THE IDAHO SUPREME COURT:
CONSERVATIVE IN THE EXTREME OR JUST COY?

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Idaho is an extremely conservative state, politically and socially. However, over the past ten years, Idaho has been—and continues to be—one of the fastest growing states in the country. With a tremendous population influx from other states, in particular California, the cultural and political landscape is changing quickly and dramatically. A majority of the state's population is located in the Treasure Valley surrounding the city of Boise. Historically, there has been a large and vocal religious right-wing majority within that community. It has elected a super-majority of conservative republican legislators in both houses of the state Legislature, and those groups have heavily influenced the governor's office, which has appointed all but one of Idaho's Supreme Court justices over the last ten years.

That picture is changing with the new demographics. Boise is now represented exclusively by democratic party legislators, all of whom are pro-choice. Notwithstanding the inroads the pro-choice movement has made in the Idaho Legislature, a new parental consent law and right to view law have been proposed this year; both are expected to be enacted into law. An anti-coercion bill was presented but has been withdrawn due to insufficient time to pass it this year. It will be re-introduced in next year's session. The parental consent law was drafted conservatively, to avoid a repeat of prior legal challenges, and no new legal battles are anticipated as a result of the passage of either the new parental consent law, SB1082[2] or the mother's right to view act, HB248.[3]

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[2] Senate Bill No. 1082, 2007 Idaho Session Laws, Ch. 193, p. 565. amending Idaho Code §18-609 relating to consent required for abortions for minors, providing procedures for obtaining consent, reporting by courts and statistical records, and deleting provisions relating to affirmative defense and medical emergency.

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Notwithstanding the political, social, and moral climate in Idaho, the Idaho Supreme Court (Court) has ruled only peripherally on any life issues. On the only occasion the Court was asked to intervene on an important aspect of the abortion issue, it declined to hear the case, thereby avoiding a potential conflict with the state's executive branch.

On the issue of abortion, the Idaho legislature has declared "the states have a 'profound interest' in preserving the life of preborn children," and consequently that "all state statutes, rules and constitutional provisions shall be interpreted to prefer, by all legal means, live childbirth over abortion."[4] Moreover, even though the Idaho Legislature has on at least five occasions enacted legislation regulating abortion and mandating parental consent, none of those enactments are operative. Laws enacted in 2000 and 2001 were stricken down as unconstitutional by the United States District Court of Idaho. That decision was upheld by the Ninth Circuit Court of Appeals.[5] In 2005, the Idaho Legislature enacted a new parental consent law,[6] resulting in an immediate lawsuit by Planned Parenthood of Idaho. The U.S. District Court issued a preliminary injunction

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[3] House Bill No. 248, 2007 Idaho Sess. Laws, Ch. 224, p. 675. amending Idaho Code §18-609 to provide that all physicians or their agents who use ultrasound equipment in the performance of an abortion shall inform the patient that she has the right to view the ultrasound image of her unborn child before an abortion is performed.

[4] IDAHO CODE ANN. §18-601 (2007)

[5] Planned Parenthood v. Wasden, 376 F.3d 908 (9th Cir. 2004), *cert. denied,* 125 S. Ct. 1694 (2005). In 2000, the Idaho Legislature enacted Senate Bill 1299, a comprehensive informed consent/parental consent law. The U.S. District Court enjoined the act in its entirety on September 1, 2000, CIV 00-00353-MHW. In response, in 2001 the Idaho Legislature enacted House Bill 340 amending the enjoined statute. Planned Parenthood filed a second amended complaint and a trial was held in the U.S. District Court. The court issued a permanent injunction as to the judicial bypass provision, the mandatory reporting requirement, post emergency notification and the definition of medical emergency, but severed these provisions from the remainder of the statute. The 9th Circuit decision upheld the District Court's ruling on the medical emergency definition, and further held that the provision was not severable from the remainder of the statute. The effect of this ruling was to permanently enjoin enforcement of the entire law.

