

**RULE OF LAW, NOT THE RULE OF MEN:  
LIFE ISSUES AND THE ALABAMA SUPREME COURT**  
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In a real sense, any analysis of the Alabama Supreme Court’s philosophy and jurisprudence with respect to life issues is necessarily going to end up being an examination of the Court’s general judicial philosophy with respect to all issues. This is because the Court has not ventured into these areas under the Alabama Constitution in the same way the United States Supreme Court (USSC) has under the federal Constitution, and has, therefore, not expanded any rights beyond what federal law dictates. Even with the issue that many have considered today’s primary life issue – abortion – the Court simply has not issued many decisions on the issue, beyond those concerning the application of statutory bypass provisions, involving the ability of a minor to obtain an abortion without parental consent.

The Court has not issued any decisions on and, therefore, has not had the occasion to “find” fundamental rights to abortion, assisted suicide, human cloning, embryo research, and other life issues under the Alabama Constitution. However, given the Court’s conservative approach to constitutional and statutory interpretation, it is highly unlikely this Court would be willing to find such rights where the people of the State of Alabama have not expressly placed them in their governing documents.

## **I. LIFE ISSUES**

### **Abortion**

As indicated above, virtually all of the Alabama Supreme Court’s decisions on abortion relate to Alabama’s statutory bypass procedure. Alabama law generally requires parental consent before a minor can have an abortion.<sup>2</sup> Interestingly, the Alabama Legislature provided

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<sup>2</sup> See ALA. CODE § 26-21-3 (1975).

an express statement of purpose behind the consent requirement, stating the requirement was important because, among other things, it helps “foster[] the family structure and preserv[e] it as a viable social unit” and because “the medical, emotional and psychological consequences of abortion are serious and can be lasting, particularly when the patient is immature.”<sup>3</sup>

However, Alabama allows minors to bypass the parental consent requirement if that minor can meet certain statutorily prescribed standards.<sup>4</sup> A court must waive the consent requirement if

the court finds either ... (1) That the minor is mature and well-informed enough to make the abortion decision on her own; or (2) That performance of the abortion would be in the best interest of the minor.<sup>5</sup>

Application of this standard by a trial court is purely fact-driven and is done on a case-by-case basis. However, the proper mode of appellate review of the application of this standard has produced some controversy in recent years.

In *Ex parte Anonymous*<sup>6</sup> (decided in 2001), the Alabama Supreme Court reviewed a decision by the Alabama Court of Civil Appeals, which affirmed a trial court’s refusal to grant a minor a waiver of the parental consent requirement. In affirming the Court of Civil Appeals, the Supreme Court overruled one of its own decisions – *Ex parte Anonymous*<sup>7</sup> (decided in 1993) – and held the “ore tenus” rule applies to appellate review of a trial court’s decision regarding waiver. The ore tenus rule states that when a trial judge finds facts through listening to live testimony and, therefore, has to make a credibility determination, those fact findings are entitled to a presumption of correctness on appeal and cannot be disturbed unless “plainly erroneous or manifestly unjust.”<sup>8</sup>

The Court’s 1993 decision had itself overruled a decision by the Court of Civil Appeals, holding the ore tenus rule did not apply. In so holding, the Court ordered the granting of a

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<sup>3</sup> ALA. CODE § 26-21-1 (1975).

<sup>4</sup> See ALA. CODE § 26-21-4(d)(4) (1975).

<sup>5</sup> ALA. CODE § 26-21-4(f) (1975).

<sup>6</sup> 803 So. 2d 542 (Ala. 2001).

<sup>7</sup> 618 So. 2d 722 (Ala. 1993).

<sup>8</sup> *Ex parte Anonymous*, 803 So. 2d at 546 (quoting *Noland Co. v. Southern Dev. Co.*, 445 So. 2d 266, 268 (Ala. 1984)).

consent waiver, even though the trial judge who had heard the live testimony of the minor and had denied the waiver concluded a waiver was inappropriate.<sup>9</sup> In its 2001 decision, however, the Court returned to the application of the ore tenus rule, reasoning that although the rule is not applied where the facts presented to the trial court are undisputed, in waiver hearings there will never be contradicting testimony, because the only person giving relevant testimony is the minor seeking the abortion. And with regard to that testimony, the trial judge must make a credibility determination as to whether “(1) the minor is mature and well-informed enough to make the abortion decision on her own; or (2) [t]hat performance of the abortion would be in the best interest of the minor.”<sup>10</sup> Therefore, the Court reasoned,

As the per curiam opinion of the Court of Civil Appeals notes, § 26-21-4, Ala. Code 1975, clearly contemplates that the trial court will conduct a hearing at which the minor testifies, after which the trial court is to issue specific factual findings and legal conclusions. That hearing is to be transcribed. *See* 26-21-4(g), Ala. Code 1975. The nature of a proceeding for obtaining a waiver of parental consent for an abortion will almost always preclude the appearance of any adverse party, because any party adverse to the proceeding will be unaware of the proceeding and will, therefore, be unrepresented. *See* § 26-21-4(a), Ala. Code 1975. Therefore, as in this case, the record will contain only the testimony of the minor petitioner as adduced by her counsel, and the testimony of other witnesses called by the petitioner to support the petition; neither the minor petitioner nor the witnesses will have been subjected to cross-examination. Thus, there will seldom be contradicting *testimony* in the record.

We find that in a case where a minor seeks a waiver of parental consent for an abortion and no adverse party cross-examines her or otherwise challenges her testimony, a rule compelling acceptance of undisputed live testimony as true – without affording any deference to the trial court's ability to observe and assess the demeanor of the witness – is unsound. In such a case – where the trial court has had the opportunity to observe the witness and where assessments of the level of the minor's maturity are crucial – the trial court's findings should be afforded considerable deference. Here, the trial judge had the responsibility of determining the facts. In

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<sup>9</sup> *See Ex parte Anonymous*, 618 So. 2d at 725.

