

# THE CONNECTICUT SUPREME COURT AND LEGISLATIVE PARALYSIS IN THE CONSTITUTION STATE

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While Connecticut’s nickname, “The Constitution State,” is fairly well known to most individuals residing in the Northeastern United States, it would be wrong to assume Connecticut’s first constitution adopted during colonial times served as a model for the later United States Constitution. To the contrary, the two documents contain significant differences, and even today, Connecticut is fond of noting its state constitution is uniquely independent from its federal counterpart in various respects, including its rights of due process and equal protection.<sup>2</sup>

To be sure, the federal framework developed under the Warren<sup>3</sup> and Burger<sup>4</sup> Courts unquestionably gave Connecticut judges greater opportunity to deduce new individual freedoms from the state constitutional framework. Naturally, the rights woven into the state Constitution may surpass the scope of those established under the federal Constitution. Yet even more significant is the fact the proliferation of individual rights under Connecticut’s state constitution has been as much a result of legislative silence as piggybacking the federal system.

Almost immediately after *Roe v. Wade* was decided in 1973, the gravamen of *Roe*’s holding of abortion-on-demand was put to the challenge by the states and federal government.<sup>5</sup> In 1980, the United States Supreme Court (USSC), in *Harris v. McRae*, upheld a federal statute, the so-called “Hyde Amendment,” which restricted abortion funding under Medicaid, unless the

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2. 61 CBJ No. 4, Aug. 1987, at 212, 214.

3 Earl Warren was Chief Justice of the United States from October 5, 1953–June 23, 1969.

4 Warren Earl Burger was Chief Justice of the United States from June 23, 1969–September 26, 1986.

5. *Roe v. Wade*, 410 U.S. 113 (1973).

abortion was necessary to save the life of the mother or in cases of rape or incest.<sup>6</sup> Although government may not impose undue obstacles to an abortion, observed the Court in *McRae*, “it need not remove those not of its own creation.”

A few years earlier, the USSC handed down a similar decision in *Maher v. Roe*, in which the Court tapped into the wisdom of one of the most notable of legal positivists, Justice Holmes, in relation to non-therapeutic abortion:

When an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature. We should not forget that ‘legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.’<sup>7</sup>

Once it became clear limits on publicly-funded abortions were constitutional, Connecticut’s Medicaid department revised its regulations to conform to the Hyde Amendment to ensure full Medicaid reimbursement. Shortly thereafter, then-trial judge Robert Berdon, later to become an associate justice of Connecticut’s highest court, seized on Connecticut’s “distinguished history of paying for the medical expenses of the poor from the public purse” to bring Connecticut into the fold of a handful of states to require the state to pay for therapeutic abortions. With one swipe of the pen, Judge Berdon imposed the paradox of public financing of abortion to effectuate a “personal choice.” Yet it was Connecticut’s highest court’s finding the legislature had failed to act that served as the real basis of the trial court’s decision. Indeed, decades earlier, the USSC struck down a Connecticut law also perceived as out of step with evolving public sensibilities. In 1965, the case of *Griswold v. Connecticut*, which was dubbed by Justice Stewart as an archaic, silly, unenforceable contraception ban, catapulted the rest of the country into the current abortion wars.<sup>8</sup>

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6. *Harris v. McRae*, 448 U.S. 297 (1980).

7. *Maher v. Roe*, 432 U.S. 464, 479–80 (1977) (quoting *Missouri v. K. & T. R. Co. v. May*, 194 U.S. 267, 270 (1904) (Holmes, J.)).

8. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

Most state laws regulating abortion were scrapped by the Connecticut legislature in 1990, and the sparse laws that do remain are well within the comfort zone of most abortion advocates.<sup>9</sup> As *Planned Parenthood v. Casey* and its progeny have attempted, however clumsily, to define the contours of *Roe v. Wade*, state legislative policy on issues of life has changed very little in recent years.<sup>10</sup>

In the state's 2006 legislative session, Connecticut's overwhelmingly democratic legislature and Republican Governor partnered to fast-track taxpayer-subsidized stem-cell research. In the legislative arena, groups espousing conservative positions are frequently put on the defensive. These groups have made little progress in advancing reasonable restrictions on abortion and in the past several years have allocated their resources to the fight against same-sex marriage or tax relief, although abortion parental consent laws were heard in committee in 2007.<sup>11</sup> "Safe" districts for pro-life legislators in Connecticut are few and far between. Connecticut pro-life groups hope *Roe v. Wade* will simply fall under its own weight, as the federal courts continue to wrestle with ever-evolving abortion regulations, compounded by profound medical advances and a growing weariness with *Roe* among most Americans.

Unfortunately, the state leadership reelected in 2006 by a wide margin remains loyal to groups hostile to protecting the unborn. Right to life groups will likely remain on the defensive for some time to come. Connecticut's independent streak means unless future election returns bring a dramatic turn against incumbents, prospects to make Connecticut a life-friendly state through the legal and legislative process will remain an uphill battle.

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9. Connecticut mandates that abortion clinics meet only rudimentary health and safety standards. CONN. GEN. STAT. § 19a-116. All women considering abortion must receive counseling on the type of abortion procedure to be used and its inherent risks, only minors must also receive information on the alternatives to abortion and public and private agencies that can provide assistance to them. A qualified counselor must discuss the possibility of the minor involving a parent or other adult in her decision. CONN. GEN. STAT. § 19a-601.

10. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

11. *Kerrigan v. State*, 909 A.2d 89 (Conn. 2006); *Kerrigan v. Commissioner of Public Health*, 904 A.2d 137 (Conn. 2006).

## I. LIFE ISSUES

As a result of legislative indifference to abortion, common law jurisprudence in Connecticut at times offers greater protection for the unborn. At the same time, other life issues, such as capital punishment, stem-cell research, and healthcare rights of conscience have made an abrupt move to the political left in the past several years. As such, it is problematic to blame the state judiciary as “activist” when, by and large, Connecticut’s elected representatives have simply failed to protect the rights of the unborn, weak, and vulnerable.

### Abortion

In the wake of *Roe v. Wade*, Connecticut’s law banning abortions was declared null and void, even as it applied to abortion providers who lacked training or medical licensing.<sup>12</sup> While the USSC is still struggling to balance the contours of states’ rights to regulate abortion, Connecticut lurched toward creating even *greater* abortion license in the 1980’s through taxpayer subsidization and has remained there ever since.<sup>13</sup> Whereas the Hyde Amendment’s barring federal reimbursement to states for most abortion procedures was ultimately found not to violate the U.S. Constitution,<sup>14</sup> the state court decision in *Doe v. Maher* held singling out abortion in the Medicaid context would defeat the goals and purposes of the Medicaid program.<sup>15</sup> While *Roe v. Wade* short-circuited the legislative process, *Doe v. Maher* exploited legislative paralysis in order to put Connecticut on the map with one of the most permissive abortion laws in the country.

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12. *State v. Sulman*, 339 A.2d 62 (Conn. 1973); *State v. Menillo*, 362 A.2d 962 (Conn. 1975). At the time of *Menillo*, CONN. GEN. STAT. § 53-29 proscribed any attempt to procure a miscarriage or an abortion by any person. The defendant, a non-physician and without any medical training, performed an abortion in a motel room for a fee upon a female in normal good health.

13. *Doe v. Maher*, 515 A.2d 134 (Conn. Super. Ct. 1986); *Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387 (Mass. 1981); *Comm. to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981).

14. *Harris v. McRae*, 448 U.S. 297 (1980); *Williams v. Zbaraz*, 448 U.S. 358 (1980).

15. *Doe*, 515 A.2d 134.

The Medicaid regulation at issue in *Doe v. Maher* was actually struck down on the narrowest of grounds, although it is commonly cited as dicta in support of an implied constitutional right to abortion.<sup>16</sup> The decision focused on vague statutory language authorizing the funding of all services “medically necessary.”<sup>17</sup> Since *Roe v. Wade* redefined abortion as a “medical procedure,” the Court in *Doe v. Maher* reasoned any cost arising from an abortion was thereby transformed into a “medical expense”. Read together with Connecticut’s tradition of providing public support for the medical needs of the poor, the Court concluded that, by carving out most abortions from coverage, the State was embarking on an impermissible departure from its historical role as providing basic medical care for its neediest residents.<sup>18</sup>

Of course, the glaring fact abortion was never treated as a privacy right or legitimate “medical procedure” in Connecticut’s history was sidestepped in *Doe v. Maher*. Not a single instance could be cited in which a Connecticut court deduced a state constitutional right to privacy from the doctor-patient relationship or the right to make decisions necessary for the preservation and protection of one’s health.<sup>19</sup> In light of this, the Court declared the law “must be examined in the light of [its] historical development and legislative evolution.”<sup>20</sup>

According to the court in *Doe v. Maher*, the express public policy of the state to protect and preserve human life beginning at the moment of conception was overshadowed by the

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16. In turning toward the Constitutional claims, the court in *Maher* ruled the regulation violated the due process clause (article I, section 10) and equal protection clauses (article I, sections 1 and 20) of the Connecticut Constitution. While privacy is not expressly guaranteed in the Connecticut Constitution, implied rights are reserved. Since the court’s disposed of the case on statutory grounds only, however, the remaining analysis under Constitutional grounds can fairly be treated as dicta.

17. CONN. GEN. STAT. § 17-134b provides in part: Medical assistance shall be provided for any otherwise eligible person whose income...is not more than the minimum income permissible under federal law for such eligibility...” The court in *Doe v. Maher* concluded that the Department exceeded the scope of authority delegated by the legislature by not funding “therapeutic” abortions. CONN. GEN. STAT. § 17-134b; CONN. STATE AGENCIES §§ 17-134d-1, 17-134d-2.

18. *Doe*, 515 A.2d 134.

19. *Id.* at 425–27.

20. *Id.* at 413 (citing *Penfield v. Jarvis*, 399 A.2d 1280 (Conn. 1978)).

charitable tradition of funding medical services for the poor.<sup>21</sup> Along the same lines, the Court delicately traversed the USSC's holding<sup>22</sup> that the State of Connecticut does not have an obligation to pay for therapeutic or non-therapeutic abortions under the federal Equal Protection Clause.<sup>23</sup> Neutrality, the state court observed, requires funding for both child birth and abortion in order to advance Medicaid's goal to "prevent or treat illness or injury."<sup>24</sup> Failure to subsidize abortion was

an invidious discrimination against women, or at least a constitutionally problematic subordination of women, in the law's very indifference to the biological reality that sometimes requires them...to resort to abortion procedures if they are to avoid pregnancy and childbearing.

