirable display of candor, former California Supreme Court Justice Otto Kaus admitted that the pendancy of his 1982 retention election may have influenced his vote on a key issue. Further, ousted California Supreme Court Justice Joseph Grodin commented on the effect of the 1986 elections on future justices as follows:

But that the poison is in the atmosphere, and that it must, inevitably, erode to some extent the authority and independence of the courts, even if it does not affect the way judges decide cases—of that, I think, there can be no serious doubt. Whether our basic constitutional guarantees, and our fundamental legal rights, can continue to flourish in such an atmosphere is . . . part of the question of the day.

Finally, Justice Kaus humorously added, "[y]ou cannot ignore that there are elections, any more than you can ignore that there is a crocodile in your bathroom."

In New Jersey, the selection process takes the politics out of the courtroom and the crocodiles out of the bathroom. The governor, with the advice and consent of the Senate, appoints
new justices for a term of seven years. After this initial appointment, the same system is used for reappointing justices, who then enjoy life tenure. While this method has its political overtones, the individual justices of the New Jersey Supreme Court do not face any form of elections to retain their position. The New Jersey method of selecting and retaining justices ensures judicial independence because justices are free from the stresses of elections. "Undoubtedly the most important factor supporting the independence of the Judiciary is the method of appointment used in New Jersey."

Without the political pressures faced by other state supreme court justices, the New Jersey Supreme Court can focus its attention on justice rather than popularity. As demonstrated by the cases outlined above, the New Jersey court sometimes makes unpopular decisions favoring historically disadvantaged groups. Whether protecting the constitutional rights of criminal defendants, securing the privacy of rape victims, or addressing the racial disparity in public school funding, the court continues to rule on principles of law rather than politics. The judicial independence and security provided by the selection and tenure methods is at least a contributing factor in the New Jersey Supreme Court's activism.

B. The New Jersey State Constitution is Dedicated to a Strong Judiciary

Because of the upsurge in state supreme courts' reliance on state constitutions for the protection of individual rights, a strong, rights-oriented state constitution is essential for a progressive state supreme court. Not surprisingly, the New Jersey Supreme Court is supported by one of the nation's best
Two elements of the New Jersey Constitution provide bases for the supreme court’s activism: (1) the protection of individual rights through an expansive bill of rights, and (2) the establishment of an unified, modern court system. While the New Jersey Constitution provides these bases to support supreme court activism, the California Constitution serves as an example of how to discourage such judicial activism.

1. Protection of Individual Rights Under the New Jersey Constitution

Activist state supreme courts require a state constitution firmly supportive of individuals’ rights. “The detailed structure of state constitutions is important because, generally speaking, the more extensive the substantive and procedural limitations a state constitution imposes . . . the greater the likelihood of participation by the state supreme court in determining the policy in the state.” Further, since the U.S. Supreme Court cannot review decisions based on “independent and adequate” state grounds, a rights-oriented state constitution is necessary to insulate decisions from U.S. Supreme Court review.

In 1947, the New Jersey constitutional convention expanded the state Bill of Rights to include equal rights for women and collective bargaining rights for labor unions. Further, the new constitution established a modern anti-discrimination provision, explicitly prohibiting racial segregation in schools. These rights built upon the series of rights contained in the 1875 Amendments to the previous constitution. The 1875 rights required a “thorough and efficient education,” banned special laws passed by the legislature, and

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310. TARR & PORTER, supra note 1, at 50–51.
312. See N.J. CONST. art. I, para. 1 (replacing the word “men” with “persons”); see also O’Hern, supra note 309, at 827.
314. See id. art. I, para. 5, cl. 1.
315. Id. art. VIII, § 4, para. 1, cl. 1.
provided for uniformity in taxation. Together, the New Jersey Bill of Rights grants the people of the Garden State significant protection from government interference. In contrast to New Jersey's strong Bill of Rights, California has a very weak state bill of rights upon which its supreme court can base decisions.