<sup>10</sup> ALA. CODE § 26-21-4(f) (1975).

particular, it was the trial judge's responsibility to determine whether the petitioner is mature enough and well-informed enough about the abortion procedure to make an independent decision whether to undergo an abortion without parental consent. *See* § 26-21-4(f), Ala. Code 1975. In addition to hearing the testimony, the trial judge could observe the minor and could consider her demeanor as she testified. That aspect of the evidence is denied an appellate court by a cold record. The trial judge was in a far better position than are we to determine, as a matter of fact, the minor's maturity and level of knowledge. The Legislature has mandated that a decision to grant or to deny a waiver of the requirement of parental consent is to rest upon an evaluation of the minor's maturity and level of knowledge. We conclude that because the decision must be based upon facts gleaned from the testimony best evaluated by the trial court, the ore tenus rule should apply.<sup>11</sup>

Another abortion case of note is *In re Anonymous*<sup>12</sup> (decided in 1998). Although it also stemmed from a petition for waiver of the parental consent requirement, *In re Anonymous* involved two particular issues of interest: the ability of a guardian *ad litem*, appointed to represent the fetus, to appeal from the grant of a waiver, and whether the consent waiver statute unconstitutionally deprived parents of the right to raise their child as they saw fit. The trial court granted the waiver, and the appointed guardian appealed to the intermediate appellate court, the Alabama Court of Civil Appeals. The Court of Civil Appeals affirmed in a very short opinion, holding the guardian had no ability to appeal because, under Alabama law, the right to appeal was purely statutory and because the Legislature had authorized appeals by only minors who had been denied a waiver.<sup>13</sup>

The Alabama Supreme Court affirmed, agreeing there was no statutory authority to appeal. The majority assumed the Legislature must have been of the opinion it could not allow

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<sup>11</sup> *Ex parte Anonymous*, 803 So. 2d at 546–47 (footnote omitted). Justice Woodall dissented in *Ex parte Anonymous*, and often dissents in similar cases, apparently on procedural (rather than substantive) grounds, opining that the Court has misapplied the ore tenus rule in these contexts. *Id.* at 569 (Woodall, J., dissenting); *see, e.g., Ex parte Anonymous*, 812 So. 2d 1234, 1241 (Ala. 2001) (Woodall, J., dissenting) (stating that the Court “has allowed the minor’s constitutional and statutory rights to be defeated by conclusory statements of the trial court, which are belied by the record”).

<sup>12</sup> 720 So. 2d 497 (Ala. 1998).

<sup>13</sup> *Id.* at 499 (discussing *In re Anonymous*, 720 So. 2d 497 (Ala. Civ. App. 1998)).

an appeal by a guardian *ad litem* (which would hold up the abortion) without running afoul of various decisions of the USSC striking down various hindrances on a minor's ability to procure an abortion:

The Legislature, as the Court of Civil Appeals correctly noted, did not provide a right to appeal from an order granting a petition for a waiver of parental consent. We can conclude only that the Legislature understood its subordination to the Supremacy Clause of the United States Constitution and that it recognized that, pursuant to the United States Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), it could not constitutionally confer upon a nonviable fetus the right to appeal, through a guardian ad litem, an order granting a minor's request to have an abortion. *See, also, Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976); *Bellotti v. Baird*, 443 U.S. 622, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983), *overruled, Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 733 (1983). (Each of these decisions dealt with the matter of parental consent for a minor seeking an abortion and predated the adoption of the 1987 Parental Consent Statute.)<sup>14</sup>

The Court also summarily held the waiver provision of the parental consent statute did not violate a parent's constitutional right to rear their child, citing the rule that a statute will be upheld unless it is shown *beyond a reasonable doubt* to violate some constitutional principle.<sup>15</sup>

In dissent, four members of the Court (including current Justices See and Lyons), while acknowledging the issue was a "close" issue of procedure, argued the guardian *ad litem* had the ability to appeal.<sup>16</sup> The dissenters first noted (1) the trial court had the authority to appoint a guardian to protect the rights of the unborn, as has been recognized in other contexts such as in legitimacy proceedings,<sup>17</sup> (stating that "[t]he fact that an unborn child has many legal rights is of ancient origin"), and (2) the Legislature's express purpose in enacting the parental consent

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<sup>14</sup> *In re Anonymous*, 720 So. 2d at 499–500.

<sup>15</sup> *Id.* at 500 (citing *Alabama State Fed'n of Labor v. McAdory*, 246 Ala. 1, 9–10 (1944)). The Court's holding on the constitutional issue was unanimous.

<sup>16</sup> *Id.* at 503.

<sup>17</sup> *Id.* at 501–02.

statute was to preserve the life of the unborn.<sup>18</sup> The dissenters concluded that because the parental consent statute was silent on whether a guardian could appeal from a grant of waiver, the Rules of Civil Procedure – which, they argued, allowed for an appeal – filled in the gap.<sup>19</sup>

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

Alabama law provides strong protection for the unborn from criminal violence. This was not always the case. Until recently, Alabama’s homicide law covered only victims that were “persons,” defined as “human being[s] who had been born alive at the time of the homicidal act.”<sup>20</sup> However, Alabama recently passed – in a unanimous vote – the “Brody Act,” which became law on July 1, 2006. The Brody Act is named “in memory of the unborn son of Brandy Parker, whose death occurred when she was eight and one-half months pregnant.”<sup>21</sup>

The Brody Act amended § 13A-6-1 of the Alabama Code to include protection for the unborn. That statute now defines “person” for the purposes of the homicide statutes as “a human being, including an unborn child in utero *at any stage of development, regardless of viability.*”<sup>22</sup>

The Alabama Supreme Court has not yet passed on the constitutionality of the Brody Act. However, given the Court’s general judicial philosophy as described below, there is no reason to believe the current Court would consider this statute as anything other than a legitimate exercise of legislative power.

### **Assisted suicide**

In *Knight v. Beverly Health Care Bay Manor Health Care Center*, 820 So. 2d 92 (Ala. 2001), the Court adopted the stringent “clear and convincing evidence” standard for determining whether a person was in a “persistent vegetative state” sufficient to allow life-sustaining treatment to be withdrawn. *Knight* involved an individual who had a living will directing that any feeding tube was to be withdrawn in the event that she was in a “persistent vegetative state.” Her children brought an action to enjoin the care facility from withdrawing their mother’s

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<sup>18</sup> *Id.* at 502–03.

<sup>19</sup> *Id.* at 503.

<sup>20</sup> Former ALA. CODE § 13A-6-1(2) (1975).

<sup>21</sup> 2006 ALA. ACT 419.

<sup>22</sup> § 13A-6-1(a)(3) (emphasis added).

feeding tube, but the trial court denied the request, holding that there was “substantial evidence” that their mother was in a “persistent vegetative state.”