Such discrimination could warrant "absolute scrutiny"<sup>25</sup> in appropriate circumstances.

While *Doe v. Maher* was not appealed and is, therefore, unsettled law,<sup>26</sup> the case from which it sprang, *Roe v. Wade*, was later relied upon by the Connecticut Supreme Court in the context of medical malpractice. In *Ochs v. Borrelli*, Connecticut's highest court took exception to the premise "the birth of a child is always a blessing to its parents" offsetting any financial burdens in the context of assessing damages in "wrongful birth" cases.<sup>27</sup> The Court upheld the award for pain and suffering to, among other things, compensate for the mother's anxiety that the

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21. CONN. GEN. STAT. § 53-29 prohibited attempted abortions by third parties; CONN. GEN. STAT. 53-30 prohibited a woman from performing an abortion on herself; CONN. GEN. STAT. § 53-31 prohibited the encouragement, promotion or advertisement of abortion. In 1972, Connecticut passed CONN. GEN. STAT. § 53-31a (1972, May Sp. Sess., P.A. 1, §1), which prohibited performing an abortion on a woman except to save her life. All of these prohibitions were repealed in 1990. Conn. Pub. Act 90-113, sec. 4.

22. See *Maier v. Roe*, 432 U.S. 464 (1977); *Harris v. McRae*, 448 U.S. 297 (1980).

23. *Maier*, 432 U.S. 464.

24. *Doe v. Maier*, 515 A.2d 134 (Conn. Super. Ct. 1986) (citing the Commissioner's 1985 Budget Request).

25. Absolute scrutiny is the unwillingness to consider any justification for sex discrimination once it is found.

26. Connecticut Atty. Gen. Opinion (11/16/98).

27. *Ochs v. Borrelli*, 445 A.2d 883 (Conn. 1982).

baby was going to be deformed.<sup>28</sup>

In 1999, the Connecticut Appellate Court, in *Burns v. Hanson*, took *Ochs* one step further and countenanced a wrongful birth action when the child suffered from no disability.<sup>29</sup> The Court observed,

We declined [in *Ochs*] to carve out any exception, grounded in public policy, to the normal duty of a tortfeasor to assume liability for all the damages that he or she has caused. We held that any such exception would improperly burden the exercise of a constitutionally protected right to employ contraceptive measures to limit the size of one's family.

In 2003, the Connecticut Supreme Court held that a fetus is a body part of its mother, akin to teeth or skin that eventually shed. The ruling unanimously upheld the conviction of a man who tried to induce a miscarriage by slipping his girlfriend labor-inducing drugs. Rejecting the defendant's argument that he could not be charged with attempting to commit aggravated assault because the fetus was the target, and not the mother, the Court held that that a fetus constitutes a member of the victim's body within the meaning of the criminal code based on its implantation within the mother's uterus and its attachment to the mother via the umbilical cord and placenta.<sup>30</sup>

### **Protection of the Unborn from Criminal Violence**

Additionally, most criminal protections of the unborn have been judicially stripped away due to legislative inaction. In *State v. Anonymous*, a Connecticut trial court held an unborn but viable fetus is not a "person" or "human being" within the meaning of the criminal code for

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28. *Id.*

29. *Burns v. Hanson*, 734 A.2d 964 (Conn. 1999); *Anonymous v. Hospital*, 366 A.2d 204 (Conn. Super. Ct. 1976).

30. *State v. Sandoval*, 821 A.2d 247 (Conn. 2003).

assault.<sup>31</sup> While the historical basis and reasoning of the decision in *State v. Anonymous* was on stronger ground than *Doe v. Maher*, it failed to address the obvious question what a fetus is if not a human being. Recently, the Connecticut Supreme Court decided this question in the context of aggravated sexual assault.<sup>32</sup> In *State v. Sandoval*, the Court held a 5-week-old fetus constitutes a “member” of the mother’s body on account of attachment to the mother “via the umbilical cord and placenta.”

A common thread in these cases is the judicial reluctance to expand the common law to afford greater protections to the unborn and instead defer the matter to the legislature. Time and again, however, the legislature fails to respond, including foregone opportunities to revise the homicide statute<sup>33</sup> or terminate parental rights<sup>34</sup> to protect the unborn. While the penalties for assault were increased in 1999 for victims known by the assailant to be pregnant, Connecticut does not recognize the killing of an unborn child as a form of homicide.<sup>35</sup>

The only arena in which protection of the unborn has grown in Connecticut is in the area of tort law, as a consequence of its compensatory purpose. Thus, various decisions handed down before and after *Roe v. Wade* protect some nascent life.<sup>36</sup> For instance, Connecticut recognizes

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31. *State v. Anonymous*, 516 A.2d 156 (Conn. Super. Ct. 1986) (interpreting CONN. GEN. STAT. § 53a-54a(a)). Connecticut has opted not to revise its definition of “person” under the criminal code for murder following *State v. Anonymous*.