[6] House Bill 351, 2005 Idaho Sess. Laws. This new informed consent law was enacted following the 9th Circuit's 2004 decision enjoining the prior statute, but before the U.S. Supreme Court had denied certiorari. The legislation included a provision to preserve the State's appeal in Section 8, which provided: "This act shall be in full force and effect when the Attorney General of the State of Idaho drafts a proclamation indicating that the United States Supreme Court has denied a petition for certiorari in the case of Wasden v. Planned Parenthood of Idaho, Supreme Court Docket No. 04-703 and files the proclamation with the Secretary of State and the Secretary of State notifies the Idaho Code Commission of such action."

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staying enforcement of that law, and that decision is currently on appeal to the Ninth Circuit.[7] The state legislature is expected to pass an entirely new parental consent law in the 2007 session. Passage of this law would render the appeal of prior legislation moot. That proposed law has been passed by the Idaho Senate and has been forwarded to the Idaho House of Representatives.[8]

I. LIFE ISSUES

The Idaho Legislature has been the battleground in Idaho on virtually all issues dealing with the sanctity of human life. The Court has steered clear of any definitive ruling on these difficult moral and legal questions. Moreover, the Court has shown a propensity to avoid political controversy.

Abortion

The Idaho Supreme Court has ruled in criminal cases dealing with illegal abortions. Those decisions all predate *Roe v. Wade*[9] and are more than fifty years old. Apart from those cases, the Idaho Supreme Court has not addressed the issue of abortion directly in any case. Idaho's parental consent legislation has been struck down twice by federal courts and is currently on appeal to the Ninth Circuit. However, the Court has not been presented with any case raising these issues.

In January, 2004, Idaho Chooses Life Alliance filed suit against the Idaho State Department of Health & Welfare (DHW) and Governor Dirk Kempthorne for the department's failure to carry out the provisions of Idaho Code §18-609, enacted in 1983,

[7] Planned Parenthood v. Wasden, CIV 05-148-S-EJL, April 18, 2005. A preliminary injunction was issued by the U.S. District Court staying enforcement of the entire statute on July 1, 2005. That decision is on appeal to the 9th Circuit. However, the Idaho Legislature is in the process of enacting Senate Bill 1082 in its 2007 session. The Idaho Senate has passed the bill by a substantial majority, and it is expected to pass in the House by a similar margin. The Governor has indicated his approval of the proposed law. In testimony before the Senate State Affairs committee on this bill on February 2, 2007, the Attorney General's office indicated that passage of this bill would render moot the pending appeal.
[8] Following the drafting of this paper, the Idaho Legislature passed both the new parental consent bill and right to view amendment. Both bills were signed by Governor Butch Otter and have become law in Idaho. No legal challenges have been brought with respect to either law.
[9] 410 U.S. 113 (1973).

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which required it to publish easily-comprehended, printed material, to be made available to the pregnant woman at least twenty-four (24) hours prior to performance of an abortion. *Idaho Chooses Life Alliance v. Kempthorne*[10]. The material was required to include descriptions of services available to the woman as an alternative to abortion, descriptions and photographs of the fetus at various stages of development, and description of the abortion procedures and any foreseeable complications and risks to the mother. Although the Legislature mandated the publication and dissemination of these informational materials, DHW made no attempt to comply with the law for over twenty (20) years.[11] The lawsuit asked the Court to issue a writ of mandate to the governor and the head of the DHW. The filing of the lawsuit created a huge political controversy in the state Legislature and governor's office. In March 2006, without comment, the Court declined to rule on the merits of the petition. In 2006, Governor Dirk Kempthorne was appointed Secretary of the Interior by President Bush. Lieutenant Governor Jim Risch took over as governor when Kempthorne left office in March. Within days, he ordered DHW to publish and disseminate the informational brochures.