The issue of what was the proper evidentiary standard under these circumstances presented a question of first impression for the Alabama Supreme Court. Following the lead of many other jurisdictions, the Court held that the “clear and convincing evidence” standard should apply; that is, “a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.” *Knight*, 820 So. 2d at 101 (quoting Ala. Code § 6-11-20(b)(4) (1975)). The Court found particularly compelling the rationale of the Supreme Court of Arizona in *Rasmussen v. Fleming*, 154 Ariz. 207, 224, 741 P.2d 674, 691 (1987):

Although the typical evidentiary standard in civil cases is “by a preponderance of the evidence,” we have recognized the need for a higher standard in exceptional civil matters. We deal here with matters that in at least some instances raise life-or-death issues and in all instances involve personal interests more important than those found in the typical civil dispute where private litigants squabble over a sum of money. We hold that court-resolved disputes in cases of this nature must be resolved by clear and convincing evidence.

*Knight*, 820 So. 2d at 100. And among a list of supporting citations from other jurisdictions, the Court quoted a concurring opinion from a member of the Wisconsin Supreme Court, who wrote: “The diagnosis of persistent vegetative state must be by evidence which is clear and convincing. We are, after all, dealing with the death of a human being.” *Id.* at 101 (quoting *In re Guardianship of L.W.*, 167 Wis. 2d 53, 94, 482 N.W.2d 60, 76 (1992) (Ceci, J., concurring)) (emphasis added).

In short, it appears that this Court will follow the law with regard to life issues, but it will not venture to invent or “lead” the law in an agenda-driven manner. The Court has made clear that such matters are in the hands of the people of Alabama, either through their Legislature or in their Constitution.

## II. JUDICIAL RESTRAINT

The Alabama Supreme Court makes every effort to reject judicial activism and to hold fast to a conservative judicial philosophy of judicial restraint. The Court’s philosophy stems from, and is guided by, the Alabama Constitution’s express separation of powers provision. That provision states: “In the government of this state ... the judicial shall *never* exercise the legislative and executive powers, or either of them; *to the end that it may be a government of laws and not of men.*”<sup>23</sup>

Some observers have noted the Court’s commitment to judicial restraint and the separation of powers has not always been so clear.<sup>24</sup> However, beginning in the mid-1990s, the Court underwent something of a philosophical (as well as a political) transformation.<sup>25</sup> Two cases in particular are representative outgrowths of this transformation: *Ex parte James*<sup>26</sup> and *Birmingham-Jefferson Civic Center Authority v. City of Birmingham*.<sup>27</sup> These cases strongly illustrate the Court’s commitment to restrain itself from intruding into the realm of the other branches of government, namely, the legislative.

*Ex parte James* was the final chapter in Alabama’s “Equity Funding Case” – one of many legal actions brought in various states seeking to have the judiciary essentially take over the distribution of funds in a particular state’s school system. Commenced in the early 1990s, the Equity Funding Case was centered upon a circuit trial judge’s order and injunction declaring the funding of the Alabama schools unconstitutional and directing a new distribution of funding. The Equity Funding Case produced four different opinions from the Court over nine years<sup>28</sup> – but in those opinions the Court rejected the notion that any judicial remedy would be a legislative act and therefore violate the separation of powers. In 2002, the Court corrected that error and dismissed the Equity Funding Case, based on a lack of jurisdiction, stating:

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<sup>23</sup> ALA. CONST. art. III, § 43 (1901) (emphasis added); *see also* ALA. CONST. art. III, § 42 (1901).

<sup>24</sup> *See, e.g.,* Michael DeBow, *The Road Back From Tort Hell: The Alabama Supreme Court, 1994–2004*, available at [www.fed-soc.org/Publications/White%20Papers/alabama2004.pdf](http://www.fed-soc.org/Publications/White%20Papers/alabama2004.pdf).

<sup>25</sup> *Id.*

<sup>26</sup> 836 So. 2d 813 (Ala. 2002).

<sup>27</sup> 912 So. 2d 204 (Ala. 2005).

<sup>28</sup> *See Ex parte James*, at 815–16 (discussing the previous decisions).

[W]e now recognize that any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature. Accordingly, compelled . . . primarily by our duty under §43 of the Alabama Constitution of 1901 . . . we complete our judicially prudent retreat from this province of the legislative branch in order that we may remain obedient to the command of the people of the State of Alabama that we ‘never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.’<sup>29</sup>

The Court built upon its commitment to separation of powers in *Birmingham-Jefferson Civic Center Authority v. City of Birmingham* (“BJCC”),<sup>30</sup> a case that also reflects the Court’s philosophy regarding the limits of judicial review. *BJCC* involved the interpretation of a state constitutional provision – Section 63 of the Alabama Constitution – concerning when sufficient votes have been cast to pass a bill in the legislative houses.<sup>31</sup> The Alabama Legislature had a long-standing interpretation of that provision, but the trial court disagreed with that interpretation.

On appeal, the Court unanimously held the issue was a nonjusticiable political question for the Legislature, not the judiciary, to determine. Stating that “[g]reat care must be exercised by the courts not to usurp the functions of other departments of government,”<sup>32</sup> the Court held the courts had no jurisdiction to decide the issue, as the interpretation of Section 63’s voting requirements was purely a matter for the legislature to resolve. In reaching this conclusion, the Court bound itself closely to the constitutional text, stating “there is a textually demonstrable constitutional commitment to the legislature of the question of how to determine what constitutes a ‘majority of each house . . . voting in [the bill’s] favor.’”<sup>33</sup> Importantly, the Court also stated

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<sup>29</sup> *Id.* at 819 (quoting ALA. CONST. art. III, § 43 (1901) (emphasis in original)).

<sup>30</sup> *Birmingham-Jefferson Civic Ctr. Auth.*, 912 So. 2d at 212.

<sup>31</sup> Section 63 of article IV of the Alabama Constitution states that “no bill shall become a law, unless on its final passage it be read at length, and the vote be taken by yeas and nays, the names of the members voting for and against the same be entered upon the journals, and a majority of each house be recorded thereon as voting in its favor. . . .” The dispute was whether “a majority of each house” as used in Section 63 meant (1) a majority of a quorum of that house, or (2) a majority of the votes actually cast (not counting abstentions) in the presence of a quorum.

<sup>32</sup> *Birmingham-Jefferson Civic Ctr. Auth.*, 912 So. 2d at 212.

