A MIXED BAG: THE ARIZONA SUPREME COURT'S PROTECTIONS FOR HUMAN LIFE UNDER THE ARIZONA CONSTITUTION

Peter A. Gentala[1]

As a whole, it is impossible to label the jurisprudence of Arizona Supreme Court ("Court") as either "activist" or "judicially restrained." The Court has decided very few cases that directly impact legal protections for the sanctity of human life in Arizona. Consequently, the Court does not have a settled jurisprudence on whether there is a right to abortion under the Arizona Constitution. The Court's decisions, however, should raise some concern as to the direction it might take in the future. It has employed problematic legal reasoning and methodologies that, if relied upon in the future, could lead to activist decisions. These include (1) discovering a new "right" by construing a constitutional provision in an unprecedented way; (2) inconsistently applying state versus federal constitutional standards; (3) deciding a case quickly without adequately addressing Arizona law; and (4) failing to provide analysis when departing from long-standing, constitutional interpretation. It is unclear how much influence the Court's few sanctity-of-life cases will have in the future. Three of the Court's five members have joined the Court since it has decided these cases. Moreover, one of the Court's sanctity-of-life cases was decided before any of the Court's current members joined the Court.

The Arizona Supreme Court is relatively new in its composition. Four out of five justices have joined the Court since 2002. There is little available information about the views of the Court's current members on issues affecting life under the Arizona Constitution. One justice has participated in two abortion cases, voting in both cases to expand abortion's availability. One justice dissented from a decision expanding taxpayer-funded abortion in Arizona. Finally, one justice was involved as a law clerk in a federal decision that influenced the U.S. Supreme Court's *Roe v. Wade* decision.[2]

---

[1] B.A. 1998, Dallas Baptist University. M.A., J.D. 2002, Regent University. The author is the General Counsel for The Center for Arizona Policy.

[2] 410 U.S. 113 (1973).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

I. LIFE ISSUES

The Court has yet to address many of the key sanctity-of-human-life issues. Specifically, it has not ruled on Arizona's recently revised fetal homicide laws, on the rights of doctors and pharmacists not to participate in treatment or procedures they consider unethical, or on the issues surrounding embryo research.

The Court largely draws its abortion jurisprudence from the United States Supreme Court ("USSC"), but it has made two meaningful decisions concerning taxpayer-funding for abortion and the transportation of a minor to another state for an abortion. The Court also issued a very troubling decision on the removal of nutrition and hydration from medical patients.

Abortion

The Court does not recognize a fundamental right to an abortion based on the Arizona Constitution.[3] It does, however, recognize a right for indigent women to have publicly-funded abortions for health reasons, where the state is already funding abortions to preserve a mother's life.[4] While the Court has recognized a right to control one's medical treatment,[5] it has not applied this right to abortion.

The leading decision discussing abortion under the Arizona Constitution is *Simat Corporation v. Arizona Health Care Cost Containment System*. The *Simat* decision resulted from a lawsuit challenging the scope of abortion services offered to indigent women under the Arizona Health Care Cost Containment System ("AHCCCS"). By law, AHCCCS only covered abortion where a mother's life was threatened.[6] Additionally, by regulatory rule, AHCCCS

---

[3] Simat Corp. v. Ariz. Health Care Cost Containment Sys., 56 P.3d 28, 37 (Ariz. 2002).

[4] *Id.* at 34.

[5] Rasmussen v. Fleming, 741 P.2d 674, 682 (Ariz. 1987).

[6] *Simat*, 56 P.3d at 30.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

covered abortion in cases of rape or incest.[7] In this respect, Arizona's abortion coverage for indigent women was identical to that provided by the federal government under Medicaid.[8]

A group of abortion providers filed suit alleging the state's refusal to fund "medically necessary" abortions violated the Arizona Constitution.[9] The trial judge granted summary judgment in favor of the abortion providers and ordered the state to fund medically necessary abortions to the same extent it funded other pregnancy-related services.[10]

The trial judge was reversed by a unanimous, three-judge panel of the Arizona Court of Appeals. The court of appeals noted that, in *Harris v. McRae*, the United States Supreme Court upheld the federal Hyde Amendment, which prohibits federal funding of abortion except in the cases of life, rape, or incest.[11] It then rejected the abortion provider's claim that article II, section 8,[12] of the Arizona Constitution had been violated.

> Nothing in Article 2, § 8 suggests that the framers of the Arizona Constitution intended the right to privacy under our constitution to create a right of Arizona citizens to subsidized abortions to which they are not entitled under the United States Constitution, even if Arizona citizens have a greater right to privacy under the Arizona Constitution.[13]

Specifically, the court of appeals denied that the right to control medical care, recognized in the case *Rasmussen v. Fleming*,[14] required a different result.

---

[7] *Id.*

[8] Simat Corp. v. Ariz. Health Care Cost Containment Sys., 29 P.3d 281, 283 (Ariz. Ct. App. 2001).

[9] Specifically, the complaint alleged violations of ARIZ. CONST. art. II, § 8 (the so called "Privacy Clause"); ARIZ. CONST. art. II, § 4 (due process); ARIZ. CONST. art. II, § 13 (equal privileges and immunities); and ARIZ. CONST. art. IV, part 2, § 19(13) (prohibition against special laws). *Simat*, 29 P.3d at 283.

[10] *Simat*, 29 P.3d at 283.

[11] *Id.* at 284 (discussing Harris v. McRae, 448 U.S. 297 (1980)).

[12] This provision reads: "§ 8. Right to privacy: Section 8. No person shall be disturbed in his private affairs, or his home invaded, without authority of law." ARIZ. CONST. art. II, § 8. No delegate to the 1910 Arizona Constitutional Convention referred to the provision as the "right to privacy." The caption was added by a clerk in 1939. *See* Steven J. Twist & Len L. Munsil, *The Double Threat of Judicial Activism: Inventing New "Rights" in State Constitutions*, 21 ARIZ. ST. L.J. 1005, 1040 (1989).

[13] *Simat*, 29 P.3d at 285.

[14] 741 P.2d 674, 682 (Ariz. 1987). The *Rasmussen* decision is discussed at length *infra* at section I(C).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

> [E]ven if an AHCCCS patient has a right to direct her medical care under the Arizona Constitution, it does not follow that the patient has a constitutional right to receive financial assistance to obtain all potential treatments. The patient is free to elect to undergo an abortion and is not penalized by the statute for doing so.[15]

The court of appeals turned to the Privileges and Immunities Clause and again found that Arizona's abortion funding practices were constitutional. For a second time, the court of appeals noted the USSC's decision in *Harris v. McRae*.

> Like the United States Supreme Court, we conclude that Arizona's statutory scheme is not predicated on a constitutionally suspect classification. The Arizona law does not discriminate on the basis of sex. Nor does the classification impinge upon the exercise of a fundamental right. Moreover, the statutory scheme is rationally related to a legitimate government purpose, because the state has a legitimate interest in protecting unborn life and in promoting childbirth.[16]

Finally, the court of appeals summarily rejected the claim that Arizona had violated the prohibition on special laws from article IV, part 2, section 19, of the Arizona Constitution.[17]

The Arizona Supreme Court fashioned an entirely different resolution. By a vote of three to two, a majority of the Court ruled Arizona's abortion funding policy violated Arizona's Privileges and Immunities Clause.

The Court found that the "regulation in question discriminates between two classes of women: those who require recognized and necessary medical treatment to save their lives and those who require such treatment to save their health and perhaps eventually their lives."[18] It applied strict scrutiny analysis, saying there were two fundamental rights at stake: (1) the right to "choose abortion" under the federal Constitution; and (2) the right to equal treatment under the Arizona Constitution.[19] The Court acknowledged Arizona has a "compelling" interest in

---

[15] *Simat*, 29 P.3d at 286.

[16] *Id.* at 286-87 (citations omitted).

[17] *Id.* at 287.

