

**MISSOURI'S DEFENSE OF THE SANCTITY OF LIFE:
UNITED OR COMPROMISED?
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Until last year's passage of the "Missouri Stem Cell Research and Cures Initiative," the people of Missouri proved themselves time and again to be staunch defenders of human life. The courts of Missouri, however, have had little impact in this area, except in some limited circumstances described below. As a Missouri circuit judge wrote recently, in considering the state's parental consent statute, "[f]or years, decisions regarding the constitutionality of laws passed by state legislatures regarding the issue of abortion have in the most part been the province of the federal judiciary. During that time, Missouri's courts have rarely made contributions to the jurisprudence that has so divided the nation."² In contrast, the Missouri Legislature has been active in the defense of life.

This white paper summarizes the historical development and current state of the law in Missouri related to life issues, as well as noting the facts known about current Missouri Supreme Court ("Court") judges. While Missouri statutory law is quite favorable to concerns about human life, the recent passage of the constitutional amendment relating to embryonic stem cells, which guarantees the right to destroy cloned embryos, and the current composition of the Court, which has proved to have activist members, leaves some doubt as to whether Missouri will remain united for life.

I. LIFE ISSUES

From the Missouri general assembly's passage of a law that defines life as beginning at conception to the state's strict restrictions on abortion, including its informed consent and

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² *Planned Parenthood of Kansas & Mid-Missouri v. Nixon*, No. 0516-CV25949, 2005 WL 3707407, at *2 (Mo. Cir. Ct. Jackson County Nov. 18, 2005).

parental notification laws, to its living will statute, the Missouri Legislature has demonstrated the strongest conviction of the sanctity of life. To the limited extent it has been called upon to do so, the Court has upheld these provisions, respecting the public policies enacted by the people's representatives.

Abortion

Subject to *Roe v. Wade* and its progeny, Missouri is a solidly pro-life state as evidenced by the repeated actions of the state Legislature.³ Two statutes in particular demonstrate the state's strong commitment to protecting the sanctity of life. Section 1.205 of the Missouri statutory provisions regarding the construction of statutes states,⁴ in part:

1. The general assembly of this state finds that:
 - (1) The life of each human being begins at conception;
 - (2) Unborn children have protectable interests in life, health, and well-being;
 - (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges and immunities available to other persons, citizens and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.

No Missouri court has considered the constitutionality of Section 1.205 under *Roe* and its progeny. However, that very question came before the United States Supreme Court ("USSC") in *Webster v. Reprod. Health Servs.*⁵ The Eighth Circuit Court of Appeals had held that Missouri's law "impermissibl[y]" adopted "a theory of when life begins."⁶ The USSC stated that the language of the statute did not by its terms regulate abortions in contravention of *Roe* but rather could be read to constitute a permissible value judgment favoring childbirth over

³ 410 U.S. 113 (1973).

⁴ MO. REV. STAT. § 1.205 (2007).

⁵ 492 U.S. 490 (1989).

⁶ *Reprod. Health Servs. v. Webster*, 851 F.2d 1071, 1076 (8th Cir. 1988).

abortion.⁷ The USSC noted, however, that construction of the statute was “something that only the courts of Missouri can decide,” and since it had not yet been interpreted or applied by Missouri courts to restrict abortion, the USSC found it unnecessary to pass on its constitutionality.⁸ Nevertheless, because the USSC refused to invalidate Section 1.205, it thereby nullified the Eighth Circuit’s ruling.

Section 188.010, the first provision of the statutory section on the regulation of abortion, states:

It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.⁹

No Missouri court has considered the constitutionality of Section 188.010, but the Eighth Circuit considered the issue, stating that the section “merely articulates the legislature’s intent to regulate abortion to the full extent that the state is free to do so. Being nothing more than an expression of the state’s determination to exercise its constitutional authority, the section cannot be unconstitutional, and we so hold.”¹⁰

With respect to the regulation of abortion, Missouri law is fairly restrictive, within the limits of federal constitutional law.¹¹ For example, Missouri prohibits post-viability abortions, except to preserve the life or health¹² of the mother.¹³ Even under those required conditions, further restrictions apply. For example, the physician must use the method most likely to preserve the life and health of the unborn child, unless such method would create a greater risk to

⁷ *Webster*, 492 U.S. at 506.

⁸ Since *Webster*, Missouri courts have had occasion to consider the applicability of Section 1.205 to the interpretation of other state statutes, *see* discussion *infra* Section II(b), but not to statutes regulating abortion itself.

⁹ MO. REV. STAT. § 188.010 (2007).

¹⁰ *Women’s Health Ctr. of West County, Inc. v. Webster*, 871 F.2d 1377, 1383 (8th Cir. 1989).

¹¹ MO. REV. STAT. § 188.010-.250 (2007).

¹² According to *Doe v. Bolton*, the following factors may relate to a woman’s health: “physical, emotional, psychological, familial, and the woman’s age.” *Id.*, 410 U.S. 179, xxx (1973). Thus, the Missouri health exception, as defined by *Doe* is not terribly restrictive.

¹³ *Id.* § 188.030.1.

the life or health of the mother.¹⁴ And, a second physician must be in attendance to provide medical care for any child born alive during the abortion procedure.¹⁵ No Missouri court has considered the constitutionality of this statute. However, the section requiring the presence of a second physician was held constitutional by the USSC in *Planned Parenthood Ass’n of Kansas City, Missouri, Inc. v. Ashcroft*.¹⁶

In 1999, the Missouri Legislature passed the Infant’s Protection Act, an act banning what are commonly known as partial-birth abortions.¹⁷ The bill was vetoed by then-Governor Carnahan, and the Legislature overrode that veto on September 16, 1999. According to the statute, a person is guilty of the Class A felony crime of infanticide “if such person causes the death of a living infant with the purpose to cause said death by an overt act performed when the infant is partially born or born.”¹⁸ The statute contains an exception for the life, but not the health, of the mother.¹⁹ While lower Missouri state courts have had occasion to interpret the statutory language,²⁰ no Missouri state court, including the Court, has ruled on its constitutionality. In 2005, the Eighth Circuit found the statute unconstitutional under *Stenberg v. Carhart*, 530 U.S. 914 (2000), because it made no exception for the health of the mother.²¹ The case was appealed to the USSC,²² which vacated the judgment and remanded it to the Eighth Circuit for further consideration, in light of *Gonzales v. Carhart*.²³ In *Gonzales*, the USSC

¹⁴ *Id.* § 188.030.2.

¹⁵ *Id.* § 188.030.3.

¹⁶ 462 U.S. 476, 482-86 (1983).

¹⁷ MO. REV. STAT. § 565.300 (2007).

¹⁸ *Id.* § 565.300.3.

¹⁹ *Id.* § 565.300.5.

²⁰ See *State v. Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc.*, 97 S.W.3d 54 (Mo. Ct. App. E.D. 2002) (per curiam) (considering the scope of the Act, the court held that the statute could not be interpreted to contain an exception for procedures necessary to preserve the health of the mother). Please note that citations herein for the Missouri Courts of Appeal will include the particular court designation in order to provide readers with the most complete picture of the state court landscape.

²¹ *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 429 F.3d 803 (8th Cir. 2005).

²² *Id.*, petition for cert. filed, 74 U.S.L.W. 3517 (U.S. Feb. 24, 2006) (No. 05-1124).

²³ *Nixon v. Reprod. Health Servs. Of Planned Parenthood of the St. Louis Region, Inc.*, 127 S.Ct. 2120 (2007).

upheld a similarly worded federal statute,²⁴ concluding that the absence of the health exception did not render the statute unconstitutional on its face.²⁵

Additionally, under Missouri law, a woman must give prior, informed, and written consent in order to have an abortion.²⁶ In addition, except in the case of a medical emergency, no person shall perform an abortion unless at least 24 hours have elapsed since the treating physician has met with the patient and discussed with her the “indicators and contraindicators, and risk factors including any physical, psychological, or situational factors for the proposed procedure”²⁷ Missouri law provides a criminal penalty (Class A misdemeanor)²⁸ and a civil penalty (revocation of license)²⁹ for violations of the 24-hour waiting period.

