

NOT AS BAD AS YOU THINK: THE 2007 MARYLAND COURT OF APPEALS ON THE SANCTITY OF HUMAN LIFE AND JUDICIAL RESTRAINT

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Maryland is nationally regarded as a bastion of liberal politics. On matters pertaining to human life, however, the jurisprudence and potential future makeup of Maryland's highest court suggest there may be a significant opening to protect the unborn, should *Roe v. Wade*² be overturned.

This paper will examine judicial restraint in the context of a survey of cases about the sanctity of human life in the State of Maryland. Section I will provide the historical foundation by which to analyze the current tendencies of the Court of Appeals on life issues. Section II will examine the current Court on issues of separation of powers and judicial restraint. The final section provides general information about Maryland's highest court and its justices.

I. LIFE ISSUES

Abortion

Until *Roe v. Wade*,³ Maryland restricted abortions in most cases.⁴ Prior to 1973, the cases before the Maryland Court of Appeals and its intermediate court, the Court of Special

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² 410 U.S. 113 (1973).

³ Id.

⁴ Md. Code Ann. Art. 27 § 3 (1967 Repl.Vol.) stated: "(a) No person shall terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth, except that a physician licensed by the State of Maryland may terminate a human pregnancy or aid or assist or attempt a termination of a human pregnancy if said termination takes place in a hospital accredited by the Joint Commission for Accreditation

Appeals, show active prosecution and conviction of abortionists under the law.⁵ After *Roe*, Maryland's laws prohibiting abortion lay fallow.

In 1991, the General Assembly of Maryland enacted a statute expressly permitting abortion, with certain exceptions that are vague and have been unenforced.⁶ The statute was subsequently confirmed in a general referendum in 1992.⁵ The Court of Appeals has not had occasion to interpret that statute, and its recent decisions involving matters related to the life of the unborn child and the rights of parents still rely heavily on the trimester framework found in its interpretation of common law and in *Roe v. Wade*, as more fully described below.

Protection of the Unborn from Criminal Violence

In 1989, the Court articulated the legal precedent applicable to cases involving manslaughter of the unborn. In *Williams v. State of Maryland*,⁷ the defendant attempted to shoot an arrow at another man and, as a result, struck Lyles, a woman nine months pregnant, in a major artery. As a result, Lyles died from loss of blood, but her child was delivered an hour before her death. The child died shortly thereafter, as a result of the same injuries.

Article 5 of the Maryland Constitution affords its citizens the benefit of English common law, as it existed on July 4, 1776. In *Williams*, the Court was presented with two conflicting claims as to what constituted English common law pertaining to manslaughter involving the unborn.

of Hospitals and licensed by the State Board of Health and Mental Hygiene and if one or more of the following conditions exist:

- (1) Continuation of the pregnancy is likely to result in the death of the mother;
- (2) There is a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother;
- (3) There is substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation;
- (4) The pregnancy resulted from a rape committed as a result of force or bodily harm or threat of force or bodily harm and the State's Attorney of Baltimore City or the county in which the rape occurred has informed the hospital abortion review authority in writing over his signature that there is probable cause to believe that the alleged rape did occur."

⁵ See, e.g., *Roeder v. State of Maryland*, 244 A.2d 895 (1968).

Md. Code Ann., Health-Gen. § 20-209 (2007).

⁶Md. Code Ann., Health-Gen. § 20-209 (2007).

⁷ *Williams v. State of Maryland*, 561 A.2d 216 (1989).

The Court considered the conflicting opinions on the matter of Lords Hale and Coke, 18th century English jurists and reviewed various commentaries from the period including Blackstone, Hawkins, and Wharton. In finding a cause of action for manslaughter does arise on behalf of an infant, born alive, who later dies as a result of injuries inflicted *in utero*, the Court aligned itself with the opinions of Lords Coke and Blackstone. The Court further stated, “So extensive is the acceptance of this common law rule that we conclude that it was indeed the law of Maryland in 1776.”⁸

In the 1995 case of *Scott v. White*, the Court of Appeals considered whether a cause of action may be maintained for wrongful death resulting from the negligent infliction of prenatal injuries causing the death of an unborn child that was not viable and was stillborn.⁹ In that case, White was driving a car in which Scott, eight weeks pregnant, was a passenger. The car collided with an ambulance in Baltimore and, as a result, Scott suffered a miscarriage of her eight-week-old unborn child. Scott later died of her injuries. The personal representative for Scott’s estate brought an action against White, on behalf of the unborn child, for wrongful death.

Previously, in *State v. Sherman*,¹⁰ the Court determined a cause of action may be maintained on behalf of a *viable* fetus who was stillborn. The Court also held, in *Damasiewicz v. Gorsuch*,¹¹ that a cause of action may be maintained by a non-viable fetus born alive. However, in *Scott*, the Court declined to grant rights to a non-viable fetus that suffers injury as a result of another’s negligence and, as a result, is stillborn.¹²

In rejecting a cause of action for a non-viable stillborn child in *Scott*, the Court noted the inherent conflict between granting any rights to a non-viable child that is stillborn and the constitutional right to abortion found in *Roe v. Wade*. But ultimately, the Court rested its

⁸*Id.* at 219.