<sup>33</sup> *Id.* at 218.

judicial resolution of this issue would reflect a lack of respect for the Legislature as a co-equal branch of government that, like the judiciary, has a duty to uphold the Constitution:

The preservation of the constitution in its integrity and obedience to its mandates, is exacted alike from the legislative and the judicial departments of the government. Legislators take the same oath of office that judges and justices take-to ‘support the Constitution of the United States, and Constitution of the State of Alabama.’ See § 279, Ala. Const. 1901. The Constitution provides that ‘[e]ach house [of the legislature] shall have power to determine the rules of its own proceedings,’ and the judiciary should presume that the legislators comply with their oath of office when they determine and apply those rules. If the judiciary questions the legislature’s declaration that Act No. 288 and Act No. 357 were validly enacted by the legislature, we would be demonstrating a lack of the respect due that coordinate branch of government.<sup>34</sup>

In his special concurrence, Justice Parker questioned whether the notion of judicial review developed since *Marbury v. Madison*,<sup>35</sup> had not been overextended. With regard to Chief Justice John Marshall’s famous line from *Marbury*, “It is emphatically the province and duty of the judicial department to say what the law is,”<sup>36</sup> Parker wrote:

In these words, which enshrined the principle of judicial review, Chief Justice John Marshall noted that constitutional interpretation is *emphatically* the responsibility of the judiciary. He did not say that constitutional interpretation is *exclusively* the responsibility of the judiciary.

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The United States Constitution, Art. VI, requires federal and state officials to take oaths to support the Constitution of the United States. Similarly, the Alabama Constitution of 1901, Art. XVI, § 279, requires that ‘[a]ll members of the legislature, and all officers, executive and judicial,’ take oaths to ‘support the Constitution of the United States, and the Constitution of the State of Alabama.’ Because officers of each branch of the government must swear to support the Constitution, it is reasonable to conclude that officers of each branch have a duty of constitutional interpretation.<sup>37</sup>

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<sup>34</sup> *Id.* at 219 (citations omitted).

<sup>35</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>36</sup> *Id.* at 177.

<sup>37</sup> *Birmingham-Jefferson Civic Ctr. Auth.*, 912 So. 2d at 222 (Parker, J., concurring specially).

Parker’s opinion warned of the possibility of judicial usurpation of power present when there is not a proper respect for the constitutional interpretations of co-equal branches of government. In delivering this warning, Parker included an interesting quotation from Joseph Nicholson, a Maryland congressman and judge, given just before Marbury was decided:

By what authority are the judges to be raised above the law and above the constitution? Where is the charter which places the sovereignty of this country in their hands? Give them the powers and the independence now contended for, and they will require nothing more; for your government becomes a despotism, and they become your rulers. They are to decide upon the lives, the liberties, and the property of your citizens; they have an absolute veto upon your laws by declaring them null and void at pleasure; they are to introduce at will the laws of a foreign country, differing essentially with us upon the great principles of government; and after being clothed with this arbitrary power, they are beyond the control of the nation, as they are not to be affected by any laws which the people by their representatives can pass. If all this be true; if this doctrine be established in the extent which is now contended for, the constitution is not worth the time we are now spending upon it. It is, as it has been called by its enemies, mere parchment. For these judges, thus rendered omnipotent, may overleap the constitution and trample on your laws; they may laugh the legislature to scorn and set the nation at defiance.<sup>38</sup>

Nicholson’s sentiments certainly foreshadow many of the current complaints being raised over alleged problems with judicial supremacy.

Regarding its interpretation of constitutional texts, the Alabama Supreme Court’s method is one of “strict construction,” consistent with its view of separation of powers. In other words, the Justices truly see themselves as bound to the constitutional text, as it is the text – and not the personal preferences of the individual Justices – the people have established as their fundamental law. This principle was best illustrated and defended in the Court’s 1999 decision in *Ex parte Melof*.<sup>39</sup>

*Melof* involved what came to be known as Alabama’s “phantom equal protection provision.” This provision did not exist in the text of the Alabama Constitution; in fact, earlier

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<sup>38</sup> *Id.* at 223 (Parker, J., concurring specially) (quoting former Congressman and Judge Joseph Nicholson).

<sup>39</sup> 735 So. 2d 1172 (Ala. 1999).

Alabama constitutions contained an equal protection provision, but that provision was removed in the 1901 Constitutional Convention<sup>40</sup> in an effort to hinder black Alabamians. However, in the late 1970s, the Court ruled such a provision was found within the “spirit” of a combination of several different textual provisions and was purportedly similar to the federal Equal Protection Clause.<sup>41</sup> The Court then utilized this “phantom equal protection provision” to strike down tort reform legislation<sup>42</sup> and to judicially restructure the funding of Alabama’s educational system in the Equity Funding Case.<sup>43</sup> This “provision” was doubly problematic, because (1) it had no text to analyze to determine its substantive boundaries and intent, and (2) as a purported component of the Alabama Constitution, the Court’s decisions under that phantom provision would not be reviewable by the United States Supreme Court.

In *Melof*, the Court held that, even though the Justices would personally like to see an equal protection provision in the Alabama Constitution,<sup>44</sup> one simply did not exist. The Court made clear it is not empowered to rewrite the constitution based on personal preference and that, even though the phantom provision had been relied upon in several decisions, a substantive “provision” not found in the text of the constitution could not simply be “created” by the principle of *stare decisis*, no matter how many decisions relied upon that wholly unfounded constitutional “interpretation.”

In response to the dissents from the three more liberal-leaning Justices<sup>45</sup> – in particular that of Justice Cook, who accurately described how the elimination of the equal protection

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<sup>40</sup> See *Opinion of the Justices No. 102*, 252 Ala. 527, 530 (1949) (“We point out that there is no equal protection clause in the Constitution of 1901. The equal protection clause of the Constitution of 1875 was dropped from the Constitution of 1901.”).

<sup>41</sup> See U.S. CONST. amend. XIV (“[N]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>42</sup> See *Smith v. Schulte*, 671 So. 2d 1334, 1337 (Ala. 1995) (holding that statutory cap on amounts recoverable in a wrongful-death action against medical providers violated the equal-protection guarantee of the Alabama Constitution) (plurality opinion); *Moore v. Mobile Infirmary Ass’n*, 592 So. 2d 156, 165–71 (Ala. 1991) (holding that limit on noneconomic damages in medical malpractice cases violated Alabama’s equal protection guarantee) (plurality opinion).

