NEW HAMPSHIRE: UNCHARTED TERRITORY

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Summarizing the New Hampshire Supreme Court's rulings on issues related to life and judicial restraint is difficult, at best. Surmising how its relevant rulings might lean in the future presents an even greater challenge.

For starters, the state whose motto is "Live Free or Die" is known for having an independent nature that is deeply ingrained in its culture and citizenry. This same independence is reflected in the individuals of the state's highest court. Also, cases involving the majority of life issues have not come squarely before the court. Finally, the current court is relatively "young," in terms of experience, where the senior member was appointed in 1995, and the four remaining members were appointed during or after 2000. Collectively, these reasons contribute to the proposition that predicting how the court might rule on life issues or surmising which justices might exhibit judicial restraint on such issues is uncharted territory.

I. LIFE ISSUES

The New Hampshire Supreme Court has not faced cases directly on point with the following life issues: abortion, protection of the unborn from criminal violence, assisted suicide, healthcare rights of conscience, cloning, or destructive embryo research. However, tangential life issues have been addressed and these cases give a sense of the court's perspective in respecting life. Issues regarding rights of children, both *in utero* and after birth; wrongful death; wrongful birth; right to life; right to die; and rights of conscience have come before the court.

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Protection of the Unborn from Criminal Violence

Rather than directly dealing with the issue of protecting the unborn from criminal violence, the court in *State v. Millette* reached only an interpretation of the adequacy of an indictment.[2] The defendant in the case, a medical doctor and psychiatrist, was charged with second degree murder pursuant to statutory provisions, in that she gave a pregnant woman a substance to cause a miscarriage, thereby causing the death of the woman.[3] The statute provided "that if a person causes the death of a pregnant woman by perpetrating or attempting to perpetrate either the felony of destroying a quickened foetus or the misdemeanor of procuring the miscarriage of an unquickened foetus,[4] 'he shall be deemed guilty of murder in the second degree, and shall be punished accordingly.' "[5] Because the abortion resulting from the woman's death was that of an "unquickened foetus," the doctor was charged with a misdemeanor.[6]

The state's homicide law required malice aforethought as an indispensable element of the crime of murder; where malice aforethought was not alleged in either indictment, the defendant was entitled to have her motion to quash granted.[7] The court left open the possibility of the State indicting and trying the defendant for second-degree murder if it was prepared to allege and prove malice aforethought, or it left open the possibility for indicting and trying the defendant for manslaughter; the State could not, however, try the defendant pursuant to the indictments as they were.[8]

Injury to and Wrongful Death of Unborn

Almost 100 years ago, in *Prescott v. Robinson*,[9] the New Hampshire Supreme Court considered a pregnant mother's damages rights when both she and her child *in utero* were injured. In *Prescott*, the defendant negligently managed an automobile and ran it into the carriage in which the plaintiff was riding.[10] The plaintiff, who was then pregnant, fell to the

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[2] State v. Millette, 299 A.2d 150, 151 (N.H. 1972).
[3] *Id.* at 151.
[4] N.H. REV. STAT. ANN. § 585.12–13 (1955).
[5] *Millette*, 299 A.2d at 152.
[6] *Id.* at 151.
[7] *Id.* at 152–53.
[8] *Id.* at 154–55.
[9] 69 A. 522 (N.H. 1908).
[10] Prescott v. Robinson, 69 A. 522, 522–23 (N.H. 1908).

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ground and was severely injured, including internally.[11] The child to which she later gave birth was born "deformed, disfigured, and diseased."[12]

The court was presented with whether the plaintiff was entitled to recover for mental distress, based on her fear before the birth of her child that the child would be deformed due to the defendant's negligent act, and whether her mental suffering after the birth of her child, and her prospective anxiety and disappointment because of her child's deformity and diseased condition, were recoverable.[13] The court concluded the plaintiff's right to deliver a normal and healthy child was jeopardized; accordingly, she was entitled to damages inflicted by the defendant, including those for mental distress and further disappointment at the birth of a deformed child.[14]

> In arriving at its decision, the court opined that
> [t]he mother's right to the damages she suffers for the defendant's wrongful act in causing her to bring forth a misshapen and sickly child, instead of a well developed and healthy one, does not depend on the question whether at the time of the injury the *foetus* is deemed in law a person, or whether after birth it may maintain an action to recover for the wrong done to it before its birth. [15]

"If a *foetus* is deemed to constitute a part of the mother's person," the court reasoned, "an injury to it is plainly an injury to her, as much as an injury to her hand or arm would be."[16] Further, the court stated:

> The fact that one of the results of the alleged injury in this case was the deformity of the *foetus*, which became the child's misfortune upon his birth, does not prove that no right of the plaintiff was invaded in this regard for which damages are allowable. On the contrary, it shows that her natural right to the normal action of her physical organs in the growth and development of the *foetus* was seriously infringed.[17]

[11] *Id.* at 523.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 524.
[16] *Id.* at 523.
[17] *Id.*

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Because the question before the court was specifically about the mother's rights to collect damages, it was unnecessary for the court to determine what, if any, rights a child *in utero* has for injuries he/she receives.

In *Poliquin v. MacDonald*,[18] the defendant negligently operated a motor vehicle that collided with the vehicle in which the plaintiff's intestate was riding *in utero.* The plaintiff's intestate was born dead as a result of the miscarriage of the intestate's mother.[19] The court considered whether New Hampshire's wrongful death statute gave a right of action to the personal representative of an infant for injuries and resulting death suffered by it while *in utero.*[20]

In its analysis, the court recalled *Prescott v. Robinson,* in which it had previously denied the mother's right to recover in her own right for pre-natal injuries to a child born alive but deformed, for which, if it were deemed a person in law, would have a right of action.[21] The *Poliquin* court reasoned that "[i]f a child can live separate and apart from its mother, even though she die, it does not seem logical to say the injury was wholly that of the mother and not of the child."[22] The court held that "recovery should be allowed on behalf of a viable child born alive."[23]

Further, the court opined that "a fetus having reached that period of pre-natal maturity where it is capable of independent life apart from its mother is a person and if such a child dies in the womb as the result of another's negligence, an action for recovery may be maintained on its behalf."[24] Conversely, the court reasoned that "if a fetus is non-viable at the time of injury and dies in the womb its representative can maintain no action."[25]

[18] 135 A.2d 249 (N.H. 1957).
[19] *Id.*
[20] *Id.* at 250 (referencing N.H. REV. STAT. ANN. § 556:7, 9–14).
[21] *Id.* at 250 (citing Prescott v. Robinson, 69 A. 522 (N.H. 1908)).
[22] *Id.* at 251.
[23] *Id.*
[24] *Id.*
[25] *Id.*

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Ultimately, the court remanded this case for a determination of whether the plaintiff's intestate was viable or nonviable at the time of injury.[26] This case established that an *in utero* child's personhood and rights to recover in tort were based on its viability at the time of its death.