In 2006, the Court addressed the constitutionality of Section 188.039.³⁰ In that case, Planned Parenthood argued that the statute was unconstitutionally vague and violated rights of liberty and privacy under the Missouri Constitution.³¹ The members of the Court did not write individually or separately but rather issued a *per curiam* opinion, holding the statute was not unconstitutional. In rejecting Planned Parenthood’s argument that the statute was unconstitutionally vague, the Court found that the statute had simply codified the common law of informed consent and “imposes no duty regarding the extent of consultation between a physician and a patient seeking an abortion additional to that already required by common law, a duty that has been recognized under the law for almost 100 years and has been firmly established in Missouri for 45 years.”³² In rejecting Planned Parenthood’s argument that the 24-hour waiting

²⁴ There are some differences between the Missouri and federal statutes. For example, the federal statutory definition of “partial-birth” refers only to vaginal deliveries and requires the fetus to be delivered to a specific anatomical landmark depending on the fetus’ presentation. 18 U.S.C. § 1531(b)(1). The Missouri statute has a similar provision regarding anatomical landmarks, but also covers abdominal deliveries. MO. REV. STAT. § 565.300.2(3).

²⁵ *Gonzales v. Carhart*, 127 S.Ct. 1610 (2007).

²⁶ MO.REV. STAT. § 188.027.2 (2007).

²⁷ *Id.* § 188.039.

²⁸ MO. REV. STAT. § 188.075 (2007).

²⁹ *Id.* § 188.065.

³⁰ *Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685 (Mo. 2006) (*per curiam*).

³¹ Planned Parenthood also brought suit under federal law. *See Reprod. Health Servs. of Planned Parenthood of the St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139 (8th Cir. 2005).

³² *Nixon*, 185 S.W.2d at 690.

period violated the Missouri Constitution, the Court noted that the USSC had upheld a 24-hour waiting period against a similar challenge³³ and found no reason to construe the Missouri Constitution more broadly than the federal one.³⁴

Regarding parental consent, under Missouri law, no woman under the age of 18 may consent to an abortion unless (1) the physician obtains the written consent of the minor and one parent or guardian; (2) the minor is emancipated and the physician obtains the minor's written consent; (3) the minor "has been granted the right to self-consent to the abortion by court order" and the physician obtains that minor's written consent; or (4) the minor "has been granted consent to the abortion by court order," the court gives written consent and the minor "is having the abortion willingly."³⁵ This basic scheme has been upheld numerous times by the USSC.³⁶ No Missouri court has ruled on the constitutionality of this provision.

Missouri law also creates a civil cause of action against any person who "intentionally cause[s], aid[s], or assist[s] a minor to obtain an abortion without the consent or consents required by section 188.028."³⁷ In considering numerous constitutional challenges to this law, known as the "Parental Consent for Aiding and Assisting Mandate," state circuit court judge, Judge Charles E. Atwell, found Section 188.250 constitutional.³⁸ The case was then appealed directly to the Court, which, in a 2007 *en banc* decision, affirmed the lower court decision, with some modifications.³⁹ In that case, the Court gave the phrase "aid or assist" in the statute "a narrowed construction so as not to include speech or expressive conduct. As so construed, it does not bar providing information or counseling and does not violate the First Amendment."⁴⁰ The Court also found that the statute did not violate the Commerce Clause or the due process

³³ *Id.* at 691, relying on *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

³⁴ *Id.* at 691-92.

³⁵ MO. REV. STAT. § 188.028 (2007). The statute also provides procedures for obtaining consent from the court.

³⁶ *See Ashcroft*, 462 U.S. at 493 (upholding a prior version of the Missouri parental consent statute). *See also Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

³⁷ MO. REV. STAT. § 188.250.1 (2007).

³⁸ *Planned Parenthood of Kansas & Mid-Missouri v. Nixon*, No. 0516-CV25949, 2005 WL 3707407 (Mo. Cir. Ct. Jackson County Nov. 18, 2005).

³⁹ *Planned Parenthood of Kansas & Mid-Missouri, Inc. v. Nixon*, No. SC87321, 2007 WL 1260923 (Mo. May 1, 2007).

⁴⁰ *Id.* at *6.

rights of non-Missouri health care providers because it does not apply to wholly out-of-state conduct.⁴¹ Finally, it held the statute did not constitute an undue burden on abortion rights, nor did it violate the right to travel.⁴²

Numerous Missouri statutes restrict the availability of public funds for abortions or for the provision of abortion counseling, unless necessary to preserve the woman's life.⁴³ In a recent decision, the Court ruled that Planned Parenthood affiliates would not be required to repay almost one million dollars in state family planning grants that were awarded in violation of the state's prohibition on funding for affiliates of abortion providers.⁴⁴ Throughout the 1990s and until 2003, the Missouri Legislature had appropriated funds to the department of health for family planning services and related gynecological care for low-income women. Some of these funds went to organizations that performed abortions, namely several Planned Parenthood entities. To ensure that no state money would subsidize abortions, in 1999, the Legislature enacted specific restrictions in the appropriations bill itself. In the wake of the legislation, some of these entities reorganized their corporate structures so that some of them did not provide abortions. The language of that bill did not exclude such organizations from receiving funds (as long as such organizations were independent from and did not share names, facilities, expenses, etc. with abortion-providing affiliates). The director of the department of health then signed contracts with the reorganized Planned Parenthood entities, awarding them state family planning

⁴¹ *Id.* at *7.

⁴² *Id.* at *8-9.

⁴³ *See, e.g.*, MO. REV. STAT. § 188.205 (2007) (prohibiting expenditure of any public funds for the purpose of performing or assisting an abortion, or for the purpose of encouraging or counseling such an abortion, unless necessary to save the life of the mother); *Id.* § 188.210 (prohibits public employees within the scope of their employment from performing or assisting an abortion, and prohibits such employees from encouraging or counseling a woman to have an abortion, unless necessary to save the life of the mother); *Id.* § 208.655 (prohibiting the state from providing healthcare coverage to uninsured children for abortions or abortion counseling, unless it is done to save the life of the mother or if the unborn child is the result of rape or incest); *Id.* § 191.320 (allowing genetic centers and clinics that contract with the state to provide genetic counseling, but such counseling shall not include referrals for abortions, unless necessary to save the life of the mother). No Missouri state court has considered the constitutionality of these statutes. *But see* Stangler v. Shalala, No. 94-4221-CV-C-5, 1994 WL 764104 (Mo. Ct. App. W.D. Dec. 28, 1994) (holding that the 1994 Hyde Amendment required states participating in Medicaid to fund abortions for which the amendment provides federal funds, namely to fund abortions due to rape or incest, and therefore if Missouri chose to accept federal Medicaid funds, it could not also enforce Section 188.205).

⁴⁴ Shipley v. Cates, 200 S.W.3d 529 (Mo. 2006).

grants. The state, represented by a Special Assistant Attorney General, sued for an injunction to prevent funds from going to Planned Parenthood and for a refund of state funds already expended under state contracts. After a series of decisions, many of which were complicated by the precise status and power of the Special Assistant Attorney General, the state Attorney General moved to dismiss the case. After a failed effort to intervene as a plaintiff, a separate taxpayer's lawsuit was brought by Daniel Shipley in which he sought a declaration that Planned Parenthood was ineligible to receive state funds, an injunction from future payment of such funds and for restitution of funds already paid. The circuit court entered judgment for Shipley, finding that the groups in question were restricted from receiving state funds because they shared office space, equipment, supplies, expenses, employee wages, and names similar to organizations that provided abortion services. The circuit court also ruled that the organizations must repay the funds, plus interest, to the state.