[18] *Simat*, 56 P.3d at 32.

[19] *Id.*

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

"preserving and protecting potential life and promoting childbirth."[20] But the Court found this compelling interest was insufficient.

> Surely, a woman's right to choose preservation and protection of her health, and therefore, in many cases, her life, is at least as compelling as the state's interest in promoting childbirth.
>
> …
>
> The state would perhaps have a better case if it withheld funding for all abortions. But, given the right of choice announced in *Roe*, once the state allows abortion funding if immediately necessary to save the mother's life, the state's interest in promoting childbirth cannot be considered sufficiently compelling to justify refusing to protect the health of a seriously ill woman.[21]

The Court openly disagreed with the rationale of the USSC's decision in *Harris v. McRae*, saying it was "difficult to reconcile that decision with the basic teaching of *Roe*." The Court also speculated that *Harris* may have been overruled *sub silentio* by subsequent USSC decisions. [22] But—this discussion of USSC precedent notwithstanding—the Court made it clear its decision was based entirely on the Arizona Constitution and that it was not relying on any federal cases.[23] It did not reach the questions of whether article II, section 8, applies to abortion or abortion fundng.[24]

The majority decision was authored by Justice Stanley Feldman, who retired from the Court in 2003. He was joined by Thomas Zlaket, who retired from the court in 2002, and by the Court's current Chief Justice, Ruth McGregor. The Court's current Vice-Chief Justice, Rebecca Berch, authored a strong dissent. Her dissent was joined by former Chief Justice Charles Jones, who retired from the Court in 2005.

In her dissent, Vice Chief Justice Berch noted Arizona courts "have always followed the United States Supreme Court's equal protection . . . analysis" and that this analysis is embodied

[20] *Id.* at 33.

[21] *Id.* at 34.

[22] *Id.* at 34 n.3.

[23] *Id.* at 37.

[24] *Id.* at 32, 34.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

by *Harris v. McRae*. "Thus, the federal constitution requires that while a state may not interfere with a woman's right to choose to have an abortion, it need not fund abortions."[25]

The dissent objected to the majority's application of strict scrutiny instead of the rational basis test, which was used by the court of appeals.[26] The dissent questioned the majority's determination that fundamental rights were at stake, pointing out that the USSC itself had only applied rational basis review in funding cases.

> Construing Arizona's Privileges and Immunities Clause in a manner at odds with the traditional analysis, which has always been to interpret the equal protection clauses of the Fourteenth Amendment and the state constitution in similar fashion, constitutes a dramatic departure from prior Arizona case law.[27]

As for the majority's designation of a fundamental right to neutral funding, "the pivotal question—funding, not choice—has never been defined as fundamental and therefore the applicable standard of review is not strict scrutiny, but rather the rational basis standard."[28] Finally, the dissent faulted the majority for failing to defer to the Legislature.

> This is the type of policy choice routinely entrusted to the Legislature and, unless the choice is unlawful or unconstitutional, our jurisprudence and notions of separation of powers require that we defer to the Legislature's choice. If the public disagrees with the choices of its elected representatives, its recourse is to turn those representatives out of office. It is not for this court to make such policy decisions.
>
> …
>
> This court's analysis minimizes the State's interest in potential human life and ignores the fact that abortion differs in a profound way from other kinds of medical treatment. In no other "treatment" is a potential life terminated. Thus, the State has a heightened interest in protecting life that the majority dismisses too lightly.[29]

The *Simat* majority expressly limited the scope of its decision.

---

[25] *Id.* at 38-39 (Berch, J., dissenting).

[26] *Id.* at 40.

[27] *Id.* (internal quotation marks omitted).

[28] *Id.*

[29] *Id.* at 40-41 (citations omitted).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

> We reach no conclusion about whether the Arizona Constitution provides a right of choice, let alone one broader than that found in the federal constitution. We need not address the question because Arizona's citizens, like those of other states, are entitled to assert the right to choose as defined and articulated by the United States Supreme Court.[30]

While the majority decision stops short of applying article II, section 8, in the abortion context, it does take the time to mention that the clause gives individuals the right to "care for their health and to choose or refuse the treatment they deem best for themselves."[31] It also makes of point of noting its earlier decisions recognized a right "not found, or at least not yet found or recognized, under federal law."[32]

The *Simat* decision is striking for its independence. Rather than accepting the USSC's analysis in the identical questions posed in *Harris v. McRae*, the majority engaged in its own analysis and came to the opposite result. The decision's application of state versus federal constitutional standards is inconsistent. The majority purports to employ a "primacy" approach[33] of interpretation, resting its decision entirely on the state, as opposed to federal, constitution.[34] But *Simat* relies in part on authority from the USSC. As Chief Justice McGregor has explained since, "the court continued to apply the levels of scrutiny established by the United States Supreme Court to consider challenges brought under the federal equal protection clause."[35] So

[30] *Id.* at 37 (majority opinion).

[31] *Id.* at 32 n.2 (citing Rasmussen v. Fleming, 741 P.2d 674, 682 (Ariz. 1987)).

[32] *Id.* (citation omitted).

[33] There are three general approaches to interpreting state constitutions. In the "lockstep" approach, a state court follows the U.S. Supreme Court's interpretation of the similar provision of the federal Constitution. In the "primacy" approach the state court looks first to its own constitution and uses the federal courts only for guidance. Finally, in the "interstitial" approach the state court follows federal law unless there is a compelling reason to employ an interpretation separate from that of the U.S. Supreme Court. *See* Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 ARIZ. ST. L.J. 265, 267 (2003) (citations omitted).

[34] *Simat*, 56 P.3d at 37.

[35] McGregor, *supra* note 32, at 270.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

the *Simat* decision really is a novel, hybrid approach. At the same time, the Court declined to follow *Harris v. McRae* while borrowing from other USSC authority.

Finally, the *Simat* decision is also noteworthy because of the roles of two current Court justices. Chief Justice Ruth McGregor was in the majority, while Vice Chief Justice Rebecca Berch dissented.

Another important case in Arizona's abortion jurisprudence came down in 1999, when the Arizona courts decided the case of Jackie Doe, a 14-year-old ward of the state who was raped and became pregnant. The girl was both dependent on the state and a juvenile detainee in the custody of the Maricopa County juvenile authorities.[36] When she was 24-27 weeks pregnant, she went to court seeking an abortion. The trial judge ordered that she be taken to Kansas for the purpose of having a late-term, therapeutic abortion.[37] Transfer to Kansas was ordered because no Arizona physicians would perform an abortion on the minor because of her advanced pregnancy.[38] Later, the trial judge modified his order to state that "funds of the State of Arizona not be used in either transportation or performance of the procedure."[39]

On appeal, the court of appeals stayed the trial judge's order to enable Jackie Doe to be examined by an Arizona physician, to determine the viability of the baby before being taken to Kansas. The court of appeals also ordered that if the baby was viable, an Arizona physician must be on hand to ensure that Arizona, and not Kansas, law would be followed.[40]

---

[36] Doe v. Ryan (Jackie Doe), No. CV-99-0343-SA, slip op. at 5 (Ariz. filed Aug. 30, 1999) (Jones, Vice C.J., dissenting), *available at* http://www.supreme.state.az.us/orders/scorder/1999_2002Orders/dissent831.pdf.

[37] Doe v. Ryan (Jackie Doe), No. CV-99-0343-SA, slip op. at 1-2 (Ariz. filed Aug. 29, 1999) (majority opinion), *available at* http://www.supreme.state.az.us/orders/scorder/1999_2002Orders/order830.pdf.

[38] *Id.* at 2 ("It also appeared that no Arizona doctor was willing or available to render the necessary medical treatment and that travel out of state would be necessary."); *Jackie Doe*, *supra* note 35, at 7 (Jones, Vice C.J., dissenting) ("Doe's counsel acknowledged that no Arizona physician was willing to perform an abortion at Doe's stage of gestation."). Under Arizona law, an abortion cannot be performed on a viable fetus, unless it is necessary for the life or health of the mother. ARIZ. REV. STAT. ANN. § 36-2301.01 (2007).