<sup>43</sup> See *Pinto v. Alabama Coalition for Equity*, 662 So. 2d 894, 901–10 (Ala. 1995) (Houston, J., concurring in the result).

<sup>44</sup> *Ex parte Melof*, 735 So. 2d at 1186–88 (Hooper, C.J., concurring specially); *Id.* at 1188 (Maddox, J., concurring specially); *Id.* at 1191 (Houston, J., concurring specially); *Id.* at 1192–96 (See, J., concurring specially).

<sup>45</sup> These Justices are no longer on the Court.

provision from earlier constitutions was done for racist purposes and who argued persuasively why an equal protection provision is a good and important thing to have in a state constitution<sup>46</sup> – Justice Houston filed a special concurrence, summarizing the conservative judicial philosophy and aptly demonstrating why judges must show fidelity to the constitutional text, regardless of their own personal desires:

As a legal document, a constitution does not change on its own. The very purpose of protecting individuals would be undermined if those in charge of interpreting the constitution were to add or delete provisions to reflect ‘changes in society.’ Why? Because both the question of who selects the interpreter and the question of what counts as a ‘change in society’ will be decided by those in power at any particular time. No, as a legal document, a constitution can change only if the parties who gave effect to the document—the people—call for change. This recognition of the exclusive right of the people to change their own constitution is inherent in the amendment procedure. . . . Related to their exercise of that right is the expectation of the people that we, as judges, will interpret our Constitutions and their amendments as they are written, in order to effectuate the will of the people. To go any further would be to usurp the powers of the people, and we should not do that simply because we can get away with it. . . . To be sure, a judicial declaration [creating an ‘equal protection provision’] would be much faster and easier than a constitutional amendment. Also, I am sure that the general population would overwhelmingly support such a declaration. There would be very little resistance or grumbling among the citizens of Alabama, so why not? The problem, of course, as I have illustrated above, is that while such a popular declaration may be all right today, we must ask: What about tomorrow’s judge and tomorrow’s issue? If we are not restrained to the text of the Constitution; if we current Justices can amend it today by judicial declaration to include a provision that the people have not put there, will the next ‘declaration’ be so favorable? As Justice Cook has made clear in his dissent, those with power can do some horrible things for some horrible reasons. It is naive to think that something like that could not happen again. As the saying goes, those who do not pay attention to history are doomed to repeat it. Might does not make right. We should not, simply because we can, shift the power to amend the Constitution from the hands of the people into the hands of nine Supreme Court Justices. . . .<sup>47</sup>

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<sup>46</sup> Justices Cook and Kennedy concurred in the result but dissented from the Court’s reasoning concerning the phantom equal protection clause. *See Ex parte Melof*, 735 So. 2d at 1195–1205 (Cook, J., concurring in the result, dissenting from the rationale). Justice Johnstone dissented, but appears to have dissented only from the Court’s rationale. *See id.* at 1205–08 (Johnstone, J., dissenting).

<sup>47</sup> *Id.* at 1188–90 (Houston, J., concurring specially).

Justice Johnstone’s dissent relied on the doctrine of *stare decisis* and argued the Court is bound to recognize the phantom provision because it had been reaffirmed several times since 1977.<sup>48</sup> However, as Justice Houston noted in his special concurrence,<sup>49</sup> and as the Court has made clear since,<sup>50</sup> *stare decisis* cannot support the “creation” of a wholly non-textual constitutional “provision” under the guise of “interpretation.”

The Court also takes a “strict constructionist” approach to construing statutes, again consistent with its strong respect for separation of powers. This Court’s approach as follows:

Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect. It is true that when looking at a statute we might sometimes think that the ramifications of the words are inefficient or unusual. However, it is our job to say what the law is, not to say what it should be. Therefore, only if there is no rational way to interpret the words as stated will we look beyond those words to determine legislative intent. To apply a different policy would turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers.<sup>51</sup>

The Court has consistently applied this “plain meaning” rule.<sup>52</sup>

Given the current Alabama Supreme Court’s conservative judicial philosophy as described above, it seems apparent Alabama citizens can be confident the Court, when faced with a case involving a “life issue” – be it abortion, euthanasia, cloning, etc. – will not rule on

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<sup>48</sup> *Id.* at 1205–08 (Johnstone, J., dissenting).

<sup>49</sup> *Id.* at 1191–92.

<sup>50</sup> *See, e.g.,* Marsh v. Green, 782 So. 2d 223, 232 (Ala. 2000) (“[W]hen the Constitution is misinterpreted, the doctrine of *stare decisis* is not entitled to the deference it otherwise receives. . . . [W]hile the doctrine of *stare decisis* counsels against a reconsideration of precedent, the Court has been particularly willing to reconsider constitutional cases because, in such cases, correction through legislative action is practically impossible.”) (citations and internal quotations omitted).

<sup>51</sup> DeKalb County LP Gas Co. v. Suburban Gas, 729 So. 2d 270, 275–76 (Ala. 1998) (citations and internal quotations omitted). *Id.* at 275–76 (citations and internal quotations omitted; emphasis added).

<sup>52</sup> *See* Marc James Ayers, *Unpacking Alabama’s Plain-Meaning Rule of Statutory Construction*, 67 ALA. LAW. 31 (Jan. 2006) (discussing the Court’s use of the *DeKalb County* “plain meaning rule”).

the basis of anything other than what is dictated under the federal Constitution or what the Alabama citizens have expressly decided to set forth as their law.

Although the Court is not monolithic and its members do not always come to the same conclusions,<sup>53</sup> they for the most part share the same conservative philosophy of judicial restraint and respect for separation of powers when it comes to interpreting constitutional or statutory texts. The primary *major* philosophical division on the Court concerns the role of the Court when faced with unfavorable interpretations of the federal Constitution from the USSC. This issue came to light in a most public way during the 2006 Alabama Republican primaries, when Justice Tom Parker sought the office then held by former Chief Justice Drayton Nabers.