In *Blake v. Cruz* [12] the Court recognized a cause of action for wrongful birth, defined as a claim brought by the family to impose tort liability on a defendant physician for damages and expenses incurred by the parents of a child born with birth defects when,

[10] Idaho Chooses Life Alliance, an Idaho Nonprofit Corporation, Roger Neuenschwander, M.D., Lifeline Pregnancy Center, Incorporated, an Idaho Nonprofit Corporation, et.al., v. Dirk Kempthorne, as Governor of the State of Idaho, Karl Kurtz, as Director of the Idaho Department of Health & Welfare, Idaho Department of Health & Welfare, Supreme Court Docket No. 30380, January 16, 2004.
[11] The Department of Health & Welfare requested an opinion from the Idaho Attorney General in 1993 on the constitutionality of Idaho Code §18-609 clarifying the Department's responsibilities. The Attorney General issued Attorney General Opinion No. 93-1, which informed the Department that ". . . as set out in Idaho Code §18-609, under Idaho's informed consent provisions, it is the responsibility of the Department of Health and Welfare to publish and make available to abortion providers materials containing: (1) information concerning services available to assist a woman through pregnancy, at childbirth and while her child is dependent; (2) descriptions and scientifically verified photographs of fetal development in two-week intervals; and (3) information concerning abortion procedures and risks. In addition, the department must compile and annually report the number of abortions performed in Idaho where the above-described materials were not provided to the pregnant patient."
[12] Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1985)

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but for the negligence of the physician, the child would not have been conceived or carried to term.[13]

In *Blake*, Dr. Cruz determined Mrs. Blake was in the early stages of pregnancy when he diagnosed a rash as roseola and failed to run tests that would have revealed her condition as rubella. Her daughter was born with severe congenital defects. The parents contended that had Dr. Cruz diagnosed her condition as rubella, they would have chosen to have an abortion.

The *Blake* decision was rendered by a Court whose constituency was entirely different from, and far more liberal than, its present majority. But even that Court declined to go so far as to recognize a cause of action in the child for wrongful life. In restricting its decision to a cause of action for recovery of medical expenses incurred by the parents, that Court acknowledged society's fundamental interest in protecting life, noting:

> Basic to our culture is the precept that life is precious. As a society, therefore, our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence. To recognize wrongful life as a tort would do violence to that purpose and is completely contradictory to the belief that life is precious. The fact that Dessie Blake will live in a severely disabled condition is unquestionably a tragedy; nevertheless, we agree…that life—whether experienced with or without a major physical handicap—is more precious than non-life.[14]

With regard to state funding of abortions, two Idaho trial courts have rendered decisions, although the Idaho Supreme Court has remained silent on the issue. In 1994, in *Jane Roe v. Jerry Harris*,[15] the District Court of Ada County held the state is not required to provide funds for abortion on demand to recipients under state funded welfare programs. The decision did not prohibit the state from barring those payments, however. As a result, the state of Idaho continued paying for abortions from 1994 through 2001. In fact, hundreds of Medicaid abortions were purchased by Idaho taxpayers during this

[13] *Id.* at 327.
[14] *Id.* at 322.
[15] Case No. 96977, District Court of the Fourth Judicial District, Ada County, Idaho

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eight-year period. It was not until Idaho Chooses Life sponsored legislation in 2001 to delete language providing that public funds could be used to pay for abortions, HB309[16] that the legislature finally nullified the effect of that court decision by expressly prohibiting such payments by the state.

In 2001, the ACLU filed suit, challenging the constitutionality of HB309 in the Ada County District Court. That Court rejected the ACLU claims and ruled constitutional the new statute prohibiting the use of state funds to pay for abortions on demand, except as necessary to save the life of the mother or unless the pregnancy was the result of rape or incest, as determined by the courts.[17] The Court held "the funding choices of the Legislature do not impermissibly infringe upon the fundamental right to procreation or a right of privacy under the Idaho constitution." [18]

Of great interest is the fact that the ACLU decided not to appeal the decision -- which is a good indication that, in 2001, they had even less confidence in the Court's pro-abortion disposition than pro-lifers had in their pro-life perspective.

Protection of the Unborn from Criminal Violence

In 2002, the Idaho Legislature added protection of the unborn to Idaho's criminal code.[19] At least two prosecutions under the law recently resulted in convictions, but neither case has reached the Court. As a result, the Court has not had an opportunity to rule on the constitutionality of the statute.

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[16] House Bill No. 309, 2001 Idaho Sess. Laws 996.

