THE 2006 CHIEF JUSTICE JOSEPH WEINTRAUB LECTURE: THE PURPLE THREAD: SOCIAL JUSTICE AS A RECURRING THEME IN THE DECISIONS OF THE PORITZ COURT

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Chief Justice Poritz, present and past members of the Supreme Court, Dean Deutsch, and compatriots at the bench and Bar. I am delighted to be home tonight at Rutgers Law School where generations of law students have not only learned the tools of our profession, but also have been inspired by the spirit of altruism that has animated this great institution since its inception. It is a particular honor for me to speak tonight as part of a lecture series named for my first Chief Justice, Joseph Weintraub, before whom I was fortunate to argue many cases as a young lawyer. He is frozen in my memory today in all of his iconic, glittering brilliance. It is likewise a particular pleasure for me to have the opportunity tonight to address the work of my newest Chief Justice, Deborah Tobias Poritz, who assumed a position that has been filled by the greatest lights of our profession--Arthur Vanderbilt, Joseph Weintraub, Richard Hughes, and Robert Wilentz--and remade it in her own image.

I

Let us begin at the beginning. On July 10, 1996, as a result of Chief Justice Robert Wilentz's worsening illness and resignation, Deborah Poritz, upon nomination by Governor Christine Todd Whitman, was sworn in as Chief Justice of the New Jersey Supreme Court. She was an entirely legitimate choice. Her resume was stellar--a brilliant student, a Phi Beta Kappa graduate of Brooklyn College, a law degree from the University of Pennsylvania, and an unparalleled employment record ranging from English Professor to Governor's Chief Counsel,

from partner in a prestigious Princeton law firm to Attorney General of the State of New Jersey. In many of those roles she broke new ground for her gender and performed in each admirably and with distinction.

The Court that she would head was, at the time, known throughout the nation as a protector of individual rights, a model for state supreme court administration and jurisprudence, and, as Professors Tarr and Porter observed, "basked in its reputation for judicial progressivism."[1]

Thus, it did not appear that Chief Justice Poritz was to be called upon to remedy a broken judicial system or to revitalize a lackluster decision-making process. From the perspective of any ascendant to power, inheriting a diamond is surely better than inheriting a piece of coal. However, it would be fair to say that Deborah Poritz joined the Wilentz Court and not vice-versa. She entered what one might call the lions' den because, as at least one legal scholar observed, the "Lions" of New Jersey's activist Court were departing.[2] On that court were Associate Justices who had worked closely with each other, some for ten years or more. Like old married people, Justices Handler, Pollock, O'Hern, Garibaldi, Stein, and Coleman could end each other's sentences. In a New York Times article following Chief Justice Wilentz's death, one Justice described the Wilentz Court as "going through their mental gymnastics together . . . with the ease of a great basketball team that can pass a ball among players without looking."[3] Good for them. Not so good for someone who never played basketball. And let's face it--Chief Justice Poritz never played basketball. Although she has never said so, I imagine that, no matter how helpful

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[1] G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 194 (Yale University Press 1988).

[2] Scott Carbone, The Unreasonable Expectation of Privacy: The "New" New Jersey Supreme Court Reevaluates State Constitutional Protections, 30 SETON HALL L. REV. 361, 388 (1999).

[3] Jan Hoffman, His Court, His Legacy: Robert Wilentz, His Bold Often Infuriating Opinions, and How He Got 6 Justices to Go Along With Them, N.Y. TIMES, June 30, 1996, § 13 (New Jersey), at 1.

and wonderful her colleagues were (and she has repeatedly said that they did everything they could to help her), those days were challenging. As Chief Justice Wilentz stated during his remarks upon taking the oath of office, even the most self-confident individual would be awestruck taking over the leadership of such an institution.[4]

And it was not just the internalized struggle that we all experience when thrust into new and unfamiliar territory. Frankly, no legal commentator or editorial writer suggested the possibility that the Poritz Court might aspire to what its forebears had achieved, or even stay the progressive course that had been established. If those hopes indeed had life within the observers' breasts, they remained unexpressed. What was expressed was the opposite. Reporting on speculation at the time, one commentator encapsulated the common wisdom that, because she was believed to be more conservative than her predecessor, the Chief Justice "would lead the Court away from the . . . innovative legal thinking that had defined the Wilentz years."[5]

Ten years have now passed. In what has been denominated by commentators as a dramatic change for any court,[6] six of the seven original members of the Poritz Court are gone -- three replaced by a Republican governor and three by a Democratic governor. The Court changed in 1999, when Justices Handler and Pollock retired and were replaced by Justice Verniero and me; in January 2000, when Justice Garibaldi retired and was replaced by Justice LaVecchia; in June 2000, when Justice O'Hern retired and was replaced by Justice Zazzali; in September 2002, when Justice Stein retired and was replaced by Justice Albin; in September 2003, when Justice Coleman retired and was replaced by Justice Wallace; and finally in

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[4] Robert N. Wilentz, Chief Justice of the Supreme Court of N.J., Remarks on Taking the Oath of Office as Chief Justice (Swearing in Ceremony) (Aug, 2, 1979), in 49 RUTGERS L. REV. 753, 754 (1997).
[5] Gerald J. Russello, The New Jersey Supreme Court: New Directions?, 16 St. John's J. Legal Comment. 655, 662 (2002).
[6] Id. at 656-57.

September 2004, when Justice Verniero resigned and was replaced by Justice Rivera-Soto. Only the Chief Justice remains.

The passage of a decade seemed both to me and Dean Deutsch like a good time for stock taking--to engage in what the Gnostic teacher Theodotus described as understanding "[w]ho we were, and what we have become; where we were . . . whither we are hastening . . . ."[7]

Tonight, I hope to perform what I call, oxymoronically perhaps, a preliminary retrospective of the Poritz Court. It is preliminary for two reasons: primarily and obviously – it is not over. More importantly, it is only with the perspective that comes with the passage of time that the true measure of the Court will be taken. Tonight, I simply re-imagine the narratives of the Poritz Court in an assessment that is part observation and part memoir. Query? Am I an apt choice as an observer or is my presence on the Court a distorting prism? And where recollection is concerned, am I accurate because I was there, or is it the case that, as the New Yorker's William Maxwell suggests, when we speak of what we confidently call memory -- "a fact that has been subjected to a fixative and thereby rescued from oblivion" --"we lie with every breath we draw."[8] I leave that to you.