Justice Parker, reflecting the stances he previously voiced as spokesman for former Chief Justice Roy Moore, took the other Court members to task in a newspaper op-ed piece<sup>54</sup> for reversing the death sentence of Renaldo Adams.<sup>55</sup> Adams had been convicted of a particularly heinous rape and murder of a pregnant mother and her unborn child in front of her other children. However, the Court made no independent decision to reverse; it reversed in light of the USSC's decision in *Roper v. Simmons*,<sup>56</sup> in which the Supreme Court held 5-4 it was unconstitutional under the Eighth Amendment to the federal Constitution to execute any convicts who were less than 18 at the time of their crimes. Because the Eighth Amendment is binding on the States, and because Renaldo Adams was 17-years old when he committed his crimes, the Alabama Supreme Court was compelled to reverse his death sentence. In reversing, the Court members followed the traditional, almost unanimously held model of the rule of law, under which the USSC is the last word on the meaning of the federal Constitution; and because state judges take an oath to follow that Constitution, they are compelled to follow the USSC's interpretations of it.

In his op-ed piece, Justice Parker claimed the Justices had no duty to follow *Roper*, because, in his view, *Roper* was wrongly decided and because decisions like *Roper* only bound

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<sup>53</sup> See, e.g., *City of Bessemer v. McClain*, 2006 Ala. LEXIS 185 (Ala. 2006); *Ex parte McCord-Baugh*, 894 So. 2d 679 (Ala. 2004).

<sup>54</sup> This article is available at <http://www.alliancealert.org/2006/20060106.htm>.

<sup>55</sup> *Ex parte Adams*, 2005 Ala. LEXIS 217 (Ala. Dec. 23, 2005). Justice Parker was recused from the case because he had participated in the prosecution of Adams.

<sup>56</sup> 543 U.S. 551 (2005).

the particular parties in that case. Parker contended the Court had an independent duty to the Constitution, not the views of five members of the USSC. Parker claimed the Alabama Supreme Court should have “protested” the *Roper* decision in some way and given the USSC a chance to reverse itself, just as the Missouri Supreme Court had done, leading to the USSC’s reversal of its own precedent (by affirming the Missouri court) in *Roper*.<sup>57</sup>

It is sufficient to say Parker’s decision to criticize the other Court members in a newspaper op-ed did not go over well with some of his colleagues.<sup>58</sup> However, this “rule of law” controversy died down somewhat, following the Republican primaries, after Parker’s attempt to acquire the Chief Justice’s seat did not succeed.

### III. THE COURT

Judge	Appointed by/Year	Term Expires <sup>59</sup>	Miscellaneous <sup>60</sup>
Sue Bell Cobb, Chief Justice <sup>61</sup>	Elected in 2006	2012	– Biographical information: J.D. and B.A. University of Alabama; District

<sup>57</sup> See *id.* at 628–29 (Scalia, J., dissenting) (discussing how the Missouri Supreme Court “flagrantly disregard[ed]” clear United States Supreme Court precedent in ruling that execution of one who was a minor at the time of his crime was unconstitutional).

<sup>58</sup> See the response of one of the Justices at <http://www.decaturdaily.com/decaturdaily/news/060419/woodall.shtml>.

<sup>59</sup> The term of office for a justice of the Alabama Supreme Court is six years, and then that justice is put up for re-election in partisan, statewide elections.

<sup>60</sup> Most of the information in this section is taken from the Justices’ official biographies on the Alabama Supreme Court’s website: <http://www.judicial.state.al.us/supreme.cfm>.

<sup>61</sup> During the preparation of this paper, Sue Bell Cobb was elected to the office of Chief Justice, defeating incumbent Chief Justice Drayton Nabers, Jr. Of relevance to this paper are Nabers’ pro-life comments in his book *The Case for Character*, written while he was in office as Chief Justice. Nabers wrote:

Our laws are the most permissive in the developed world in allowing parents to take the life of their unborn children. Meanwhile, abortion is a denial of biblical justice. In the most basic way—by denying the right to life—abortion fails to give what is due to another. The original abortion decision of *Roe v. Wade* ranks with the 1857 *Dred Scott* decision, which declared that slaves had no rights as U.S. citizens, as the worst a court can do.

It is worth recalling the immortal words of Justice McLean, dissenting in *Dred Scott v. Sandford*: “A slave is not a mere chattel. He bears the impress of his Maker, and is amenable to the laws of God and man; and he is destined to an endless existence.” This is straight biblical morality, and it applies with equal rigor to every unborn child. They bear the impress of their Maker and they deserve justice.

			<p>Judge of Conecuh County until 1994; Elected to the Alabama Court of Criminal Appeals in 1994.</p> <p>– Professional affiliations: Faculty member in the Alabama Judicial College; President of the Alabama Council of Juvenile and Family Court Judges; Chair of the Children First Foundation; Member of the Farrah Law Society Board of Directors, and First United Methodist Church where she plays the piano for children's choir.</p> <p>- Other: Appointed as District Judge of Conecuh County immediately following her admission to the Bar, becoming one of the state's youngest judges; has received several awards related to her efforts in the field of juvenile justice, and, among other recognitions, received the 1999 Public Citizen of the Year Award by the Alabama Chapter of National Social Workers Association.</p>
Harold F. See, Jr.	Elected in 1996; Reelected in 2002	2008	<p>– Biographical information: J.D. University of Iowa College of Law, M.A. in economics from Iowa State University; B.A. Emporia State University; Taught economics at Illinois State University and practiced law with the firm of Sidley &amp; Austin; Following his private practice, served for over 20 years on the faculty at the University of Alabama School of Law.</p>

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The day after *Roe v. Wade* was decided in 1973, the *New York Times* declared that the U.S. Supreme Court had put the abortion matter to rest. Certain editors of that newspaper no doubt hoped that our collective conscience would soon become seared to the unheard cry of the unborn. Now, more than thirty years later, we know that in a democracy that trusts in God such blatant injustice, no more than slavery, can be put to rest. The Dred Scott decision, in God's time, was abolished, and so will be *Roe v. Wade*.

Drayton Nabers, Jr., *The Case For Character*, 180-81 (2006).