[17] Planned Parenthood of Idaho, Inc., v. Kurtz*,* Case No. CVOC0103909D, Memorandum Decision,6-12-02. The Court upheld House Bill 309 enacted in 2001. It is codified as Idaho Code § 56-209c, which provides: "No funds available to the department of health and welfare, by appropriation or otherwise, shall be used to pay for abortions, unless it is the recommendation of two (2) consulting physicians that an abortion is necessary to save the life of the mother, or unless the pregnancy is a result of rape or incest as determined by the courts." (IDAHO CODE ANN § 56-209c (2007))

[18] Planned Parenthood of Idaho, Inc., v. Kurtz, Case No. CVOC0103909D, Memorandum Decision, p.10, 6-12-02.

[19] Senate Bill 1344, 2002 Idaho Sess. Laws;, was codified as an amendment to Idaho Code §18-4001, which defines the crime of murder in pertinent part as follows: "Murder is the unlawful killing of a human being including, but not limited to, a human embryo or fetus . . ." The bill is referred to as "Noah's Law" because the legislation was inspired by the stillborn birth of Noah Smith, whose mother—in her ninth month of pregnancy—was attacked, fracturing his skull. *See* http://www.nrlc.org/news/2002/NRL04/noah.html.

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Idaho Code §18-4001 defines murder as "the unlawful killing of a human being including, but not limited to, a human embryo or fetus, with malice aforethought." Section 18-4006 defines manslaughter as "the unlawful killing of a human being including, but not limited to, a human embryo or fetus, without malice." Section18-907 provides in pertinent part that: "A person commits aggravated battery who, in committing battery...upon the person of a pregnant female, causes great bodily harm, permanent disability, or permanent disfigurement to an embryo or fetus."

None of these statutes have been challenged in Idaho courts on constitutional grounds, and the Court has not rendered any decisions interpreting the applicability of these statutes to the unborn.

Assisted Suicide

Assisted suicide is not permitted under Idaho law and would be treated as a criminal act under Idaho common law. There are no Idaho Supreme Court cases discussing this issue.

Healthcare Rights of Conscience

Idaho law permits certain healthcare providers or institutions, or both, to refuse to participate in abortion services only, on the basis of religious or moral beliefs. Idaho Code §18-612 provides:

> Nothing in this act shall be deemed to require any hospital to furnish facilities or admit any patient for any abortion if, upon determination by its governing board, it elects not to do so. Neither shall any physician be required to perform or assist in any abortion, nor shall any nurse, technician or other employee of any physician or hospital be required by law or otherwise to assist or participate in the performance or provision of any abortion if he or she, for personal, moral or religious reasons, objects thereto. Any such person in the employ or under the control of a hospital shall be deemed to have sufficiently objected to participation in such procedures only if he or she has advised such hospital in writing that he or she generally or specifically objects to assisting or otherwise participating in such procedures. Such notice will suffice without specification of the reason therefor. No refusal to accept a patient for abortion or to perform, assist or participate in any such abortion as herein provided shall form the basis of any claim for damages or recriminatory action against the declining person, agency or institution.

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No reported decisions have been rendered by the Court on this statute. Nor have Idaho Courts ever addressed any issues relating to a pharmacist's dispensation of abortifacents.

Cloning

There are no reported Idaho cases in this area of the law and no Idaho statute dealing with this issue.[20]

Destructive Embryo Research

There are no reported Idaho cases in this area of the law. However, it appears Idaho's definition of manslaughter is broad enough to include destruction of a human embryo or fetus, whether or not it occurred in the context of scientific research, if the embryo or fetus were considered viable at the time of destruction.

The Idaho Code defines manslaughter thusly:

> [T]he unlawful killing of a human being, including, but not limited to, a human embryo or fetus, without malice. It is of three (3) kinds: 1. Voluntary -- upon a sudden quarrel or heat of passion. 2. Involuntary -- in the perpetration of or attempt to perpetrate any unlawful act, other than arson, rape, robbery, kidnapping, burglary, or mayhem; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection; or in the operation of any firearm or deadly weapon in a reckless, careless or negligent manner which produces death. 3. Vehicular -- in which the operation of a motor vehicle is a significant cause contributing to the death. . . ."[21]

Intent to kill is not an essential element of involuntary manslaughter. [22] The Court has not issued a ruling on the point in time at which an embryo or fetus becomes viable. It is conceivable that embryo research that caused the destruction of a viable embryo or fetus could be construed as an act of involuntary manslaughter.