32. *State of Connecticut v. Sandoval*, 821 A.2d 247 (Conn. 2003).

33. *Id.*; See CONN. GEN. STAT. § 53a-3(a).

34. *In re Valerie D.*, 613 A.2d 748 (Conn. 1992) (interpreting child welfare statute, CONN. GEN. STAT. § 46b-120, to apply to born children only despite express public policy to protect viable fetuses, CONN. GEN. STAT. § 19a-602, and direction to liberally construe the child protection statute (CONN. GEN. STAT. § 45a-706) (J. Borden).

35. CONN. GEN. STAT. § 53a-59a, et. seq.; Con. Pub. Acts 99-186.

36. A child has no right of recovery under common law for injuries received before birth. Connecticut is among those states that have adopted a more liberal rule to allow recover where the fetus was viable at the time of injury. *Tursi v. New England Windsor Co.*, 19 Conn. Sup. 242 (Conn. Super. Ct. 1955). “Indeed, it has been said that seldom in the law has there been such an overwhelming trend in such a short period of time as there has been in the

causes of action by infants who sustain injuries at any stage prior to birth as a result of negligence<sup>37</sup> or wrongful death.<sup>38</sup> A mother's contributory negligence cannot be imputed to the innocent child for prenatal injuries.<sup>39</sup>

In *Hatala v. Markiewicz*, a Connecticut wrongful death case decided prior to *Roe v. Wade*, the court abandoned the "barbaric common-law rule that destruction of life is not an actionable injury". The court further observed:

To deny the infant or its representatives relief in this type of case is not only a harsh result but its effect is to do reverence to an outmoded, timeworn fiction not founded on fact and within common knowledge untrue and unjustified.... A rule fixing survival as the determinant rather than viability has the appeal of simplicity. It might also aid the judiciary but hardly justice.<sup>40</sup>

In a recent Connecticut trial case, *Florence v. Town of Plainfield*, decided in the context of wrongful death of a nine-month old fetus prior to birth, the judge relied upon Justice Blackmun's observation in *Roe v. Wade* that a "strange inconsistency" exists between the law of tort, which affords protection to the unborn, and the criminal law, which does not.<sup>41</sup> The trial judge noted,

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trend toward allowing recovery for prenatal injuries to a viable fetus." *Simon v. Mullin*, 380 A.2d 1353 (Conn. Super. Ct. 1977) (quoting 62 AM. JUR. 2D 614, Prenatal Injuries, § 2).

37. *Simon v. Mullin*, 380 A.2d 1353 (Conn. Super. Ct. 1977) ("[I]t has been said that seldom in the law has there been such an overwhelming trend in such a relatively short period of time as there has been in the trend toward allowing recovery for prenatal injuries. . . ."); *Tursi v. New England Windsor Co.*, 111 A.2d 14 (Conn. Super. Ct. 1955); *Gorke v. Le Clerc*, 181 A.2d 448 (Conn. Super. Ct. 1962).

38. *Hatala v. Markiewicz*, 224 A.2d 406 (Conn. Super. Ct. 1966); *Gorke*, 181 A.2d 448; *Prates v. Sears, Roebuck & Co.*, 118 A.2d 633 (Conn. Super. Ct. 1955); CONN. GEN. STAT. § 52-555.

39. *Kirkland v. Pollack*, No. 167175 (Conn. Super. Ct. June 4, 1975); WRIGHT, FITZGERALD, ANKERMAN, CONNECTICUT LAW OF TORTS § 77 (3d ed. 1991).

40. *Hatala v. Markiewicz*, 224 A.2d 406 (Conn. Super. Ct. 1966).

41. *Florence v. Town of Plainfield*, 849 A.2d 7 (Conn. 2004); *Roe v. Wade*, 410 U.S. 113, 162-63 (citing an American Medical Association report of 1859).

Implicit in the principle that damages for nonfatal prenatal injuries to a viable fetus are recoverable is a recognition that there exists to such an unborn child a duty of care for the breach of which the wrongdoer may be held liable.... In all reason and logic it can make no difference in liability whether the wrongfully inflicted injuries to the viable fetus result in death just prior to birth or in death just after birth.<sup>42</sup>

Consistent with the remedial purposes of tort law, the court then held that, “absent a clear expression from the legislature to the contrary,” the wrongful death statute permitted an action on behalf of the fetus.

### **Assisted Suicide**

Connecticut is one of 38 states to expressly prohibit assisted suicide.<sup>43</sup> While Connecticut courts have not weighed in on physician-assisted suicide (PAS) as a constitutional right, trial courts have skirted the assisted suicide law in specific instances. In April 2005, for example, a man charged with second-degree manslaughter was granted 1-year special probation, termed “accelerated rehabilitation,” for his role in advising a suicide victim where to aim his gun and cleaning the revolver that belonged to the victim. In granting the probation, trial Judge Robert C. Brunetti distinguished between “causing” and “assisting” a suicide and referred to his own family’s experience with cancer as factors in his decision granting leniency. During the sentencing, the Judge expressed sympathy for the defendant and observed that the lenient punishment arose from “a very narrow ruling” under the law.