For the New Jersey Supreme Court, the granting of individual protections in the new constitution provides a basis for its progressive decisions. These provisions allow the New Jersey Supreme Court to have a hand in the ultimate policy in the state and to insulate itself from U.S. Supreme Court review. With such constitutional support, it is not surprising that the New Jersey Supreme Court has been a beacon of judicial activism and progressivism.

2. The New Jersey Constitution’s Foundation for a Strong Judiciary

Prior to the constitutional convention of 1947, the New Jersey Supreme Court was an example of judicial ineffectiveness and inaction. The Constitutional Convention Committee on the Judiciary (“Judiciary Committee”) identified three problem areas under the old New Jersey system: (1) jurisdictional controversies engendered by rival courts of law and equity; (2) multiple functions of appellate court judges and reiterated appeals of the same case; and (3) total lack of businesslike organization, coordination, and supervision of the courts as a whole. As of 1947, seventeen separate classes of courts operated in the state, frustrating all attempts at uniformity and creating a jurisdictional maze for litigants. The 1947 constitution alleviated many of the structural defects in the judiciary by unifying the courts of law and equity; granting the supreme court control over administration, practice,

316. See Williams, supra note 309, at 9–10.
317. See infra text accompanying note 334 (declaring California's bill of rights was essentially removed by constitutional amendments, and, thus, the state relies solely on the federal Bill of Rights).
318. See supra text accompanying note 310.
319. See supra text accompanying note 311.
320. See TARR & PORTER, supra note 1, at 186–88; Winters, supra note 9, at 131; see also supra notes 8–11 and accompanying text.
322. See TARR & PORTER, supra note 1, at 187.
and procedure in all courts; and limiting the functions of each judge to one court.\textsuperscript{323}

Beyond restructuring the court system, the Judiciary Committee's greatest achievement was establishing a strong supreme court. Providing for a selection and tenure method free from the political process,\textsuperscript{324} granting wide discretion for supreme court review, and establishing the chief justice as the head of the court system made the supreme court a formidable player in the state of New Jersey.\textsuperscript{325} In fact, the office of chief justice was perhaps the most powerful office created by the 1947 constitution.\textsuperscript{326}

The Judicial Committee's comments in adopting these pro-judiciary provisions demonstrate its commitment to a powerful high court. In addressing the issue of which cases should be heard by the high court, the committee chose to grant expansive, rather than limited, jurisdiction.\textsuperscript{327} "By making the new Supreme Court's appellate jurisdiction selective, that court is assured of an adequate opportunity to hear, consider and decide every case which comes before it."\textsuperscript{328} Further, the Judicial Committee's comments on the method of selection and tenure for supreme court justices also underlined their dedication to a strong high court. "By making judges secure in their positions, the possibility of distractions concerned with reappointment would be removed."\textsuperscript{329} The intent of the New Jersey constitutional convention of 1947 was clear: establish a broad range of individual rights for the supreme court to interpret, and permit the justices the security to decide a variety of cases. This led the editor of the Journal of the American Judicature Society to declare, before the 1947 constitution even went into effect, that upon adoption of the New Jersey Constitution, "the people of New Jersey [would]
exchange America’s worst court system for America’s best. 330

Unlike the New Jersey Constitution, which establishes an independent supreme court, the California Constitution limits the ability of its supreme court to rule independently and progressively. Specifically, California utilizes the initiative and referendum system to overturn numerous liberal decisions of the California Supreme Court. 331 The initiative and referendum procedure permits the people to place issues on the ballot for amending the state constitution. 332 While twenty-four states have this system in place, none use it with the frequency of California. 333

For example, the people in California essentially have overturned numerous liberal decisions of the California Supreme Court in the area of criminal procedure by submitting initiatives to the voters which have effectively reduced the power of the court. The voters of California amended their state constitution to require the Supreme Court to interpret virtually every constitutional right intended to protect defendants in criminal cases exactly the same as the parallel provision of the United States Constitution. There is essentially no bill of rights in California. There is only the Federal Bill of Rights. 334