[39] *Jackie Doe*, *supra* note 35, at 6 (Jones, Vice C.J., dissenting).

[40] *Jackie Doe*, *supra* note 36, at 2 (majority opinion).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

The next day, the Court vacated the order of the court of appeals by a 3-2 majority. The Court issued a short, unpublished opinion. The only member of the current Court to take part in the *Jackie Doe* decision is then-Justice McGregor. She voted with the majority to allow Jackie Doe to be taken to Kansas for the late-term abortion.[41] Then-Chief Justice Zlaket and Vice Chief Justice Jones dissented. Their written dissents object to the precipitous timeframe the Court had to make its decision and that the Court had been given an inadequate record, legal authority, and arguments of counsel.[42] Vice Chief Justice Jones expressed his concern that the laws of Arizona were being ignored:

> The law of Arizona applies to a ward of this state, in particular a juvenile who is lawfully detained by constituted Arizona authorities. At the least, our law ought first to be ascertained and then followed, not ignored. In my view, we have not followed our law. The relief available to Doe should have been confined to that provided under the Arizona statutes.[43]

The *Jackie Doe* decision is troubling because a majority of the Court approved of a judicial order apparently designed to skirt Arizona's law protecting viable, unborn human life. The case raised numerous difficult questions, such as the differences between Arizona and Kansas law with regard to late-term abortions, whether public-funding of abortion in violation of state law was occurring,[44] and whether Jackie Doe's right to abortion outweighed the state's legitimate penological interest[45] in her continued custody. The Court's *Jackie Doe* decision fails to discuss any of these issues.

---

[41] *Id.* at 4.

[42] Jackie Doe, *supra* note 35, at 1-5 (dissenting opinions).

[43] *Id.* at 8.

[44] *See* ARIZ. REV. STAT. ANN. § 35-196.02 (2007) (prohibiting public-funding of abortion).

[45] *See generally* Turner v. Safley, 482 U.S. 78, 89 (1987) (holding that prison regulations impinging on an inmate's constitutional rights are valid if they are reasonably related to legitimate penological interests); Doe v. Arpaio, 150 P.3d 1258, 1262-67 (Ariz. Ct. App. 2007) (applying *Turner's* analysis to inmate's claim that prison's abortion policy was unconstitutional); Victoria W. v. Larpenter, 369 F.3d 475, 486 (5th Cir. 2004) (applying *Turner's* analysis to inmate's claim that prison's abortion policy was unconstitutional).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

Arizona's additional attempts at regulating the abortion industry have met with varying degrees of success when challenged in court. The following abortion laws are enforceable in Arizona:

- Physician assistants may not perform surgical abortions.[46]
- Abortion is prohibited at state universities and colleges.[47]
- There is a duty to preserve the life of fetuses delivered alive.[48]

Additionally, Arizona has a number of abortion laws that are not currently enforceable due to federal court decisions or on-going federal litigation. These include the following:

- Partial-birth abortion banned.[49]
- General prohibition on medical abortions.[50]
- Ban on soliciting an abortion.[51]
- Ban on advertising for abortion services.[52]
- Abortion clinic regulations.[53]

Notably, Arizona does not have an informed consent law.

---

[46] ARIZ. REV. STAT. ANN. § 32-2501 (2007).

[47] ARIZ. REV. STAT. ANN. § 15-1630 (2007). This law was upheld by the Arizona Supreme Court in Roe v. Ariz. Bd. of Regents, 549 P.2d 150 (Ariz. 1976).

[48] ARIZ. REV. STAT. ANN. § 36-2301 (2007).

[49] ARIZ. REV. STAT. ANN. § 13-3603.01 (2007), *invalidated by* Planned Parenthood of S. Ariz., Inc., v. Woods, 982 F. Supp. 1369 (D. Ariz. 1997).

[50] *Id.*at § 13-3603, *invalidated by* State v. Wahlrab, 509 P.2d 245 (Ariz. Ct. App. 1973) (applying Roe v. Wade, 410 U.S. 113 (1973)).

[51] *Id.* at § 13-3604, *invalidated by* State v. New Times, Inc., 511 P.2d 196 (Ariz. Ct. App. 1973) (applying Roe v. Wade, 410 U.S. 113 (1973)).

[52] *Id.* at § 13-3605, *invalidated by* State v. New Times, Inc., 511 P.2d 196 (Ariz. Ct. App. 1973) (applying Roe v. Wade, 410 U.S. 113 (1973)).

[53] ARIZ. REV. STAT. ANN. §§ 36-449, 36-449.01 to .03, 36-2301.02 (2007), *invalidated in part by* Tucson Woman's Clinic v. Eden, 379 F.3d 531 (9th Cir. 2004).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

Protection of the Unborn from Criminal Violence

In 1985, an Arizona man was convicted of murdering a woman and killing her unborn child. On appeal, the Court reversed the manslaughter conviction for the killing of the unborn child.[54] The applicable portion of the manslaughter statute proscribed:

> Knowingly or recklessly causing the death of an unborn child at any stage of its development by any physical injury to the mother of such child which would be murder if the death of the mother had occurred.[55]

The Court found that this language "explicitly requires two separate mental states, one toward the mother, and the other toward the unborn child."[56] The doctrine of "transferred intent," the Court ruled, could not be applied to this statute.[57] The Court concluded that the trial judge's jury instruction was faulty, because it allowed the jury to convict the defendant "without finding the mental state toward the unborn child required by our statute."[58] Thus, Arizona's protection for the unborn against criminal violence was hampered by a loophole, making it much harder to obtain a fetal homicide conviction.

The Arizona Legislature revisited the fetal homicide laws in 2005 and made changes that addressed the loophole.[59] The 2005 revisions to the fetal homicide laws have not since been construed by the courts.

Assisted Suicide

The Court does not recognize a right to physician-assisted suicide. State law clarifies that the legal authority of medical patients to authorize others to make decisions on their behalf does

---

[54] State v. Amaya-Ruiz, 800 P.2d 1260 (Ariz. 1990).

[55] ARIZ. REV. STAT. ANN. § 13-1103(A)(5) (2007) (amended 2005).

[56] *Amaya-Ruiz*, 800 P.2d at 1281.

[57] *Id.*

[58] *Id.* (emphasis omitted).

[59] *See* ARIZ. REV. STAT. ANN. §§ 13-604, 13-604.01, 13-703, 13-1102, 13-1103, 13-1104, 13-1105, 13-4062, 31-412, 41-1604.11, 41-1604.13 (2007).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

not extend to assisted suicide or mercy killing.[60] Further, Arizona law criminalizes assisted suicide.[61]

The Court recognizes a right to control and refuse medical treatment. The Court finds this right in article II, section 8, of the Arizona Constitution. The case in which the Court announced this right, *Rasmussen v. Fleming*,[62] is important to sanctity-of-life issues in Arizona, for two reasons. First, it rests on broad reasoning that permits the removal of nutrition and hydration from disabled patients in almost all scenarios. Second, it applies beyond cases dealing with the refusal of medical treatment, because it recognizes a general right to control medical treatment.

The *Rasmussen* case revolved around Mildred Rasmussen, an elderly woman who lived under supervised care at a nursing home. After living in the nursing home for several years, Ms. Rasmussen's physical and mental condition declined to the point where she had to receive nutrition and hydration through a tube.[63] Eventually, a guardianship proceeding was commenced for the purpose of consenting to the removal of the tube on Ms. Rasmussen's behalf. The trial court concluded Ms. Rasmussen was in a "chronic vegetative state" and was "incapacitated" under Arizona law.[64] The trial court appointed a guardian for Ms. Rasmussen, without restriction. The trial court's decision was appealed, but Ms. Rasmussen died before the court of appeals could render a decision. Despite Ms. Rasmussen's death, the court of appeals rendered a decision in the case. It held there was a federal constitutional right to refuse medical treatment, as well as a state constitutional right, based on article II, section 8, of the Arizona Constitution and that this right could be asserted by a family member or a guardian.[65]

---

[60] ARIZ. REV. STAT. ANN. § 36-3210 (2007).