The New Hampshire Supreme Court further refined a child's right to a damages claim in *Bennett v. Hymers*.[27] In this case, a child *in utero* was involved in a collision that resulted in injuries. At the time of the accident, the child, according to the declaration, was "'capable of life separate and apart from his mother.'"[28] The child brought suit through his father and next friend for injuries suffered in the collision.[29] The court was asked whether a child born alive who suffered injuries while *in utero* as a result of negligent operation of a motor vehicle by another may maintain an action for such injuries, whether or not the child was capable of independent life apart from its mother at the time the injury was inflicted.[30]

First, the court reasoned a viable child born alive has a cause of action for injuries suffered "while a viable fetus *en ventre sa mere*," thus confirming the *Poliquin* court's view.[31] Next, the court considered whether the child, if a non-viable fetus at the time of the accident, could recover for injuries inflicted by the defendant's negligence.[32] In deciding this part of the issue, the court opined:

> It is not our intention to engage in an abstruse and technical discussion of the exact moment when conception occurs and the life of a new being starts. However it seems to us that if an infant is born alive and survives bearing physical or mental injuries medically provable to have been incurred by it while *en ventre sa mere* it is being oblivious to reality to say that the mother alone was injured by the tortious act and not the child.[33]

Finally, the court boldly stated that "the fetus from the time of conception becomes a separate organism and remains so throughout its life."[34] Realizing that the law recognized a

[26] *Id.*
[27] 147 A.2d 108 (N.H. 1958).
[28] *Id.* at 108.
[29] *Id.*
[30] *Id.* at 108–09.
[31] *Id.*
[32] *Id.* at 109.
[33] *Id.*
[34] *Id.* at 110.

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child's legal existence while *in utero* with respect to property rights and rights of inheritance, as well as in the field of criminal law, the court recognized the illogical position of not protecting it against the torts of others.[35] The court held accordingly "that an infant born alive can maintain an action to recover for prenatal injuries inflicted upon it by the tort of another even if it had not reached the state of a viable fetus at the time of injury."[36] Thus, this case firmly established that if a child was born alive, he/she could maintain an action for injuries, regardless of his/her ability at the time of injury to sustain life independent from the mother.

In *Wallace v. Wallace,*[37] yet another case considering the distinctions between viability and nonviability as related to damages rights, the court was asked whether a death action could be maintained on behalf of an aborted nonviable fetus, pursuant to New Hampshire's wrongful death statute.[38] The plaintiff, a passenger in a motor vehicle driven by the defendant, received injuries in the accident that included injuries to, and the death of, the 10 to 12-week old male fetus she was carrying.[39] As administratrix of the estate of the fetus, the plaintiff sought a death action.[40]

The plaintiff inferred that, under *Bennett v. Hymers*, both nonviable and viable fetuses had a cause of action following live birth for injuries prior to birth, and, therefore, there should not be a distinction based on viability governing the applicability of the wrongful death statute.[41] The court, however, did not agree. In its assessment of the applicability of the statute to the issue of fetal viability, the court stated:

> The real question is not when life begins but rather, whether our death statute should be construed to allow a cause of action on behalf of a fetus that has not drawn a breath of air, seen the light of day, or possessed the capacity to survive in the world outside its mother, despite all the medical and other care that could be mustered for it. To deny a nonviable fetus a cause of action is not to deny that life begins with conception.[42]

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[35] *Id.*
[36] *Id.*
[37] 421 A.2d 134 (N.H. 1980).
[38] *Id.* at 134–35.
[39] *Id.* at 135.
[40] *Id.*
[41] *Id.*; *see also* Bennett v. Hymers, 147 A.2d 108 (N.H. 1958).
[42] *Wallace*, 421 A.2d at 136.

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The court considered underlying policy implications for extending civil liability to a fetus before it obtained the status of "person," "in the real and usual sense of the word," and held that "no independent cause of action for wrongful death lies on behalf of a nonviable fetus that never achieves live birth."[43] Interestingly, the court noted "in passing" that it would be incongruous for a mother having a federal constitutional right to deliberately destroy a nonviable fetus, pursuant to *Roe v. Wade*,[44] while at the same time subjecting a third person to liability to the fetus for negligent acts.[45] That the point at which a fetus becomes viable would change with advances in technology and move closer to conception was also acknowledged by the court; even so, it refused to accept the logic that viability could never be a question of law.[46]

A pointed dissent urged the court to discard the "outmoded and improper 'viability' distinction."[47] Citing the holding in *Bennett*, "that a child born *alive* could maintain an action for injuries received before birth *without* regard to viability at the time of injury,"[48] and noting the court's clear opinion "that the fetus from the time of conception becomes a separate organism and remains so throughout its life,"[49] the dissent exposed the majority's unsuccessful "dance" around the earlier decision of the court by not extending "civil liability for negligence to … [the child] by giving it a cause of action until it becomes a 'person' by 'being born alive' while at the same time not overruling the *Poliquin* or the *Bennett* language."[50] The dissent urged the court to discard the "viability" distinction and conclude that "life is life and people are people."[51]

Based on this case, the court apparently values life, but with an artificial timetable. Viability distinctions might provide a target for the award of tort damages, but it is, at best, a moving target.

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[43] *Id.* at 136–37.
[44] *See* Roe v. Wade, 410 U.S. 113 (1973).
[45] *Wallace*, 421 A.2d at 137.
[46] *Id.*
[47] *Id.* at 140 (Douglas, J. dissenting); *see also* Poliquin v. MacDonald, 135 A.2d 249, 251 (1957).
[48] *Wallace*, 421 A.2d at 138 (Douglas, J. dissenting) (quoting Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958)).
[49] *Wallace*, 421 A.2d. at 140 (N.H. 1980) (Douglas, J. dissenting) (quoting Bennett v. Hymers, 147 A.2d 108, 110 (1958)).
[50] *Id.* at 140 (Douglas, J. dissenting).
[51] *Id.*

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A child's rights to recover damages came before the court yet again in *Bonte v. Bonte*.[52] In this case of unfortunate circumstances, the sole question presented was whether a child born alive could maintain a cause of action in tort against his/her mother for the mother's tortious conduct that caused prenatal injury.[53]

The facts are straightforward. At the time the defendant mother was seven months pregnant, she was struck by a car while crossing the street.[54] The plaintiff, who was delivered the next day by emergency caesarean section, was born with catastrophic brain damage resulting in cerebral palsy and severe and permanent disability.[55] The plaintiff's father brought suit individually and as next friend of the plaintiff, against the defendant, alleging negligence.[56] The action below, decided by then Judge Dalianis,[57] resulted in the Superior Court granting a motion to dismiss on the ground the pleadings failed to state a cause of action.[58] Although the defendant argued allowing the cause of action to proceed "'deprives women of the right to control their lives during pregnancy … [and] unfairly subjects them to unlimited liability for unintended and often unforeseen consequences of every day living,'" the court disagreed.[59]

On review, the court looked to *Bennett v. Hymers*, which allowed for an infant born alive to maintain an action to recover for prenatal injuries inflicted upon him/her by the tort of another, did not limit those against whom the child could bring suit, and recognized the injuries suffered by the child while *in utero* as "'distinct and independent'" from any injuries suffered by the mother.[60] The court determined, therefore, that New Hampshire case law permitted a child to maintain a cause of action for negligence resulting in prenatal injury.[61] Next, the court considered whether that child could maintain an action against his/her mother. After reviewing parental immunity cases, the court held a child born alive has a cause of action against his/her

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[52] Bonte v. Bonte, 616 A.2d 464 (N.H. 1992).
[53] *Id.* at 464.
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Justice Dalianis now sits on the New Hampshire Supreme Court.
[58] *Id.*
[59] *Id.* at 466.
[60] *Id.* at 465 (quoting Bennett v. Hymers, 147 A.2d 108, 110 (N.H. 1958)).
[61] *Id.* at 465.