In New Jersey, there is no referendum system to permit voters from reversing unpopular, progressive decisions. 335 Thus, while the initiative and referendum system subjects California Supreme Court decisions to easy reversal by popular vote, the New Jersey Supreme Court remains more insulated from the amendment process. 336

330. Winters, supra note 9, at 131.
331. See Wefing, supra note 20, at 716–17.
332. See id. at 716.
333. See id.
334. Id. at 716–17.
335. In New Jersey, amendments to the constitution require three-fifths vote of each house of the legislature in one year, or a simple majority of the legislature in two successive years. Only after this process will a proposed amendment appear on a ballot. See N.J. Const. art. IX, para. 1.
336. The voters confronted the New Jersey Supreme Court twice in 1992 by passing amendments overturning two of the court’s decisions. See generally Wefing, supra note 20, at 718–20 (noting that if the New Jersey legislature begins to use this amendment process more frequently to undercut the New Jersey Supreme Court, it may jeopardize the court’s independence).
C. State Supreme Court Justices as Leaders and Policymakers

While selection and tenure methods along with a supportive state constitution enable justices to rule progressively, each individual justice must take his or her own step into judicial activism. Prior to the Bird controversy, the California Supreme Court enjoyed years of strong leadership by progressive chief justices. Similarly, the leader of the New Jersey judicial reformation, former New Jersey Chief Justice Arthur T. Vanderbilt, brought progressive ideals to the New Jersey court. This section addresses the significance of the chief justice position and a 1971 study of the perceptions among state supreme court justices regarding their role in the political process, which further demonstrates the New Jersey Supreme Court’s dedication to activism.

During the period from 1940 to 1977, prominent judicial leaders and scholars served as Chief Justice of the California Supreme Court. Chief Justices Gibson, Traynor, and Wright embedded an activist disposition in the California court. Since the retirement of Chief Justice Wright, the court has undergone significant change. "Rose Bird rarely shares the accolades heaped on the three chief justices who preceded her [Gibson, Traynor, and Wright]." Further, after her ousting, equally unheralded justices, Malcolm Lucas and Ronald George, led the court down a more conservative path. The vision of an activist, progressive tribunal instilled in the California Supreme Court during the Gibson-Traynor-Wright era is over. Filling the seat of chief justice with a leader the caliber of Bird’s predecessors is perhaps the first step in returning the California court to its activist prominence.

Similar to Gibson, Traynor, and Wright in California, the chief justice position led the progressive era in New Jersey. “Through his support of judicial reform and his service as

338. See supra Part II.B.1.
339. See supra Part II.B.1.
341. While Malcolm Lucas is often credited with stabilizing the turbulent California Supreme Court, his reputation regarding judicial restraint and deference—over judicial activism and policy-making—clearly distinguishes his court from the progressive courts of his predecessors. See supra Part II.B.4.
342. See supra Part II.B.4.
chief justice, Arthur Vanderbilt fundamentally reshaped—one might even say created—the New Jersey Supreme Court.\footnote{343} During the 1947 constitutional convention, the Judiciary Committee freely borrowed ideas from Vanderbilt.\footnote{344} Among Vanderbilt’s suggestions adopted by the Judicial Committee were the establishment of a seven-member supreme court, centralization of managerial authority in the hands of the chief justice, and elimination of the division of law and equity.\footnote{345} Further, as chief justice, Vanderbilt influenced the supreme court to take an activist approach to their decisions. Robert Wilentz, the chief justice who served after Vanderbilt, placed the expectations of the New Jersey court after Vanderbilt into perspective, “the experience of that reform [during Vanderbilt’s era] is so strong, and its meaning so clear, that it still moves us substantially in New Jersey.”\footnote{346} The Vanderbilt legacy remains as an example for other state supreme courts to model: one leader, dedicated to reform and activism, can transform an entire court from obscurity to national prominence.