II

Now, obviously, because the Poritz Court has decided and written opinions in over a thousand cases, some culling mechanism was in order, hence the title of this lecture. The social justice strands were actually suggested by the Dean but seemed about right to me and also an easily described point of departure. Not so. Here is what we know. We know that the term social justice was coined in 1840 by a Sicilian priest, and "given prominence by Antonio

[7] ELAINE PAGELS, THE GNOSTIC GOSPELS xix (Vintage Books 1989) (1979) (quoting Theodotus, cited in Clemens Alexandrinus, *Excerpta ex Theodoto* 78.2).
[8] WILLIAM MAXWELL, SO LONG, SEE YOU TOMORROW 27 (ALFRED A. Knopf 1980).

Rosmini-Serbati in La Costitutione Civile Secondo la Giustizia Sociale in 1948."[9] That is all we know definitively.

Indeed, philosopher Friedrich Hayek points out that whole books and treatises have been written about social justice without ever once offering a definition of the term.[10] According to author Michael Novak, the term is allowed "to float in the air as if everyone will recognize an instance of it when it appears. This vagueness seems indispensable. The minute one begins to define social justice, one runs into embarrassing intellectual difficulties."[11] In fact, I read numerous descriptions of the term in various books and articles, no two of which were identical. Definitions came from sources as varied as Saint Thomas Aquinas and Director Spike Lee, whose notions, I might tell you, were startlingly similar. Aquinas says social justice is a "certain rectitude of mind whereby a man does what he ought to do in the circumstances confronting him."[12] Spike Lee echoes that approach in his simple but eloquent, Do the Right Thing.[13] In Utilitarianism, John Stuart Mill riffed the term in a slightly different way. He said, "Society should treat all equally well who have deserved equally well of it . . . . [T]his is the highest abstract standard of social and distributive justice . . . ."[14] Indeed, the old pornography saw did come to mind--apparently, you know it when you see it.

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[9] Michael Novak, Defining Social Justice, FIRST THINGS, Dec. 2000, at 11, available at http://www.firstthings.com/ftissues/ft0012/opinion/novak.html.
[10] Id.
[11] Id.
[12] [23 Virtues] THOMAS AQUINAS, SUMMA THEOLOGIÆ PRIMA SECUNDÆ (Thomas Gornall trans., Blackfriars 1964) (1979) (NOTE TO EDITOR – WE WERE UNABLE TO ACCESS THE HARD COPY OF THE BOOK AND THEREFORE DO NOT HAVE A PAGE NUMBER – BOOK IS AT PRINCETON LIBRARY IN THE RARE BOOK SECTION).
[13] DO THE RIGHT THING (40 Acres & A Mule Filmworks 1989).
[14] JOHN STUART MILL, UTILITARIANISM 59-60 (Batoche Books Ltd. 2001) (1863), available at http://socserv2.socsci.mcmaster.ca/~econ/ugcm/3ll3/mill/utilitarianism.pdf.

To add to the confusion, the concept of "social justice" has been identified with both sides of the political spectrum. On the left today, it is the rallying cry of liberation theologists.[15] Yet, as long ago as the 1940s, it was the name given by a Boston priest, a reformer turned right wing crusader, to his newspaper and political party that regularly espoused an ideology of exclusion.[16]

Because I am giving this lecture, I consider myself free to define the term and I do so. Like John Rawls, I view the term as politically neutral,[17] and I define it, solely for our purposes, as the principled decisions we make that have the effect of ensuring fair and equal treatment to our fellow citizens.

III

Obviously, the key to the definition is principled decision-making because the achievement of a socially beneficial aim in an unprincipled way would be unthinkable in a system of laws. Thus, I will begin by outlining for you briefly the core pillars of decision-making utilized by the Poritz Court, each of which is deeply rooted in New Jersey Supreme Court jurisprudence.

First, we continue to be, as we were meant to be by the framers of the 1947 Constitution, independent, as far as humanly possible, from external influences. We decide cases on their merits, without regard to partisanship, friendship, or personal interest. As Chief Justice Wilentz observed in his final message to us, that is "the ultimate source of our strength."[18]

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[15] ANTHONY GIDDENS ET AL., INTRODUCTION TO SOCIOLOGY ch. 17, (W.W. Norton 5th ed. 2005) (1991), available at http://www.wwnorton.com/giddens5/ch/17/.
[16] SHELDON MARCUS, FATHER COUGHLIN: THE TUMULTUOUS LIFE OF THE PRIEST OF THE LITTLE FLOWER 71, 106 (Little, Brown & Company 1973).
[17] JOHN RAWLS, A THEORY OF JUSTICE 136-37 (Belknap Press, 5th prtg. 1973) (1971).
[18] Robert N. Wilentz, Chief Justice of the Supreme Court of N.J., Retirement Statement (June 13, 1996), in 49 RUTGERS L. REV. 1213, 1213 (1997).

Second, we continue to believe that adherence to settled legal rules is the preferred approach in order to achieve what scholars describe as the goals of coherence, consistency and stability.[19] That allows people to plan their lives, provides counsel with a stable basis of reasoning, avoids relitigating every relevant proposition in every case, averts a rush of litigation every time justices change, and promotes public confidence.[20]

However, we also continue to recognize that adherence to precedent requires more than a rubber stamp. One legal scholar puts it this way: when we hear a story, two questions arise--do we want to repeat it, and, if so, how do we want to repeat it. If the answer to the first question is "yes" and if we like the way the story was told the first time, we simply tell it the same way again. If not, we retell it in our own words. It is in that way that our precedent remains at once fixed yet alive.[21]

Third, we continue to believe that the decision not to adhere to precedent is a weighty one. As Justice Handler observed at an earlier Weintraub lecture, "there has to be a sound and compelling reason--a decisional imperative--for a court to abandon existing authority and extend the law to grounds beyond established rules and principles."[22]