On direct appeal, the Court held, in a 4-3 decision, that the abortion organizations were not required to repay the state funds, even though the grants had violated the state prohibition on funding for affiliates of abortion providers. This opinion is one of the few opinions, in a case relevant to this paper, in which current, sitting judges of the Court penned individual opinions. In the majority opinion, authored by Chief Justice Wolff, the Court concluded that, since the Legislature had discontinued the family planning funding, thereby rendering moot the claims for declaratory and injunctive relief, the only issue before the Court was that of restitution.⁴⁵ In denying the plaintiff's petition for restitution, the Court stated that restitution may only be required in two situations: "first, where the contract is *void* from inception; and second, where the government has entered into an illegal or *voidable* contract and there is some evidence of unfairness, fraud, bad faith, or collusion and it would not be inequitable to require a refund."⁴⁶ It concluded that the plaintiff had not challenged the director's authority to enter into the funding contract but rather simply claimed that the director had improperly interpreted the appropriations statute in awarding the funds to Planned Parenthood. Therefore, the Court concluded, there was

⁴⁵ *Id.* at 534.

⁴⁶ *Id.*

no argument that the contracts were void. With respect to whether the contract was illegal or voidable, without deciding whether Planned Parenthood was eligible to receive the funds, the Court found that the group was not legally responsible for knowing whether the director's interpretation of the appropriations statute was correct. Furthermore, it found no evidence of unfairness, fraud or bad faith, and instead found that "Planned Parenthood took numerous measures to comply with the contract provisions, including reorganizing corporate structures. In these circumstances, the government cannot accept the benefits of the contracts and retain those benefits while also recovering the consideration paid."⁴⁷ Judges Stith, Teitelman, and White concurred with Justice Wolff.

Judge Limbaugh wrote a dissenting opinion, which Judges Price and Russell joined. In his dissent, Judge Limbaugh argued that the contracts at issue were illegal and void and that the State was entitled to a return of the funds. He reasoned that the director's interpretation of the appropriations bill did not comport with the plain and ordinary meaning of the words used therein. Therefore, the director lacked authority to enter into the contracts with the defendants. In response to the claim that the voidness argument failed because the plaintiff had failed to properly challenge the director's legal authority, Judge Limbaugh responded that the majority had mischaracterized the plaintiff's claim and had overlooked that the plaintiff challenged the director's authority to contract with organizations that are tied to abortion providers. To the extent that the State had accepted a "benefit" of the grants, it was a benefit that was "neither requested nor authorized, and in fact the state's payment for that benefit was prohibited by law. As such, there was no benefit at all."⁴⁸ Finally, Judge Limbaugh reasoned that it was not inequitable to require restitution as the lawsuit was filed before defendants rendered any services or received any money from the State, and, therefore, they were on notice that the contracts "were of questionable legality and that they performed the contracts at their peril."⁴⁹

Additionally, the Missouri Legislature has prohibited insurance companies from providing coverage for elective abortions, except by separate, optional rider for which there must

⁴⁷ *Id.* at 536.

⁴⁸ *Id.* at 539 (Limbaugh, J., dissenting).

⁴⁹ *Id.* at 540.

be an additional premium.⁵⁰ No Missouri state court has interpreted this statute or considered its constitutionality. Upon a challenge that the statute impermissibly infringes on a woman's right to choose an abortion, the Eighth Circuit held that the plaintiff had failed to show that the statutory scheme placed an undue burden on her abortion decision and that the statute bore a rational relationship to a legitimate government purpose (here, to reduce the cost of insurance and to protect "the interest of citizens who object to subsidizing abortions through payment of their insurance premiums").⁵¹

Protection of the Unborn from Criminal Violence

In a series of cases over the past century, the Missouri Supreme Court has struggled with the question of whether an unborn child is a "person" for purposes of non-abortion related statutes. In 1913, the Court first addressed the question of whether a child born alive, who died as a result of injuries in the womb, could support a statutory claim for wrongful death. The Court held that the child could not, stating that it "had not been able to find any precedent at common law establishing the right of a child injured while *en ventre sa mere*, but subsequently born alive, to bring an action thereafter for injuries so received."⁵²

In 1953, in *Steggall v. Morris*, the Court revisited the question of whether a child born alive, who later died from prenatal injuries, could recover under the wrongful death statute. There, the Court reversed its decision in *Buel*, holding that such a child was a "person" capable of supporting a wrongful death cause of action.⁵³

In 1976, in *State ex rel. Hardin v. Sanders*,⁵⁴ the Court addressed the wrongful death claim of a viable stillborn child, who died as a result of an automobile accident. In that case, involving none of the current, sitting judges, the Court held that the unborn child was not a "person" capable of sustaining a wrongful death claim. There, the Court distinguished *Steggall* on the ground that its holding was based on a live birth, and that "a fetus is not a 'person' within

⁵⁰ MO. REV. STAT. § 376.805 (2007).

⁵¹ *Coe v. Melahn*, 958 F.2d 223, 225-26 (8th Cir. 1992).

⁵² *Buel v. United Ry. Co.*, 154 S.W. 71, 72 (Mo. 1913).

⁵³ *Steggall v. Morris*, 258 S.W.2d 577 (Mo. 1953).

⁵⁴ 538 S.W.2d 336 (Mo. 1976).

the meaning of the wrongful death statute until there has been a live birth. We think that the legislature in enacting the original act and subsequent revisions did not intend to create an action for the death of a fetus never born alive.”⁵⁵

In 1983, in *O’Grady v. Brown*, the Court revisited the *Hardin* question of whether a stillborn child, who died as a result of prenatal injuries, was a “person” under the wrongful death statute.⁵⁶ None of the *O’Grady* judges remain on the Court. Overruling its decision in *Hardin*, the Court held that such an unborn child was a “person” within the purview of the wrongful death statute. In reaching this conclusion, the Court first examined the text of the statute, noting that it had been changed since the date of the *Hardin* decision to allow compensation for the loss of “consortium, companionship, [and] comfort.”⁵⁷ The Court rejected the argument that it must strictly construe the statute because the statute was in derogation of the common law (which did not provide a wrongful death claim). Instead, the Court said, such actions “do not take away any common law right; they were designed to mend the fabric of the common law, not to weaken it. ... We must therefore apply the statutory language with a view to promoting the apparent object of the legislative enactment.”⁵⁸ In so doing, the Court found that it was consistent with the manifest purpose of the statute to permit a cause of action for the wrongful death of an unborn child, and to hold otherwise would frustrate its purpose.⁵⁹ The defendants argued that the issue was more properly one for the Legislature to resolve and that the Legislature had the opportunity to amend the statute after the Court’s decision in *Hardin* and had not done so. The Court was not persuaded by this argument, instead reasoning that “the legislature did change the focus of the statute by permitting recovery for loss of society and companionship. Presumably the Legislature intended that the courts would construe the statute in a manner which would give

⁵⁵ *Id.* at 338-39.

⁵⁶ 654 S.W.2d 904 (Mo. 1983).

⁵⁷ MO. REV. STAT. § 537.080 (2007).

⁵⁸ *O’Grady*, 654 S.W.2d at 908 (internal citations omitted).