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[20] University of Idaho scientists successfully cloned a mule in 2003 as part of a cloning research project titled *Project Idaho*. Information about that project is available at www.uidaho.edu/cloning/ or at www.avs.uidaho.edu/nerl/. Scientists have addressed the potential ethical and moral issues by stating that their research has not been done with intentions of transferring this technology to the cloning of humans. Last visited on Oct. 5, 2007..

[21] IDAHO CODE ANN §18-4006 (2007).

[22] State v. Atwood, 105 Idaho 315, 318, 669 P.2d 204, 207 (Ct. App. 1983)

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This analysis is totally hypothetical and problematic, because an embryo or fetus harvested by a legal abortion would no longer be viable when presented for use in such research, and legal abortions are excluded under Idaho law from application of these criminal statutes.[23]

On all of these life issues, the Court has been relatively silent. For the most part, they have not had the opportunity to render opinions, because the abortion rights cases have primarily been brought in the federal court or not appealed beyond the trial court. In other areas, there are simply no reported cases.

II. JUDICIAL RESTRAINT

Judicial restraint is the preference of a court to follow case precedent, interpret laws strictly according to their own words, and uphold laws unless they are obviously in conflict with the constitution. The opposite of judicial restraint is judicial activism characterized by interpretation of laws with the overriding intent to serve the public welfare.

The Court is not an activist court. Instead, it has adamantly declared it will not interfere with the Legislature and will attempt to interpret Idaho law consistently with legislative intent. At least four of the five members of the Court consider themselves strict constitutional constructionists, and their recent decisions on a wide variety of legal issues have, in general, upheld legislative enactments, interpreting them according to their "plain meaning," without broad re-interpretation of their provisions.

The published comment by Justice Daniel Eismann characterizes the entire Court today. He wrote:

> What the citizens of this state deserve are justices who will follow the law. That requires a balance of both independence and accountability--sufficient independence that they can follow the law and sufficient accountability that they will. That balance is provided by an election system. Independence comes from the fact that incumbent judges are infrequently challenged and rarely defeated.

[23] Senate Bill 1519, 2002 Session Laws, codified as an amendment to IDAHO CODE ANN §18-4016(2) (2007).

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> Accountability comes from the fact that the people can, if they choose, remove a judge who has abused the power of his or her office.[24]

The Idaho Supreme Court strictly interprets Idaho's constitution and statutes. For example, in *Paolini v. Albertson's Inc.,* [25] the Court was asked to answer the question "Can stock options be wages under Idaho Code §§ 45-601(7) and 45-613?" Instead of attempting to reconcile the two statutes, by deducing an unstated rationale for both, the Court simply reiterated its oft-cited rule of statutory interpretation:

> This Court must construe a statute to give effect to the intent of the Legislature. *Carrier v. Lake Pend Oreille School Dist. #84,* 142 Idaho 804, 807, 134 P.3d 655, 658 (2006) It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. *McLean v. Maverik Country Stores, Inc.,* 142 Idaho 810, 813, 135 P.3d 756, 759 (2006).

The analysis that followed was akin to diagramming a sentence for an English class. It was a purely mechanical selection of specific words within the statute yielding a simple conclusion.[26]

Over the past ten years, the Court has followed this same practice whenever called

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[24] Daniel Eismann, *Judicial Independence*,,THE ADVOCATE, Dec. 2003.
[25] 418 F.3d 1023 (D. Idaho, 2006)
[26] The Paolini Court noted: "Idaho Code § 45-608(1) gives clarity to the Legislature's intent regarding the meaning of the word *wages* in Chapter 6 of Title 45. It states: Employers shall pay all wages due to their employees at least once during each calendar month . . . in lawful money of the United States or with checks on bank . . . This statute requires employers to "pay all wages due to their employees at least once during each calendar month, on regular paydays designated in advance by the employer." By its terms, it is not limited to wages earned during a calendar month or to wages that are normally paid every calendar month. It applies to wages *due* during the month. Wages earned over a longer period of time, such as an annual bonus based upon net profits, will come due during a specific calendar month and are covered by the statute.