[61] ARIZ. REV. STAT. ANN. § 13-1103(A)(3) (2007).

[62] 741 P.2d 674 (Ariz. 1987).

[63] *Id.* at 679.

[64] *Id.* at 680.

[65] *Id.*

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

The Court granted review of the case and proceeded to render a decision, despite the fact that Ms. Rasmussen was deceased.[66] The Court noted that the USSC had not yet[67] held there was a federal constitutional right to refuse medical treatment.[68] Turning to the Arizona Constitution, the Court held that article II, section 8, provides a right to refuse medical treatment.[69] Concerning state common-law, the Court held that "the doctrine of informed consent—a doctrine borne of the common-law right to be free from nonconsensual physical invasions—permits an individual to refuse medical treatment."[70] The Court concluded that "Rasmussen's right to refuse medical treatment still existed despite her incompetency and her failure to articulate her medical treatment desires prior to becoming incompetent."[71] It went on to hold that, in Arizona, a guardian has the legal authority to refuse medical treatment on behalf of an incompetent patient.[72]

The Court laid out two standards that guide a guardian's discretion. First, under "substituted judgment," a patient's living will, oral directives, power of attorney, reactions to others, and religious beliefs are examined for evidence of the patient's desire.[73] Second, where there is no evidence of a patient's wishes, the "best interests" standard is used. Under this standard, a number of factors may be consulted, including "relief from suffering, preservation or restoration of functioning, and quality and extent of sustained life."[74] In the years since the *Rasmussen* decision, the Arizona Legislature has codified both standards.[75] As a final matter,

---

[66] *Id.*

[67] The federal constitutional right to refuse medical treatment was subsequently recognized by the U.S. Supreme Court in Cruzan v. Mo. Dep't of Health, 497 U.S. 261 (1990).

[68] *Rasmussen*, 741 P.2d at 681-82.

[69] *Id.* at 682.

[70] *Id.* at 683.

[71] *Id.* at 686.

[72] *Id.* at 688.

[73] *Id.* at 689 n.21.

[74] *Id.* at 689 (citation omitted).

[75] ARIZ. REV. STAT. ANN. §§ 36-3203(C), 36-3206(G) (2007).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

the Court also held that a "clear and convincing" evidentiary standard should be used by courts resolving disputes over removal of nutrition and hydration.[76]

After *Rasmussen*, guardians of incapacitated persons in Arizona are recognized with broad latitude to refuse provision of nutrition and hydration on behalf of the patient. Under *Rasmussen's* "best interests" standards, a guardian may refuse treatment in a situation where there is no objective evidence of the patient's wishes by undertaking an independent evaluation of the patient's quality of life.

The constitutional centerpiece of the *Rasmussen* decision is the Court's ruling that article II, section 8, grants a right to refuse medical treatment.

> Although [Article 2, § 8] has been invoked most often in a Fourth Amendment context, we see no reason not to interpret "privacy" or "private affairs" as encompassing an individual's right to refuse medical treatment. An individual's right to chart his or her own plan of medical treatment deserves as much, if not more, constitutionally-protected privacy than does an individual's home or automobile.[77]

Traditionally, article II, section 8, had been interpreted as coextensive with the Fourth Amendment to the United States Constitution.[78] *Rasmussen* marked the first time the Court applied article II, section 8, to anything beyond testing the legality of searches and seizures.[79] Indeed, before *Rasmussen* was decided, no Arizona court accepted that the clause had any application outside of the search and seizure context.[80]

---

[76] *Rasmussen*, 741 P.2d at 691.

[77] *Id.* at 682.

[78] *See*, *e.g.*, Malmin v. State, 246 P. 548, 549 (Ariz. 1926) ("Section 8, article 2, of the state Constitution, however, although different in its language, is of the same general effect and purpose as the Fourth Amendment, and, for that reason, decisions on the right of search under the latter are well in point on section 8. . . .").

[79] Jodi A. Jerich, *Considerations of the Arizona Legislature: The Effects of State Constitutionalism*, 35 ARIZ. ATT'Y 30, 33-34 (Dec. 1998).

[80] Twist & Munsil, *supra* note 11, at 1046, 1048.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

Some commentators believe the *Rasmussen* decision has opened the door for the Court to create a right to abortion under the Arizona constitution.[81] For its part, the Court came very close to applying *Rasmussen* to abortion in the *Simat* decision, but it chose, instead, to rest its holding on the Privileges and Immunities Clause.[82]

Healthcare Rights of Conscience

No hospital or healthcare worker in Arizona may be required to perform abortions.[83] The Court has never addressed the matter. Unfortunately, pharmacists in Arizona do not have a right to refrain from participating in treatment that violates their conscience. There are no cases that address rights of conscience for pharmacists.

Cloning & Destructive Embryo Research

Arizona law bans public funding of cloning.[84] Arizona law does not restrict research that destroys human embryos. The Court has never addressed human cloning or destructive embryo research.

The Court's jurisprudence touching the sanctity of human life is a mixed bag. On one hand, it is fortunate that the Court has never announced a right to abortion under the Arizona Constitution. On the other hand, the Court claims the Arizona Constitution is more expansive in its coverage of individual freedoms than the federal Constitution. Already, the Court has invoked the broader rights of the Arizona Constitution to expand the availability of taxpayer-funded abortion and create a right to refuse medical treatment. Looking to the future, much depends on whether the Court will continue to give expansive interpretations to provisions of the Arizona Constitution.

---

[81] *See* Stanley G. Feldman & David L. Abney, *The Double Security of Federalism: Protecting Individual Liberty Under the Arizona Constitution*, 20 ARIZ. ST. L.J. 115, 134 (1988); Jerich, *supra* note 84, at 34.

[82] *See Simat*, 56 P.3d at 32 n.2.

[83] § 36-2151 (2007).

[84] ARIZ. REV. STAT. ANN. § 35-196.04 (2007).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

II. JUDICIAL RESTRAINT

What of the Arizona Supreme Court's faithfulness to the judicial role as a whole? Does it have a restrained view of its powers? For the reasons discussed above, the *Rasmussen*, *Jackie Doe*, and *Simat* decisions are the most prominent examples of abuse of judicial power. But the Court has also issued other decisions that raise troubling questions about its view of its own powers.

In 1994, the Arizona Supreme Court issued a plurality opinion striking down Arizona's scheme for financing public schools.[85] In the decision, *Roosevelt Elementary School District v. Bishop* (*Roosevelt*), the Court ruled that the Arizona Constitution's requirement that the Legislature establish and maintain a "general and uniform public school system" voided the Legislature's practice of using money from the state, school districts, and counties to fund public education.[86] "The [legislative] scheme," the Court explained "is a combination of heavy reliance on local property taxation, arbitrary school distinct boundaries, and only partial attempts at equalization."[87] But the Court stopped short of ordering specific relief.

> There are doubtless many ways to create a school financing system that complies with the constitution. As the representatives of the people, it is up to the Legislature to choose the methods and combinations of methods from among the many that are available. Other states have already done so.
>
> We therefore reverse the judgment of the superior court and remand the case for entry of judgment declaring that art. XI, § 1 of the Arizona Constitution requires the Legislature to enact appropriate laws to finance education in the public schools in a way that does not itself create substantial disparities among schools, communities or districts. Because the present scheme is the source of these disparities, it is not in compliance with art. XI, § 1. The trial court shall retain jurisdiction to determine whether, within a reasonable time, legislative action has been taken.[88]

[85] Roosevelt Elem. Sch. Dist. v. Bishop, 877 P.2d 806 (Ariz. 1994).