In the face of such a sound and compelling reason, for example, what Justice Handler identified as "case[s] present[ing], directly and inescapably, issues arising from difficult social dilemmas,"[23] we are willing to modulate, redefine, and diverge from precedent when it is

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[19] RONALD DWORKIN, LAW'S EMPIRE 228-32 (Belknap Press 1986).
[20] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 568-70 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).
[21] William M. Eskridge, Jr., Symposium on Statutory Interpretation: Legislative History Values, 66 CHI.-KENT L. REV. 365, 391 n.99 (1990) (citing L. FULLER, THE LAW IN QUEST OF ITSELF 9-10 (1940)).
[22] Alan B. Handler, Principled Decisions, 52 RUTGERS L. REV. 1039, 1066 (2000).
[23] Id.

necessary. In this respect, in one of the most famous dissenting opinions ever written, Chief Justice Vanderbilt said:

> We should not permit the dead hand of the past to weigh so heavily upon the law that it perpetuates rules of law without reason. Unless rules of law are created, revised, or rejected as conditions change and as past errors become apparent, the common law will soon become antiquated and ineffective in an age of rapid economic and social change. It will be on its way to the grave.[24]

A wag might put it this way--blind adherence to stare decisis requires us to be as wrong today as we were yesterday.

Fourth, we continue to believe that our primary function in statutory interpretation is effectuating the Legislature's intent, but we recognize that that is often a difficult assignment. There are many reasons for that, including the frailty of language and the conciliatory nature of the legislative process which often results in planned ambiguity. Most importantly, as Chief Justice Weintraub noted, drafters of legislation simply cannot, in many instances, imagine the unique circumstances in which their words will be applied.[25] Thus we reject Montesquieu's view that for a judge to engage in statutory interpretation "he needs only to open his eyes."[26] To be sure, that is occasionally so, but what is as often required when a question of statutory interpretation is raised is much more, including the application of history, logic, and common

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[24] Fox v. Snow, 6 N.J. 12, 27-28 (1950) (Vanderbilt, C.J., dissenting).

[25] New Capitol Bar & Grill Corp. v. Div. of Employment Sec., 25 N.J. 155, 160 (1957) ("It is frequently difficult for a draftsman of legislation to anticipate all situations and to measure his words against them. Hence cases inevitably arise in which a literal application of the language used would lead to results incompatible with the legislative design. It is the proper function, indeed the obligation, of the judiciary to give effect to the obvious purpose of the Legislature, and to that end words used may be expanded or limited according to the manifest reason and obvious purpose of the law. The spirit of the legislative direction prevails over the literal sense of the terms." (internal citations omitted)).

[26] BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 75 (Thomas Nugent trans., Hafner Press 1949).

sense to bridge the gap between the written words and what Judge Learned Hand called "the flux that passes before [us]."[27]

Fifth, we believe that a remedial statute is just that--an initiative to address and solve an apparent problem--and we continue to adhere to the well-established canon of statutory interpretation that remedial legislation should be liberally construed to achieve its salutary aims for the benefit of the people.

Sixth, we continue to recognize the limits of our power, acknowledging the line of demarcation between, and according full respect and deference to, the coequal branches of government.

Seventh, we have a clear understanding of our role as the final arbiter of the constitutional rights of our fellow citizens and a concomitant understanding that there will be an occasional need to declare the acts of another void insofar as they trench on fundamental constitutional principles. That is not judicial activism or overstepping; it is a core judicial function. Alexander Hamilton put it this way in the Federalist Papers:

> [E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master. [28]

Yet the public is sometimes uncomfortable with the exercise of that function. As Chief Justice Poritz has recently observed:

> Hamilton's argument contains a fundamental understanding of the relationship between the judiciary and the other branches that is anti-majoritarian. Most Americans believe deeply that democracy is about the will of the majority and

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[27] Judge Learned Hand, A Fanfare for Prometheus: Address Before the American Jewish Committee (Jan. 29, 1955), in GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 592 (Harvard University Press 1994).
[28] THE FEDERALIST NO. 78 (Alexander Hamilton).

> find it difficult to accept the courts as having the authority to ever limit that will, but in constitutional adjudication it is so.[29]

Eighth, we continue to be Constitutionalists. That is, as Justice Brennan and Justice Pollock have advocated, we consider the New Jersey Constitution as an independent source of liberty guarantees for our fellow citizens.[30] Although we are respectful of federal interpretations of cognate United States Constitutional provisions we do not consider ourselves tethered to them. Rather, as Justice Clifford once put it quite poetically:

> Although that Court may be a polestar that guides us as we navigate the New Jersey Constitution, we bear ultimate responsibility for the safe passage of our ship. Our eyes must not be so fixed on that star that we risk the welfare of our passengers on the shoals of constitutional doctrine. In interpreting the New Jersey Constitution, we must look in front of us as well as above us.[31]

Ninth, we continue to be committed not only to rendering opinions but also to explaining them logically, rationally, and informatively as a guide to the future. We are teachers as well as adjudicators. As Justice Harlen Fiske Stone once observed:

> I can hardly see the use of writing judicial opinions unless they are to embody methods of analysis and of exposition which will serve the profession as a guide to the decision of future cases. If they are no better than an excursion ticket, good for this day and trip only, they do not serve even as protective coloration for the writer of the opinion and would much better be left unsaid.[32]

Tenth, we acknowledge our mistakes and the wrong turns that we have made, at once evidencing that we know we are not infallible and repairing any damage that has been done. By

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[29] Deborah T. Poritz, Chief Justice of the Supreme Court of N.J., Remarks for University of Pennsylvania Law School Graduation (May 15, 2006).
[30] Stewart G. Pollock, Associate Justice of the Supreme Court of N.J., Weintraub Lecture at the S.I. Newhouse Center for Law and Justice: State Constitutions as Separate Sources of Fundamental Rights (April 27, 1983) in 35 RUTGERS L. REV. 707, 707-08 (1983)(foreword by Justice William J. Brennan, Jr.).
[31] State v. Hempele, 120 N.J. 182, 196 (1990).
[32] ALPHEUS THOMAS MASON, THE SUPREME COURT FROM TAFT TO WARREN 105 (Louisiana State University Press 1958).

way of example, in what one legal commentator denominated slyly as a "mea culpa trilogy,"[33] we recalibrated the entire controversy doctrine and gave Circle Chevrolet[34] the circumscribed effect it so richly deserved. Likewise, in French[35] we recognized that Aubrey[36] required retooling and we did so.