This statute also requires that employers "*shall* pay *all* wages due to their employees . . .in lawful money of the United States or with checks on banks. . ." (emphasis added) "The word *shall*, when used in a statute, is mandatory." *Goff v. H.J.H. Co.*, 95 Idaho 837, 839, 521 P.2d 661, 663 (1974). Thus, the employer does not have discretion to pay wages in a manner other than as directed by the statute. The manner of payment directed by the statute applies to "*all* wages due." If all wages due must be paid in cash, with a check, or by deposit into the employee's account, then the word *wages* can only refer to monetary compensation. Nonmonetary compensation such as stock options cannot be wages because that form of compensation is not payable in cash, with a check, or by deposit into the employee's account. When Section 45-601(7) is construed with Section 45-608(1), stock options cannot constitute wages under Section 45-601(7). The term *wages* in Chapter 6 of Title 45 only refers to monetary compensation."

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upon to interpret and apply an Idaho statute. In some cases, the Court has exhaustively reviewed legislative history, as well as the language in the statute, in order to determine and apply the law consistently with the Legislature's underlying purposes.

For instance, in *State v. John Doe*, [27], the Court was presented with a case that had obvious policy implications but elected to avoid a constitutional question, instead strictly interpreting the statute in question. Doe, a ten year old boy, stood up in class and asked his substitute teacher for a shotgun. When his teacher asked why he needed the shotgun, Doe responded that he wanted to shoot another boy who had been bothering him. Doe was immediately removed from the classroom and interrogated by the police. He was subsequently charged with a violation of Idaho Code §33-512(11) which makes it a misdemeanor offense for a person to, among other things, disrupt "the educational process." Doe never returned to class and was permanently removed from school.

Doe filed a motion to dismiss the criminal charge, on the grounds that the statute was unconstitutionally void for vagueness and not intended to apply to the conduct of a student. Consistent with its policy of judicial restraint, the Court first noted it declined to rule on constitutional issues whenever a case could instead be resolved by statutory interpretation. The Court then noted the statute grants trustees of school districts certain powers, but does not define the phrase "disrupts the education process." Because that provision was not defined in the statute or by prior case law, the Court held it was ambiguous and, therefore, subject to its interpretation. But the goal of that interpretation was to find and give effect to the legislative intent. The Court reviewed minutes of the education committee of the state Legislature and concluded the purpose of the statute was to promote a safe learning environment, rather than criminalize student conduct. The Court's opinion in this case indicates distinct preference to adopt a practical interpretation and application of a statute that serves a narrowly-defined purpose rather than to construe statutes broadly. It is also another example of the reluctance of the Court to identify and declare a statute is in conflict with the Idaho Constitution.

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[27] 140 Idaho 271, 92 P.3d 521 (2004)

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It would be accurate to describe the Court's recent rulings over a broad variety of legal issues as evincing this policy and practice of strict construction. A recent case in point is *City of Boise v. Keep the Commandments Coalition***,** [28] In *City of Boise*, Boise obtained an injunction against placement of a Ten Commandments monument initiative on the ballot, arguing it was not the proper subject for an initiative, under both Idaho statutory and case law. The Court reversed, ruling Boise must place the proposal on the ballot. The Court could have intervened by broadly interpreting the initiative right guaranteed by Article III, §1 of the Idaho Constitution, and its enabling statutes, Idaho Code § 34-1801, *et seq*. Instead, the Court held the district court did not have judicial authority to issue an injunction, because, until the initiative proposal was submitted to a vote and passed, the issue of its validity was not yet ripe. The Court could have reached the same result either by intervention or by abstention. The Court chose to abstain from the substantive controversy and resolve the dispute by narrowly construing its own judicial review authority. In taking this approach, the Court clearly demonstrated its conservative strict constructionist ideology.

On the heels of its decision in *Keep the Commandments*, the Court decided a much more controversial initiative case by adopting the same abstention doctrine. In *Davidson v. Sun Valley*, [29] Ryan Davidson sought to qualify a ballot initiative to legalize the growth, sale, and use of marijuana in Sun Valley. The City rejected the initiative petition on the grounds that it was contrary to state law and, therefore, an improper subject for an initiative.