⁵⁹ *Id.* at 909-10.

effect to this declared purpose.”⁶⁰ The Court left open the question as to whether the wrongful death statute would also provide a cause of action for the death of a *nonviable* fetus.⁶¹

That very question came before the Court in 1990 in *Rambo v. Lawson*.⁶² There, a plurality of the Court held that the legislative purpose of the statute would not be served by including nonviable fetuses within the definition of a covered “person,” and, therefore, declined to extend the holding of *O’Grady*. By the time of *Rambo*, the Legislature had enacted Sections 1.205 and 188.010, discussed *supra* in Section II(a)(i). The *Rambo* Court, however, found no indication that these provisions were intended to amend the wrongful death statutes and that, in any case, most of the provisions did not become operative until after the accident under review took place.⁶³ In a concurring opinion, Judge Robertson emphasized that the duty was upon the Legislature to define “person” for the wrongful death statute. Additionally, Robertson criticized the *O’Grady* decision, which, in his estimation, had extended the bounds of the wrongful death statute beyond the language enacted by the Legislature. Judge Robertson reasoned that, because the Court had ruled in *Hardin* that the wrongful death statute did not cover an unborn child, and the legislature’s subsequent amendment [permitting recovery for loss of society and companionship] did not address covering an unborn child, the decision of the Court in *O’Grady* to extend the statute to an unborn child was nothing more than “a judicial amendment of the wrongful death statute.”⁶⁴ Therefore, in the case at hand, Judge Robertson determined that a nonviable fetus was not governed by the wrongful death act because the statute did not explicitly include such fetuses. Judge Robertson did not discuss the applicability of Section 1.205 to the statute. Judge Holstein dissented from the *Rambo* decision, arguing that viability was an unworkable standard for determining whether a fetus was a “person” and that a fetus should be considered a person under the statute, based on its plain language and scientific evidence.⁶⁵ Judge Robertson responded that the question was not whether viability is the appropriate

⁶⁰ *Id.* at 911.

⁶¹ *Id.*

⁶² 799 S.W.2d 62 (Mo. 1990).

⁶³ *Id.* at 64.

⁶⁴ *Id.* at 65 (Robertson, J., concurring).

⁶⁵ *Id.* at 66-71 (Holstein, J., dissenting).

standard, but rather whether the Legislature intended to permit “a cause of action for the death of any unborn child, viable or not.”⁶⁶ While none of the members of the *Rambo* Court are still sitting on the Court, it does demonstrate a recent instance of very strict statutory interpretation and – especially in Judge Robertson’s concurrence – the requirement of an appropriate action by the Legislature in amending the language of the statute.

Two years later, in *State v. Knapp*, a related question came before the Court, regarding whether a viable fetus who died in the womb is a “person” within the meaning of the involuntary manslaughter statute.⁶⁷ In a decision authored by current Court Judge Limbaugh, in which all of the members concurred,⁶⁸ the Court held that the definition of “person” was supplied by Section 1.205, whereby the Legislature had substantively amended the involuntary manslaughter statute. In so holding, the Court rejected arguments that Section 1.205 was unconstitutionally vague or was an impermissible blanket amendment of other statutes. The Court was particularly persuaded by the fact that Section 1.205 and the involuntary manslaughter statute⁶⁹ were passed in the same legislative session on the same day. Therefore, the Court concluded, “they must be read *in pari materia*.”⁷⁰ The Court distinguished *Rambo* in two respects. First, the death of the fetus in *Knapp* occurred after the enactment of Section 1.205, and second, “unlike the involuntary manslaughter statute, the wrongful death statute was not republished as part of the act that included § 1.205.”⁷¹ Of particular interest is the fact that Judge Robertson was still a member of the Court at this time, and by joining the opinion, demonstrated his approval of the Court’s statutory interpretation.

Finally, the Court returned to the wrongful death statute in 1995 in *Connor v. Monkem*.⁷² In that case, in a 4-3 decision authored by Judge Price,⁷³ the Court held that a parent may state a

⁶⁶ *Id.* at 66 (Robertson, J., concurring).

⁶⁷ 843 S.W.2d 345 (Mo. 1992).

⁶⁸ The only other current member of the Court sitting on the court in 1992 was Judge William Ray Price.

⁶⁹ MO. REV. STAT. § 565.024 (2007).

⁷⁰ *Knapp*, 843 S.W.2d at 347.

⁷¹ *Id.* at 349.

⁷² 898 S.W.2d 89 (Mo. 1995).

⁷³ Note that the only other current, sitting judge on the Court in 1995 was Judge Limbaugh. However, he was not sitting in *Connor*.

claim for the death of a nonviable, unborn child, thereby abrogating the ruling in *Rambo*. Judge Price reasoned that, while Section 1.205 did not expressly amend the wrongful death statute, it did set out a canon of interpretation “that the time of conception and not viability is the determinative point at which the legally protectable rights, privileges, and immunities of an unborn child should be deemed to arise.”⁷⁴ Accordingly, for all cases arising out of incidents after the effective date of Section 1.205, the Court concluded that “the legislature intended the courts to interpret ‘person’ within the wrongful death statute to allow a natural parent to state a claim for the wrongful death of his or her unborn child, even prior to viability.”⁷⁵ Once again, of particular note, Judge Robertson concurred in this part of the majority opinion.⁷⁶ Judge Covington dissented, finding no indication that Section 1.205 was intended to apply to the wrongful death statute.⁷⁷

Since *Connor*, the Court has not revisited the applicability of Section 1.205 to other statutory provisions.⁷⁸

Assisted Suicide and Euthanasia

Under Missouri law, the knowing assistance of another in the commission of self-murder is voluntary manslaughter.⁷⁹ There are no reported Court decisions interpreting this statutory provision.

Missouri has a living will statute which enables any competent person to direct the withholding or withdrawal of death-prolonging procedures.⁸⁰ This statute has a rule of construction which states that nothing therein is intended to “condone, authorize or approve mercy killing or euthanasia nor permit any affirmative or deliberate act or omission to shorten or

⁷⁴ *Connor*, 898 S.W.2d at 92.

⁷⁵ *Id.* at 92-93.

⁷⁶ Judge Robertson wrote separately to note that he did not join the dictum in Part V of the opinion, in which the court speculated that plaintiffs might have practical difficulty in proving damages as the result of a nonviable child.

⁷⁷ 898 S.W.2d at 93-96 (Covington, J., dissenting).

⁷⁸ Lower state courts have taken up this question, however, and have uniformly followed *Knapp* and *Connor*. See *State v. Holcomb*, 956 S.W.2d 286 (Mo. Ct. App. W.D. 1997) (unborn child is a person for purposes of the first degree murder statute); *State v. Rollen*, 133 S.W.3d 57 (Mo. Ct. App. E.D. 2003) (unborn child is a person for purposes of a felony murder in the second degree).

⁷⁹ MO. REV. STAT. § 565.023.1(2) (2007).

⁸⁰ *Id.* § 459.010-.055.

end life.”⁸¹ Under the statute, death-prolonging procedures do not include “the administration of medication or the performance of medical procedure[s] deemed necessary to provide comfort, care or to alleviate pain nor the performance of any procedure to provide nutrition or hydration.”⁸² Nothing in this statutory scheme is intended to preclude the right of a competent patient to make decisions nor to supersede any right or responsibility that “any person has to effect the withholding or withdrawal of medical care in any lawful manner.”⁸³

The only reported Court decision involving this statutory scheme is *Cruzan v. Harmon*.⁸⁴ Although the living will statute was not at issue in the case, the Court looked to the statute as an expression of the State’s policy regarding the sanctity of life. No judge in the *Cruzan* case remains on the Court today. In *Cruzan*, the Court addressed the question of whether a guardian may order that food and water be withheld from an incompetent ward in a persistent vegetative state. The trial court had found that, while competent, Nancy had expressed her desire not to continue her life unless she could live “halfway normally.” Based on that expression of intent, the trial court concluded that Nancy would not want to continue nutrition and hydration; that no state interest outweighed her liberty right, and that to deny Nancy’s guardians the right to act on her behalf would deny Nancy the equal protection of the law. In a decision authored by Judge Robertson, in which Justice Billings, Judge Rendlen, and Special Judge Reinhard concurred, the Court reversed the decision of the trial court, holding that Nancy’s guardians did not have the authority to order withdrawal of nutrition and hydration and that evidence of her wishes did not support the guardians’ claim to exercise substituted judgment on her behalf.⁸⁵

The Court cited a series of cases from other states, involving similar questions regarding a proposed right to die for terminally ill patients, and examined the various tests employed to assist in making a determination of whether to remove life-sustaining treatments. For example,

⁸¹ *Id.* § 459.055(5).