[86] *Id.* at 810, 814-16 (relying on article XI, section 1 of the Arizona Constitution)

[87] *Id.* at 815.

[88] *Id.* at 816 (footnote omitted).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

Then Vice Chief Justice James Moeller dissented from the plurality decision.[89] Vice Chief Justice Moeller faulted the plurality for invoking the Arizona Constitution to void the school financing scheme, when substantially the same financing scheme existed at the time the Arizona Constitution was adopted.[90] Vice Chief Justice Moeller also maintained that the Court was acting outside of its appropriate role. "Questions," he explained, "concerning the fine tuning of the financing schemes should appropriately be addressed to the Legislature."[91]

In the *Roosevelt* decision, the Arizona Supreme Court exceeded its authority. It used the Arizona Constitution to strike down a method for financing public schools that had been in place since before the Constitution was adopted. While the Court stopped short of ordering the Legislature to enact specific legislation, as the litigation progressed the Court's supervision of the Legislature became more pronounced.[92] In the *Roosevelt* decision—and in the litigation that followed—the Arizona Supreme Court failed to respect the constitutional province of the Legislature and adhere to its own constitutional role.

It is important to note that none of the current members of the Arizona Supreme Court were on the Court when it decided *Roosevelt*.

The Arizona Supreme Court has also limited the legislature's constitutional authority to protect victims of crime. In 1999, the Arizona Supreme Court agreed with a death row inmate that an Arizona law limiting the time-frame for inmates to seek post-conviction relief was unconstitutional.[93] Specifically, in *State ex rel. Napolitano v. Brown*, the Court found that the Arizona law was a violation of the separation of powers because it prescribed a different time

---

[89] *Id.* at 823 (Moeller, Vice C.J., dissenting).

[90] *Id.* at 825.

[91] *Id.* at 827.

[92] *See* Hull v. Albrecht, 950 P.2d 1141, 1146 (Ariz. 1997) (instructing the Legislature "A reasonable time has passed and it is now time to act. Choose a system that ensures adequate capital facilities statewide."); Hull v. Albrecht, 960 P.2d 634 (Ariz. 1998) (ruling that legislative attempt to comply with *Roosevelt* decision was also unconstitutional).

[93] *See* State *ex rel.* Napolitano v. Brown, 982 P.2d 815 (Ariz. 1999).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

deadline for post-conviction relief than the one set by the Court itself.[94] "The Constitution . . .," the Court reasoned, "vests the power to make procedural rules exclusively in this court."[95]

But, the Constitution also gives the Legislature rule-making authority. In 1990, Arizona voters adopted an amendment to the Constitution which specifically authorized the Legislature to enact procedural rules "to ensure the protection of [victims'] rights."[96] The State argued that this provision authorized the Legislature to enact a different deadline for post-conviction relief because it was part of giving victims swift resolution of criminal cases.[97]

The Court disagreed. First, the Court claimed that there was no evidence that the Legislature was trying act pursuant to its constitutional authority to protect victims' rights.[98] Second, the Court said that even if the Legislature was acting according to its constitutional authority, that authority did not extend beyond the protection of rights "unique and peculiar to crime victims . . . ."[99] The right to "a speedy trial" was not unique to crime victims, the Court reasoned, because both criminal defendants and the "judicial system as a whole" were also interested in ensuring prompt resolution of criminal cases.[100] Finally, the Court said that other constitutional rights of victims, such as the right to be treated fairly, the right to receive information, the right to be present and heard at criminal proceedings, and the right to refuse discovery requests from criminal defendants were not advanced by tightening the deadlines for post conviction relief.[101] The Court's summary of its holding offers some explanation for its narrow reading of the Legislature's authority to enact rules for the protection of victims' rights:

---

[94] *Id.* at 817, 819.

[95] *Id.* at 817 (citing ARIZ. CONST. art. VI, § 5).

[96] *Id.* at 816 (quoting ARIZ. CONST. art. II, § 2.1(A), cl. 11).

[97] *Id.* (citing ARIZ. CONST. art. II, § 2.1(A), cl. 10).

[98] *Id.* at 817.

[99] *Id.* at 818.

[100] *Id.*

[101] *Id.*

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

> Because the time limits of the amendments do not create rights or involve rights unique and specific to victims, and because they are not needed to protect the enumerated rights of [victims], paragraph ten of the ["Victim's Bill of Rights"] cannot serve as a source of authority for the Legislature to usurp this court's rulemaking authority and enact time limits contrary to those set forth in Rule 32.4.c.[102]

It is true that originally the Arizona Constitution only granted the Arizona Supreme Court the authority to make procedural rules.[103] But, when the voters amended the Constitution in 1990, the Legislature was also given rule making authority. Specifically, the Legislature was granted authority to "enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims," including the right "[t]o a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence."[104] The Arizona Supreme Court's ruling in *State ex rel. Napolitano v. Brown* essentially reads this right out of the Constitution. The Court's declaration that the Constitution's protections for victim's rights are limited to those that are "unique and peculiar to crime victims" has no constitutional justification. The Court's *ipse dixit* appears designed gut the plain meaning of a constitutional provision in order to maintain its own exclusive control over rulemaking authority.

The *State ex rel. Napolitano* decision was authored by now Chief Justice Ruth McGregor. Chief Justice McGregor is the only member of the current Court who took part in the decision.

The Arizona Supreme Court's understanding of its role also arose when it considered the Governor's line-item veto authority. In 2003, the Court decided not to reach the merits of a lawsuit raising the constitutional scope of the Governor's line-item veto authority. In *Bennett v. Napolitano*, the President of the Senate and the Speaker of the House of Representatives, along with the majority leaders of the both the Senate and House, claimed that Governor Janet Napolitano had exceeded her veto authority when she vetoed several provisions from four bills

---

[102] *Id.* at 818-19.

[103] *See* ARIZ. CONST. art. VI, § 5, cl. 5.

[104] ARIZ. CONST. art. II, §§ 2.1(D), 2.1(A), cl. 10.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

that comprised the state's operating budget for fiscal year 2004.[105] Specifically, the lawmaker-plaintiffs argued that some of the items the Governor vetoed were not appropriate because they were not "appropriations" – the sole legitimate object of the Governor's line-item veto authority under the Arizona Constitution.[106] In one instance, the Governor vetoed a source for appropriated funds, but left the appropriation intact, asserting that the funds should be drawn from elsewhere.[107]

The Court ruled that the Legislators did not have standing to bring the suit. The Court found that the plaintiffs had not "shown [an] injury to a private right or to themselves personally . . . ."[108] The Court also found that the four plaintiffs were not sufficient to raise the Legislature's interest as a whole.

> When a claim allegedly belongs to the legislature as a whole, four members who bring the action without the benefit of legislative authorization should not, except perhaps in the most exceptional circumstances, be accorded standing to obtain relief on behalf of the Legislature.[109]

The Court acknowledged that it was free to consider the merits even without "particularized injury." Nevertheless, the Court determined that it would not waive the basic standing requirements in this case.[110] The Court argued that waiving the standing requirements would cause it to become a "referee of a political dispute."[111] The Court also noted that the Legislature could have attempted to override the Governor's vetoes.[112] Finally, the Court observed that the Legislature used an "unusual method" to structure its legislation, and it speculated that the Legislature might have actually engaged in unconstitutional "logrolling" –

[105] 81 P.3d 311, 313 (Ariz. 2003).

[106] *Id.* at 313-15.

[107] *Id.* at 314.

[108] *Id.* at 317.