⁹ *Scott v. White*, 663 A.2d 1264 (1995)

¹⁰ *State of Maryland v. Sherman*, 198 A.2d 71 (1964).

¹¹ *Damasiewicz v. Gorsuch*, 79 A.2d 550 (1951).

¹² Note, however, that in *Smith v. Borello*, 804 A.2d 1151 (2002), the Court of Appeals, in considering a question certified to it by the United States Court of Appeals for the Fourth Circuit, found that although a wrongful death action may not be brought with respect to the death of a non-viable fetus that is stillborn, a woman can recover for her own psychic trauma related to the loss of a non-viable fetus due to the negligence of another.

opinion on a more general common law position that viability marks the threshold beyond which liability may arise for negligence.¹³

Ancillary to the rights of the unborn child are the rights of his/her parents. In one case that came before the Court of Special Appeals, the Court considered whether the father of an unborn child, who had not yet reached the end of the first trimester, has any right to prevent his wife from procuring an abortion.¹⁴ In *Coleman v. Coleman*¹⁵ the Court of Special Appeals expressly, and apparently for the first time in a published opinion, decided the then-existing laws prohibiting abortion in the Code of Maryland were superseded by *Roe v. Wade* and subsequent cases of the United States Supreme Court (USSC).¹⁶

It was further decided the husband's arguments that, under common law, the child had the right to be born and receive maintenance from his parents and that he, the father, had the right to protect the child were flawed, because the decisions of the USSC superseded any rights under English common law the husband may have under the Maryland Constitution. Furthermore, reasoned the Court of Special of Appeals, the USSC's decisions, including *Planned Parenthood of Central Missouri v. Danforth*,¹⁷ held a husband has no rights to interfere with his wife's abortion during the first trimester. The Court concluded the common law provided no rights to the unborn child until viability, which it interpreted to be the end of the first trimester.

Coleman also rejected the husband's claim that his unborn child was already viable, citing scientific evidence that a fetus is viable from the moment of conception. The Court ruled, relying on *City of Akron v. Akron Center for Reprod. Health, Inc.*,¹⁸ that the "husband's evidence

¹³ The Court also considered Scott's position that to find no cause of action may be maintained by a non-viable stillborn fetus would be a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. In rejecting that argument, the Court cited *Roe v. Wade* for the proposition that a fetus is not considered a "person" for purposes of Fourteenth Amendment protection. *Scott*, 663 A.2d at 1269.

¹⁴ Note that the Court of Appeals had the occasion to consider this same question in *Hagerstown Reprod. Health Services v. Chris Allen Fritz*, 295 Md. 268 (1983), but declined to do so on the grounds that the case had become moot when Ms. Fritz obtained the abortion between the time the Circuit Court's stay was lifted by a single judge on the Court of Special Appeals and the time the Court of Appeals granted *certiorari*.

¹⁵ *Coleman v. Coleman*, 471 A.2d 1115 (1984).

¹⁶ Note that the law referenced in *Coleman* was subsequently repealed in 1991 and a new law that permits abortion is in effect

¹⁷ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

¹⁸ *City of Akron v. Akron Center for Reprod. Health, Inc.*, 462 U.S. 416 (1983).

did not establish that medical science has generally accepted as true that the fetus, during the first trimester, is capable of meaningful life outside the mother's womb.”¹⁹

In 2005, the Court considered whether the State has any right to protect the unborn child from the reckless acts of his mother. In *Kilmon v. State of Maryland*,²⁰ the Court of Appeals considered whether the intentional ingestion of cocaine by a pregnant woman can form the basis for a conviction for the reckless endangerment of the later-born child that is drug-addicted. Finding the crime of reckless endangerment is purely statutory, the Court opined that the Maryland legislature did not intend for the crime of reckless endangerment to apply to a woman with respect to her unborn child, because it expressly refused to do so in the past, and, furthermore, recent legislation regarding homicide with respect to the killing of a viable fetus expressly exempted the mother with respect to her own child. As a result, the legislature’s intent with respect to the reckless endangerment statute must have been to exempt acts or omissions of the mother with respect to harm caused to her unborn child.

Assisted Suicide

The Maryland Court of Appeals has had little occasion to consider the matter of assisted suicide. The Court did, however, consider this issue in the 2001 case of *Fister v. Allstate Life Insurance Company*.²¹

In *Fister*, the Court considered a case in which a woman attempted to commit suicide by rigging a shotgun with a string with the help of her friend, a Mr. Goldman. After several attempts to make the device fire, she exhorted Goldman to “do something right” and pull the trigger. He complied, and she died as a result of the injuries. Her estate attempted to collect under certain life insurance policies issued by the respondent, all of which contained an exception for suicide. The estate argued she did not commit suicide but was murdered. The insurance company argued Goldman acted in accordance with the desire and instructions of Fister and, therefore, she had committed suicide, assisted by another.

¹⁹ *Coleman*, 471 A.2d at 1120.

²⁰ *Kilmon v. State of Maryland*, 905 A.2d 306 (2005).

²¹ *Fister v. Allstate Life Ins. Co.*, 783 A.2d 194 (2001).