⁸² *Id.* § 459.010(3).

⁸³ *Id.* § 459.055(2).

⁸⁴ 760 S.W.2d 408 (Mo. 1988).

⁸⁵ Judges Blackmar and Higgins dissented in separate opinions. Judge Welliver joined the opinions of Blackmar and Higgins, and filed a separate dissenting opinion.

the Court reviewed *In re Quinlan*,⁸⁶ in which the New Jersey Supreme Court had held that Karen Quinlan had a right of privacy to terminate her life (by removing a respirator), that the decreased quality of her life outweighed the state's interest in her life, and that her guardians could exercise this right on her behalf using their best judgment as to whether she would exercise it under these circumstances.⁸⁷ Next, the Court looked at similar cases from other states involving those who were not terminally ill.⁸⁸ The Court found that three tests were generally employed to make a determination as to the withdrawal of life-sustaining treatment: the subjective test,⁸⁹ the limited objective test,⁹⁰ and the pure objective test.

Against this background, the Court addressed Nancy Cruzan's case. The Court first addressed whether Nancy had a substantive right to refuse treatment, holding that "we carry grave doubts as to the applicability of privacy rights to decisions to terminate the provision of food and water to an incompetent patient."⁹¹ Even if there was such a privacy right, the Court noted that such a right must be balanced against the State's interest, such as its interest in preserving life. In exploring Missouri's interest in preserving life in an end-of-life situation, the Court looked to the State's living will statute and, noted that the uniform statute upon which it was based, the Uniform Right of the Terminally Ill Act, defines "life-sustaining treatment" broadly to include any medical procedure that prolongs the dying process.⁹² The Missouri statute, however, chose to call such treatment "death prolonging procedures," but specifically excluded within that definition the provision of nutrition and hydration. While the living will statute did not apply to the *Cruzan* case, the "statute's import here is an expression of the policy

⁸⁶ 355 A.2d 648 (N.J. 1976), *cert. denied*, 429 U.S. 922 (1976).

⁸⁷ 760 S.W.2d at 413.

⁸⁸ *Id.* at 415-16.

⁸⁹ *Id.* at 415 (apply subjective test "when clear and convincing evidence exists that an incompetent patient would refuse treatment under the circumstances were he able to do so, the guardian may exercise a substituted judgment to achieve that end.").

⁹⁰ *Id.* at 415 (apply limited objective test in the absence of clear and convincing evidence of the patient's wishes, but where there is a measure of trustworthy evidence that the patient would have refused the treatment. . . . where it is clear that the burden of the patient's unavoidable pain and suffering outweighs the benefits of continued life, termination could follow.").

⁹¹ *Id.* at 418.

⁹² *Id.* at 419.

of this State with regard to the sanctity of life.”⁹³ The Court concluded that “[g]iven the fact that Nancy is alive and that the burdens of her treatment are not excessive for her, we do not believe that her right to refuse treatment, whether that right proceeds from a constitutional right of privacy [which the court refused to find existed] or a common law right to refuse treatment [which could not be exercised, given her incompetency], outweighs the immense, clear fact of life in which the state maintains a vital interest.”⁹⁴

Assuming *arguendo* that such a privacy right did exist, the Court asked whether Nancy’s guardians possessed any right to terminate life-sustaining treatment on her behalf. First, the Court found that no such statutory authority for guardians existed under Missouri law but rather only the authority to “assure that the ward receives medical care and . . . to consent for that purpose.”⁹⁵ Next, the Court considered whether the guardian possessed the power to refuse life-sustaining treatment, derivative of any such common law rights that the incompetent person has a person (rather than by statute). Expressing grave reservations about the existence of such a third-party right at all, the Court held that such a power derives from the state’s *parens patriae* power and that “no person can assume that choice for an incompetent in the absence of the formalities required under Missouri’s Living Will statutes or . . . clear and convincing, inherently reliable evidence”⁹⁶ The Court found that no such evidence existed in Nancy’s case. In its conclusion, the Court called on the Legislature to address the issue comprehensively.⁹⁷ Since *Cruzan*, the Missouri Legislature has not amended the living will statute or the provisions regarding the authority of a guardian, and therefore *Cruzan* remains good law in Missouri.⁹⁸

This case was appealed to the USSC, which upheld the Court’s decision, reasoning that the United States Constitution did not forbid Missouri from requiring that clear and convincing

⁹³ *Id.* at 420.

⁹⁴ *Id.* at 424.

⁹⁵ *Id.* at 424 (interpreting MO. REV. STAT. § 475.120.3 (1986)).

⁹⁶ *Id.* at 425.

⁹⁷ *Id.* at 426.

⁹⁸ Only one related reported Missouri decision exists post-*Cruzan*. In *Matter of Warren*, the Western District Court of Appeals refused to follow the Supreme Court’s interpretation of Section 475.120 and held that guardians do have the statutory authority to withhold medical treatment in the best interests of the ward, and therefore, the guardian in question had authority to consent to a do-not-resuscitate order. 858 S.W.2d 263 (Mo. App. 1993).

evidence of an incompetent's wishes to the withdrawal of life-sustaining treatment, nor did it require the state to accept the substituted judgment of close family members absent this substantial proof.⁹⁹ In reaching that conclusion, the USSC did not decide whether the United States Constitution actually granted a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition but rather assumed it for purposes of the case.¹⁰⁰

Healthcare Rights of Conscience

Under Missouri law, it is unlawful for an employer to discriminate against an employee for failure to participate in an abortion.¹⁰¹ Likewise, no public or private college, university, or hospital may discriminate against a person for refusal to participate in an abortion.¹⁰² Nor may any school require a person to pay fees that would fund an abortion, if the individual "gives written notice to the proper school authorities that it would be in violation of his or her conscience or beliefs to pay for or fund abortions."¹⁰³ Finally, Missouri law provides that hospitals and medical personnel may refuse to treat or admit a woman for the purpose of an abortion.¹⁰⁴ There are no reported Missouri state court decisions regarding these statutes.

Missouri law requires health carriers or health benefit plans providing pharmaceutical coverage to include coverage for contraceptives.¹⁰⁵ However, the statute provides exemptions for those health carriers, health benefit plans, and plan enrollees when the "use or provision of such contraceptives is contrary to the moral, ethical or religious beliefs or tenets of such person or entity."¹⁰⁶ There are no reported Missouri state court decisions regarding this statute.

⁹⁹ *Cruzan by Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1990).

¹⁰⁰ *Id.* at 279.

¹⁰¹ MO. REV. STAT. § 188.105 (2007).

¹⁰² *Id.* § 188.110.1.

¹⁰³ *Id.* § 188.110.2.

¹⁰⁴ *Id.* § 197.032.

¹⁰⁵ *Id.* § 376.1199.

¹⁰⁶ *Id.* § 376.1199.4(1).

Cloning and Destructive Embryo Research

In November 2006, amid a great deal of controversy, the Missouri voters narrowly adopted Amendment Two to the state constitution.¹⁰⁷ The “Missouri Stem Cell Research and Cures Initiative” provides:

To ensure that Missouri patients have access to stem cell therapies and cures, that Missouri researchers can conduct stem cell research in the state, and that all such research is conducted safely and ethically, any stem cell research permitted under federal law may be conducted in Missouri, and any stem cell therapies and cures permitted under federal law may be provided to patients in Missouri, subject to the requirements of federal law and only the following additional limitations and requirements . . .¹⁰⁸

The provisions of this constitutional amendment effectively prevent the Legislature from criminalizing embryonic stem cell research or from denying funds on the basis that recipients engage in such research.