As one commentator remarked:

> It is worth noting that in the Davidson case, the futility of the initiative was compounded because the subject matter of the initiative – legalization of marijuana – is pre-empted at both the state and federal levels.[30]

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[28] 143 Idaho 254, 141 P.3d 1123 (2006)
[29] 143 Idaho 616, 151 P.3d 812 (2006)
[30] Brian Kane, *If the Citizens Speak, Listen: Idaho's Local Initiative Process*, THE ADVOCATE, Mar. 2007 at 18., .

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The Court declined to address the political and social issues raised by Davidson's controversial initiative proposal. Instead of taking the opportunity to interpret the initiative law as barring this type of radical social change initiative, the Court exercised judicial restraint and ruled only on the issue of ripeness. Relying on its decision in *Keep the Commandments*, the Court overturned the lower court's decision, holding Davidson should be allowed to collect signatures and qualify his initiative for the ballot, because it would not be ripe for review until and unless it was passed by the voters.

On the issue of judicial review,[31] the Court gives extreme deference to legislative enactments. Over the past ten years, it is difficult to find any cases in which the Court has held state legislation wholly invalid or interpreted state laws as being in conflict with Idaho Constitutional provisions.

Based on the decisions of the Idaho Supreme Court over the past ten years, it is reasonable to predict that the Court will continue its practice of strict construction of Idaho statutes. In order to avoid invalidating a statute, the Court will in most cases opt to decide a case on its facts and eschew the creation of new public policy or a statutory interpretation.[32]

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[31] "Judicial review" is defined by the Idaho Rules of Civil Procedure as "the district court's review pursuant to statute of actions of agencies . . ." Idaho R. Civ. P. 84(a)(2)(C). Judicial review of an administrative decision is wholly statutory; there is no right of judicial review absent the statutory grant. Idaho R. Civ. P. 84(a)(1); *Gibson v. Ada County Sheriff's Dept.,* 139 Idaho 5, 8, 72 P.3d 845, 848 (2003).

[32] The makeup of the Idaho Supreme Court has changed since this paper was drafted. Chief Justice Gerald Schroeder and Justice Linda Copple Trout have both resigned from the Court in July and August, 2007, respectively. Both resigned during their terms so that the Idaho Governor could appoint their replacements to serve until both positions come up for re-election in May, 2008. One vacancy has been filled by the appointment of Warren Jones, a Boise, Idaho attorney in private practice with extensive business litigation experience primarily on the defense side. Mr. Jones has no expressed position on life issues, but is generally regarded as conservative.

The other vacancy on the Court has yet to be filled by the Governor. As of this date, the final four candidates for that position are three Idaho District Court Judges, Joel Horton, Darla Williamson and Juneal Kerrick, and a Coeur d'Alene attorney in private practice, Kenneth Howard. None of these individuals has an expressed life issues position, and each of them are generally regarded as conservative.

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III. THE COURT

Article V, Section 6, of the Idaho Constitution provides: “The justices of the Court shall be elected by the electors of the state at large. The terms of office of the justices of the Supreme Court, except as in this article otherwise provided, shall be six years.” Although this constitutional provision appears to mandate the election of all Court justices, that requirement has been avoided in deference to the political process. By retiring mid-term, sitting Supreme Court justices have given the governor the power to appoint his or her successor. Four of the five sitting justices have taken office in this manner. At present, of the five sitting members of the Court, only Justice Daniel T. Eismann was initially elected to serve in that capacity.

Justice Eismann ran for election against sitting justice Cathy Silak, whose term expired in 2000. Justice Silak had been elevated to her post by Governor Cecil Andrus, a pro-choice Democrat.

Justice Silak authored a controversial opinion dealing with Idaho’s water rights in 1999. In that decision, the Court upheld trial court decisions that maintained "federal reserved" water rights for the Sawtooth Wilderness. These water rights for specially designated federal lands — also called "Winters rights" for the 1908 United States Supreme Court (USSC) decision that delineated them — are a major exception to the rule that states control all water resources within their borders. There was tremendous public opposition in Idaho to the decision, and the Court offered to reconsider its ruling. Justice Eismann made this decision the keystone to his election campaign. In 2000, the Court reversed itself and said the federal reserved rights did not apply to the Sawtooths or Hells Canyon. However, Cathy Silak was broadly viewed as a liberal judge who had failed to protect Idaho property rights.