In finding Fister did not commit suicide, the Court reversed the Court of Special Appeals and stated,

We believe that the plain and ordinary meaning of the word [suicide], and the definition recently set forth by the Legislature, are synonymous and unequivocally unambiguous. Suicide is the intentional taking of one's own life, *i.e.* by his or her own hands . . . In this case, Goldman held a shotgun to Fister's head and ultimately pulled the trigger, causing Fister's death. This is homicide, not suicide.²²

Healthcare Rights of Conscience

The appellate courts in Maryland have not addressed matters pertaining to healthcare rights of conscience

Cloning

The appellate courts in Maryland have not addressed matters pertaining to cloning.

Destructive Embryo Research

The appellate courts in Maryland have not addressed matters pertaining to destructive embryo research.²³ Note, however, the Maryland legislature passed legislation in 2006 for the funding of embryonic stem cell research projects.²⁴ The legislation was signed into law by Maryland's governor on April 6, 2006.

II. JUDICIAL RESTRAINT

Is the Court of Appeals "Activist"?

Certainly, Chief Judge Robert M. Bell sets the tone on this question. In Maryland, the chief judge is no mere figurehead. Cases are reviewed on a discretionary basis.²⁵ The extent to which a chief judge in Maryland influences the Court's position on a major social issue is, to a

²² Id

²³ However, in *Doe v. Shalala*, 862 F.Supp. 1421 (Md. 1994), the U.S. District Court sitting in Baltimore considered a request for an injunction against the National Institutes of Health (NIH) Human Embryo Research Panel seeking to prevent the panel from holding any meetings or making any recommendation to NIH or the Secretary of Health and Human Services with regard to the issue of human fetal research. Finding that the plaintiff unnamed embryo is not a "person" because of *Roe v. Wade*, and that the non-profit fund that brought the claim lacked standing, the suit was dismissed.

²⁴ See *Maryland Stem Cell Research Act of 2006*, 2006 Md. Laws 19 (codified at Md. Code Ann., Department of Business and Economic Development § 83A, Economic Development and Financial Assistance Programs Tit. 5, Maryland Stem Cell Research Prog. Subtit. 2B (2007)).

²⁵ Md. R. Civ. P. 8-303 (t).

large extent, a function of just how important that issue is to the particular chief judge in office. The chief judge conducts the meeting to decide which cases will be granted a writ of *certiorari*. The discussions are reportedly intense and animated. The chief judge oversees the meeting and can put his stamp of approval on the process. He generally helps direct who will write the opinion. He works the room, starting with the associate judges with the most seniority, to determine if there is consensus. Written opinions also go through a similar review process. Sometimes, the arguments are so lively the dissent wins over enough opponents that the dissenters end up with the majority opinion.²⁶

Chief Judge Bell was raised and schooled in Baltimore. No stranger to cases and controversies, Bell, long before he was on the bench, led a civil rights sit-in protest, which resulted in landmark litigation. Eventually, this case wound made it to the USSC and to this day bears his name, *Bell v. State of Maryland*.²⁷ A graduate of Harvard Law School, Judge Bell briefly practiced law before embarking on a storied judicial career, where he rose from the lowest level trial court to Maryland's highest judicial position in very short order.

Judge Bell can be described as an activist. Under his tenure, the Court of Appeals has continued the practice of levying assessments on individual attorneys, even though the Maryland Constitution reserves that privilege to the legislature alone.²⁸ Each year, the chief judge presents a state of the judiciary speech to the Maryland Legislature, at which time he also seeks to justify vast increases in judicial budget and power. He has been known to engage with individual legislators during this process. He is not afraid to assert his muscle as head of the judiciary. Recently, the chief judge was instrumental in implementing so-called drug courts, a great innovation. A conflict, however, arose when he moved to staff the drug courts with the judiciary's own counselors and enforcement officers, a clear usurpation of executive power.²⁹

²⁶ *Appellate Practice for the Maryland Lawyer: State and Federal* (Paul Mark Sandler, Esq. & Andrew D. Levy, Esq., eds., 2001).

²⁷ 378 US 226, 12 LE 2nd 822, 84 SCt. 1814 (1964).

²⁸ 5 M.L.E. Constitutional Law 289, §71 Taxation and Assessments (West Group, 2001)

²⁹ Op. Att'y Gen. of Md. (Feb. 14, 2006); *see also* the Dept. of Legislative Services analysis of the FY 2006 and FY 2007 Maryland Executive Budget which recommended that the funding for Maryland's drug courts be reduced by over seven million dollars as the proposed action "may be regarded as interfering with the governor's preeminent role in the budgetary process".

The chief judge appears poised to play a strong role in Maryland's same sex-marriage debate. Ten homosexual couples sought to declare the family law article defining marriage as between only one man and one woman unconstitutional under several clauses of the Maryland Constitution.³⁰ Ten legislators sought to intervene early in the litigation, as they were unconvinced the attorney general would enthusiastically fight for the statute's constitutionality. The trial judge rejected the motion to intervene without the requested hearing; appeals followed. Before the intermediate appellate court scheduled oral argument, the highest court, on its own motion, granted a writ of *certiorari* in order to dispose of the appeal on an expedited basis, doubtlessly acknowledging the extraordinary social implications of the underlying battle. A majority of the seven members appeared agitated at the oral argument. Early the next day, with extraordinary dispatch, Chief Judge Bell announced the per curiam affirmation of the trial court.³¹ This remarkable speed served as an exclamation point for the decision.