Although there are many problems associated with this amendment both from the pro-life and limited-government perspectives,¹⁰⁹ one of the most problematic provisions involves its supposed ban on cloning. Section 38(d)(2)(1) provides “[n]o person may clone or attempt to clone a human being.” The amendment defines cloning as follows: “to implant in a uterus or attempt to implant in a uterus anything other than the product of fertilization of an egg of a human female by a sperm of a human male for the purpose of initiating a pregnancy that could result in the creation of a human fetus, or the birth of a human being.”¹¹⁰ Because the amendment defines cloning with respect to implantation in the uterus, researchers will be free to “clone” (according to the normal usage of that word) an unlimited number of human blastocysts, provided they never implant them in a woman’s uterus.

There are no reported Court decisions with respect to the issue of human cloning or embryonic stem-cell research.

¹⁰⁷ MO. CONST. art. III, § 38(d).

¹⁰⁸ *Id.* § 38(d)(2).

¹⁰⁹ *See, e.g.*, Missouri Catholic Conference, Stem Cell Research and Cloning Information, <http://www.mocatholic.org/StemCell-Cloning/SCHCDex.htm> (last visited February 27, 2007).

¹¹⁰ MO. CONST. art. III, § 38(d)6(2).

The Missouri courts have only infrequently been called upon to interpret the state's numerous statutes relating to the life issues, and, in all cases, have upheld the challenged provisions. In only one instance, in *Shiple v. Cates*, did the Missouri Supreme Court render a decision favorable to pro-abortion entities. In that case, however, the Court did not invalidate a statutory provision or create new law but rather disagreed over the nature of the plaintiff's claim and appropriate remedies. The Court has had the opportunity to contribute to the development of law in two areas: wrongful death and criminal violence statutes and end-of-life care. In both instances, it has demonstrated remarkable restraint and deference to the Legislature. First, in the series of cases relating to whether an unborn child is a "person" for purposes of criminal violence statutes, the Court has almost uniformly included unborn children within such definition. In recent decisions, however, the Court has only demonstrated a willingness to do so by explicitly relying upon relevant legislative provisions. Secondly, the Court was called upon to interpret the living will statute and could easily have followed other states in giving it an expansive reading. Instead, the Court narrowly interpreted its own statute to support the sanctity of life.

II. JUDICIAL RESTRAINT

The Missouri Supreme Court has the power to hear five types of cases on appeal: the validity of a United States statute or treaty, the validity of a Missouri statute or constitutional provision, the state's revenue laws, challenges to a statewide elected official's right to hold office, and the imposition of the death penalty.¹¹¹

It is difficult to assess whether the Court is generally an activist or restrained Court. In his institutional biography of the Court, Gerald T. Dunne, professor emeritus of law at St. Louis University, states that "throughout its history the Court has been an activist tribunal, using its inherent constitutional authority with decisiveness and vigor."¹¹² However, aside from early decisions, such as *Dred Scott*, the text contains little evidence of such judicial activism. Indeed,

¹¹¹ MO. CONST. art. V, § 3.

¹¹² GERALD T. DUNNE, *THE MISSOURI SUPREME COURT: FROM DRED SCOTT TO NANCY CRUZAN* 186 (1993).

as a critical reviewer notes, the author disposes of *Cruzan* – a case highlighted in the book’s subtitle – in a mere three paragraphs.¹¹³

While courts, including the Missouri Supreme Court, often cite standard black letter law with respect to the scope of judicial review or statutory interpretation, it is difficult to pinpoint a particular interpretive methodology used by the Court or by its individual members. Additionally, almost every Court decision on the life issues is issued *per curiam*, making it impossible to state with certainty the judicial philosophies of the individual judges. With respect to the life issues in particular, according to the Missouri Right to Life Political Action Committee, “there are few, if any, reliable sources of information on the beliefs of individual state judges on life issues.”¹¹⁴ In light of this difficulty, Missouri Right to Life PAC recommends considering the Governor who appointed the particular judge, suggesting that a judge appointed by Governor Carnahan or Holden is probably pro-abortion, whereas a judge appointed by Governor Ashcroft, Bond, or Teasdale is probably pro-life.¹¹⁵ A search of the websites for the Missouri Catholic Conference,¹¹⁶ National Organization for Women Political Action Committee,¹¹⁷ and NARAL Pro-Choice Missouri¹¹⁸ similarly revealed no judicial endorsements. The Missouri Bar Association provides results of a survey of Missouri lawyers about judicial candidates. This survey primarily addresses general judicial temperament criteria

¹¹³ Kenneth H. Winn, Book Review, 38 AM. J. LEGAL HIST. 384-85 (1994).

¹¹⁴ Missouri Right to Life Political Action Committee, Judging Judges, http://www.missourilife.org/mrl_pac/judges_2006.htm (last visited February 23, 2007) (noting, “there is a canon of judicial ethics that forbids judges from ‘announc[ing] views on disputed legal issues.’ Although a 2002 U.S. Supreme Court decision ruled that this canon violates the First Amendment, the Supreme Court of Missouri has announced that it will consider that decision to apply only to judicial elections where there are actual contests. In practice, then, appellate judges, metropolitan trial judges, and most other judges are still forbidden by the canon from responding to surveys on contested legal questions. If Missouri Right to Life sent surveys to judges, most of the judges would be forbidden by current law from answering.”).

¹¹⁵ *Id.*

¹¹⁶ Missouri Catholic Conference, Election Information, <http://www.mocatholic.org/Legislative/Elections/ElectionDex.htm> (last visited February 23, 2007).

¹¹⁷ National Organization for Women Political Action Committees, 2006 NOW PACs Voting Guide: Missouri, <http://www.nowpacs.org/2006/mo.html> (last visited February 23, 2007); National Organization for Women Political Action Committees, 2002 Endorsed Candidates in Missouri, <http://www.nowpacs.org/2002/mo.html> (last visited February 23, 2007).

¹¹⁸ Press Release, NARAL Pro-Choice Missouri, Missouri Races Offer Chance to Protect Women’s Health, <http://www.prochoicemissouri.org/instate/voteprochoice.shtml> (last visited February 23, 2007).

but contains no information regarding substantive issues.¹¹⁹ In the absence of endorsements, substantive surveys, and jurisprudential articles authored by the judges, in conjunction with the consistency which opinions are issued *per curiam*, it is difficult to assess the Court's philosophy regarding life issues or regarding judicial review more generally.

Nevertheless, two cases will serve to demonstrate the extremes that the Court is capable of reaching. First, in *Cruzan*, discussed *supra*, the Court took a narrow view of both United States Supreme Court precedent and its own constitution and statutes. The Court rejected the contention that the Missouri constitution included a right to privacy, stating that Missouri's constitution "must be interpreted according to its plain language and in a manner consistent with the understanding of the people who adopted it."¹²⁰ Similarly, in declining to extend the right of privacy to situations involving the refusal of life-sustaining treatment, the Court cited *Bowers v. Hardwick* with approval, noting that in that case the USSC had declined to create new fundamental rights. The Court continued:

the Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those clauses, *particularly if it requires redefining the category of rights deemed to be fundamental*. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.¹²¹

Additionally, the majority decision closed with a rousing call to the Legislature as the proper authority to comprehensively address the questions at issue in the case, if it wished to change the outcome of future decisions involving end-of-life cases. Judge Robertson wrote:

This State has expressed a strong policy favoring life. We believe that policy dictates that we err on the side of preserving life. If there is to be a change in that policy, it must come from the people through their elected representatives. Broad policy questions bearing on life and death issues are more properly addressed by

¹¹⁹ See Missouri Bar Association, Voters' Information, Supreme Court of Missouri, <http://www.mobar.org/data/judges06/sc.pdf> (last visited February 23, 2007).

¹²⁰ *Cruzan*, 760 S.W.2d at 417.

¹²¹ *Id.* at 418 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986)).

representative assemblies. These have vast fact and opinion gathering and synthesizing powers unavailable to courts; the exercise of these powers is particularly appropriate where issues invoke the concerns of medicine, ethics, morality, philosophy, theology and law. Assuming change is appropriate, this issue demands a comprehensive resolution which courts cannot provide. . . .