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mother for the mother's negligence that caused injury to the child while *in utero*.[62] The court further opined that, with respect to the fetus, the mother is required to act with the appropriate duty of care, as are all persons, and, moreover, it is the same standard of care as that required of her once the child is born.[63]

The dissenting justices viewed the majority decision as failing "to fully appreciate the extent of the intrusion into the privacy and physical autonomy rights of women," yet admitted that "the step from third party liability to maternal liability follows as a matter of logic."[64] For policy reasons, however, they propounded the mother's sense of responsibility to the fetus should be moral, not legal.[65]

Wrongful Birth

Though labeled "wrongful birth," *Kingsbury v. Smith*[66] was actually a case for "wrongful conception." *Kingsbury v. Smith* brought before the court the issue of whether New Hampshire recognizes a claim for "wrongful birth"—the birth of a child which would not have occurred "but for" the act or omission of the defendant tortfeasor—and, if so, what damages may be considered by the trier of fact. Here, the husband and wife plaintiffs brought suit against defendant doctors for "wrongful birth" which, in this case the court construed as an action for "wrongful conception"—an action for damages arising from the birth of a child to which a negligently performed sterilization procedure or a negligently filled birth control prescription which fails to prevent conception was a contributing factor.[67] The negligently performed sterilization, in this case, resulted in the birth of a normal, healthy boy.[68]

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[62] *Id.* Cases reviewed by the court in reaching its holding include: Levesque v. Levesque, 106 A.2d 563 (N.H. 1954) (establishing court-created doctrine of parental immunity); Dean v. Smith, 211 A.2d 410 (N.H. 1965) (abandoning in part the parental immunity doctrine, noting that parental immunity did not exist at common law, and finding no justification for application of the court-created parental immunity doctrine in suits against a deceased parent's estate); and Briere v. Briere, 224 A.2d 588 (N.H. 1966) (extending the *Dean* holding and abolishing the court-created parental immunity doctrine adopted in *Levesque*).
[63] *Bonte*, 616 A.2d at 466.
[64] *Id.* at 467 (Brock, C.J. and Batchelder, J. dissenting).
[65] *Id.*
[66] 442 A.2d 1003 (N.H. 1982).
[67] *Id.* at 1004.
[68] *Id.*

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If every element necessary to support an action of medical malpractice were present, the court determined New Hampshire would permit a claim for "wrongful birth."[69] "Non-recognition of any cause of action for wrongful conception leaves a void in the area of recovery for medical malpractice and dilutes the standard of professional conduct and expertise in the area of family planning, which has been clothed with constitutional protection," the court opined.[70]

After reviewing the four general legal positions in the body of developing law of wrongful conception actions,[71] the court adopted the view that recovery for wrongful conception is limited to the recovery of damages to the hospital and medical expenses of the pregnancy, the cost of sterilization, pain and suffering connected with the pregnancy, and loss of the mother's wages during that time.[72] Further, the court affirmed a separate cause of action was available, by statute, for the husband's loss of consortium.[73] The court declined to allow recovery for the costs of raising the child.[74]

This decision of the court is deeply rooted in policy. Excluding the costs of child rearing allows the plaintiff to recover for negligence in torts but does not place the burden of child rearing on the tortfeasor. The court deemed this the "humane and common sense view."[75] Careful to limit this decision to the facts of this case, the court stated differing circumstances, such as the birth of an "abnormal or injured child" might result in a different conclusion.[76]

In *Smith v. Cote*,[77] the court considered, for the first time, causes of action for wrongful birth—a claim brought by the parents of a child born with severe defects against a physician who negligently fails to inform them, in a timely fashion, of an increased possibility the mother will give birth to such a child, thereby precluding an informed decision as to whether to have the child—and wrongful life—a claim brought by or on behalf of a child, contending the defendant

[69] *Id.* at 1005.
[70] *Id.* at 1005–06.
[71] *Id.* at 1004–05 (N.H. 1982). The four legal positions examined by the court include: (1) Non-recognition of any damages resulting from the birth of the child; (2) Complete recovery for the costs of child rearing; (3) Child rearing costs offset by the benefits of parenthood; and (4) Exclusion of child rearing costs as damages.
[72] *Id.* at 1006.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] 513 A.2d 341 (N.H. 1986).

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physician negligently failed to inform the child's parents of the risk of bearing a defective infant, and hence preventing the parents from choosing to avoid the child's birth.[78]

The plaintiff in this case was under the care of the defendant physicians during her pregnancy.[79] During her second trimester, a rubella titre test showed the plaintiff had been exposed to rubella.[80] After bringing her pregnancy to full term, the plaintiff gave birth to a baby girl, also a plaintiff in the case, who was born a victim of congenital rubella syndrome.[81] The plaintiffs sued, contending if the plaintiff mother had known the risks involved in having been exposed to rubella, she would have obtained a eugenic abortion.[82] Of the three counts in the original suit, only two were among the transferred questions for the court: (1) the plaintiff mother sought damages for emotional distress, extraordinary maternal care due to the plaintiff daughter's birth defects, and for the extraordinary medical and educational costs for rearing the plaintiff daughter; and (2) the plaintiff daughter sought damages for her birth with defects, for the extraordinary medical and educational costs, and for the impairment of her childhood.[83]

Specifically, the Superior Court transferred four questions of law to the court:

> A. Will New Hampshire law recognize a wrongful birth cause of action by the mother of a willfully conceived baby suffering from birth defects, against a physician on the grounds that the physician negligently failed to test for and discover that the mother had rubella, failed to advise the mother as to the risks of potential birth defects in a fetus exposed to rubella, and thereby deprived the mother of the information on which she would have had an abortion to prevent the birth of her deformed child, where the physician did not cause the baby's conception, and did not cause the deformities in the unborn fetus?
> B. If the answer to question A is in the affirmative, will New Hampshire law allow recovery in such a cause of action for damages for emotional distress, extraordinary maternal child care, and the extraordinary medical, institutional, and other special rearing expenses necessary to treat the child's impairments?
> C. Will New Hampshire law recognize a cause of action for wrongful life brought by a minor child suffering from birth defects against a physician on the grounds that the physician negligently failed to test for, discover, and advise the child's mother as to the mother's having rubella and as to information concerning the

[78] *Id.* at 342.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*

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> potential effects of rubella on her unborn fetus, which failure allegedly caused the mother not to abort the fetus, thereby causing the plaintiff child to live and exist with mental and physical deformities?
> D. If the answer to question C is in the affirmative, what general and specific damages may the child recover in such an action?[84]