Eleventh, we continue, after all these years, to be capable of outrage. If, for example, a duty to the public or to a client; the social contract; or the implied covenant of good faith and fair dealing is violated, as we recently described in Sons of Thunder[37] and Brunswick Hills Racquet Club,[38] you can expect that we will not be amused.

Finally, we continue to be inspired by an overall spirit of progressivism--what Chief Justice Hughes spoke of as "a willingness to cope with new problems and devise new solutions in the name of justice, as the common law unfolds and the Constitution adapts its magnificent basic philosophy to meet new societal problems, as a living organism rather than a dead letter."[39] In cleaving to those principles, we continue to maintain the approach to decision-making that has informed each of our predecessor courts.

IV

Let me briefly turn now to our process, which also replicates that of our forebears. Although the number of opinions issued by the Court each year has not dramatically changed,

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[33] Ronald Grayzel, Correcting the Mistakes of the Past: The Court Looks Back on Some Prior Decisions and Reformulates Its Positions, N.J. L.J., Sept. 1, 1997, at S-6 (discussing the following three decisions exempting legal malpractice actions from the party joinder requirements of the entire controversy doctrine: Olds v. Donnelly, 150 N.J. 424 (1997); Karpovich v. Barbarula, 150 N.J. 473 (1997; and Donohue v. Kuhn, 150 N.J. 484 (1997)).

[34] Circle Chevrolet v. Giordano, 142 N.J. 280 (1995).

[35] French v. N.J. Sch. Bd. Ass'n Ins. Group, 149 N.J. 478 (1997).

[36] Aubrey v. Harleysville Ins. Cos., 140 N.J. 397 (1995).

[37] Sons of Thunder v. Borden, Inc., 148 N.J. 396 (1997).

[38] Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210 (2003).

[39] Richard J. Hughes, Reflections: "A Growing Court", 11 SETON HALL L. REV. 379, 384 (1980).

you might be interested in knowing that in 1948, the seven Justices disposed of 15 petitions for certification and 221 motions.[40] In 1960, the Weintraub Court disposed of 125 petitions for certification and 288 motions.[41] Last year, we disposed of 1,266 petitions and 1,622 motions.[42] Yet, the Poritz Court has maintained the historic decisional methodology instituted by Chief Justice Vanderbilt in 1948: generally, no case discussions prior to argument to assure open-mindedness; a week of reflection before the vote to give depth to the discussion and obviate snap judgments; and strict seniority order in uninterrupted speaking, after the Chief Justice chooses a Justice to begin the recitation. (I might tell you that after 15 years on the rough and tumble Appellate Division, I found the uninterrupted part excruciating.) In any event, the only difference in the Poritz approach is a necessary change in the level of informality and flexibility to address the burgeoning caseload.

Of course, managerial styles differ. One commentator reported that Chief Justice Vanderbilt was a team player but only if he could be captain.[43] My former colleagues have regaled us with stories of Chief Justice Wilentz keeping the conversation going on a contested issue until a differing Justice fell unconscious from exhaustion. Nothing could be further from the Poritz style, which is reflective of her notion that jurisprudentially she is only one of seven. Although firm in her opinions, fully prepared, and perfectly capable of intellectually defending her position on any issue, she operates totally in a consensus mode, always seeking common ground both on rationale and outcome. Her method on difficult and contentious issues, which may take us hours or days to resolve, is particularly effective. As the discussion proceeds, she continually reframes the issue, polishing off the sharp edges, seeking the creative moment of

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[40] 1948-1949 N.J. ANNUAL REP. OF THE ADMIN. DIRECTOR OF THE CTS., at 4-5.
[41] 1960-1961 N.J. ANNUAL REP. OF THE ADMIN. DIRECTOR OF THE CTS., at 8.
[42] 2005-2006 N.J. SUP. CT. ANNUAL STAT., at 13,15.
[43] ALAN V. LOWENSTEIN, The Legacy of Arthur T. Vanderbilt to the New Jersey Bar, 51 RUTGERS L. REV. 1319, 1321 (1999).

clarity and consensus. Her aim is for all of us to reach what she calls "the Eureka moment"--the state that the physicist Alan Lightman describes as "planing."[44] He analogizes the struggle with a difficult physics problem as

> [S]ailing a round bottomed boat in a strong wind. Normally, the hull stays down in the water, with the frictional drag greatly limiting the speed of the boat. But in high wind, every once in a while the hull lifts out of the water, and the drag goes instantly to near zero. It feels like a great hand has suddenly grabbed hold and flung you across the surface like a skimming stone.[45]

Lightman calls reaching the answer to the question "a strong sensation of seeing deeply into the problem and understanding it and knowing that [we are] right--a certain kind of inevitability."[46] That is what we seek at conference. To reach that level, no superficiality of analysis can be allowed and the Chief's reframing methodology, which requires time, steadfastness, nimbleness of mind, and generosity of expression, goes a long way in achieving that outcome.

The Chief Justice also has a deep understanding of the difficult nature of attempting to reconcile the views of seven Justices with different backgrounds and frames of reference, not just on substantive issues but also on the very words that ultimately appear on the pages we write. That is not to suggest that we are not collegial--we are. It is in the nature of what we do. In the trial court, the judge has adjudicatory and rhetorical autonomy. Here, the effort is to achieve consensus and to speak in one voice. To do that requires not only reconciling diametrically opposite opinions regarding legal rationale and outcome, but also the very way in which the opinion is expressed. Some Justices believe that when they write an opinion, a lawyer reading it at his desk the next day should have absolutely no doubt about exactly what he needs to do.

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[44] ALAN LIGHTMAN, A SENSE OF THE MYSTERIOUS: SCIENCE AND THE HUMAN SPIRIT 17 (Pantheon Books 2005).
[45] Id.
[46] Id.

Others believe that it is the duty of the Court to leave plenty of room for play in the joints of its opinions for future legal development.