To the extent that courts continue to invent guidelines on an *ad hoc*, piecemeal basis, legislatures, which have the ability to address the issue comprehensively, will feel no compulsion to act and will avoid making the potentially unpopular choices which issues of this magnitude present.

There is another compelling reason to leave changes in policy in this area to the legislature. Representative bodies generally move much more deliberately than do courts; they are a bit slow and ponderous. Courts, on the other hand, are facile and eager to find and impose a solution. But [t]he medico-legal challenge in this debate is not, as is so often said, to overcome the failure of the law to keep pace with medical technology. The challenge is to prevent the dilemmas of medical decision-making from forcing upon us undesirable changes in the law. . . . When facing issues of life and death, society is best served when decisions are surefooted, not swift and ultimately uncertain.¹²²

One would be hard pressed to find a better example of a cautious and restrained judicial opinion than that of Judge Robertson's opinion in *Cruzan*. Nevertheless, after the passage of a mere 15 years, and with the turnover of most of the judges, the Court handed down a decision in *State ex rel. Simmons v. Roper*¹²³ which indicated a significant change in the judicial demeanor of the Court. That case involved the 1993 first-degree murder conviction of Christopher Simmons for a crime he committed when he was 17 years old, and he was subsequently sentenced to death under Missouri law.¹²⁴ At the time, under governing USSC precedent, *Stanford v. Kentucky*,¹²⁵ it was constitutional to administer the death penalty to those who were 16 or 17 at the time of their crimes. However, in 2002, the Court held that a national consensus

¹²² *Id.* at 426-27 (internal citations omitted).

¹²³ 112 S.W.2d 397 (Mo. 2003).

¹²⁴ MO. REV. STAT. § 565.020 (2007) (“Murder in the first degree is a class A felony, and the punishment shall be either death or imprisonment for life without eligibility for probation or parole, or release except by act of the governor; except that, if a person has not reached his sixteenth birthday at the time of the commission of the crime, the punishment shall be imprisonment for life without eligibility for probation or parole, or release except by act of the governor.”).

¹²⁵ 492 U.S. 361 (1989).

had emerged to bar the executions of mentally retarded offenders.¹²⁶ Therefore, Simmons asked the Court to apply a similar reasoning to bar his own execution.

In direct contravention of the existing USSC precedent of *Stanford*, the Court held in a 4-3 decision involving six of the current, sitting judges, that the judgment of execution was unconstitutional under the federal Constitution. Judge Laura Denvir Stith, writing for the majority, reasoned that a national consensus had emerged since *Stanford* against the execution of juvenile offenders. Furthermore, she reasoned, *Atkins* demonstrated the USSC's continued willingness to revisit these issues, and if it were to revisit the issue of juvenile executions today, it would hold such executions were barred by the Eighth and Fourteenth Amendments.¹²⁷ In response to the argument that the Court was bound by *Stanford*, Judge Stith wrote that this "argument ignores the fundamental premise on which *Stanford* ... [was] based: that this Court has not confined the prohibition embodied in the Eighth Amendment to barbarous methods that were generally outlawed in the 18th century, but instead has interpreted the Amendment in a flexible and dynamic manner."¹²⁸ Of course, this statement might explain the USSC's willingness to readily change its own interpretation of the Eighth Amendment, but it does not respond to the argument that until the USSC does so, Missouri is bound by its last resolution of the question.

Chief Justice White and Judges Wolff and Teitelman concurred in Judge Stith's opinion. Judge Wolff also filed a separate concurrence, in which he stated that, even if the USSC did not forbid juvenile executions, there would still be a legitimate basis for interpreting Missouri law to do so. According to his reasoning, Section 565.020.2, which provides that the death penalty may not be applied where the defendant "has not reached his sixteenth birthday at the time of the commission of the crime," may be interpreted in light of the common law doctrine of a rebuttable "presumption." He suggested that a 16- or 17-year old should be presumed *not* to be eligible for the death penalty and the state would have the burden to present evidence to

¹²⁶ *Atkins v. Virginia*, 536 U.S. 304 (2002).

¹²⁷ *Simmons*, 112 S.W.2d at 399-400.

¹²⁸ *Id.* at 406.

overcome that presumption.¹²⁹ While Judge Wolff recognized that the language of Section 565.020.2 could be read to provide a presumption in favor of the death penalty for offenders over the age of 15, he argued that it is the “judiciary’s prerogative to establish presumptions and to assign the burdens of overcoming presumptions” to assure that the death penalty is not wrongly imposed.¹³⁰ Therefore, Judge Wolff read the statute expansively, vesting great power in the judiciary to decide the question of juvenile executions on an individual, case-by-case basis. Because he believed that the federal Constitution also barred these executions, he also concurred in the majority opinion.¹³¹

Three judges dissented, including current Judges Limbaugh and Price, in an opinion written by Judge Price. The third dissenter, Judge Benton, is now on the Eighth Circuit and was replaced by Judge Russell. Judge Price noted that Section 565.020.2 expresses the will of the people of Missouri with respect to the execution of juveniles. Therefore, it must be enforced unless it violates either the Missouri or the United States Constitutions. The majority’s conclusion that the statute violates the United States Constitution, noted Judge Price, “is directly in conflict with the Supreme Court decision of *Stanford v. Kentucky* ...”¹³² Relying on the Supremacy Clause and well-settled law on the binding nature of the USSC’s decisions, Judge Price concluded:

While the majority of this Court might believe that *Stanford v. Kentucky* has been abandoned in light of *Atkins* and in light of their perception of a national consensus regarding capital punishment of juvenile offenders, their belief and perception are not sufficient to preempt the Supreme Court of the United States concerning its existing precedent. It is the United States Supreme Court’s prerogative, and its alone, to overrule one of its decisions.¹³³

Interestingly, while the USSC affirmed the Court’s decision,¹³⁴ Justice Kennedy said nothing to chastise the Court for its direct disregard of the Supremacy Clause and ruling

¹²⁹ *Id.* at 416-17 (Wolff, J., concurring).

¹³⁰ *Id.* at 417, n.6.

¹³¹ *Id.* at 418.

¹³² *Id.* at 419 (Price, J., dissenting).

¹³³ *Id.* at 421.

¹³⁴ *Roper v. Simmons*, 543 U.S. 551 (2005).

precedent. In his dissent, Justice Scalia lambasted both the majority and the Court on this point, stating: “[t]o add insult to injury, the Court affirms the Missouri Supreme Court without even admonishing that court for its flagrant disregard of our precedent in *Stanford*.”¹³⁵ Justice Scalia notes, however, that the USSC’s own practice of making the Eighth Amendment “a mirror of the passing and changing sentiment of American society regarding penology” understandably led to the Court’s action.¹³⁶

While it is difficult to define any particular judicial philosophy of the Court or of its members, the *Roper* decision is particularly instructive as to the willingness of the judges to push the very boundaries of the proper judicial role. Judges Stith, White, Wolff, and Teitelman all joined together to disregard the Supremacy Clause and create new federal Constitutional law. Each of these judges was appointed by either Governor Carnahan or Holden. In contrast, Judges Limbaugh and Price, both Ashcroft appointees, dissented, arguing for the constitutionality of the state statute. It is likely that this case, more than any other in this paper, demonstrates the judicial temperament and philosophy of the individual judges.

III. THE COURT

Comprised of seven members,¹³⁷ the Court’s judges are selected by the Missouri Non-Partisan Plan, commonly called “The Missouri Plan,” which consists of a nomination by a nonpartisan judicial commission and selection by the Governor.¹³⁸ In 2007, a bill was introduced to the Missouri Legislature proposing a constitutional amendment repealing the nonpartisan selection of judges and replacing it with a gubernatorial appointment process for certain judges (including Missouri Supreme Court judges).¹³⁹

¹³⁵ *Id.* at 628-29 (Scalia, J., dissenting).

¹³⁶ *Id.* at 629.

¹³⁷ MO. CONST. art. V, § 2.

¹³⁸ MO. CONST. art. V, § 25(a)-(g).