As a prelude to addressing the questions, the court acknowledged the constitutional right of a woman to terminate her pregnancy, as granted in *Roe v. Wade*,[85] and questioned whether, with that right of choice, New Hampshire common law should allow the development of a duty to exercise care in providing information bearing on that choice.[86] To the issue of wrongful birth, the court first recognized the similar claim allowed under New Hampshire law for "wrongful conception."[87] Stating "[w]e see no reason to hold that as a matter of law those who act negligently in providing such care cannot cause harm, and hence are immune from suit," and reasoning such a holding would leave a hole in medical malpractice recovery, the court held that "New Hampshire recognizes a cause of action for wrongful birth."[88]

On the issue of tangible losses due to the wrongful birth, the court held a plaintiff in a wrongful birth case may recover the extraordinary medical and educational costs attributable to the child's deformities but may not recover ordinary child-raising costs.[89] As to intangible losses, the court held damages for emotional distress were not recoverable in wrongful birth actions.[90]

As to the wrongful life claim, the court exposed the absurdity of the plaintiff daughter's claim she had an interest in avoiding "'the lifetime of suffering inflicted on [her] by [her]

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[84] *Id.* at 343.
[85] Roe v. Wade, 410 U.S. 113 (1973).
[86] *Smith*, 513 A.2d at 343–44.
[87] *Id.* at 344 (citing Kingsbury v. Smith, 122 N.H. 237 (1982)).
[88] *Id.* at 347–48.
[89] *Id.* at 350.
[90] *Id.* at 351. To reach its holding, the court considered analogous cases in which it had been reluctant to permit parents of children injured or killed as a result of negligent conduct to recover for their consequent emotional distress: Prescott v. Robinson, 69 A. 522, 524–25 (N.H. 1908) (holding that a pregnant woman who was injured in an automobile accident caused by the defendant's negligence could not recover for postnatal emotional distress caused by the condition of her premature, permanently deformed child) and Siciliano v. Capital City Shows, Inc., 475 A.2d 19, 24 (N.H. 1984) (holding that plaintiffs, the parents of children whose injuries from an amusement park ride resulted in death for one child and cerebral damage for another, did not state a cause of action in claiming damages for the loss of the society of their respective children).

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condition.'"[91] In order for the court to recognize her wrongful life action, it would have had to determine the plaintiff, while in the fetal state, had an interest in avoiding her own birth, and that it would have been better for her not to be born.

Interestingly, the court pointedly differentiated the instant issue with that of the evolving "right to die" doctrine:

> At issue is not protection of the impaired child's right to choose nonexistence over life, but whether legal injury has occurred as a result of the defendant's conduct.…[T]he judiciary has an important role to play in protecting the privacy rights of the dying. It has no business declaring that among the living are people who never should have been born.[92]

Emphasizing its unwillingness to recognize a cause of action for wrongful life—the right not to be born—the court acknowledged its "paramount regard for the value of human life and of [its] adherence to fundamental principles of justice."[93]

In *Hall v. Dartmouth Hitchcock,*[94] the first wrongful birth action since *Smith*, the parents of a son who was born with a rare chromosomal disorder alleged the defendants, including a medical center, college, and specialist, were medically negligent, which resulted in the wrongful birth of the plaintiffs' son. Although the court labeled this wrongful birth action a medical malpractice action, it acknowledged it was "unlike any other medical malpractice action because it involves the uniquely personal choice to terminate a pregnancy or give birth to a child with the increased possibility of severe birth defects."[95]

Pursuant to *Smith*, the court defined a wrongful birth claim as "a claim brought by the parents of a child born with severe defects against a medical care provider who negligently fails to inform them, in a timely fashion, of an increased possibility that the mother will give birth to such a child, thereby precluding an informed decision as to whether to have the child."[96] Additionally, causation required the plaintiff to show that "'but for the defendants' negligent

[91] *Smith*, 513 A.2d at 352.
[92] *Id.*
[93] *Id.* at 355.
[94] 899 A.2d 240 (N.H. 2006). Justice Dalianis authored the opinion while Justices Duggan and Galway concurred.
[95] *Id.* at 245, 249.
[96] *Id.* at 244 (citing Smith v. Cote, 513 A.2d 341 (N.H. 1986)).

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failure to inform her of the risks of bearing a child with birth defects, she would have obtained an abortion.'"[97] Because the evidence supported that the disclosure was appropriate and timely, the court determined the trial court erred in denying the medical center's motion for directed verdict and post-verdict motions.[98]

Assisted Suicide

The issue of assisted suicide has not come squarely before the court. Suicide has come before the court, however, in questions of tort law. Two wrongful death/suicide cases are reviewed here.

In *McLaughlin v. Sullivan*,[99] the court discussed, but did not decide, whether New Hampshire recognizes an exception to the general rule that tort actions seeking damages for the suicide of another may not be maintained. The plaintiff alleged the defendant, an attorney, negligently represented her client and that the negligent representation resulted in his wrongful conviction and ensuing suicide.[100]

The court recognized some jurisdictions have established two exceptions to the general rule; as such, recovery for wrongful death by suicide may be possible where the defendant either caused the suicide or had a duty to prevent the suicide from occurring.[101] The court found, however, the professional negligence complained of did not fit into either of the two exceptions and found no basis on the facts to form a third exception; therefore, on the facts of this case, the court did not have to determine whether there were any circumstances under which a wrongful death cause of action would lie for suicide.[102]

Although the court did not have to decide in *McLaughlin* whether there are *any* circumstances in which a wrongful death cause of action lies for suicide, it faced the issue in *Mayer v. Hampton*.[103] Again before the court was whether New Hampshire recognizes an

[97] *Id.* at 245.
[98] *Id.* at 249.
[99] 461 A.2d 123 (N.H. 1983).
[100] *Id.* at 124.
[101] *Id.* at 124–25.
[102] *Id.* at 125–27.
[103] 497 A.2d 1206 (N.H. 1985).

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exception to the general rule that tort actions seeking damages for the suicide of another may not be maintained.

The plaintiff brought his son (the plaintiff's intestate), who was a mental health patient, home to live with him.[104] The defendants, acting as officers of a police department, entered the plaintiff's intestate's home without a search warrant, proceeded to force him to the floor, pointed a gun to his head, and threatened to kill him.[105] They took him into custody, and after a short investigation, he was released.[106] The plaintiff's intestate then committed suicide by stabbing himself repeatedly.[107]

Although early case law did not allow recovery for wrongful death by suicide, "on the basis that suicide, apparently as a matter of law, is an intervening, independent agency which breaks the causal connection between the wrongful or negligent act and the death," the court reasoned the facts of this case were more like cases from other jurisdictions "which have held that a defendant may be liable for the suicide of another where his intentional torts substantially caused the death."[108] The court held that

> In order for a cause of action for wrongful death by suicide to lie for intentional torts, the plaintiff must demonstrate that the tortfeasor, by extreme and outrageous conduct, intentionally wronged a victim and that this intentional conduct caused severe emotional distress in his victim which was a substantial factor in bringing about the suicide of the victim.[109]

Under the facts of this case, the exception could apply as alleged in the plaintiff's complaint; thus, the defendants were not allowed as a matter of law to dismiss the wrongful death action.[110]

Although a person's wish to die is often paired with the consideration of the right to have assistance with their suicide, *In re Caulk*[111] presents a different twist. Instead of asking for assistance with his suicide wishes, the defendant—in a true test of New Hampshire's "Live free

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[104] *Id.* at 1208.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.* at 1209.
[109] *Id.* at 1211.
[110] *Id.*
[111] 480 A.2d 93 (N.H. 1984).