Connecticut enacted the Removal of Life Support Systems Act in 1991 to provide a statutory mechanism to effectuate a right to refuse medical treatment.<sup>44</sup> For example, Connecticut courts permit life-sustaining technology to be removed from that patient if he or she is deemed by the physician to be terminally ill, when the physician has received the informed

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42. *Florence*, 849 A.2d 7.

43. CONN. GEN. STAT. § 53a-56(a); *Marra v. Warden Cheshire*, No. CV-02-463847S (Conn. Super. Ct. May 2, 2002).

44. CONN. GEN. STAT. § 19a-570; *McConnell v. Beverly Enterprises-Conn., Inc.*, 553 A.2d 596 (Conn. 1989).

consent of the patient's next of kin and when such consent coincides with the expressed wishes of the patient. The purpose of the Removal of Life Support Systems Act is actually to immunize physicians who deny life sustaining treatment to terminally ill or permanently unconscious patients.

### **Healthcare Rights of Conscience**

The right of religious liberty which exists under the Connecticut Constitution provides as follows:

The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state; provided, that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state.<sup>45</sup>

Furthermore, the Connecticut Religious Freedom Act prohibits the state from burdening a person's exercise of religion unless it demonstrates that the law furthers of a compelling governmental interest, and is the least restrictive means of furthering that compelling governmental interest.<sup>46</sup> Under Connecticut healthcare regulations, medical providers are not required to participate in “Do Not Resuscitate” orders<sup>47</sup> or abortion procedures<sup>48</sup> against their religious, moral, or philosophical beliefs. However, no protections exist for health care providers who refuse to participate in human cloning, destructive embryo research, or other morally repugnant medical research.

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45. CONN. CONST. art. I, § 3.

46. CONN. GEN. STAT. § 52-571b.

47. CONN. AGENCIES REGS. § 19a-580d-9(a) provides: “Healthcare providers who have an ethical or philosophical, or religious objection to implementing a DNR order shall turn over care of the patient without delay to another provider who will implement the DNR order. Pending the assumption of care by another provider, the DNR order shall be followed.”

48. CONN. AGENCIES REGS. § 19-13-D54(f) provides: “No person shall be required to participate in any phase of an abortion that violates his or her judgment, philosophical, moral or religious beliefs.”

In May 2007, Governor M. Jodi Rell signed into law a bill that requires the state's 30 hospitals to offer the abortifacient Plan-B emergency contraceptive to rape victims, including Connecticut's four Catholic hospitals. Last minute changes to the bill permit the Catholic hospitals to contract a third party, such as a rape-crisis nurse, to distribute the abortifacient emergency contraceptive instead of a hospital employee. The law, however, does not contain a conscience clause. In the past, the Catholic hospitals adopted a protocol which recommends giving Plan-B to a rape victim tested as not pregnant to suppress ovulation and conception from taking place, but refer her to another hospital or outlet where she can obtain the drug if she is found pregnant. Archbishop Henry J. Mansell has vowed to challenge the law in court if no exception is made to accommodate Catholic values.

In July 2006, the Connecticut State Controller and Attorney General pressured Wal-Mart to stock the "Plan B" emergency contraceptive in all of its Connecticut stores. At the outset of negotiations with the state, Wal-Mart refused to dispense the drug on grounds of conscience. After threatening to exclude Wal-Mart from the state's insurance network if it refused to dispense the treatment, Connecticut and Wal-Mart reached an agreement ensuring customers will not be refused treatment, even in the case of a conscientious objection by an individual pharmacist. As part of the agreement, a pharmacist may decline to dispense the prescription, but the pharmacist must attempt to locate another Wal-Mart pharmacist to do so, or make arrangements for the customer's prescription to be filled at another nearby Wal-Mart or other pharmacy.

A Quinnipiac University Poll released in May 2006 found 78 percent of registered voters and 74 percent of Connecticut Catholics support requiring all hospitals to provide emergency contraception to rape victims. However, the same poll found that 66 percent of Connecticut Catholics believe abortion should be illegal in some, most or all cases.

### **Cloning and Destructive Embryo Research**

In 2005, Connecticut passed legislation banning reproductive cloning but allocated \$100 million in funding destructive embryonic stem-cell research and cloning for research.<sup>49</sup> Passage of this legislation positioned Connecticut as the third of nine states in the nation in providing public funding in support of embryonic and human adult stem-cell research. On November 21,

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49. CONN. GEN. STAT. §19a-32d-§32g.

2006, the first installment of \$19.78 million was awarded for 21 stem-cell research proposals.

In summary, Connecticut offers a fairly stark picture concerning protections to unborn human life. Its courts and legislature offers only modest protections to the unborn. Only as a result of the legal rights afforded to pregnant women, be they victims of criminal or negligent acts of another, do the unborn inure any real protection. Further, the passage of legislation requiring the distribution of emergency contraceptives in Catholic hospitals signals a disturbing trend of religious intolerance on matters of grave moral significance.