It is necessary to reconcile the views of those who write to explain things in a simple and straightforward way that reveals the point on first reading with the views of those who believe that, to garner confidence and respect, our opinions need to be shot through with philosophy, legal theory, out-of-state precedent, and a dash of rhetorical flourish. What needs to be reconciled are the views of those who believe that many past decisions have been too lengthy, too layered, too convoluted, and have left people scratching their heads with those who say that those opinions are exactly what gave the Court the cachet that it has, along with a national reputation for excellence. Those differing views of opinion writing are exemplified by the stylistic distinctions between the pithy opinions of the Weintraub Court and those more expansive expositions of the Wilentz Court. In the difficult conciliatory task of striking a balance between them, the Chief Justice is a master. And I think you can see the effect of her mastery in the rhetorical and stylistic unity of the opinions the Court issues.

She is also a gifted editor. With the skill she developed as an English professor, the Chief Justice pores over every opinion with a proverbial red pen and a sharp eye, and her suggestions always make them better. To be sure, she redlines the turns of phrase that each of us holds most dear--the latinisms, the double entendres, the poetry, the dramatic quotations (the Purple Thread would definitely be out), but in the end, we agree that the opinions are improved.

Despite her overwhelming administrative obligations, the Chief carries her own opinion load. Like her predecessors, she assigns herself the most difficult cases and those with the potential to expose the institution to criticism--in order to deflect that criticism to herself. She rarely dissents.

And you will note that when the Court splits on an issue, none of the mean-spirited carrying-on that we have come to expect in United States Supreme Court dissents is seen. That is due in great measure to the collegial atmosphere that she fosters among us. That too is classic New Jersey Supreme Court practice.

The Chief Justice is open-minded, a great listener, and is willing to rethink a position and to acknowledge that she has made an error when logic directs that result. She is funny, kind, temperate, agreeable, compassionate, and a perfect colleague. She is also what her predecessors were--what Chief Justice Hughes declared a Chief should be--"one who will set a tone of progress . . .[,] restless for the doing of right . . .[,] and untiring in the elusive search for justice . . ."[47] She is indefatigable in her belief, in Poet Laureate Seamus Heaney's words, "that a further shore is reachable from here."[48]

And like our predecessors, the members of the Court, under her leadership, are much more than mere professional associates. Justice Stein once described the camaraderie of the Wilentz Court in poignant terms, stating:

> On the last day of each term, when our work was virtually completed, the Chief would break out some fine champagne and caviar and we would sit around and reminisce about the term's highs and lows, trading insults, and barbs, needling each member in turn and the Chief most of all. The glow generated by that annual event was not only from the champagne, but also from our warmth and affection for each other, for the institution on which we were privileged to serve, and for the man who calmly and graciously had steered us through the term.[49]

I tell you tonight--that glow remains. Today, we are as they were--well, not the basketball part--but connected, collegial, respectful, familial, loyal, cognizant always that it is

[47] C.J. Richard J. Hughes, The Impact of Judicial Transitions in Administration, 10 SETON HALL L. REV. 1, 5 (1979).
[48] SEAMUS HEANEY, THE CURE AT TROY: A VERSION OF SOPHOCLES' PHILOCTETES 77 (Farrar, Straus & Giroux 1991).
[49] J. Robert L. Clifford, Presentation of the John Marshall Award in the Memory of Robert L. Wilentz, 7 SETON HALL CONST. L.J. 873, 875 (1997).

our honor to serve in what Lord Bacon described as this "hallowed place,"[50] and forever appreciative of the collegial leadership of Chief Justice Deborah Poritz.

V

Thus, knowing our principles and our process, how has the Poritz Court accounted for its stewardship? Time constraints render impossible any effort at a full survey of the vast array of the Court's decisions. I actually re-read almost a hundred of them in anticipation of tonight--each a worthy candidate for inclusion. They have touched on every element of human existence from mulligans and errant baseballs to death and dying. Thus, I have simply chosen some opinions that I view as falling within the social justice construct -- that is, principled decisions meant to secure fair and equal treatment for our fellow citizens--as a synecdoche for the whole.

Let me begin with the Court's treatment of some landmarks from the past that the pundits posited as likely subjects for retrenchment by the Poritz Court.

A.

Recall that the Hughes Court limited the right of municipalities to bar the construction of low and moderate income housing based on concepts of fundamental fairness in the exercise of government power.[51] The Wilentz Court picked up the baton and, in a series of Mount Laurel decisions, ordered municipalities to provide such housing and limned controversial remedies in furtherance of that end.[52] In a word, because the State controls land use, the Court held that it cannot constitutionally "set aside dilapidated housing in urban ghettos for the poor and decent

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[50] FRANCIS BACON, OF JUDICATURE, reprinted in FRANCIS BACON: THE MAJOR WORKS 446, 448 (Oxford University Press Inc. 2002) (1996).

[51] See, e.g., S. Burlington County NAACP v. Mount Laurel (Mount Laurel I), 67 N.J. 151 (1975).

[52] S. Burlington County NAACP v. Mount Laurel (Mount Laurel II), 92 N.J. 158, 209 (1983)(authorizing builder's remedy for noncompliant townships); see also Hills Dev. Co. v. Twp. of Bernards (Mount Laurel III), 103 N.J. 1 (1986)(upholding the Fair Housing Act as constitutional and reasonable legislative response to constitutional right of low income housing).

housing elsewhere for everyone else."[53] Eventually, the Council on Affordable Housing became the spearhead of that effort under the Fair Housing Act.[54] In 2002, the Poritz Court had an opportunity to pay what Professor John Payne has denominated as the "debt of honor" created by the Mount Laurel cases.[55] In Toll Brothers v. Twp. of West Windsor,[56] the Court affirmed a trial judge's holding that West Windsor had violated our Constitution by preventing a realistic opportunity for development of affordable housing. In so doing, the Chief Justice, speaking for the Court, reaffirmed the Court's commitment to the Mount Laurel precedent. She stated unequivocally:

> We held then, and reaffirm now, that a municipality may not "validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby . . . exclude such people from living within its confines because of the limited extent of their income and resources."[57]