		<p>– Professional affiliations: Member of various legal organizations including the American Law Institute, the American Law and Economics Association, the Federalist Society and V.O.C.A.L., a victims' rights advocacy group.</p> <p>– Other: Authored or edited over 40 books, chapters, articles, and reviews; Published articles discussing the proper separation of powers and judicial independence<sup>62</sup>; Active member of First Baptist Church, Montgomery, where he teaches Sunday school.</p> <p>– Noteworthy opinions/dissents: <i>Ziade v. Koch</i>,<sup>63</sup> involving an action alleging wrongful death of a fetus during delivery, Justice See wrote a special concurrence in which he responded to the plaintiffs' contention that "a person cannot die until they are born." Referencing the new Brody Act (discussed above), Justice See wrote:</p> <p style="padding-left: 40px;">The implication of this argument is that there was not a person in being until Chris Ziade left the womb; therefore, he could not have died until the day of his birth. Because this is the argument, it is not surprising that the briefs of both parties repeatedly refer to Chris Ziade as "the fetus." When both parties use a term in presenting their case on</p>
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<sup>62</sup> See Harold F. See, *The Separation of Powers and the Public Policy Role of the State Court in a Routine Case*, 8 TEX. REV. L. & POL. 345 (2004); Harold See, *Comment: Judicial Selection and Decisional Independence*, 61 LAW & CONTEMP. PROBS. 141 (1998).

<sup>63</sup> *Ziade v. Koch*, 2006 Ala. LEXIS 397 (Ala. 2006).

<sup>64</sup> *Id.* at \*8–9 (See, J., concurring specially) (footnotes omitted).

			<p>appeal, it is not inappropriate for this Court also to use that term, as the main opinion does. Unfortunately, the term “fetus” has come to occupy a position in the cultural debate on abortion. Thus, the term “fetus” connotes that the unborn child is, in the eyes of the law, not entitled to the full panoply of rights to which a “person” is entitled. Recalling a history in this country and elsewhere where “[s]ome . . . are more equal than others,” it is not surprising that this connotation-that the unborn child does not have full human rights-is taken as a statement that the unborn child is somehow less than fully human, and it is therefore not surprising that the use of the term “fetus” often evokes a visceral reaction.</p> <p>The recent amendment to Ala. Code 1975, § 13A-6-1, proposed by Act No. 2006-419, Ala. Acts 2006 (approved April 17, 2006), defines “person” to include an “unborn child.” The legislature has thus recognized under that statute that, when an “unborn child” is killed, a “person” is killed. I would use the term “unborn child” to describe Chris Ziade at the time of his death.<sup>64</sup></p>
Champ Lyons, Jr.	F. James; 1998; Elected in 2000; Reelected in 2006	2012	– Biographical Information: J.D. University of Alabama School of Law; B.A. Harvard University; Clerked on a federal court, then was

			<p>in private practice of law.</p> <ul style="list-style-type: none"> <li>– Professional affiliations: Recognized expert in civil procedure; His treatise on civil procedure, <i>Alabama Practice</i>, published by West Publishing Co., is now in its third edition; Has received several prestigious awards for his dedication to the legal profession; A member of several legal organizations including the American Law Institute and the American Judicature Society.</li> <li>– Other: Attends Christ Anglican Church in Mobile, Alabama.</li> <li>– Speeches/Articles: In 2004 he published an article describing his judicial philosophy as one founded on the principle of the rule of law; This article, titled “His Monument, My Oath, and the Rule of Law” stemmed from the Ten Commandments monument controversy involving former Chief Justice Roy Moore.<sup>65</sup></li> </ul>
Thomas A. Woodall	Elected in 2000 and re-elected in 2006	2012	<ul style="list-style-type: none"> <li>– Biographical information: J.D. University of Virginia School of Law; B.A. Millsaps College; Practiced law for several years before he was appointed to serve as a Circuit Judge in Jefferson County, Alabama.</li> <li>– Professional affiliations: Member of the Birmingham Bar Association and the Alabama Pattern Jury Instruction-Civil Committee; Has delivered many continuing legal education presentations focusing on insurance, trial practice, workers' compensation, legal ethics and other issues;</li> </ul>

<sup>65</sup> The article can be found at [http://www.alliancealert.org/aa2004/2004\\_05\\_25.pdf](http://www.alliancealert.org/aa2004/2004_05_25.pdf).

			<p>– Other: An active member of Vestavia Hills United Methodist Church.</p>
Lyn Stuart	Elected in 2000; Reelected in 2006	2012	<p>– Biographical information: J.D. University of Alabama School of Law; B.A. Auburn University; Practiced law as an Assistant Attorney General and an Assistant District Attorney before serving as a District and then a Circuit Judge.</p> <p>– Professional affiliations: Past president of the Alabama Council of Juvenile and Family Court Judges; Has served as a national speaker for the National Council of Juvenile and Family Court Judges, training judges and other professionals on the handling of child abuse and neglect cases; A member and past president of several civic organizations.</p> <p>– Other: A member of the First United Methodist Church of Bay Minette, where she teaches Sunday School.</p>
Patricia M. Smith	Elected in 2004	2010	<p>– Biographical Information: J.D. Thomas Goode Jones Law School; B.A. Troy University; In 1980, Justice Smith was appointed to the bench as a district court judge.</p> <p>– Professional affiliations: Distinguished for her work with organizations dedicated to children and families; Has served as Chairman on the Commission of the Future of the Juvenile Justice System; Helped to establish the Developing Alabama Youth Foundation, Inc. and the Court Appointed Special Advocate programs; In 2001 named the National Court Appointed Special Advocate Judge of the Year.</p>

			<p>– Other: The first female Assistant District Attorney in her judicial district; A member of Our Lady of the Valley Catholic Church in Birmingham.</p>
Michael F. Bolin	Elected in 2004	2010	<p>– Biographical information: J.D. Cumberland School of Law; B.A. Stamford University; Practiced law for 15 years and served 16 years as a probate judge.</p> <p>– Professional affiliations: Extensive expertise in the area of adoption law, having authored the Putative Father Registry law in Alabama, which protects the rights of all parties in adoption proceedings; Active in the Alabama Probate Judges Association, and served on various family-related committee of the Alabama Law Institute; Received the national award from the “Angels of Adoption” organization in Washington, D.C. in 2000 for his service to adoptive families.</p> <p>– Other: An active member at St. Peter the Apostle Catholic Church in Hoover, Alabama.</p>
Tom Parker	Elected in 2004	2010	<p>– Biographical information: J.D. Vanderbilt University School of Law; B.A cum laude Dartmouth College; In private practice and served as an Assistant Alabama Attorney General for many years before being appointed in 2001 as the Deputy Director of Alabama’s Administrative Office of Courts; In that capacity, he acted as legal advisor and spokesman to former Chief Justice Roy Moore; After Moore was removed from office following the Ten Commandments controversy, Justice Parker served as</p>