## II. JUDICIAL RESTRAINT

As discussed *supra*, under its equal protection and due process clauses, Connecticut affords enhanced protections to individuals from state interference.<sup>50</sup> Decisions of the USSC defining what constitutes a “fundamental right” are persuasive authority to be afforded respectful consideration and “to be followed by Connecticut courts *only when* they provide no less individual protection than is guaranteed by Connecticut law.”<sup>51</sup>

This, of course, begs the question what rights are guaranteed under the Connecticut Constitution to warrant “cherry picking” of desirable federal precedent. As is illustrated in *Doe v. Maher*, federal precedent chosen selectively can yield whatever outcome a state judge wishes to draw. Both the historical roots of Connecticut’s common law prior to 1818, as well as contemporary understandings of “rights,” may serve as a source of constitutional or quasi-constitutional rights<sup>52</sup>.

To assist in the Constitutional analysis, Connecticut courts consider the following six-factors, originally set forth in *State v. Geisler*<sup>53</sup> to ascertain fundamental rights:

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50. *State v. Geisler*, 610 A.2d 1225 (Conn. 1992). The Equal Protection Clauses consist of Article I, Sections 1 and 20. There are two classes of due process clauses in Article I of the Connecticut Constitution. Article I, Sections 8 and 9 are generally applied to criminal due process whereas Article I, Section 10 is applied to civil due process.

51. *Doe v. Maher*, 515 A.2d 134, 419 (Conn. Super. Ct. 1986) (citing *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977)); *State v. Geisler*, 610 A.2d 1225 (Conn. 1992).

52. *Ramos v. Vernon*, 761 A.2d 705 (Conn. 2000).

53. *State v. Geisler*, 610 A.2d 1225 (Conn. 1992).

- Relevant federal precedent.<sup>54</sup>
- The textual approach, in which effect must be given to each and every word in the Constitution.<sup>55</sup>
- The historical approach, including the historical constitutional setting and the debates of the framers of the Connecticut Constitution.<sup>56</sup>
- The holdings and dicta of the Connecticut Supreme and Appellate Courts
- Persuasive precedents of other states.<sup>57</sup>
- Contemporary understandings of economic and sociological considerations.<sup>58</sup>

As a general rule, a validly enacted statute will be struck down only upon proof it is unconstitutional beyond a reasonable doubt, and the court will indulge in every presumption in favor of the statute's constitutionality.<sup>59</sup> In recent years, the willingness in Connecticut to discover new implied rights under the state constitution has cooled.<sup>60</sup> The state constitution is interpreted “under a presumption that the Constitution is not intended to change the common law.”<sup>61</sup> The court is reluctant to consider facial challenges premised upon the due process clause

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54. *Id.*

55. *Id.*; *State v. Lamme*, 579 A.2d 484 (Conn. 1990) (“The adoption of federal constitutional precedents that appropriately illuminate open textured provisions in our own organic document in no way compromises our obligation to construe the provisions of our state constitution.”).

56. *Id.*; *Stolberg v. Caldwell*, 402 A.2d 763 (Conn. 1978), *appeal dismissed sub nom. Stolberg v. Davidson*, 454 U.S. 958 (1981).

57. *Lamme*, 579 A.2d 484; *Cologne v. Westfarms Assocs.*, 469 A.2d 1201 (Conn. 1984); *Palka v. Walker*, 198 A.2d 265 (Conn. 1938).

58. *State v. Gethers*, 497 A.2d 408 (Conn. 1985); *Cologne*, 469 A.2d 1201; *State v. Barton*, 594 A.2d 917 (Conn. 1991); *State v. Dukes*, 547 A.2d 10 (Conn. 1988) (stating the constitution must be interpreted within the context of the times, in accordance with the demands of modern society “or it will be in constant danger of becoming atrophied and, in fact, may even lose its original meaning”).

59. *State v. Breton*, 562 A.2d 1060 (Conn. 1989); *Zapata v. Burns*, 542 A.2d 700 (Conn. 1988).

60. *See Ramos v. Vernon*, 761 A.2d 705 (Conn. 2000) (finding that even if federal courts uniformly accepted that juvenile curfews infringe upon minors’ fundamental rights under the federal constitution, the petitioner “would still need to establish that the fundamental rights of minors *independently guaranteed under the state constitution* are implicated by the ordinance.” (Emphasis in original) (Katz, J.; Borden, Norcott, Palmer, Vertefeuille, Js., concurring; Sullivan, J., concurring in part and in the result); *Moore v. Ganim*, 660 A.2d 742 (1995) (finding no express or unenumerated constitutional right to state-funded minimal subsistence to indigent state residents) (Borden, Norcott, Palmer, Js., concurring; Berdon, Katz, Js., dissenting).

61. *Hilton v. City of New Haven*, 1992 Conn. Super. LEXIS 3434 (Conn. Super. Ct. 1992).

of the federal and state constitutions;<sup>62</sup> however, its substantive component is by no means dormant.<sup>63</sup>

Recent attempts to create substantive rights through the state's preamble<sup>64</sup> have consistently been rejected. Akin to an appeal to natural law principles, the argument boils down to the proposition that individuals who enter into a social compact for mutual protection would never consent to a compact that permitted the government to deprive them of certain rights, such as the right to life or welfare assistance.<sup>65</sup> As articulated in *State v. Joyner*,<sup>66</sup> the historical role of natural law in Connecticut jurisprudence does not support the proposition that it gives rise to unenumerated constitutional rights. Not only does natural law not serve as an unwritten source of constitutional rights, but in determining the scope of an unenumerated right, the court may not extend such rights "beyond the contours that the historical record supports."<sup>67</sup> While acknowledging Connecticut's constitution is "an instrument of progress," unenumerated rights exist, if at all, only if they are grounded in, or derived from, the constitutional text or Connecticut's unique historical record. Since *Maher v. Doe*, the courts have expressly rejected claims to an unenumerated fundamental right to shelter<sup>68</sup> and general assistance.<sup>69</sup>

### III. THE COURT

The first Connecticut Constitution was adopted in 1818, establishing a Supreme Court of Errors (now called the Connecticut Supreme Court), which is composed of a chief justice and six

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62. *Ramos*, 761 A.2d 705.