The chief judge will likely play a major role when Maryland rules on the merits of the same-sex marriage litigation. After the highest court summarily rejected the motion to intervene, the matter was remanded for trial last summer. Traditional marriage proponents lost and immediately noted an appeal. Again, the highest court swooped down and snatched the appeal from the intermediate appellate court, deciding to make the status of marriage in Maryland its sole business. The Court of Appeals must have factored in that the losing party would have appealed anyway, and it is certainly within the Court's right to take on cases with widespread social impact.³² It is hard to predict where Maryland will end up. It will probably result in a greatly divided court, with Judge Bell on the side of declaring the pertinent section of the Family Law Article unconstitutional. The chief judge has demonstrated his willingness to address matters of social policy.

³⁰ *Conaway v. Deane*, 903 A.2d 416 (2006).

³¹ *Duckworth v. Deane*, 903 A.2d 883 (2006).

³² <http://www.courts.state.md.us/coappeals/coaoverview.html>. A party generally may file a petition for a writ of certiorari for review of any case or proceeding pending in, or decided by, the Court of Special Appeals upon appeal from a circuit court, an orphans' court or the Maryland tax court. The Court of Appeals grants those petitions it feels are desirable and in the public interest. The Court also may review cases on a writ of certiorari issued on the Court's own motion. The Court of Appeals conducts a monthly review of appellants' briefs from cases pending in the Court of Special Appeals in an effort to identify cases suitable for consideration by the higher court.

By contrast, the second most junior member of the Court, Judge Lynne A. Battaglia, serves as the other bookend. Judge Battaglia's pre-judicial life exposed her to the virtues of the separation of powers doctrine. Her primary positions were as legal counsel to a United States congresswoman, followed by an executive appointment as the United States Attorney General for the State of Maryland. She had no prior judicial experience when the governor tapped her for the Court of Appeals. She is the author of a detailed analysis of one of Maryland's most venerated appellate judges who has demonstrated enthusiasm for the separation of powers doctrine.³³ Judge Battaglia is a disciple of that same viewpoint.³⁴ She was one of the few judges who displayed sensitivity to the oral argument on behalf of the legislators seeking intervention in Maryland's same-sex marriage litigation. Judge Battaglia has also chaired a long-standing commission seeking to restore civility among the members of the Maryland Bar Association. She is a big believer in the duty of each branch of government to keep its own ranks in order.³⁵

Of particular interest is Judge Battaglia's opinion in *Fister v. Allstate Life Insurance Company*.³⁶ This case is discussed in greater above, but it bears mentioning here, as it is illustrative of her conservative approach to the construction of a statute. She did not allow the startling facts of that case to influence her theory of strict statutory construction. Judge Battaglia wrote, with particularly strong language, that a court's inquiry ends if the words of a statute are clear and unambiguous according "to their commonly understood meaning."

Judge Irma Raker has been with the Court of Appeals since 1994. She is widely respected. She hails from Montgomery County, a liberal bastion on the outskirts of Washington, D.C., and definitely sides closer to Chief Judge Bell on the continuum of judicial restraint. She is not timid about speaking out on matters of crime and punishment, the environment, battered

³³ Lynne A. Battaglia, *Obeisance to the Separation of Powers, and Protection of Individuals' Rights and Liberties: The Honorable John C. Edridge's Approach to Constitutional Analysis in the Court of Appeals of Maryland, 1974-2003*, 62 Md. L. Rev. 387 (2003).

³⁴ Thus for example, in the conclusion to her law review article, Judge Battaglia comments on Judge Eldridge's views very favorably when she notes that Judge Eldridge held great "respect for our Constitution" and caused Judge Battaglia a deep "admiration for his professional accomplishments." Earlier she makes the point that Judge Eldridge "tends to exercise judicial restraint and defers to the other branches of government." 62 Md. L. Rev. 387 (2003), at 409 and 416.

³⁵ <http://www.msa.md.gov/msa/mdmanual/29ap/html/msa13543.html>.

³⁶ *Fister*, 783 A.2d at 194.

spouse syndrome, and child abuse and neglect.³⁷ The recipient of many distinctions and honors, Judge Raker has served on many judicial conferences, not the least of which is to chair the sometimes controversial Judicial Compensation Committee. This Committee has engaged in aggressive debate with the legislature on more than one occasion. As discussed in greater detail below, in a remarkable 113-page opinion of judicial muscle flexing, Judge Raker joined Judge Harrell in the recent landmark case of *Schisler v. State*.³⁸