A hugely important dynamic in this election involved Silak’s role as a founding member of the Idaho ACLU chapter in the late 1980s. Idaho Chooses Life mailed thousands of letters, cut radio ads across the state, and otherwise informed people about

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her radical social and pro-abortion agenda. This information was as important to her defeat as the water issue.

Biographical information of the current justices of the Idaho Supreme Court

Judge	**Appointed by / Year**	**Term Expires**	**Miscellaneous**
Chief Justice Daniel T. Eismann	Elected / 2000 (commenced in 2001); re-elected 2007	2014	-Biographical information: B.A., University of Idaho; J.D., University of Idaho, 1976; Enlisted in U.S. Army, 1967; Served two tours of duty in Vietnam; Private practice, 1977 – 1986; Appointed Magistrate Judge, 1986; Appointed District Judge 1995; -Professional/social affiliations: Evangelical Christian and pro-life. -Articles: Several articles published in The Advocate discussing changes in procedural rules, and the impact of the drug court on Idaho rehabilitation programs. - Awards: Awarded two purple hearts and three medals for heroism;
Warren E. Jones	Governor C. Otter / 2007	2014	-Biographical information: B.A. Political Sciences, College of Idaho, 1965; J.D., University of Chicago Law School, 1968; Law clerk for Joseph J. McFadden, Chief Justice of the Idaho Supreme Court, 1968-1970; Private practice with the law firm of Eberle, Berlin, Kading, Turnbow, McKlveen & Jones for 37 years;

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Joel Horton	Governor C. Otter/ 2007	2014	-Biographical information: B.A. Political Sciences, University of Washington, 1982; J.D. University of Idaho College of Law, 1985; Private practice, 1985-1986; Deputy prosecuting attorney, 1986 – 1988; Deputy Attorney General, 1991-1994; Ada County magistrate, 1994-1996; District Court Judge, 1996-2007.
Roger Burdick	Governor D. Kempthorne / 2003	2010	-Biographical information: B.A., University of Colorado; J.D., University of Idaho, 1974; Private practice, 1974-1980; Public Defender, 1976-1980; Elected Prosecuting Attorney for Jerome County, 1980; Magistrate Judge, 1981-1993; District Judge, 1993-2003;.
Jim Jones	Governor D. Kempthorne / 2005	2011	-Biographical information: B.A., University of Oregon, 1964; J.D., Northwestern University, 1967; Served 13 month tour in Vietnam as artillery officer; promoted to Captain; Served as a legislative assistant to former U.S. Senator Len B. Jordan; Twice elected Attorney General for State of Idaho; - Awards: Received Army Commendation Medal, Bronze Star, Air Medal with Four Oak Leaf Clusters, Vietnamese Cross of Gallantry with Bronze Star.

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CONCLUSION

Article 1 of the Idaho Constitution states that '*All men are by nature free and have certain inalienable rights, among which are enjoying and defending life*….' Sooner or later, these words will come to bear upon the practice of abortion in Idaho.

As reflected in the Legislature's composition and various public opinion studies over the past decade, it is clear a majority of Idaho's citizens believe the unborn are entitled to the protections envisioned by the framers of Idaho's constitution. As long as we retain the ability to restrain the judiciary through an election process, justices of the Court will have to be mindful of those core values, as they seek to reconcile the historical roots of our constitution with newly-minted rights recognized by the federal courts – especially those articulated by the Ninth Circuit.

In the short term, it seems the Court will be content to rest in the conservatism articulated by USSC Justice John Harlan – that is, a general deference toward acts of Idaho's legislative and executive branches. An abortion lobby will be greatly aiding that endeavor, as it has shown a real reluctance to test the mettle of the Court. And, indeed, given the very liberal inclinations of the federal courts in both Idaho and the Ninth Circuit, there seems little reason to look for a strategy change from that quarter.

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