63. *Fair Cadillac-Oldsmobile Isuzu P'ship v. Bailey* explored the makeup of the Connecticut due process clause relative to its substantive nature. *Ramos v. Vernon*, 761 A.2d 705 (Conn. 2000) (citing *ATC Partnership v. Windham*, 741 A.2d 305 (Conn. 1999), *cert. denied*, 530 U.S. 1214 (2000)).

64. CONN. CONST. art. I, § 1.

65. *State v. Webb*, 680 A.2d 147, n.20 (Conn. 1996).

66. *State v. Joyner*, 625 A.2d 791 (Conn. 1993) (Js. Borden and Norcott concurring).

67. *Webb*, 680 A.2d 147, n.20.

68. *Hilton v. City of New Haven*, 1992 Conn. Super. LEXIS 3434 (Conn. Super. Ct. 1992).

69. *Moore v. Ganim*, 660 A.2d 742 (Conn. 1995).

associate justices.<sup>70</sup> A panel of five justices hears and decides each case. On occasion, the chief justice summons the court to sit en banc as a full court of seven, instead of a panel of five, to hear particularly important cases. Connecticut Governor Jodi Rell is widely anticipated to nominate a new chief justice in March of 2007 to replace Justice William Sullivan.

The system of appointment closely mirrors the judicial appointment structure of the federal courts, with the exception that federal judges are appointed for life. Connecticut adopted a method of appointing and re-appointing judges for 8-year terms through a screening of applicants by a 12-member independent Judicial Selection Commission.<sup>71</sup> The Judicial Selection Commission recommends, the governor nominates, and the legislature appoints judges to the various courts.<sup>72</sup>

The Connecticut Judicial Performance Evaluation Program is the mechanism by which judges are evaluated. As part of the evaluation process, anonymous questionnaires are distributed to attorneys who appeared before the judge for a proceeding lasting at least one hour, as well as to jurors who sat on a case presided over by the judge. The attorney questionnaire measures a judge's performance, based upon various criteria, including demeanor, legal ability, and judicial management skills. Evaluation reports are generated from the input received. The Chief Court Administrator conducts individual interviews to aid judges in interpreting the data. Judges are also provided self-assessment forms to assist them in assessing their own courtroom performance and placing the attorney and juror responses in perspective.

In addition to being used by a Deputy Chief Court Administrator as a benchmark to discuss the ongoing needs and performance of judges, the data is used by the Judiciary Committee and the Judicial Selection Commission at the time for considering the re-appointment of a judge.

### **Biographical information of the justices currently sitting on the Connecticut Supreme**

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70. The current Supreme Court consists of the following seven Justices: Hon. David M. Borden, Hon. Flemming L. Norcott, Jr., Hon. Joette Katz, Hon. Richard N. Palmer, Hon. Christine S. Vertefeuille, Hon. Peter T. Zarella, and Hon. William J. Sullivan.

71. CONN. GEN. STAT. § 51-44a.

72. CONN. GEN. STAT. §2-40.

**Court.**

<b>Justice</b>	<b>Appointed by/Year</b>	<b>Term Expires</b>	<b>Miscellaneous</b>
Chief Justice Chase T. Rogers (Sworn in as Chief Justice on April 25, 2007)	Governor M. Rell/ 2007	2015	-Biographical Information: B.A., Stanford University (1979); J.D., Boston University School of Law (1983) -Professional/Social Affiliations: Partner, Cummings & Lockwood (1991); Judge, Connecticut Superior Court (1998); Judge, Appellate Court (2006);
Senior Associate Justice David M. Borden (Retiring in August 2007)	Governor W. O'Neill/ 1990	2008 (Age 70)	-Biographical Information: B.A., <i>Magna Cum Laude</i> , Phi Beta Kappa, Amherst College (1959); LL.B., <i>cum laude</i> , from Harvard Law School (1962); Executive Director, Commission to Revise the Criminal Statutes of the State of Connecticut (1963–71) -Professional/Social Affiliations: Instructor, University of Connecticut School of Law -Noteworthy Opinions: <i>In re Valerie D.</i> , 613 A.2d 748 (Conn. 1992); The Democratic Party -Speeches: Connecticut Public Interest Law Journal Fall 2003 Symposium: <i>Gideon v. Wainwright After 40 Years: Are We Keeping the Promise?</i> -Articles: <i>Connecticut Criminal Jury Instructions; Superior Court Criminal Rules; Connecticut Criminal Law</i> ; Authored several law review articles. -Awards: University of Connecticut Law Review Award for Excellence in Legal Scholarship and Service to the Legal Community (1994); Raymond E. Baldwin Public Service Award (1997)
Justice Flemming L. Norcott, Jr.	Governor L. Weicker/ 1992	2008	-Biographical Information: B.A., Columbia University (1965); J.D., Columbia University School of Law (1968) -Professional/Social Affiliations: Co-founder and executive director, Center for Advocacy, Research and Planning, Inc.; Lecturer, Yale Law School and Yale College; Lecturer, Criminal Justice Program, University of New Haven; The Democratic Party -Awards: United States Peace Corps Franklin