Falling on the Battaglia side of the continuum is the Honorable Dale R. Cathell. He represents the first appellate circuit which encompasses all nine counties on Maryland's eastern shore. The eastern shore is politically and culturally very different from the rest of Maryland. It was a stronghold for southern sympathizers during the Civil War. It is known for conservatism. Judge Cathell well represents his circuit. In *Schisler v. State*, discussed in greater detail below, he wrote a very controversial majority opinion in which he surveys the history of the separation of powers doctrine and projects a conservative attachment to it.³⁹ While the opinion ends up using the power of judicial review to invalidate sections of a legislative enactment, Judge Cathell does so with great reluctance and respect for the Constitution, the political process, and the importance of not stepping out of judicial bounds. Considered fair-minded by most observers, Judge Cathell chaired an important committee on racial and ethnic fairness in the judicial process and was heralded for his evenhanded temperament.⁴⁰

This leaves us with the three remaining justices in the middle: Judges Alan M. Wilner, Glenn T. Harrell, Jr., and Clayton Greene, Jr. On issues surrounding the sanctity of human life, these three justices are difficult to predict. Each has demonstrated a willingness to venture into the domain of the legislature when deemed necessary; each has also been known to defer to the legislature against the hue and cry for judicial activism in cases or controversies which reach the Court.

³⁷ www.msa.md.gov/msa/mdmanual/29ap/html/msa11659.

³⁸ 970 A.2d 175 (2006).

³⁹ *Id.* at 177.

⁴⁰ www.msa.md.gov/msa/mdmanual/29ap/html/11678.

Judge Wilner is an excellent example of a judge who generally defers but is not unwilling to venture into judicial activism on subjects he holds dear. One such example is the legal status of the unborn. Judge Wilner has become the “go to guy” whenever a case presents the highly charged area of protecting the unborn as against the rest of the world, especially the mother. He has proven a champion of a woman’s right to privacy. He cut his teeth while a member of the Court of Special Appeals, Maryland’s intermediate appellate court. There, he participated in, and concurred with, an opinion affirming a trial judge who would not enjoin a mother from aborting her baby on a petition filed by the husband and father. By the time the case made it to his Court, the unborn child was dead, and the case was moot. That did not stop Judge Wilner’s ambitious panel from taking an unnecessary advisory position because “the public interest will be best served if we address the merits of the matter, thus affording some guidance to litigants and trial courts.”⁴¹

It was Judge Alan M. Wilner who again took the lead in a case where a woman who lost her unborn baby of 19 weeks wanted to sue for wrongful death arising out of an automobile accident.⁴² While she plead wrongful death, the Court of Appeals interpreted her pleading as a claim for emotional distress to herself over the loss of the unborn child. This is an important distinction. The former would be tantamount to admitting the “fetus” was a person. The latter only entitles her to grief, pain, and suffering in connection with the personal loss of the unborn child. It does not require acknowledgment of the personhood of the baby. To reach the desired decision, Judge Wilner had to resort to out-of-state law. Leading precedent in Maryland included an older case where the highest court had recognized the wrongful death of an unborn baby who died when struck by an arrow when the mother was near term.⁴³ Invoking *Roe v. Wade*,⁴⁴ the Court distinguished the two cases on the basis of viability and invoked non-Maryland cases for support. Judge Wilner concluded

⁴¹ *Coleman*, 471 A.2d. at 57.

⁴² *Smith v. Borello*, 370 Md. 227, 804 A.2d, 1151 (2002), Pregnant woman who was injured, and as part of that injury suffered the loss of a fetus, could recover, in her own action for personal injuries, for any emotional distress attributable to the loss of the fetus.

⁴³ *Williams*, 561 A.2d at 216.

⁴⁴ 410 U.S. 113 (1973).

[a] pregnant woman who sustains personal injury as the result of a defendant's tortious conduct and who, as part that injury, suffers the loss of the fetus may recover, in her own action for personal injuries, for any demonstrable emotional distress that accompanies and is attributable to the loss of the fetus.⁴⁵

A wrongful death action cannot be sustained for an unborn child in the first trimester, leaving the situation unclear in the second and third trimesters. Presumably, the parents of a third trimester baby could maintain a wrongful death action, but this has not yet been settled.

Most recently, Judge Wilner took on the vexatious topic of what happens when crack-addicted mothers recklessly endanger their children by ingesting cocaine.⁴⁶ Last year, Maryland had two such cases. Judge Wilner merged them and overturned the trial judge, who had convicted both mothers under a reckless endangerment statute. The statute identified as a crime any conduct creating a substantial risk of death or serious physical injury to "another person." The highest court carefully reviewed the intention of the legislature, as the statute arguably was not clear on its face. The opinion carefully analyzes legislative history, concluding the state legislature could not possibly have intended to apply the reckless endangerment statute to prenatal drug ingestion by a pregnant woman. Unborn babies not being persons, reasoned the Court, the statute could not apply to them. The legislature had to have meant only persons who were outside the womb. The court rejected the prosecution's argument that the fetus, once born, would be a third person victimized by the crime, even though the shooting was committed while that child was still in the womb.

Judge Glenn T. Harrell, Jr. is also in the middle, when it comes to judicial restraint. He has gone on record and criticized his colleagues when they step outside of the separation of powers doctrine. For example, he wrote a strong dissent during the Court of Appeals' promulgation and ratification of Rule 8.41, governing the conduct of Maryland attorneys.⁴⁷ This rule was criticized because it reiterated the existing fact that considerations of race should not influence an attorney's handling of a case. Strong sanctions were imposed. The Court of

⁴⁵ *Borello*, 804 A.2d at 1163.