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or die" motto—was asking to be left alone in order to be able to successfully carry out his own death.

The defendant wished to end his life by refusing to consume any nourishment except certain liquids.[112] Due to many charges against him, the defendant never expected to be released from prison again; if he could not live freely, he did not want to live at all.[113] Making no demands for anything, he claimed a constitutionally protected right to die without state intervention.[114] On transfer from the Superior Court was the question: "'Does [the defendant], an inmate at the New Hampshire State Prison, have a constitutional right to die, without interference by the State, if he is mentally competent to make such a decision and if he has knowingly and voluntarily decided to die by starvation?'"[115]

Noting the defendant's specific intent to cause his own death, the court differentiated that he was not merely avoiding "extraordinary and heroic measures to prolong his life."[116] The court held that "in balancing this prisoner's right to privacy under the State Constitution with the State's interests in maintaining an effective criminal justice system and in preserving life, the State's interests must prevail."[117] Thus, the court would not allow the defendant to die on his own terms.

Contrary to the majority's view, the dissent concluded the State had "not demonstrated a compelling interest so as to override [the defendant's] fundamental liberty right to fast until his natural death without governmental intervention."[118] Looking to the state motto to "live free or die," the dissent would have permitted the latter.[119]

Healthcare Rights of Conscience

New Hampshire is one of only three states that do not statutorily protect healthcare rights of conscience. However, Part One, Article Four, of the New Hampshire Constitution addresses

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[112] *Id.* at 94.
[113] *Id.* at 95.
[114] *Id.*
[115] *Id.* at 94.
[116] *Id.* at 97.
[117] *Id.*
[118] *Id.* (Douglas, J. dissenting).
[119] *Id.*

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rights of conscience: "Among the natural rights, some are, in their very nature unalienable, because no equivalent can be given or received for them. Of this kind are the Rights of Conscience." Juxtaposed with these "unalienable" rights is Part One, Article Three, which states: "When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such an equivalent, the surrender is void." Notwithstanding the constitutional provision specifically referring to "Rights of Conscience," few New Hampshire cases are brought pursuant to such rights.[120]
Although no cases have yet made specific claims as to "healthcare rights of conscience," cases challenging the requirement to vaccinate children prior to their school attendance have, in part, have raised rights of conscience claims, pursuant to the constitution's rights of conscience assurance.[121] In ruling the vaccination requirements constitutional, the court placed the state's public health interests above the rights of conscience of the individual.

Though many life issues have not been directly addressed by the state's highest court, historical language indicates a respect for life. From the court's declaration that the unborn child is a "person" when having reached a pre-natal capability to sustain independent life,[122] to the court's bold statement that the unborn child is a "separate organism" "from the time of conception,"[123] to the court's acknowledgment that the state has in interest in "preserving life,"[124] precedent supports a life-respecting view. Even when unwilling to grant an independent cause of action for wrongful death on behalf of a nonviable unborn child that never achieved live birth, the court stated clearly its view did not "deny that life begins with conception."[125] And when faced with a wrongful life claim, the court would not consider that a plaintiff had an interest in avoiding having ever been born.[126]

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[120] *See e.g.*, Libertarian Party New Hampshire v. State, 910 A.2d. 1276 (N.H. 2006) (challenging ballot access provisions as violating rights of conscience, via rights of association); *In re* Tocci, 624 A.2d 548 (N.H. 1993) (claiming moral opposition to unified bar as ground for relief pursuant to rights of conscience).
[121] *See e.g.*, State v. Drew, 192 A. 629 (N.H. 1937); Sch. Bd. of Manchester, 136 A. 263 (N.H. 1927); Barber v. Sch. Bd. of Rochester, 135 A. 159 (N.H. 1926).
[122] Poliquin v. MacDonald, 135 A.2d 249, 251 (N.H. 1957).
[123] Bennett v. Hymers, 147 A.2d 108, 110 (N.H. 1958).
[124] *In re* Caulk, 480 A.2d 93, 95 (N.H. 1984).
[125] Wallace v. Wallace, 421 A.2d 134, 136–37 (N.H. 1980).
[126] *See* Smith v. Cote, 513 A.2d 341, 352 (N.H. 1986).

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Notwithstanding its historical respect for life, the court has also recognized it is bound by precedent such as the constitutional right of a woman to terminate her pregnancy.[127] Because there is a dearth of New Hampshire-specific precedent regarding most life issues, the territory remains largely uncharted pursuant to New Hampshire law.

II. JUDICIAL RESTRAINT

One of the purposes for reviewing past decisions of a court is to help determine how the court might rule on similar issues as they arise in future cases. Part of this review is the "activist" nature of the court. Whether the court qualifies as an activist court depends substantially on the reviewer's perspective.

In general, however, an activist court is known for straying beyond the judicial role of interpreting law into the territory of making new law. Instead of leaving certain policy considerations to a legislature as new issues arise, an activist court is more likely to venture into the policy realm. Such activism can compromise the work of a legislature and undermine a constitutional government.

As for the New Hampshire Supreme Court, in interpreting a provision of the constitution in *N.H. Municipal Trust Workers' Compensation Fund v. Flynn*,[128] they stated: "'We will look to its purpose and intent, bearing in mind that we will give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast.'"[129] Furthermore, the court does not always hold the delegates' statements at the constitutional convention as significant in determining an amendment's meaning; rather, to be entitled to consideration, "the delegates' statements must interpret the amendment's language in accordance with its plain and common meaning while being reflective of its known purpose or object."[130]

In a clear statement regarding its non-activist stand in this case, the court said it would "not redraft the constitution in an attempt 'to make it conform to an intention not fairly expressed

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[127] *Id.* at 44 (citing Roe v. Wade, 410 U.S. 113 (1973)).
[128] 573 A.2d 439 (N.H. 1990).
[129] N.H. Mun. Trust Workers' Comp. Fund v. Flynn, 573 A.2d 439, 441 (N.H. 1990) (quoting Opinion of Justices, 494 A.2d 261, 267 (N.H. 1985)).
[130] *Id.* at 441.