			<p>the Special Projects Manager for The Foundation for Moral Law (an organization led by the former Chief Justice).</p> <p>– Professional affiliations: A Founding Director of the Alabama Family Alliance (now the Alabama Policy Institute) and, later, the founding Executive Director for the Alabama Family Advocates; Has appeared on Focus on the Family, with Dr. James Dobson, The 700 Club, with Dr. Pat Robertson, the McNeil-Leher News Hour, For the Record, and numerous radio programs around the country.</p> <p>– Other: Won a Rotary International Fellowship to study law at the University of Sao Paulo School of Law, in Sao Paulo, Brazil, where he was the first foreign student in Brazil’s most prestigious law school; A member of Frazer Memorial United Methodist Church.</p>
Glenn Murdock <sup>66</sup>	Elected in 2006	2012	<p>– Biographical information: J.D. University of Virginia Law School; B.A. Phi Beta Kappa and summa cum laude from the University of Alabama; Served for a year as a law clerk to the late Clarence W. Allgood, United District Judge for the Northern District of Alabama; Private practice until 2001, when he was elected to the Alabama Court of Civil Appeals.</p> <p>– Professional Affiliations: Known for his expertise in constitutional law; A member of the Birmingham and Alabama Bar Associations, and</p>

<sup>66</sup> During the preparation of this paper, Glenn Murdock was elected to the office vacated by the retiring Justice Bernard Harwood, Jr.

		<p>in the Rotary Club of Birmingham.</p> <p>– Noteworthy opinions/dissents:  <i>L.K.D.H. v. Planned Parenthood of Alabama, Inc.</i>,<sup>67</sup> which allowed an action to proceed against Planned Parenthood for injuries sustained by a child through a botched abortion; Rejecting Planned Parenthood’s argument that they should not be held liable because, had the procedure gone smoothly, there would be no child at all, Murdock wrote:</p> <p style="padding-left: 40px;">We find Planned Parenthood's position disturbing. According to Dr. Davis's affidavit, when an abortion provider properly performs an abortion procedure, i.e., is not negligent, “particularly during an early gestation period, such as in the case here, <i>it is not uncommon</i> for there to be a continuing pregnancy.” (Emphasis added.) In light of the “not uncommon” possibility that a child will survive even a properly performed abortion procedure, it is untenable for Planned Parenthood to argue that it should be able to avoid liability to the child who is thereafter born no matter how deficient the abortion provider's actions or how serious the harm the provider might cause to the child.</p> <p style="text-align: center;">. . . .</p> <p>The United States Supreme Court has decided that a</p>
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<sup>67</sup> 944 So. 2d 153 (Ala. Civ. App. 2006).

<sup>68</sup> *L.K.D.H.*, 944 So. 2d at 160–61.

			<p><i>mother</i> has a right under certain circumstances not to give birth to her child. Neither the United States Supreme Court nor the Supreme Court of Alabama has ever ruled that a medical provider, or for that matter a mother, can engage, with some blanket of constitutional protection, in negligent or reckless conduct that deforms or injures a child so long as the deformity or injury is inflicted on the child before it leaves the womb. To embrace this position as the law of the land in Alabama would give license to those who would undertake to end the life of an unborn child to do so as carelessly or recklessly as they wish without bearing any responsibility to those who are injured or deformed as a result and who are left to cope with the consequences of the provider's wrongful acts. It would be hard to imagine a more troubling development in our law.<sup>68</sup></p> <p>– Other: Active member of Covenant Presbyterian Church of Birmingham.</p>
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**CONCLUSION**

Currently, the members of the Alabama Supreme Court are elected to six-year terms through partisan, statewide elections (although were initially appointed by the Governor to serve out the remainder of a term for a Justice who has left the Court). However, the idea of judicial *selection*, rather than election, is getting more attention, at least in the lawyers’ ranks, if not in

the general populace. Recent presidents of the Alabama State Bar strongly promoted the idea of judicial selection as a road to enhancing “judicial independence,”<sup>69</sup> and the current and at-large Bar presidents have indicated they are following suit. This movement has adherents of all political stripes (one is former Justice Houston, a judicial conservative), but it is fair to say the idea currently finds its largest voice in the more liberal camp. Indeed, the Alabama Republican Party has been an outspoken challenger of the proposal, which the former Party Chairman called a “transparent” attempt to “force liberal Democrat judges onto a state bench that has been dominated for the past decade by conservative Republicans elected by the people of Alabama.”<sup>70</sup>

Whatever the merits of judicial selection in general (and there certainly are some), the idea still removes from the citizens of the State of Alabama the ability to select their own appellate judges, something that will more than likely make judicial selection a very tough sell. Additionally, concerns about getting the best, most qualified nominee, regardless of race or other characteristic (as opposed to a more “politically-correct” selection), might be raised in light of the particulars of the Alabama Bar’s proposed judicial selection program. That program calls for a “Judicial Nominating Commission” with certain racial- and gender-based set-aside seats and where the all of the Commission members are to be selected in accordance with the “geographic, gender, racial and ethnic diversity of the state.”<sup>71</sup>

This debate is only now finding a larger voice and will clearly be a development worth watching.

Overall, Alabama enjoys a scholarly, well-respected Supreme Court that truly attempts to adhere to the idea that its job is to follow, and not rewrite, the law with respect to all issues,

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<sup>69</sup> See Bobby Segall, *The Independence of Our Judiciary*, 66 ALA. LAW. 324 (Sept. 2005).

<sup>70</sup> Press Release, Alabama Republican Party, “Liberal Attorneys Work to Return Alabama to Days of ‘Jackpot Justice’” (Aug. 18, 2005) available at <http://www.algop.org/News/Read.aspx?ID=130>.

<sup>71</sup> See <http://www.alabar.org/media/news/05-0824.cfm> (providing the text of the Alabama Bar’s proposed constitutional amendment establishing a judicial selection process). The proposal calls for retention elections of sitting appellate judges, and establishes a “Judicial Evaluation Commission” to evaluate those judges in order to educate the citizens before those citizens making a decision on retaining a judge. *Id.* The “Judicial Evaluation Commission” contains the same racial- and gender- set-aside and “diversity” issues as the Nominating Commission. *Id.*

including life issues. And it appears that the people of Alabama desire to maintain that conservative judicial philosophy in their appellate courts both now and in the future.