In a similar vein, although not the architect of Robinson v. Cahill[58] or Abbott v. Burke,[59] the cases that struck down the State's school funding methodology based on the "thorough and efficient" clause in Art. VIII, ¶ 1 of the New Jersey Constitution, the Poritz Court has issued numerous orders and opinions[60] to effectuate what was mandated in the earlier Abbott cases to equalize the educational opportunities for rich and poor. Required on occasion to modulate the details of prior orders to meet the vicissitudes of the task, the Poritz Court has nonetheless, in

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[53] Id.
[54] N.J.S.A. 52:27D-301 to -329.
[55] John M. Payne, Tribute to Chief Justice Robert N. Wilentz: Politics, Exclusionary Zoning and Robert Wilentz, 49 RUTGERS L.REV. 689, 711 (1997).
[56] 173 N.J. 502 (2002).
[57] Id. at 540-41 (emphasis added) (quoting Mount Laurel I at 713).
[58] 70 N.J. 155 (1976).
[59] 119 N.J. 287 (1990).
[60] Abbott v. Burke, 2006 N.J. LEXIS 499, clarif'd by 2006 N.J. LEXIS 655; 185 N.J. 612 (2005); 182 N.J. 153 (2004); 181 N.J. 311 (2004); 177 N.J. 596 (2003); 177 N.J. 578 (2003); 2003 N.J. LEXIS 461; 172 N.J. 294 (2002); 170 N.J. 537 (2002); 163 N.J. 95 (2000); 164 N.J. 84 (2000); 153 N.J. 480 (1998).

each Abbott ruling, kept faith with the promises of our Constitution, guided by the notion as expressed by Chief Justice Poritz that "another generation of school children" should not have to "pay the price" of an unequal education.[61] Nevertheless, I note that the Abbott opinions and orders are paradigms of moderate and pragmatic thinking and writing, adapted to the needs of the day and deferring to coequal branches of government, wherever possible.

B.

The Poritz Court has continued to resort to the New Jersey Constitution to carve out greater protections for individual rights than would be afforded under its federal counterpart. In 2000, in a closely watched case, Green Party v. Hartz Mountain Industries, Inc.,[62] the Court had an opportunity to revisit an earlier decision of the Wilentz Court, New Jersey Coalition Against War v. J.M.B. Realty Corp.,[63] and once again invoked the State Constitution, characterizing the mall as the new "Main Street" [64] and reaffirming the speech protections of our citizens by disallowing mall owners to unreasonably condition leafleteers' exercise of their speech and political rights.[65]

In the area of search and seizure, the Poritz Court, like its predecessors, diverged from federal constitutional doctrine in a number of cases to grant greater privacy rights to New Jersey citizens under our own Constitution. In State v. Carty,[66] for example, the Court, responding to evidence of race-based stops on the highways, rejected federal precedent and ruled that under our Constitution, law enforcement must have "reasonable suspicion" to justify requesting a driver stopped on a highway to consent to a search.[67]

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[61] Abbott, 163 N.J. at 102 (2000).
[62] 164 N.J. 127 (2000).
[63] 138 N.J. 326 (1994).
[64] Id. at 347, 353.
[65] Green Party, 164 N.J. at 157, 158.
[66] 170 N.J. 632 (2002).
[67] Id. at 639-40.

With respect to criminal trial procedure, the Court has also distanced itself from federal constitutional jurisprudence to protect the integrity of jury selection by barring, under our own Constitution (Art I ¶ ¶ 5, 9 and 10), the exercise of peremptory challenges based upon the wearing of religious garb or engaging in missionary work.[68] Writing for the Court, the Chief Justice debunked the notion that religious garb in any way reveals a juror's attitudes and denominated that idea as unjustified stereotyping and group bias.[69] She concluded that permitting the use of such challenges to foster group bias would be subversive to a fair voir dire procedure.[70]

Similarly, in Planned Parenthood v. Farmer,[71] the Court struck down the Parental Notification for Abortion Act,[72] applying Chief Justice Weintraub's equal protection balancing test under our own Constitution. In an opinion penned by the Chief Justice, the Court concluded that the heavy burden on a young woman who did not wish to tell her parents about her pregnancy was not ameliorated by the judicial waiver proceeding and was not justified by the family values reasons advanced by the State, which had enacted no similar restrictions on other medical and surgical procedures.[73]

In terms of access to the courts, in Pasqua v. Council,[74] the Court declared, in the absence of a definitive ruling by the United States Supreme Court, that the due process guarantees in our Constitution entitle a parent at risk of jail for non-payment of child support to be represented by counsel.[75]

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[68] State v. Fuller, 182 N.J. 174, 194 (2004).
[69] Id. at 200.
[70] Id. at 203-04.
[71] 165 N.J. 609 (2000).
[72] N.J.S.A. 9:17A-1.1 to -1.12.
[73] Planned Parenthood, 165 N.J. at 638, 642-43.
[74] 186 N.J. 127 (2006).
[75] Id. at 153.

In short, the New Jersey Supreme Court, heeding the words of Justice Brennan that "[s]tate constitutions, too, are a font of individual liberties, [whose] protections often extend[] beyond those required by the [United States'] Supreme Court's interpretation of federal law," has made it clear to all New Jerseyans that our State Constitution is a separate, valid, and important source of rights for the people of New Jersey.[76]

C.

It is equally true that the Court has maintained the attitude of progressivism that vivified its forebears. In State v. Cook,[77] under its supervisory powers, the Court ordered the study of procedures for tape recording all confessions for the purpose of rendering subsequent judicial proceedings more fair and accurate.[78] Likewise, in State v. Cromedy,[79] the Court addressed, for the first time, the problems inherent in cross-racial identifications and proposed remedial action including the use of expert testimony and jury instructions.[80]

In connection with capital cases, the Poritz Court has been unstinting in continuing the effort begun during the Wilentz years to assure that discrimination does not infect the process. In particular, in *In re* Proportionality Review (II),[81] the Chief, writing for the Court, adopted a new scientific model to monitor the possible presence of racial discrimination in capital causes.[82]

In reaffirming that the right to personal dignity does not disappear when a person is accused of a crime, in State v. Maisonet,[83] the Court ruled that fundamental fairness dictates that a defendant is entitled to basic necessities such as food, soap, water, a clean mattress, and a comb