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in it.'"[131] Moreover, the court stated it is the "duty of the judiciary to interpret the law, not make it."[132]

In another case of constitutional interpretation, *Warburton v. Thomas*,[133] the court was asked to interpret two procedural provisions of the constitution. The court expressed its conservative responsibility in reviewing the history of the constitution as follows:

> [I]t is the duty of the court to place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention from the language used, viewed in the light of the surrounding circumstances. While the constitution as it now stands is to be considered as a whole as if enacted at one time, to ascertain the meaning of particular expressions, it may be necessary to give attention to the circumstances under with they became parts of the instrument.[134]

The court further stated:

> [W]e regard it as a well settled and unquestioned rule of construction that the language used by the legislature, in the statutes enacted by them, and that used by the people in the great paramount law which controls the legislature as well as the people, is to be always understood and explained *in that sense in which it was used at the time when the constitution and the laws were adopted.*[135]

In *In re Petition of State of N.H.*,[136] a case in which the defendant faced the possible sentence of life without parole for multiple convictions, the court interpreted sentencing statutes. The court turned first to the plain language of the statute.[137] Because more than one reasonable interpretation of the statutory language existed, the court then looked to legislative history.[138] When the legislative history did not bring clarity, and the court was still undecided as to the proper interpretation of the statute, it stated: "[W]e think it is crucial that the legislature make

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[131] *Id.* at 441 (quoting Concrete Co. v. Rheaume Builders, 132 A.2d 133, 135 (N.H. 1957)).
[132] *Id.* at 445.
[133] 616 A.2d 495 (N.H. 1992).
[134] Warburton v. Thomas, 616 A.2d 495, 497 (N.H. 1992) (citation omitted).
[135] *Id.* at 498 (citation omitted).
[136] 872 A.2d 1000 (N.H. 2005). Justice Galway authored the opinion while Chief Justice Broderick and Justices Dalianis and Duggan concurred.
[137] *In re* Petition of State of N.H., 872 A.2d 1000, 1002 (N.H. 2005).
[138] *Id.*

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clear the sentencing implications of 'previously convicted of 2 or more offenses.'"[139] The court's request for the legislature to "make its intention unmistakably clear" highlights the court's perception that its role is to interpret rather than make law.[140]

Furthermore, on many occasions, by respecting the separation of powers doctrine, the court exhibits judicial restraint. Such doctrinal and procedural respect was at the center of *Horton v. McLaughlin*.[141]

The petitioners, who were members of the New Hampshire Supreme Court at times pertinent to this appeal, sought reimbursement for attorney's fees incurred as a result of successfully defending themselves against impeachment. In agreement with the ruling of the Superior Court, the court held the issue in this case was a nonjusticiable political question.[142] To the petitioners' argument that they were not seeking reimbursement until post-impeachment efforts and, therefore, that the case should be justiciable, the court stated: "Regardless of the timing of the request, the petitioners incurred the fees during the course of impeachment proceedings over which the legislature has exclusive authority."[143]

Although the court recognized the appropriate authority of the legislature, it furthered its inquiry into justiciability by considering whether there could be "'unusual circumstances that might justify a more searching review of impeachment proceedings.'"[144] Here, the court found "no constitutional violation that would make the petitioners' claim justiciable," and thus affirmed the trial court's dismissal of the petitioners' claim for attorney's fees on justiciability grounds.[145]

In a special concurrence, one justice opined that the doctrine of sovereign immunity precluded the petitioners from suing the State to recover the costs and legal fees resulting from impeachment proceedings.[146] Because sovereign immunity is a jurisdictional question, and

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[139] *Id.* at 1005.
[140] *Id.* at 1005–06.
[141] 821 A.2d 947 (N.H. 2003). Per curiam decision by panel of specially appointed justices. Justice Hicks concurred, as part of panel, prior to his permanent appointment to the Court.
[142] Horton v. McLaughlin, 821 A.2d 947, 949 (N.H. 2003).
[143] *Id.* at 950.
[144] *Id.* (quoting *In re* Judicial Conduct Comm., 145 N.H. 108, 112 (2000)).
[145] *Id.* at 952.
[146] *Id.* at 952–53 (Dickson, J. concurring specially).

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because jurisdiction trumps justiciability, he would have dismissed the petition on grounds of subject matter jurisdiction.

In *Petition of Judicial Conduct Committee*,[147] the court further distinguished *Horton v. McLaughlin* by stating the nonjusticiability of a political question derives from the principle of the separation of powers.

In *Hughes v. Speaker of the House of Representatives*,[148] a case concerning the enactment of a school funding bill, the court was asked to consider both New Hampshire's constitution regarding right of access and legislative procedure and certain statutes regarding the public's right to know. The plaintiff was a member of the House, and the defendants were the Speaker of the New Hampshire House of Representatives, the President of the New Hampshire Senate, the General Court of the State of New Hampshire, the House Conference Committee on the bill, and the Senate Conference Committee on the bill.[149]

Again, in bold respect of the principle of the separation of powers doctrine, the court held whether the defendants violated the statutory provisions governing the public's right to know is a political question and, therefore, one the court would not review.[150] Thus, the legislature's adherence to procedural rules and statutes is in the control of the legislature and not subject to judicial review, unless the procedure is mandated constitutionally. Whether the defendants violated the constitution was not a political question, however, and the court reached an opposite conclusion as to the justiciability of this question, stating: "It is our duty to interpret constitutional provisions and to determine whether the legislature has complied with them."[151]

Perhaps no cases better exemplify the court's respect for the separation of powers than the line of cases commonly known as the *Claremont* cases.[152] In each of the cases, the overriding issue is the state's duty to provide adequate public education to all students.

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[147] 151 N.H. 123, 855 A.2d 535 (2004). Chief Justice Broderick and Justices Dalianis and Galway concurred; Justice Duggan concurred specially.
[148] 876 A.2d 736 (N.H. 2005). Justice Duggan authored the opinion while Chief Justice Broderick and Justices Dalianis and Galway concurred.
[149] Hughes v. Speaker of the House of Representatives, 876 A.2d 736, 740 (N.H. 2005).
[150] *Id.* at 746.
[151] *Id.* at 747.
[152] Because the facts and holdings of the *Claremont* cases are not relevant to the State Supreme Court Project, they are not discussed in detail. Citations are provided for those who may wish to know more about these decisions and

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Five school districts, five school children, and five taxpayers from "property poor" communities were plaintiffs in the 1993 *Claremont I* case.[153] They sought to have the educational funding system in New Hampshire declared unconstitutional. The court, in an uncomplicated interpretation of a constitutional mandate, held the State had a constitutionally imposed duty to provide an adequate education to all students who could be educated.[154] Although this decision favored the property-poor communities, it did *not* "define the parameters of the education mandated by the constitution as that task is, in the first instance, for the legislature and the Governor."[155]

Exercising judicial restraint, the court left the decision as to what is "adequate" up to the other two political branches. In an effort to determine what was "adequate," multiple cases have come before the court, with the court often offering guidance but leaving the specific parameters to other branches of government.