⁴⁶ *Kilmon v. State*, 905 A.2d 306 (2006).

⁴⁷ *Ct. of App. of Md. Standing Comm. on Rules of Practice and Procedure*, *Md. Register*, Vol. 32, Issue 5, Friday, March 4, 2005 at 529.

Appeals disregarded the fact that the broad language of the existing rule already prohibited racial considerations. Maryland is the only state that expanded upon the model rule. The rule was created by the judiciary, and Judge Harrell steadfastly contended proposed sanctions exceeded the scope of judicial authority.

Lastly, there is the newest member of the Court of Appeals, Judge Clayton Greene, Jr. A democrat, Judge Greene is the sole appointment by Maryland's first republican governor in nearly forty years. Presumably, he was selected because he shares some of Governor Robert L. Ehrlich, Jr.'s conservative pro-life, pro-family philosophy. Accordingly, Judge Greene has issued several opinions limiting motor tort recoveries to Maryland statutory minimums. Private insurance companies have successfully persuaded him to construe against benefits in excess of Maryland's minimal requirements of \$20,000.00 automobile liability protection.⁴⁸ Such a conservative view is, of course, contrary to the ideals of the plaintiff's bar, of which he was once a member. As a former member of the Maryland Trial Lawyers Associate, one would have expected him to hold a progressive view on traditional republican platforms like tort reform. It appears he does not.

Yet, at least one gay rights publication lauds Judge Greene as "liberal-leaning" and, specifically, believes he will be the favorable swing vote on Maryland's pending same-sex marriage case.⁴⁹ That publication's prediction is without substance, since Judge Greene's judicial record on social issues is too brief to glean tendencies like same-sex marriage. He is difficult to predict when it comes to judicial restraint. Perhaps Judge Greene strongly believes liberalizing insurance benefits is the province of the legislature, thereby explaining his motor tort conservative opinions. If so, it could suggest Judge Greene holds a conservative view on judicial restraint. This would, hopefully, make him a friend of a legislative fix to pro-life issues.

Judicial Review

In September 2006, the Maryland Court of Appeals issued *Schisler v. State*, an opinion that offering a virtual treasure trove of intellectual nuggets as to how the Court views the

⁴⁸ *Johnson v. Nationwide*, 878 A.2d 615 (2005); *Stearman v. State Farm*, 849 A.2d 539 (2004).

⁴⁹ Lou Chibbaroug, *Gay Marriage Goes to Maryland High Court*, Wash. Blade, Dec. 18, 2006.

doctrine of separation of powers. From it, one can glean individual tendencies on judicial review. The opinion includes the written disagreements of five of the seven justices. Mostly the writings support the observations presented in this paper above; in a few instances, we see variance.

The case arises out of an unprecedented energy crisis in Maryland last summer. A statute artificially restraining rising electrical energy charges for seven years had sunshined. Marylanders were about to be faced with a drastic and immediate 72% increase in electric prices. The general assembly convened an emergency session to address the crisis. The result was Senate Bill 1. Among other things, the legislature stripped the governor's power to protect the current and future members of the regulatory agency, an executive function.

A constitutional challenge quickly followed. The majority opinion of Maryland's highest court struck down key provisions of the bill under several sections of the Maryland Constitution. Judge Cathell compared the general assembly's enactment to a hypothetical statute that dismantles a disagreeable panel of Maryland's intermediate court because the legislature did not like a certain judicial opinion.⁵⁰ The majority rebuked the attempt of the legislature to usurp the executive's powers of appointment. Here, we get a strong flavor for Judge Cathell's conservative views on the function of government: He likes to protect the prerogative of each branch to do its own business. It underscores the fact, by implication, that he similarly disfavors a judiciary usurping legislative authority. Interestingly, in contrast to observations made above, the chief judge joined him in *Shisler*. Judge Greene predictably agreed with Judge Cathell.

The other four justices ran the gamut on the separation of powers doctrine. Predictably, Judge Battaglia issued a stinging dissent.⁵¹ She stressed the plenary power of the legislature to have the final say when the branches conflict. She underscored her conservative view that sometimes the judiciary and executive departments must yield to the legislature, as that branch most reflects representative democracy. Her dissent supported our thesis that she would be least likely to intervene as a judge in the legislature's authority to make public policy, even on issues like the sanctity of life.

⁵⁰ *Schisler*, 907 A. 2d at 177.

⁵¹ *Id.* at 231.

Judge Wilner wrote that he agrees with the final judgment but insisted it should have rested on only one constitutional provision, namely, Article VIII which is Maryland's colonial ratification of Montesquieu's pure theory on the separation of powers.⁵² He viewed the conduct of the legislature as classic usurpation. He rejected any notion that the plenary power of the legislature dictated Senate Bill 1 during a crisis. Elsewhere, we have argued Judge Wilner does not mind flexing his judicial muscle. This concurring opinion was strikingly conservative. What we are probably observing is Judge Wilner's well-known cerebral ideal on the role of the judiciary. As a general matter, he believes his court should eschew challenges to legislative authority. Thus, for example, he once opined that only the legislature could change a common-law tort doctrine, even though he thought it was absurd.⁵³ On another occasion, however, he shocked the Maryland worker's compensation community when he wrote an opinion reversing 90 years of case law, in an effort to restore the original intent of the legislature.⁵⁴ He seems to show restraint regarding the role of the judiciary unless the subject matter is particularly dear to his personal ideals, thus perhaps explaining his willingness, as previously shown, to show little restraint when it comes to the rights of the unborn.