[109] *Id.* at 318.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 318-19.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

combining nongermane subjects together in the same bill.[113] This last conjecture the Court entertained at the invitation of an *amicus curiae* brief. Neither of the parties raised or discussed it.[114]

The Court's *Bennett* decision rests on dubious ground. In the first place, the Court's conclusion that the Legislators had not sustained a particularized injury is far from clear. If the Governor really did exceed her line-item veto authority, the plaintiffs did not merely suffer a political defeat. Addressing the merits would have enabled the Court to clearly distinguish whether it was a case of shrewd but innocuous politicking, or unconstitutional usurpation. Secondly, the Court in essence created a requirement that Legislators obtain authorization from a vote of the entire legislative body before raising constitutional claims in court. This new requirement falling upon one of three co-equal branches of government could have broad implications for future disputes involving the separation powers. Moreover, the Court itself had earlier ruled on a challenge to an Arizona Governor's veto authority brought by a single Legislator.[115] Finally, the Court's discussion of whether it should waive standing as a prudential matter came close to addressing the legal merits of dispute. In *dicta*, the Court discussed whether the Legislature had engaged in unconstitutional "logrolling."[116] The Court identified strongly with the Governor's policy position. "A governor presented with a multi-subject bill inevitably faces a 'Hobson's choice.' She must either veto the entire bill, including the measures she supports, or accept the entire bill, including the measures she opposes."[117] With musings such as this it's hard to share the Court's confidence that it avoided wading into a political dispute.[118]

[113] *Id.* at 319-20.

[114] *Id.* at 319.

[115] *See* Rios v. Symington, 833 P.2d 20 (Ariz. 1992).

[116] *See Bennett*, 81 P.3d at 319.

[117] *Id.*

[118] *See id.* at 318.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

Former Chief Justice Charles Jones authored the *Bennett* decision. The concurring justices are all current members of the Court. They are now Chief Justice Ruth McGregor, now Vice Chief Justice Rebecca White Berch, Justice Michael Ryan, and Justice Andrew Hurwitz.

Three years later the Governor's line-item veto authority was back before the Court. This time, the Court reached the merits of the case and agreed with the Legislature that the Governor had exceeded her authority. In *47th Legislature v. Napolitano* the Legislature challenged the Governor's veto of a provision from a bill creating pay raises for state employees.[119] The vetoed provision exempted certain state employees from the state merit system.[120] Before filing the action, each house of the Legislature voted to authorize its presiding officer to bring a legal challenge to the Governor's veto.[121]

The Court found that the Legislature had standing because, if the Governor exceeded her authority, it had suffered an "institutional injury."[122] The Court cited a USSC decision where a group of 21 state senators who had opposed a proposed constitutional amendment were held to have standing when the Lieutenant Governor broke a tie by voting in favor of the resolution.[123] The block of Legislators, the USSC said, could assert a claim of institutional injury because, absent the Lieutenant Governor's vote, they had sufficient votes to defeat the measure. The Court held that the circumstances before it were analogous.

> A majority of the members of the legislature can pass legislation, Ariz. Const. art. 4, pt. 2, § 15, subject to the governor's veto power. If, as the Legislature asserts, the Governor's item veto was unconstitutional and thus invalid, the Legislature's right to have the votes of a majority given effect has been overridden and the Legislature, as an institution, has sustained a direct injury to its authority to make and amend laws by a majority vote.[124]

---

[119] 143 P.3d 1023, 1025 (Ariz. 2006).

[120] *Id.*

[121] *Id.*

[122] *Id.* at 1028.

[123] *Id.* at 1027 (citing Coleman v. Miller, 307 U.S. 433 (1939)).

[124] *Id.* at 1028.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

The Court distinguished its own earlier ruling in *Bennett*. "In this case, both the House of Representatives and the Senate authorized the Forty-seventh Legislature to challenge the Governor's [veto] . . . making it clear that the Legislature as a body intended to challenge the Governor's action."[125]

The Court also rejected the Governor's argument that the Legislature did not have standing because it did not hold a vote to override the veto. "[I]f the Governor did, in fact, exceed her item veto authority, the Legislature should not be put to the task of attempting to override an invalid veto before being able to challenge an allegedly unauthorized action in court. The alleged injury to the Legislature as a body occurred, if at all, when the Governor vetoed legislation approved by a majority of each house."[126] The Court went on to rule for the Legislature, saying the vetoed provision was not an "appropriation" subject to the Governor's item veto authority.[127]

The Court's ruling in *47th Legislature* highlights its selective approach to standing in *Bennett*. Requiring that the Legislature hold a vote to authorize a legal challenge may undermine the Legislature's ability to vindicate its institutional authority to "amend laws by a majority vote."[128] Legislation is different from litigation. It's possible that a majority of the Legislature might vote for legislation, but not vote to hire a team of attorneys to file and prosecute a lawsuit. In such cases, constitutional injury goes unaddressed. Moreover, the Court's apprehensions over involving itself in a political dispute from *Bennett* are no where to be found in the *47th Legislature* decision. Thus raising the question of whether in the clear setting of an inter-branch, constitutional dispute there was ever any validity to them in the first place.

---

[125] *Id*.

[126] *Id*.

[127] *Id.* at 1030.

[128] *Id.* at 1028.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

III. THE COURT

There are five justices on the Arizona Supreme Court. Each justice is appointed by the Governor from a list of three recommended candidates. The slate of recommended candidates is chosen by a bipartisan commission.[129] Justices serve six-year terms.[130] Afterward, they may stand for retention by the voters in a general election.[131] Justices must retire at age 70.[132]

Since 1974, judges in Arizona's two most populous counties have been appointed and retained through the "merit selection" system.[133] Only two judges have ever failed to be retained by the voters.[134] In both cases, the county bar opposed retention of the judges due to low approval ratings from surveys of attorneys.[135] Several judges have been retained despite being the subject of unfavorable public attention. For example, in 1990, a Maricopa County Superior Court judge was retained, even though the bar association recommended that he be rejected.[136] In 1996, a Maricopa County Superior Court judge was retained even though he received the lowest approval rating of any of the thirty-five judges up for retention from Maricopa County that year.[137] The most shocking retention came in 1988, when voters retained a Maricopa

---

[129] *See generally* Ariz. Supreme Court, Judicial Merit Selection and Retention in Arizona [hereinafter Merit Selection], http://www.supreme.state.az.us/jnc/meritpage.htm (last visited June 29, 2007).

[130] ARIZ. CONST. art. VI, § 4.

[131] Merit Selection, *supra* note 134.

[132] ARIZ. CONST. art. VI, § 39.

[133] *See* A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643, 654 (1998).

[134] *See* John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 881 (1990); Pelander, *supra* note 138, at 658.

[135] *Id.*

[136] Pelander, *supra* note 138, at 661.

[137] *Id.* at 719-20.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

County Superior Court judge after the judge was convicted of criminal possession of marijuana.[138]

There have been a few attempts by political committees to oppose candidates for judicial retention. In 1993, a political action committee opposed the retention of a Pima County Superior Court judge. The judge retired before the next election cycle in which he was to stand for retention.[139] In 2004, a political committee urged the voters not to retain two Maricopa County Superior Court judges.[140] Despite this effort, both judges were retained in office.[141]

At this point in time, Arizona's system of judicial retention provides little accountability. The judicial retention vote is functionally a rubber stamp of approval. Arizona voters have yet to vote out a judge based on disagreement with activist judicial rulings. The only two times voters did not retain a sitting judge was because the state bar itself campaigned against retention. And several judges have been retained despite an array of negative circumstances, including negative press, political campaigns against them, and even a recent criminal conviction. Four of the five Court justices have stood for retention at least once. The public has retained each justice it has voted on by an overwhelming margin.

Chief Justice Ruth McGregor has been on the Court since 1998. Previously, she was on the Arizona Court of Appeals, where she served as both Vice Chief Judge and Chief Judge.[142] She served as law clerk for former USSC Justice Sandra Day O'Connor.[143] Chief Justice McGregor practiced law for 15 years before she became a judge.[144]

---

[138] *Id.* at 661.

[139] *Id.* at 723-24.

[140] See Michael Kiefer, *Judges/Group Says Its Efforts Hurt Pair's Poll Ratings*, ARIZ. REPUBLIC, Nov. 4, 2004, at 9B.