Most recently, in the ongoing *Claremont* educational tax saga, the court, in *Londonderry School District SAU #12 v. State*, became apparently frustrated with the legislature's unwillingness to address the issue raised in the previous *Claremont* cases.[156] A concurrence of four out of five justices stated the legislature, in its enactment of "Criteria for an Equitable Education",[157] had not defined a constitutionally adequate education and, thus, neither a citizen

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the ongoing dance between the branches of government. Londonderry v. State, 907 A.2d 988 (N.H. 2006); Claremont Sch. Dist. v. Governor (*Claremont VII*), 794 A.2d 744 (N.H. 2002); Sirrell v. State, 780 A.2d 494 (N.H. 2001); Claremont Sch. Dist. v. Governor (*Claremont VI*), 761 A.2d 389 (N.H. 1999); Claremont Sch. Dist. v. Governor (*Claremont V*), 744 A.2d 1107 (N.H. 1999); Claremont Sch. Dist. v. Governor (*Claremont IV*), 725 A.2d 648 (N.H. 1998); Claremont Sch. Dist. v. Governor (*Claremont III*), 712 A.2d 612 9 (N.H. 1998); Claremont Sch. Dist. v. Governor (*Claremont II*), 703 A.2d 1353 (N.H. 1997); Claremont Sch. Dist. v. Governor (*Claremont I*), 635 A.2d 1375 (N.H. 1993).

[153] *Claremont I*, 635 A.2d at 1377.

[154] *Id.* at 1376.

[155] *Id.* at 1381.

[156] *See Londonderry*, 907 A.2d 988. Justice Hicks authored the opinion; Chief Justice Broderick and Justice Dalianis concurred; Justice Duggan concurred specially in part and dissented in part, stating that further factual development was necessary as to whether any municipalities were receiving insufficient funding from the State to pay for an "adequate education;" and Justice Galway concurred in the majority's determination that the legislature has not defined a constitutionally adequate education, and dissented in retaining jurisdiction. He stated that in so doing, the court risked "taking over the legislature's role in shaping educational and fiscal policy." Justice Galway boldly stated that the court's "sole duty is to uphold and implement the New Hampshire Constitution." *Id.* (Galway, J. dissenting in part) (quotation omitted).

[157] N.H. REV. STAT. ANN. § 193:E:2 (2005).

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nor a school district could “determine the distinct substantive content of a constitutionally adequate education.”[158] In an unusual move, the court retained jurisdiction and expressed their expectation “that the political branches will define with specificity the components of a constitutionally adequate education before the end of fiscal year 2007.”[159]

While the court affirmed it had refrained from taking over the legislature’s role during the almost 13 years the *Claremont* cases had been occurring—and stated that it would continue to do so in the *Londonderry* case—the court also made clear its responsibility to protect citizens’ constitutional rights.[160] That the court deemed a judicial remedy essential, in absence of the legislature performing its duty, was clear in the court’s statement that “[d]eference [to the legislature] . . . has its limits.”[161]

Because individual justices are not pressured to vote a particular way based on a desire to retain an appointment, the occasional “activist” type of vote is likely to come forth, and a particular justice’s position is not always predictable. Fortunately, however, the court’s collective appreciation for a tripartite government and its respect for the law- and policy-making roles of its coequal branches are paramount. The court has historically appreciated the benefit the legislature and governor receive from public debate and input and is likely to continue to exhibit judicial restraint in the future.

III. THE COURT[162]

Like the independent culture of New Hampshire, its judiciary is likewise made up of independent minds. In addition to pervasive cultural influences, the judiciary’s independence might be attributable to the mode of judicial selection.[163] Because neither the legislature nor the people vote directly on judges, the justices would have no reason to give in to the ever-changing

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[158] *Londonderry*, 907 A.2d. at 993.
[159] *Id.* at 995.
[160] *Id.* at 996.
[161] *Id.* at 996.
[162] General information on the court and its history and links to more specific information about the court may be found at: Judicial Branch of the State of N.H., *About the Supreme Court*, http://www.nh.gov/judiciary/supreme/about.htm (last visited Mar. 5, 2007) [hereinafter *About the Supreme Court*].
[163] N.H. CONST. pt. II, arts. 46, 60.

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swings of the political public.[164] And the fact that justices may serve until age seventy, rather than a fixed term, [165] provides yet another possible reason the court exemplifies independence—its justices have no fear of losing their appointments based on politically unpopular decisions.

As with most states' high courts, the roles of the New Hampshire Supreme Court are many. First, pursuant to the state constitution, the court has appellate jurisdiction and is New Hampshire's only appellate-level court. [166] The court accepts almost all merit-based cases submitted on direct appeal from the trial courts, selected appeals from administrative agency decisions, and questions of state law transferred by federal courts.[167] Occasionally, the court is granted original jurisdiction.[168] In addition, the court has an obligation to issue advisory opinions, when requested from either the governor or the legislature.[169]

The court also serves as the administrator for the entire court system.[170] In this role, it makes procedural rules, oversees budgeting for the court system, regulates professional conduct of members of the bar, manages admission to the bar, and disciplines members of the judiciary from lower courts.[171] Regarding its roles, the New Hampshire Supreme Court received favorable reviews in a 2002 Judicial Performance Evaluation Report.[172] The survey's respondents gave the court a score indicating "excellent" in categories such as Performance and Judicial Management Skills, Temperament and Demeanor, and Bias and Objectivity.[173]

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[164] The following paper contains a more complete discussion of the concept that the judicial selection process might affect judicial decisions: Phillip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. (SPECIAL ISSUE) 31, 36, 37 (1986) (proposing that the judicial selection process might affect judicial decisions).
[165] N.H. CONST. pt. II, art. 78.
[166] N.H. CONST. pt. II, art. 72-a; N.H. REV. STAT. ANN. § 490:4 (1997); N.H. SUP. CT. R. 7; Judicial Branch of the State of N. H., *Supreme Court Judicial Duties, Appeal Process*, http://www.nh.gov/judiciary/supreme/index.htm (last visited Mar. 5, 2007).
[167] *Id.*; N.H. SUP. CT. R. 4, 34.
[168] N.H. CONST. pt. II, art. 72-a; § 490:4; N.H. SUP. CT. R. 7.
[169] N.H. CONST. pt. II, art. 74.
[170] N.H. CONST. pt. II, art. 73-a; Judicial Branch of the State of N.H., *Judicial Duties, Administrative Duties*, http://www.nh.gov/judiciary/supreme/index.htm (last visited Mar. 5, 2007) [hereinafter *Judicial Duties*].
[171] *Id.*; *see* N.H. CONST. pt. II, art. 73-a.
[172] Judicial Performance Evaluation Report, http://www.courts.state.nh.us/press/judicialperfeval.htm (last visited Mar. 5, 2007). At the time of the survey, Justices Broderick, Dalianis, and Duggan were serving on the court.
[173] *Id.*

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One Chief Justice and four Associate Justices comprise the New Hampshire Supreme Court.[174] Each justice, including the Chief Justice, receives his/her appointment by being nominated by the governor and subsequently confirmed by the executive council.[175] Assuming good behavior, justices may serve until they reach the age of 70, after which retirement is mandatory.[176] Current members of the court include: Justice John T. Broderick, and Associate Justices Linda S. Dalianis, James E. Duggan, Richard E. Galway, and Gary E. Hicks.[177]

Any attempts to identify how justices might interpret a case, based on which political party they are aligned with or which governor appointed them are unlikely, in light of the above discussion regarding the New Hampshire court's independence.[178] Moreover, a justice's individual perspective, no matter how aligned he/she may or may not be with a particular philosophy, is typically masked within a majority's reasoning.[179] Even so, the biographies of the individual justices might offer some insight into a justice's perspective in rendering decisions. Therefore, a table summarizing the justices' biographies follows.