A 1971 study of various state supreme court justices illustrates the activist impression Vanderbilt left on subsequent justices and reveals a unique disposition of the New Jersey court. A survey of supreme court justices from New Jersey, Massachusetts, Pennsylvania, and Louisiana\footnote{347} asked what role each justice perceived him- or herself as playing in the political process of their respective states.\footnote{348} Only in New Jersey did a majority of justices perceive themselves as “lawmakers,” rather than “law interpreters” or “pragmatists.”\footnote{349} The study summarized the New Jersey court’s position by observing, “[t]he New Jersey judges believe courts make policy and they tend to innovate and even make proposals to the state legislature . . . the New Jersey Supreme Court appears to contribute frequently to policy change in the state.”\footnote{350} Although the scope of the study was limited to one set of New

\footnotesize{\textsuperscript{343} TARR & PORTER, supra note 1, at 186.}  
\footnotesize{\textsuperscript{344} See id. at 190.}  
\footnotesize{\textsuperscript{345} See id. at 191.}  
\footnotesize{\textsuperscript{346} Id. at 195.}  
\footnotesize{\textsuperscript{347} See GLICI, supra note 337, at 41 tbls.2–3.}  
\footnotesize{\textsuperscript{348} See id. at 24–26.}  
\footnotesize{\textsuperscript{349} Id. at 41 tbls.2–3.}  
\footnotesize{\textsuperscript{350} Id. at 47.}
Jersey justices during a particular period, its results nevertheless deserve recognition. The study shows that the activist and reformist nature of Arthur Vanderbilt manifested itself in the perceptions of the justices who followed him.

V. PROPOSAL

"Taken altogether, the picture that emerges is of a court that has eagerly embraced opportunities to promulgate policy for the state and doctrine for the nation, confident in its own abilities and of the legitimacy of the activist posture it has adopted." This description of the New Jersey Supreme Court also accurately reflects the pre-Bird California court. Unfortunately, politics and the appointment of more conservative justices took the California court in a more moderate, mainstream direction. To return the California Supreme Court to its activist prominence will require a combination of constitutional redrafting and a rededication of the justices to independent decision making. Using the New Jersey Supreme Court as a model is perhaps the first step in reshaping the high court of the Golden State.

While this comment does not purport to propose an exact formula for creating a progressive court, certain attributes of the New Jersey system lay the groundwork for constructing a progressive state supreme court. First, to permit state high courts to rule independently of political pressures, judicial selection and tenure methods should be free from popular elections. Second, since state supreme courts alone are responsible for interpreting state constitutions, states should develop constitutions containing expansive individual rights and a judicial system structured to provide the high court room to interpret such rights. Further, the California experience demonstrates that states should not implement the initiative and referendum system for amending state constitutions. Third, the selection process should target activist justices—such as Chief Justice Vanderbilt in New Jersey and

351. See id. at 15–19.
352. See supra text accompanying notes 343–46.
353. TARR & PORTER, supra note 1, at 184–85.
354. See supra Part II.B.1–2.
355. See supra Part II.B.4.
356. See supra Part IV.A.
357. See supra text accompanying notes 331-34.
Chief Justices Gibson, Traynor, and Wright in California— who are willing to take an active part in the political process of the state. By implementing the New Jersey model, high courts of other states, including California, can take major steps towards earning similar recognition.

VI. CONCLUSION

This comment highlights the attributes of the New Jersey Supreme Court that have earned it a national reputation for independence and activism. Further, this comment reveals, via the California experience, how politics can overhaul a tribunal literally overnight. This comment suggests that the Garden State, rather than the Golden State, model is most desirable. New Jersey’s history of activism deserves praise and should serve as a guide to those states seeking to change their supreme court from an inactive—perhaps irrelevant—judicial body, into an activist, progressive court.

358. See supra text accompanying notes 338–46.
359. The results reached by the New Jersey Supreme Court in controversial cases, see supra Part II.A.2, should not necessarily be adopted by other jurisdictions. Rather, this comment advocates modeling the New Jersey court because it has proven, over time, to rule independently, often making unpopular decisions. Such conviction should be the aim of every judicial body in the country.
360. See supra Parts IV, II.A.
361. See supra Part II.B.
362. See supra Part V.