[141] CTR. FOR ARIZ. POLICY, JUDICIAL SELECTION AND RETENTION 3 (2007), http://azpolicy.org/pdf/GFI/Jud1SelectionandRetention.pdf.

[142] Ariz. Supreme Court, Profile of Chief Justice Ruth V. McGregor (Sept. 15, 2005) [hereinafter McGregor Profile], http://www.supreme.state.az.us/azsupreme/mcgregor.htm.

[143] *See generally* Ruth McGregor, *Justice O'Connor: Twenty Years of Shaping Constitutional Law*, 32

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

In her time on the Court, Chief Justice McGregor has taken part in two abortion cases. In both cases, she voted to expand abortion rights. First, she took part in the *Jackie Doe* decision. She voted with the majority to send the pregnant minor, who was a ward of the state, across state lines for the purpose of obtaining an abortion.[145] Chief Justice McGregor also took part in the *Simat* decision, which is discussed more fully above. Her vote with the majority's unorthodox interpretation of the Privileges and Immunities Clause raises concerns that she may again apply that clause, or perhaps, article II, section 8, to expand abortion in Arizona.

Chief Justice McGregor has delivered two published speeches in honor of retired USSC Justice Sandra Day O'Connor.[146] In one of these, she commented that "[f]rom equal protection to the religion clauses to reproductive rights, Justice O'Connor has blazed trails and left her mark upon the law."[147]

In 2003, Chief Justice McGregor published a noteworthy law review article on judicial interpretation of the Arizona Constitution.[148] In the article, she surveys the three main approaches to interpreting a state constitution and concludes that the Court has not been consistent in its own approach.[149] She briefly mentions the *Simat* decision when discussing the Privileges and Immunities Clause.[150] Notably, Chief Justice McGregor does not discuss article II, section 8, despite the fact that it is one of the most prominent examples of a state constitutional provision the Court has interpreted independently of the Federal Constitution.

MCGEORGE L. REV. 821 (2000-2001) (paying tribute to Justice O'Connor); Ruth V. McGregor, *A Tribute to Justice Sandra Day O'Connor*, 119 HARV. L. REV. 1245 (2005-2006) (paying tribute to Justice O'Connor).

[144] McGregor Profile, *supra* note 147.

[145] *Jackie Doe*, *supra* note 36.

[146] McGregor, *supra* note 148.

[147] McGregor, *supra* note 148, 32 MCGEORGE L. REV. at 822.

[148] McGregor, *supra* note 32.

[149] *Id.* at 267.

[150] *Id.* at 269-70.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

Vice Chief Justice Rebecca Berch joined the Court in 2002 from the Arizona Court of Appeals, where she had served since 1998.[151] She has held numerous public positions, including Solicitor General of Arizona from 1991-1994.[152]

Vice Chief Justice Berch's most noteworthy opinion is her dissent in *Simat*. As discussed above, her dissent challenged the majority's novel application of the Privileges and Immunities Clause, as well as the majority's willingness to step into the policy function of the Legislature. Vice Chief Justice Berch has authored several law review articles but nothing illuminative of her view on whether the Arizona Constitution grants a right to abortion.

Justice Michael Ryan has been on the Court since 2002. He was appointed to the Arizona Court of Appeals in 1996. Prior to that, he served as a Maricopa County Superior Court judge, beginning in 1985.[153]

The most noteworthy legal decision Justice Ryan has issued with regard to abortion is his order in the *Jackie Doe* case. At the time, he was on the court of appeals. He stayed the trial judge's order in order to determine whether the baby was viable.[154] Justice Ryan's speeches and writings do not offer any information about his position on abortion under the Arizona Constitution.

Governor Janet Napolitano nominated Justice Hurwitz to the Court in 2003. Prior to joining the Court, he had a long career in private practice, during which he argued twice before the USSC.[155] He served as Arizona Governor Bruce Babitt's chief of staff from 1980-1983 and co-chaired Governor Janet Napolitano's transition team in 2002.[156]

---

[151] Ariz. Supreme Court, Profile of Vice Chief Justice Rebecca White Berch (Mar. 8, 2006), http://www.supreme.state.az.us/azsupreme/Berch.htm.

[152] *Id.*

[153] Ariz. Supreme Court, Profile of Justice Michael D. Ryan (Nov. 10, 2005), http://www.supreme.state.az.us/azsupreme/Ryan.htm.

[154] *Jackie Doe*, *supra* note 36, at 2.

[155] Jack Levine, *Newest Justice Experienced in All Three Branches of Government*, 23 MARICOPA LAW. (Maricopa County Bar Ass'n., Phoenix, Ariz.), Mar. 2003, No. 3, at 1, 7, *available at* http://www.maricopabar.org/maricopa-lawyer/mlmarch2003.pdf.

[156] *Id.*; Ariz. Supreme Court, Profile of Justice Andrew D. Hurwitz (Nov. 10, 2005) [hereinafter Hurwitz

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

Justice Hurwitz clerked for U.S. District Judge Jon O. Newman, U.S. Court of Appeals Judge for the Second Circuit J. Joseph Smith, and USSC Justice Potter Stewart.[157] In 1972, he worked on an abortion case while clerking for Judge Newman in Connecticut.[158] The decision, *Abele v. Markle*,[159] struck down a Connecticut law outlawing all abortions, except those necessary to preserve the life of a mother. Justice Hurwitz appears to have had a hand in drafting Judge Newman's opinion.[160]

In 2003, Justice Hurwitz published a law review article arguing that Judge Newman's *Abele* decision was highly significant to the USSC's decision in *Roe v. Wade*.[161] Justice Hurwitz believes the structure and logic of Justice Blackmun's majority opinion in *Roe* strongly suggest they were influenced by *Abele*.[162] Two features of Judge Newman's *Abele* decision that appear in *Roe* are the determination that a "fetus" is not a "person" under the Fourteenth Amendment[163] and the singling out of "viability" as the point in time when the state's interest in protecting potential life justifies a ban on abortion.[164] Justice Hurwitz believes the viability concept was a significant contribution to *Roe*, because it maximized the period of time when the state cannot intervene to preserve the life of the baby.

> This viability dictum, first introduced by Justice Blackmun into the *Roe* drafts only after Justice Powell had urged that he follow Judge Newman's lead,

---

Profile], http://www.supreme.state.az.us/azsupreme/Hurwitz.htm.

[157] Hurwitz Profile, *supra* note 161.

[158] Levine, *supra* note 160, at 1.

[159] 342 F. Supp. 800 (D. Conn. 1972).

[160] *See* Andrew D. Hurwitz, *Jon O. Newman and the Abortion Decisions: A Remarkable First Year*, 46 N.Y.L. SCH. L. REV. 231, 238 n.55 (2002-2003) ("Justice Stewart (my future boss) jokingly referred to me as 'the clerk who wrote the Newman opinion.'"); Levine, *supra* note 160, at 1 ("Hurwitz came to the attention of U.S. Supreme Court Justice Potter Stewart as the result of an opinion in an abortion case that Hurwitz had drafted while clerking for Newman.").

[161] Hurwitz, *supra* note 165.

[162] *Id.* at 237-39.

[163] *Id.* at 234-35, 237.

[164] *Id.* at 235-36, 238, 244-47.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

> effectively doubled the period of time in which states were barred from absolutely prohibiting abortions.
> . . .
> Judge Newman's [*Abele*] opinion not only had a profound effect on the United States Supreme Court's reasoning, but on the length of time that a pregnant woman would have the opportunity to seek an abortion.[165]

Justice Hurwitz's article does not take a position on whether *Roe*, or *Abele* for that matter, were rightly decided. His article is, however, in no way critical of Judge Newman's expansive abortion opinion or of *Roe* itself. It makes no reference to the controversy surrounding legalized abortion. In fact, he twice refers to *Roe* as a "landmark" of the USSC's jurisprudence.[166] At a minimum, Justice Hurwitz has a unique professional tie to the early, formative stage of the USSC's abortion jurisprudence.