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[174] *Judicial Duties*, *supra* note 170.

[175] N.H. CONST. pt. II, arts. 46, 60. Chief Justice John Broderick initially went from being an Associate Justice to being Chief Justice pursuant to N.H. REV. STAT. ANN. § 490:1 (Supp. 2004) (allowing Chief Justice to serve a five-year term, after which the next most senior justice would automatically become Chief Justice). The statute was later invalidated as being beyond legislative authority by *In re* Governor & Exec. Council, 846 A.2d 1148, 1149 (N.H. 2004). Chief Justice Broderick retained the post with an appointment from Governor Benson.

[176] N.H. CONST. pt. II, arts. 73, 78.

[177] Judicial Branch of the State of N.H., *Meet the Justices*, http://www.nh.gov/judiciary/supreme/justices.htm (last visited Mar. 5, 2007) [hereinafter *Meet the Justices*].

[178] For example, Justice David H. Souter, who was a former member of the New Hampshire Supreme Court, was appointed to the United States Supreme Court in 1990 by President George H.W. Bush. Although appointed by a Republican who might be popularly labeled as "conservative," Justice Souter votes to the "left" on many issues. U.S. Supreme Court, *The Justices of the Supreme* Court, http://www.supremecourtus.gov/about/biographiescurrent.pdf (last visited Mar. 5, 2007). Similarly, Chief Justice Broderick, who was appointed to the New Hampshire Supreme Court by a Republican governor, has ties to former President Bill Clinton, a Democrat. Judicial Branch of the State of N.H., *Chief Justice John T. Broderick, Jr.*, http://www.nh.gov/judiciary/supreme/meetbrod.htm (last visited Mar. 5, 2007) [hereinafter *Chief Justice John T. Broderick, Jr.*]; Harry R. Weber, *Justice Attacked at Home*, PORTSMOUTH HERALD, Mar. 31, 2002, *available at* http://www.seacoastonline.com/2002news/3_31c.htm (last visited Mar. 5, 2007) (stating that Broderick was co-chair of Clinton's1991-92 state presidential campaign); Remarks by the President to the People of Dover, N.H., (Jan. 11, 2001), http://www.polarbearandco.com/ClintonDover.html (referencing ties to Judge John Broderick).

[179] Any case covered herein that was decided during or after 1995—the time at which the longest serving member of the current court was appointed. *See About the Supreme Court*, *supra* note 162.

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Member	Appointed by/year	Term Expires[180]	Miscellaneous
John T. Broderick[181]	Governor S. Merrill (R)/ 1995	2017	- Biographical Information: University of Virginia Law School; sworn in as Chief Justice by Republican Governor Craig Benson/2004 - Professional Affiliations: Served as President of N.H. Trial Lawyer's Association; served as Director of national Legal Services Corporation - Articles/Speeches: Speaker at N.H. Trial Lawyer's 25th Anniversary Dinner 12/18/02; Remarks to Mid-Winter N.H. Bar Meeting 2/18/05; State of Judiciary Speech 2/23/05; Remarks on Access to Justice at Mid-Winter N.H. Bar Meeting 2/16/06
Linda S. Dalianis[182]	Governor J. Shaheen (D)/ 2000	2018	- Biographical Information: Suffolk University Law School; first woman appointed to Supreme Court of N.H.; served in Superior Court for almost 20 years as both Associate Justice and Chief Justice; served on Supreme Court Rules and Legislation Committees; served on Superior Court committees on guardians, marital master, and alternative dispute resolution - Professional Affiliations: Chairs Family Division

[180] A justice's term expires upon the justice reaching age 70. N.H. CONST. pt. II, arts. 73, 78. The years reported for this column are based on reports of individual justice's ages either from court's website, see *Meet the Justices*, *supra* note 177, or from various Internet searches.
[181] *Chief Justice John T. Broderick, Jr.*, *supra* note 178.
[182] Judicial Branch of the State of N.H., *Associate Justice Linda S. Dalianis*, http://www.nh.gov/judiciary/supreme/meetdalian.htm (last visited Mar. 5, 2007).

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			Implementation Committee; chairs Judicial Branch Dispute Resolution Committee; helped to implement Webster Scholar's Program, a performance-based method of admission to N.H. Bar[183]; participant in State Department Project, Bosnian War Crimes Court
James E. Duggan[184]	Governor J. Shaheen (D)/ 2001	2012	- Biographical Information: Georgetown Law Center; former law professor at Franklin Pierce Law Center; directed State's Appellate Defender Program - Professional Affiliations: Member N.H. Bar Association's Committee on Professionalism; member N.H. Supreme Court's Minimum Continuing Legal Education Board - Speeches: Speaker at 2006 Civic Leadership Academy, New Hampshire Institute of Politics, St. Anselm College - Other: Received Frank Rowe Kenison Award from N.H. Bar Foundation, 2002
Richard E. Galway[185]	Governor C. Benson (R)/ 2004	2014	- Biographical Information: Boston University Law School; served 9 years on Superior Court; specialized in private practice in Worker's Compensation law, and authored two manuals and several N.H. Bar Journal articles on same; served

[183] *See* Sophie M. Sparrow and Linda Dalianis, *New Hampshire's Performance-Based Variant of the Bar Exam: The Daniel Webster Scholar Program*, 74 THE BAR EXAMINER NO. 4 (Nov. 2005).
[184] Judicial Branch of the State of N. H., *Associate Justice James E. Duggan*, http://www.nh.gov/judiciary/supreme/meetduggan.htm (last visited Mar. 5, 2007).

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			as president of N.H. Bar Association
Gary E. Hicks[186]	Governor J. Lynch (D)/ 2006	2024	- Biographical Information: Boston University Law School; served 5 years on Superior Court; served on Board of N.H. Institute of Art 22 years; Chairman for 7 - Speeches: 2006 Commencement Speaker N.H. Institute of Art

CONCLUSION

Where the court recognizes its role is to interpret rather than make law, the majority decisions that come from the court are likely to be closely tied to societal leanings and influences. It is, therefore, this ever-changing societal view and the associated pressure imposed on the other two government branches that make the court's future decisions in the territory of life-respecting issues difficult to chart. For those who are interested in preserving and respecting life, the message is this: If political pressures from New Hampshire's citizens are respectful of life, the court's decisions—when facing new cases and charting new territory—should so reflect.

[185] Judicial Branch of the State of N. H., *Associate Justice Richard E. Galway*, http://www.nh.gov/judiciary/supreme/meetgalway.htm (last visited Mar. 5, 2007).
[186] Judicial Branch of the State of N. H., *Associate Justice Gary E. Hicks*, http://www.nh.gov/judiciary/supreme/meethicks.htm (last visited Mar. 5, 2007).

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