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[76] William J. Brennan Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 491 (1977).
[77] 179 N.J. 533 (2004).
[78] Id. at 547.
[79] 158 N.J. 112 (1999).
[80] Id. at 132-33.
[81] 165 N.J. 206 (2000).
[82] Id. at 209.
[83] 166 N.J. 9 (2001).

in prison and awarded a defendant a new trial for being made to appear in a disheveled state before a jury.[84]

Turning to the area of child welfare, the Court has consistently recognized the need for the judicial system to be sensitive to the treatment of juveniles. For example, in State v. Smith,[85] the Court upheld the use of closed-circuit television for child victims of sexual assault testifying against their assailants.[86] In State v. Presha,[87] the Court ruled that juveniles under fourteen cannot be interrogated by the police outside the presence of their parents.[88] Likewise in State v. J.M.,[89] the Court modified the Rules of Practice to permit juveniles to present important evidence on probable cause at a waiver hearing even though adults do not enjoy a similar right.[90]

In a series of family law decisions, the Poritz Court permitted grandparent visitation over a parent's objection;[91] articulated the standard for a mother's removal of her child from the State over the objection of her ex spouse;[92] and applied family law principles to resolve a dispute over custody and visitation in a homosexual household.[93] Each of those opinions is child centered; indeed, the Court declared the standard to be "avoidance of harm to the child."[94]

Still in the area of domestic cases, in Shah v. Shah,[95] the Court broadly interpreted the domestic violence law to extend the effective period of a temporary domestic violence

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[84] Id. at 22.
[85] 158 N.J. 376 (1999).
[86] Id. at 318.
[87] 163 N.J. 304 (2000).
[88] Id. at 322.
[89] 182 N.J. 402 (2005).
[90] Id. at 188.
[91] Moriarty v. Bradt, 177 N.J. 84, 117 (2003).
[92] Baures v. Lewis, 167 N.J. 91, 118 (2001).
[93] V.C. v. M.J.B., 163 N.J. 200, 227-28 (2000).
[94] Moriarty, 177 N.J. at 115; see Baures, supra, 167 N.J. at 118 (holding that child's removal from state over objection of ex spouse should not be inimical to child's interest); V.C., supra, 163 N.J. at 227-228 (holding that custody should be awarded in child's best interest).
[95] 184 N.J. 125 (2003).

restraining order against an out-of-state resident to protect our citizens.[96] And in State v. B.H.,[97] the Court again underscored the importance of Battered Woman Syndrome testimony in the search for truth.[98]

D.

The Poritz Court has also consistently evidenced its willingness to cope with the problems of a new age and to devise new solutions for them: it recognized a tort based on preconception negligence;[99] limned a remedy for divorced couples who could not agree on the disposition of frozen pre-embryos;[100] abrogated the learned intermediary defense to reflect the present-day reality that drug companies now engage in direct advertising to consumers and should be responsible for what they say;[101] and, in a series of opinions stemming out of Owens-Illinois v. United Insurance Co.[102] and Carter-Wallace, Inc. v. Admiral Insurance Co.,[103] created a fair template for determining the proper method of loss allocation between insureds and insurers when dealing in the uncharted waters of quantifying long-tail environmental injuries.[104]

E.

In terms of the right of the public to share information, in R.M. v. Supreme Court of N.J.,[105] the Court lifted a long-standing restriction on the right of a grievant to speak about the fact that he or she has filed a complaint against a lawyer.[106] Regarding public access to the work of public bodies, in Times of Trenton Publication Corp. v. Lafayette Yards Community

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[96] Id. at 142.
[97] 183 N.J. 171 (2005).
[98] Id. at 195.
[99] Lynch v. Scheininger, 162 N.J. 209, 232 (2000).
[100] J.B. v. M.B., 170 N.J. 9 (2001).
[101] Perez v. Wyeth Labs. Inc., 161 N.J. 1, 21-22 (1999).
[102] 138 N.J. 437 (1994).
[103] 154 N.J. 312 (1998).
[104] Id. at 325-28; Owens-Illinois, 138 N.J. at 478-79.
[105] 185 N.J. 208 (2005).
[106] Id. at 227-28.

Development Corp.,[107] the Chief Justice, speaking for the Court, determined that, for purposes of the Open Public Meeting Act[108] and the Open Public Records Act,[109] a hybrid entity with both public and private indicia is public.[110]

F.

Recently, the Court revisited the Public Trust doctrine in Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc.[111] There, after tracing the doctrine's history back to Roman times, the Chief Justice extended its applicability to order public access to the ocean through private property.[112]

G.

Concerning voters' rights, the Court has stood firm in liberally interpreting the election laws in favor of the right to vote and the right to choose among candidates, which are the core values of our democratic system. In New Jersey Democratic Party v. Samson,[113] the Court was faced with the withdrawal of an incumbent United States Senator after the date prescribed in the statute for substitution.[114] Writing for a unanimous court, the Chief Justice interpreted the statute sensibly. She explained that the statute did not say that the filling of a vacancy within forty-eight days of the election is prohibited under all circumstances and unlike the legislatures of our sister states that had clearly expressed the consequences that follow when a vacancy occurs outside the statutory window, New Jersey had not done so.[115] When that happens, she said, "the Court must

[107] 183 N.J. 519 (2005).
[108] N.J.S.A. 10:4-6 to -21.
[109] N.J.S.A. 47:1A-1 to -13.
[110] Times of Trenton Publ'n Corp., 183 N.J. at 535.
[111] 185 N.J. 40 (2005).
[112] Id. at 55.
[113] 175 N.J. 178 (2002).
[114] N.J.S.A. 19:13-20.
[115] Id. at 194-196.

consider the 'fundamental purpose' of the enactment and . . . 'interpret it [in a manner] consonant with the probable intent of the draftsman . . . .'"[116]

Given that the underlying purposes of the election law are to further voter participation and choice, and because there was more than sufficient time to replace the senator and conduct an orderly election, the Court concluded that that is what the draftsmen would have wanted had they been presented with the facts.[117] I note that the Chief specifically stated in the opinion, "[i]f that is not what the Legislature intended, we anticipate that it will amend Section 20 accordingly."[118] No such amendment was ever proposed.