Justice Scott Bales is the newest member of the Court. Governor Napolitano appointed him to the Court in 2005.[167] Prior to his appointment he served as Assistant United States Attorney for the District of Arizona and Solicitor General of Arizona.[168]

Justice Bales clerked for U.S. Court of Appeals for the Ninth Circuit Judge Joseph T. Sneed, and USSC Justice Sandra Day O'Connor. He also clerked in the Office of the Solicitor General of the United States.[169]

Justice Bales's writings and judicial opinions do not offer any insight into his view on abortion under the Arizona Constitution.

---

[165] *Id.* at 247.

[166] *Id.* at 231, 247.

[167] Ariz. Supreme Court, Profile of Justice W. Scott Bales (Nov. 10, 2005), http://www.supreme.state.az.us/azsupreme/bales.htm.

[168] *Id.*

[169] *Id.*

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

Biographical information of the current justices of the Arizona Supreme Court

Member	Appointed by/ Year	Term Expires	Miscellaneous
Ruth McGregor, Chief Justice	Hull/ 1998.	2010; (2013 by mandatory retirement)	- Biographical information: LL.M. University of Virginia 1998; J.D. summa cum laude, Arizona State University College of Law 1974, first in class; M.A. University of Iowa 1965; B.A. summa cum laude, University of Iowa 1964; Judge in the Arizona Court of Appeals 1989-1998; Clerked for Justice Sandra Day O'Connor 1981-1982; private practice 1974-1981, 1982-1989 - Professional/political affiliations: American Inns of Court Foundation, Arizona Inns of Court, American Bar Association, Arizona Judicial Council 1995-1997; 2005-present; Arizona Judges' Association 1990-present; National Association of Women Judges, 1990 Supreme Court of Arizona Commission on Judicial Conduct 1991-1997; Judicial College of Arizona Supreme Court; Supreme Court of Arizona Disciplinary Commission 1984-1989; State Bar of Arizona Founding Fellow; Arizona Bar Foundation; Arizona Women Lawyers' Association 1975-present. - Noteworthy opinions: Voted to expand abortion in the only two cases to come before her in her time on the Court. - Articles published: Wrote a law review conceding that the Court has been inconsistent in its approach to construing the Arizona Constitution. - Other: Recipient of the Dwight D. Opperman award from the American Judicature Society (2005).
Rebecca White Berch	Hull/ 2002.	2008	- Biographical information: J.D. Arizona State University College of Law 1979; M.A. Arizona State University 1990; B.S.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

			Arizona State University 1976; Served on the Arizona Court of Appeals 1998-2002; First Assistant Arizona Attorney General, 1996-1998; Special Counsel to the Arizona Attorney General 1995-1996; Solicitor General for the State of Arizona 1991-1994; adjunct professor at several Arizona colleges. - Professional/political affiliations: Chair of the Commission on Technology; Chair of the Maricopa County Trial Court Appointments 2002-2005; Dean of the Arizona Judicial College Board 2002-2004; Judicial Ethics Advisory Committee; member of the Board of Editors for The Journal of the Legal Writing Institute 1990-2002; Homeless Legal Assistance Project Board of Directors 1990-1999. - Works published: Co-Author of *Introduction to Legal Method and Process*, 2002; Co-Author of *Teacher's Manual for Introduction to Legal Method and Process*, 2002; Author of nine law review articles, chapters in two books, book reviews and numerous articles on legal writing. - Noteworthy opinions: Dissented in the *Simat* decision on taxpayer funding of abortion.[170] - Other: Awarded the Arizona Women Lawyers' Association Professional Achievement and Contributions Award 2002, the National Association of Attorneys General Appreciation Award 1998, and numerous other awards.
Michael D. Ryan	Hull/ 2002.	2008	- Biographical information: J.D. Arizona State University Law School 1977; B.A. St. John's University (Minnesota) 1967; U.S. Marine Corps 1967-1969, served as Platoon commander in Vietnam, where he received two Purple Hearts; Served on the Arizona

[170] *Simat*, 56 P.3d at 38.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

			Court of Appeals 1996-2002; judge in the Superior Court of Maricopa County 1986--1996; Deputy County Attorney 1977-1985. - Professional/political affiliations: Chair of the Arizona Supreme Court's Committee on Keeping the Record; Vice Chair of the Arizona State Bar's Task Force on Persons with Disabilities in the Profession 2002-present; Member of the Task Force on the Recruitment and Retention of Women and Minority Lawyers; Member of the Maricopa County Resource Site Team for the Center for Sex Offender Management 1996-2000; Member and former chair of the Maricopa County Bar Association. - Noteworthy opinions: On the court of appeals, stayed an order requiring that a minor be taken out of state to have an abortion. - Other: For more than 15 years, volunteer judge for the Arizona High School Mock Trial Program, sponsored by the Arizona Center for Law-Related Education and Young Lawyers of Arizona; Presided over both regional and state competitions; Awarded the State Bar of Arizona's James A. Walsh Outstanding Jurist Award 2005.
Andrew D. Hurwitz	Napolitano/ 2003.	2009	- Biographical information: J.D. Yale University 1972; A.B. cum laude Princeton University 1968; Clerked for Supreme Court Justice Potter Stewart; Osborn Maledon 1995-2003; Judge Pro Tempore, Arizona Court of Appeals, Div. I, 1994, 1996 and 1998; Meyer Hendricks Victor Osborn & Maledon. - Professional/political affiliations: American Law Institute 2002-Present; Master of the Horace Rumpole Inn of Court 1997-Present; Member of the Board of Directors for the Arizona Center for Law in the Public Interest 1986-1988; Arizona Town Hall 1992-Present; President of the

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

			Arizona Board of Regents 1992-1993; Children's Action Alliance, Board of Directors 1999-2003; Chair of the City of Phoenix, Street Environment Committee 1989-1990. - Articles published: Wrote a law review about Judge Newman's influence on *Roe*. - Other: Clerked for Fed. Dist. Judge Jon Newman when Judge Newman issued an abortion decision that influenced *Roe v. Wade*; Note and Comment Editor at the *Yale Law Journal* 1971-1972 and on the Board of Editors 1969-1971.[171]
Scott Bales	Napolitano/ 2005.	2011	- Biographical information: J.D., magna cum laude, Harvard Law School 1983; M.A. Harvard University 1980; B.A., summa cum laude, Michigan State University 1978; Clerked for Justice Sandra Day O'Connor; Clerked for Judge Joseph Sneed on the U.S. Court of Appeals for the Ninth Circuit; Solicitor General, Office of the Arizona Attorney General 1999-2001; Assistant U.S. Attorney, District of Arizona 1995-1999; Private practice 1985-1994. - Professional/political affiliations: Arizona Foundation for Legal Services and Education; Ninth Circuit Court of Appeals, Advisory Committee on Rules of Practice; Judge Pro Tempore, Arizona Court of Appeals; Various committees within the State Bar of Arizona; various adjunct teaching positions, including Teaching Fellow at Harvard University. - Other: Newest member of the Court; Harvard Law Review, Board of Editors, 1981-1983.

[171] 410 U.S. 113 (1973).

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.

CONCLUSION

The Arizona Supreme Court has not yet committed itself to finding a right to abortion under the Arizona Constitution. Prior decisions raise concerns that the Court might choose to go in such a direction. The sparse evidence available of the views of individual justices seems to suggest that at least two of the Court's five members may be sympathetic to creating a "right" to abortion under the Arizona Constitution. Pro-life advocates should focus on the Court's jurisprudence under Arizona Constitution article II, section 8. Advocacy should focus on returning to the original intent of the provision or at the very least on preventing expansion into broader areas of "privacy," which were clearly not anticipated by the provision's framers.

©2007 Americans United for Life. This paper may be copied and distributed freely as long as the content remains unchanged and Americans United for Life is referenced as the owner of this content.