			H. Williams Award for Outstanding Community Service (2002); Reverend Dr. Martin Luther King Jr. Leadership Award, Greater New Haven NAACP (1992)
Justice Joette Katz	Governor L. Weicker/ 1992	2008	-Biographical Information: B.A., <i>cum laude</i> , Brandeis University (1974); J.D., <i>cum laude</i> , University of Connecticut Law School (1977) -Professional/Social Affiliations: Assistant Public Defender, Appellate Unit, Office of Chief Public Defender (1978–81); Assistant Public Defender (1981–83); Instructor, University of Connecticut School of Law (1981–84); Instructor, Ethics, Yale Law School; Instructor, Criminal Law and Ethics, Quinnipiac School of Law; The Democratic Party -Noteworthy Opinions: <i>Moore v. Ganim</i> <sup>73</sup> ; <i>State v. Webb</i> <sup>74</sup> ; <i>Ramos v. Vernon</i> <sup>75</sup> -Articles: <i>Connecticut Criminal Caselaw Handbook: A Practitioner’s Guide</i> (1989) -Awards: The Connecticut Women’s Education and Legal Fund’s Maria Miller Stewart Award (1993); National Organization for Women’s Harriet Tubman Award (1993); University of Connecticut School of Law’s Distinguished Graduate Award (2000); The National Council of Jewish Women’s Women of Distinction Award (2001); Connecticut Bar Association's Henry J. Naruk Judiciary Award (2004)
Justice Richard N. Palmer	Governor L. Weicker/ 1993	2009	-Biographical Information: B.A., Phi Beta Kappa, Trinity College (Hartford 1972) ; J.D., high honors, University of Connecticut School of Law (1977) -Professional/Social Affiliations: Assistant United States Attorney for Connecticut from 1980–83 and from 1987–90; President,

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73. *Moore v. Ganim*, 660 A.2d 742 (Conn. 1995) (dissenting).

74. *State v. Webb*, 680 A.2d 147 (Conn. 1996) (concurring and dissenting in part).

75. *Ramos v. Vernon*, 761 A.2d 705 (Conn. 2000).

76. *State v. Sandoval*, 821 A.2d 247 (2003)

			Hartford Courant Foundation; Instructor, Criminal Law and Ethics, Quinnipiac University School of Law; Visiting Lecturer, Ethics and Litigation, Yale Law School; The Democratic Party -Noteworthy Opinions: <i>State v. Sandoval</i> <sup>76</sup>
Justice Christine S. Vertefeuille	Governor J. Rowland/ 2000	2008	-Biographical Information: B.A., Trinity College (1972); J.D., University of Connecticut School of Law (1975) -Professional/Social Affiliations: The Democratic Party -Noteworthy opinions: <i>Nelson v. Department of Income Maintenance</i> (unpublished), citing favorably, <i>Doe v. Maher</i> <sup>77</sup> -Awards: Judicial Award from the Connecticut Trial Lawyers Association (1995)
Justice Peter T. Zarella	Governor J. Rowland/ 2001	2009	-Biographical Information: B.S., Northeastern University (1972); J.D., Suffolk University Law School (1975) -Professional/Social Affiliations: Connecticut Bar Assoc. Executive Committee of the Commercial Law and Bankruptcy Section (1985–90); Connecticut Bar Assoc. Banking Law Committee (1990–94); Town of West Hartford Ethics Commission (1992–95) and Charter Revision Commission (1995–96); Republican National Committee
Senior Justice William J. Sullivan	Governor J. Rowland/ 1999	Retired	-Biographical Information: B.A., Providence College (1962); J.D., Marshall-Wythe School of Law, College of William and Mary (1965) -Professional/Social Affiliations: Civil Service Commissioner (1974–75) and Corporation Counsel (1976–78) for the City of Waterbury; The Democratic Party -Noteworthy Opinions: <i>State v. Sandal</i> (concurrence) <sup>78</sup>

## CONCLUSION

77. *Nelson v. Comm’r, Dep’t of Income Maint.*, No. 30 55 98, 1991 Ct Sup. 3577 (Conn. Super. Ct. New Haven Apr. 19, 1991); *Doe v. Maher*, 515 A.2d 134 (Ct. Sup. Ct. 1986).

78. *State v. Sandoval*, 821 A.2d 247 (Conn. 2003).

Twenty years after *Doe v. Maher*, the unlimited right to abortion is *de facto* settled law in Connecticut. Even when the regime of *Roe v. Wade* is finally abandoned, political leadership is not in place to set Connecticut on a new path. Absent a groundswell of public support, Connecticut's historical independence and political dynamics do not give cause for hope.