That brings us to Judges Harrell and Raker, who struck a compromise. Writing an opinion that partly dissented and partly concurred, Judge Harrell contends the legislature had plenary power to dismantle the regulatory agency, since it was created by that body.⁵⁵ It did not, however, have the power to control future gubernatorial appointments, because it ceded that power to the executive branch. Overall, Judge Harrell underscored what has been previously described as his conservative view on the role of the branches of government: Exercise judicial authority to strike down only limited portions of the statute that are clearly unconstitutional, citing only one clause.

III. THE COURT

⁵² *Id.* at 225.

⁵³ *Mayor of Baltimore v. Whalen*, 909 A.2d 683 (2006).

⁵⁴ *Harris v. Howard County Board of Education*, 825 A.2d 365 (2003).

⁵⁵ *Schisler*, 907 A. 2d at 226.

The Court of Appeals, the highest tribunal in the State of Maryland, was created by the Constitution of 1776. The Court sat in various locations throughout the State in the early years of its existence but has resided in Annapolis since 1851. The Court is composed of seven judges. Until 1994, there was one from each of the first five Appellate Judicial Circuits and two from the Sixth Appellate Judicial Circuit (Baltimore City), but a Constitutional amendment realigned the circuits to create seven circuits with one judge from each. Members of the Court are initially appointed by the Governor and confirmed by the Senate. Subsequently, they run for office on their records, unopposed. If voters reject a judge's retention in office or there is a tie vote, the office becomes vacant and must be filled by a new appointment. Otherwise, the incumbent judge remains in office for a 10-year term. The Chief Judge of the Court of Appeals is designated by the Governor and is the constitutional administrative head of the Maryland judicial system.

Member	Appointed by/Year	Term Expires	Miscellaneous
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<p>Robert M. Bell (Chief Justice)</p>	<p>Governor W. Schaeffer (D)/ 1991</p>	<p>2013</p>	<p>-Biographical Information: Morgan State College, A.B. (history & political science), 1966; Harvard University Law School, J.D., 1969; Judge, District Court of Maryland, District 1, Baltimore City, 1975-80; Associate Judge, Baltimore City Circuit Court, 8th Judicial Circuit, 1980-84; Judge, Court of Special Appeals, 6th Appellate Circuit (Baltimore City), 1984-91; Judge, 6th Appellate Circuit, Baltimore City, May 16, 1991-1996; Became Chief Justice in 1996;</p> <p>-Awards: Legal Excellence Award for Advancement of Public Service Responsibility, Maryland Bar Foundation, 1999; Access to Justice Tribute Award, Pro Bono Resource Center, 2001; Baltimore Peacemaker Award, Community Mediation Program, 2005;</p> <p>- Professional/social affiliations: Member, Legal Aid Society, 1973-75; Board of Directors, Provident Hospital, 1983-84. Board of Directors, The African-American Community Foundation, 1994;</p>
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Irma S. Raker	Governor W. Schaeffer (D)/ 1994	2008	<p>- Biographical Information: Syracuse University, B.A., 1959; Hague Academy of International Law, 1959; Washington College of Law, The American University, J.D., 1972; Assistant State's Attorney, Montgomery County, 1973-79; Partner, Sachs, Greenebaum, and Tayler, 1979-80; Adjunct professor (trial practice), Washington College of Law, The American University, 1980-present; Associate Judge, District Court of Maryland, District 6, Montgomery County, 1980-1982; Associate Judge, Montgomery County Circuit Court, 6th Judicial Circuit, 1982-1993.</p> <p>-Professional/social affiliations: Commission on Battered Spouses; Advisory Commission on Child Abuse and Neglect; Former member, Board of Directors, Hebrew Home of Greater Washington</p> <p>- Articles: <i>The New "No-Knock" Provision and its Effect on the Authority of the Police to Break and Enter</i>, American University Law Review (1970-71).</p> <p>-Awards: American Judicature Book Award for Torts, Criminal Procedure; Dole Woman of Achievement Award, American Red Cross, 1998; Century of Service Award, Montgomery County Bar Association, 1999</p>
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Joseph F Murphy	Governor P. Glendening (D)/2007	2008	<p>-Biographical information: Boston College, A.B., 1965; University of Maryland School of Law, J.D., 1969; Assistant State's Attorney, Baltimore City, 1970-75; Instructor (evidence), University of Baltimore School of Law, 1974; Instructor (trial practice) University of Maryland School of Law, 1981-present; Deputy State's Attorney, Baltimore City, 1975-76; Associate Judge, Baltimore County Circuit Court, 1984-93; Chief Judge, Court of Special Appeals, At Large, 1996-2007 (Judge, 1993-1996)</p> <p>-Writings: <i>"Oral Motions in Limine,"</i> Litigation (vol. 14, no. 3), Spring 1988; <i>Maryland Evidence Handbook</i>, 1989 (2nd ed., 1993; 3rd ed., 1999;</p> <p>-Awards: Maryland Champion for Victims Award, Maryland Crime Victims' Resource Center, 2003; Man of All Seasons Award, St. Thomas More Society of Maryland, 2004.</p>
Dale R. Cathell	Governor P. Glendening (D)/ 1998	Retired 2007/ New judge not yet appointed	-Biographical Information: Served for a decade as a trial judge, then moved to the Court of Special Appeals for a decade.