H.

No discussion of the Poritz Court would be complete without a nod to its administrative initiatives, all of which have ultimately been directed toward increasing efficiency and access for users. Those initiatives include the completion of unification, best practices, drug courts, interpreters, the translation of court access documents, the web site, and an ombudsman in each vicinage to help litigants make their way through the system. Thus, under the Poritz Court, the New Jersey judicial system continues to be as user-friendly as any in the nation.

I.

Last, but certainly not least, is the one case that no review of the Poritz Court could overlook. In an opinion known worldwide, Dale v. Boy Scout's of America,[119] the Court broadly interpreted the New Jersey Law Against Discrimination[120] (LAD) and ruled that the Boy Scouts must permit an openly-gay person to serve as an adult leader.[121] The Court held that the

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[116] Id. at 194 (quoting Twp. of Pennsauken v. Schad, 160 N.J. 156, 170 (1999).
[117] Id.
[118] Id. at 195.
[119] 160 N.J. 562 (1997), rev'd, 530 U.S. 640.
[120] N.J.S.A. 10:5-1 to -49.
[121] Boy Scouts, supra, 160 N.J. at 603-04.

Boy Scouts is a "place of public accommodation" under the LAD and, as such, cannot discriminate based on "affectional or sexual orientation."[122]

In reaching its conclusion regarding the meaning of the LAD, the Chief, writing for the Court, said, "[D]iscrimination threatens not only the rights and proper privileges of the inhabitants of [New Jersey,] but menaces the institutions and foundations of a free democratic State."[123] She rejected the Boy Scouts' First Amendment argument, stating that the reinstatement of Dale would not compel the Boy Scouts to express any message and concluding that "[t]o recognize Boy Scouts' First Amendment claim would be tantamount to tolerating the expulsion of an individual solely because of his status as a homosexual--an act of discrimination unprotected by the First Amendment freedom of speech."[124]

Now it is no secret that the case was ultimately reversed by the United States Supreme Court, which ruled in a 5-4 opinion that under the First Amendment the Boy Scouts have a right of "expressive association" to reject someone who does not "accept their principles."[125] For some, that is the end of the story. Yet, for me, there was a coda that answered the projections of the pundits regarding the Poritz Court. It came in the dissent filed on behalf of Justices Stevens and Souter who, relying on Justice Brandeis's defense of federalism, concluded that in rejecting the Poritz Court's interpretation of the New Jersey LAD, the Supreme Court of the United States did "not accord this 'courageous State' the respect that is its due."[126]

VI

[122] Id. at 624.
[123] Id. at 585 (quoting N.J.S.A. 10:5-3).
[124] Id. at 624.
[125] Dale v. Boy Scouts of America, 530 U.S. 640, 655-656 (2000).
[126] Id. at 664 (Stephens, J., dissenting).

Obviously, that is just a smattering of the cases decided by the Poritz Court.[127] Some are popular. Some are not. But I think what can be derived from them is this: a devotion to principle; a respect for the landmarks of the past; a willingness to stay the course despite criticism, and to stand alone on an issue if necessary; scholarship; an ability to change where change is called for; and, above all, a leitmotif of faithfulness to ensuring that the individual rights of our citizens are safeguarded. In so doing, the Court has remained independent; honored its precedent; modulated that precedent to fill in the gap between words and reality; interpreted statutes sensibly; respected our tripartite form of government; held fast to New Jersey constitutional principles; limned remedies to address present day realities; adhered to Justice Cardozo's exhortation that the final cause of law is the welfare of society;[128] and in every way modeled itself on its progressive predecessors.

That brings me to the Purple Thread that the Roman Philosopher Epictetus described as giving distinction to a garment.[129] Despite the title of this lecture, I have concluded that this thread is not just what connects the decisions of the Poritz Court to each other but what connects all of the decisions of the New Jersey Supreme Court from the beginning to today. Although scholars use changes in the identity of the Chief Justice as a divider for Supreme Court historical purposes, in truth there is no Vanderbilt Court, no Weintraub Court, no Hughes Court, no Wilentz Court, and not even a Poritz Court, but only the Supreme Court of New Jersey, made in

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[127] Since the original presentation of this lecture, the Poritz Court has decided a number of cases, perhaps none more notable than Lewis v. Harris. ___ N.J. ___ (2006). There the Court took New Jersey further than the vast majority of other states in upholding the equality rights of homosexuals. In a decision squarely within the social justice "thread" the Court ruled that "our State Constitution guarantees that every statutory right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples." Id. (slip op. at 64).

[128] Benjamin N. Cardozo, The Nature of the Judicial Process 66 (1922).

[129] EPICTETUS, DISCOURSES OF EPICTETUS 10 (George Long trans., Kessinger Publishing 2004) (1877).

the image that inspired the framers in 1947. That is not a criticism--it is the highest praise. It acknowledges that we do not change the Court--it changes us; that, as each era ends, the consciousness described by Joseph Campbell as surviving death persists;[130] that there is a legacy of independent principled decision-making to secure dignity for our fellow citizens that transcends the limits of space and time; and that there is a continuity of purpose that binds us to our past and will tether us to our future.

The award-winning Poet William Stafford[131] describes the thread this way:

> There's a thread you follow. It goes among things that change. But it doesn't change. People wonder about what you are pursuing. You have to explain about the thread. It is hard for others to see. While you hold it you can't get lost. Tragedies happen; people get hurt or die; and you suffer and get old. Nothing you do can stop time's unfolding. You don't ever let go of the thread.[132]

That is the way it has been for the Supreme Court of New Jersey; that is the way it is for us and the way it will always be. At least, that is how I see it.

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[130] JOSEPH CAMPBELL, THE POWER OF MYTH 107 (Betty Sue Flowers ed., Double Day 1988).
[131] Among Stafford's many honors and awards were the National Book Award, the Shelley Memorial Award, and a Western States Lifetime Achievement Award in Poetry. Poets.org, William Stafford, http://www.poets.org/poet.php/prmPID/224 (last visited July 13, 2006).
[132] WILLIAM STAFFORD, THE WAY IT IS 42 (Graywolf Press 1998).