Glenn T. Harrell	Governor P. Glendening (D)/ 1999	2015	<p>-Biographical Information: University of Maryland, B.A., 1967; University of Maryland School of Law, J.D., 1970; Associate County Attorney, Prince George's County, 1971-73; Associate (1973-77) and Partner (1977-91), O'Malley, Miles & Harrell; Adjunct; Hearing Examiner, State Board of Education, 1977-84. Judge, Court of Special Appeals, At Large, May 28, 1991 to September 9, 1999; Professor (legal writing), University of Baltimore School of Law, 1997-2003.</p> <p>-Speeches: Frequent lecturer on administrative law, land-use law, and judicial ethics.</p>
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Lynn A. Battaglia	Governor P. Glendening (D)/2007	2012	<p>- Biographical Information American University, B.A. (international relations), 1967, M.A., 1968; University of Maryland School of Law, J.D., 1974; Assistant U.S. Attorney, District of Maryland, 1978-82; Adjunct faculty, University of Maryland School of Law, 1983-present; Senior Trial Attorney, Office of Special Litigation, U.S. Dept. of Justice, 1984-88. Chief, Criminal Investigations Division, Office of Attorney General, 1988-91. Chief of Staff to U.S. Senator Barbara A. Mikulski, 1991-93. U.S. Attorney, District of Maryland, 1993-2001.</p> <p>- Writings: <i>"Obeisance to the Separation of Powers, and Protection of Individuals' Rights and Liberties: The Honorable John C. Eldridge's Approach to Constitutional Analysis in the Court of Appeals of Maryland, 1974-2003"</i>, Maryland Law Review, 62: 387 (2003); <i>" 'Property and Law Are Born and Must Die Together': The Honorable Dale R. Cathell's Philosophy of Individual Property Rights and the Government in the Court of Appeals and the Court of Special Appeals, 1987-2006"</i>, University of Baltimore Law Review, 36:195 (2007).</p> <p>-Awards: Professional Legal Excellence Award for the Advancement of Professional Competence, Maryland Bar Foundation, 2004. Charles Hamilton Houston Lifetime Achievement Award in Litigation, University of Baltimore <i>School of Law</i>, 2006.:</p>
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Clayton Greene, Jr.	Governor R. Ehrlich (R)/2004	2021	<p>- Biographical Information: University of Maryland, College Park, B.A., 1973; University of Maryland School of Law, J.D., 1976; Assistant County Solicitor, 1977-78; Assistant Public Defender, 1978-85; Deputy Public Defender, 1985-88; Legal consultant, Wiley H. Bates Foundation, 1985-88. Adjunct faculty (torts & criminal law procedure), Anne Arundel Community College, 1990-2001; District Administrative Judge, District Court of Maryland, 1990-95 (Associate Judge, 1988-1995); Circuit Administrative Judge, 1996-2002; County Administrative Judge, 1996-2002 (Associate Judge, 1995-2002);</p> <p>- Awards: Civic Betterment Award, Frontiersmen International, 1989; Donald C. Roane Award for Public Service, National Association for the Advancement of Colored People, 1998.</p>
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CONCLUSION

The recent rulings of the Maryland Courts of Appeal as they relate to life issues suggest that, if *Roe v. Wade* were overturned, a conflict would be created between the rights of protection for the unborn under English common law, as incorporated into the Maryland Constitution, and the right to abortion, codified in the Maryland statutes in 1991. Without an

express amendment to the Maryland Constitution, the Court's jurisprudence suggests the unborn have certain rights after viability and that equal protection issues previously dismissed under the authority of *Roe v. Wade* and its progeny would have to be considered anew.

As for the issue of judicial restraint, this topic is in a state of flux. Three of the seven members of Maryland's highest court will change during the newly-elected governor Martin J. O'Malley's four year term.⁵⁶ The governor must select candidates from the different regions of Maryland whom the retiring justices represent, which will contain his selection process to some degree. Nevertheless, it is safe to presume Governor O'Malley will select replacement judges who share his progressive political views. Great deference is paid to current members of Maryland's intermediate appellate court. Most experts believe the current chief judge of the Maryland Court of Special Appeals, Joseph F. Murphy, Jr., and associate Judge Sally D. Adkins to be the heirs apparent to the seats of Judge Wilner and Judge Cathell, respectively. Judge Murphy will probably fall on the Bell side of the continuum, described in this article, and Judge Adkins on the Battaglia end. The analysis of future trends will have to factor in these variables.

⁵⁶ Judges Wilner, Raker and Cathell will all be reaching Maryland's mandatory retirement age during the current governor's term.