¹³⁹ H.J.R. 31, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007), available at <http://www.house.mo.gov/bills071/bills/HJR31.htm> (last visited May 31, 2007).

A judge is elected to a 12-year term.¹⁴⁰ But after a year in office, at the next general election, a judge must go before the voters of the state to retain his position by a majority vote.¹⁴¹ Since the institution of the Missouri Plan, no Court judge has ever failed to be retained.¹⁴² All judges must retire at the age of 70.¹⁴³ Unlike the USSC, only the chief justice of the Court is called “justice;” the remaining members are called “judges.”

Biographical information of the current members of the Missouri Supreme Court

Member ¹⁴⁴	Appointed by/ Year	Term Expires	Miscellaneous
Michael A. Wolff, Chief Justice	Carnahan/ 1998; Retained in 2000.	2012; Chief Justice term expires on June 30, 2007.	- Biographical information: J.D. University of Minnesota; B.A. Dartmouth College 1967; Served as a professor at St. Louis University School of Law from 1975 to 1998. - Professional affiliations: Missouri Bar; American Bar Association; Lawyers Association of St. Louis; Bar Association of Metropolitan St. Louis; The American Law Institute. - Noteworthy opinions/dissents: Authored <i>Shipley v. Cates</i> ; both joined majority and also filed a separate concurrence in <i>State ex rel. Simmons v. Roper</i> ; See relevant case discussions <i>supra</i> . - Other: Married with two grown children to Patricia B. Wolff, M.D., a St. Louis pediatrician.
Steven N. Limbaugh,	Ashcroft/ 1992.	2018	- Biographical information: B.A. 1973, J.D. 1976 Southern Methodist University;

¹⁴⁰ MO. CONST. art. V, § 19.

¹⁴¹ Missouri Bar Association, Voting for Missouri’s Judges, <http://www.mobar.org/61bc5e96-6ab7-4586-9fb8-cc60bc179a25.aspx> (last visited February 23, 2007).

¹⁴² Editorial, *The “Get Teitelman” Bill*, ST. LOUIS POST-DISPATCH, May 6, 2007, at B2.

¹⁴³ MO. CONST. art. V, § 26(1).

¹⁴⁴ The website for the Judicial Branch of the State of Missouri contains a bio for each Supreme Court judge. See Your Missouri Courts: Supreme Court Judges, <http://www.courts.mo.gov/page.asp?id=133> (last visited February 23, 2007). The information contained herein is from that source unless otherwise cited.

Jr.			<p>Master of Laws in Judicial Process University of Virginia 1998; was in private practice and served as prosecuting attorney before joining the Court.</p> <p>- Professional/social affiliations: the Missouri Bar; American Bar Association; Lawyers Association of St. Louis; Bar Association of Metropolitan St. Louis; also notably a member of the Federalist Society, “a group of conservatives and libertarians interested in the current state of legal order.”¹⁴⁵</p> <p>- Noteworthy opinions/dissents: Authored dissent in <i>Shipley v. Cates</i>; authored decision in <i>State v. Knapp</i>; joined dissent in <i>State ex rel. Simmons v. Roper</i>; See relevant case discussions <i>supra</i>.</p> <p>- Other: Has been retained twice by the Missouri electorate; Introduced U.S. Supreme Court Justice Antonin Scalia at Southeast Missouri State in May 2006¹⁴⁶; A lifelong member of the Centenary United Methodist Church in Cape Girardeau; Married with two sons to Marsha M. Limbaugh, vice-president and branch manager of A.G. Edwards & Sons, Inc.</p>
William Ray Price, Jr.	Ashcroft/1992.	2018	<p>- Biographical information: J.D. Washington and Lee University School of Law 1978; B.A. University of Iowa 1974; Rockefeller Fellow, Yale University Divinity School 1974-1975; A partner with the firm Lathrop, Norquist in Kansas City before his appointment to the Court.</p> <p>- Professional affiliations: Missouri Bar; American Bar Association; Lawyers Association of St. Louis; Missouri Drug Court Commission.</p>

¹⁴⁵ The Federalist Society, Our Purpose, <http://www.fed-soc.org/AboutUs/ourpurpose.htm> (last visited February 25, 2007).

¹⁴⁶ TJ Greaney, *Scalia: Constitution Means What It Says*, S.E. MISSOURIAN, May 4, 2006, at 1A, available at <http://www.semissourian.com/story/1151281.html> (last visited February 23, 2007).

			<p>- Noteworthy opinions/dissents: Joined dissent in <i>Shiple v. Cates</i>; authored majority decision in <i>Connor v. Monkem</i>; authored dissent in <i>State ex rel. Simmons v. Roper</i>; See relevant case discussions <i>supra</i>.</p> <p>- Other: Retained twice by the Missouri electorate¹⁴⁷; Member of the Christian Church (Disciples of Christ) where he has served as an elder.</p>
Mary Rhodes Russell	Holden/2004.	2018 ¹⁴⁸	<p>- Biographical information: J.D. University of Missouri – Columbia 1983; B.A. and B.S. Truman State University 1980; Former law clerk to the Honorable George Gunn, Supreme Court of Missouri; Partner at Clayton & Rhodes Law Office in Hannibal.</p> <p>- Professional affiliations: The Missouri Bar, American Bar Association, Illinois Bar Association, Kansas City Metropolitan Bar Association, Bar Association of Metropolitan St. Louis, Lawyers' Association of St. Louis, Springfield Metropolitan Bar Association, 10th Circuit Bar Association, Cole County Bar Association, American Bar Association, National Association of Women Judges, Women Lawyers Association of St. Louis, Mid-Missouri Women Lawyers' Association, Missouri Drug Court Commission.</p> <p>- Noteworthy opinions/dissents: Joined dissent in <i>Shiple v. Cates</i>; See relevant case discussion <i>supra</i>.</p> <p>- Other: Member of Grace Episcopal Church, Jefferson City, where she serves as an altar guild member, lay reader, and co-chair of minister search committee.</p>
Laura Denvir Stith	Holden/2001.	2014	<p>- Biographical information: J.D. Georgetown University Law Center 1978;</p>

¹⁴⁷ State of Missouri, State of Missouri Official General Election Returns for 2006, <http://www.sos.mo.gov/enrweb/allresults.asp?eid=189> (last visited February 23, 2007).

¹⁴⁸ *Id.*

			<p>B.A. Tufts University 1975; Was an Iglauer Fellowship Intern in Washington, D.C. for Senator Thomas Eagleton, a law clerk to the Honorable Robert E. Seiler of the Supreme Court of Missouri, and a partner at Shook, Hardy & Bacon in Kansas City; Served on the Missouri Court of Appeals, Western District from 1994 to March 2001.</p> <ul style="list-style-type: none"> - Professional affiliations: The Missouri Bar; American Bar Association; Kansas City Metropolitan Bar Association; Association for Women Lawyers (AWL) of Greater Kansas City; Missouri Fellow of the American Bar Foundation; Chair, Gender and Justice Joint Committee of The Missouri Bar and the Supreme Court of Missouri. - Noteworthy opinions/dissents: Joined majority in <i>Shiple v. Cates</i>; Authored majority opinion in <i>State ex re. Simmons v. Roper</i>; See relevant case discussions <i>supra</i>. - Other: Married with three daughters to Donald G. Scott, shareholder at McDowell, Rice, Smith and Buchanan, P.C.
Richard B. Teitelman	Holden/2002.	2016	<ul style="list-style-type: none"> - Biographical information: J.D. 1973, B.A. 1969 Washington University; Served as a solo general practitioner, staff attorney, managing attorney, and executive director and general counsel for Legal Services of Eastern Missouri, St. Louis; Also served as a judge on the Missouri Court of Appeals, Eastern District before joining the Court. - Professional affiliations: The Missouri Bar; American Bar Association; Bar Association of Metropolitan St. Louis. - Noteworthy opinions/dissents: Joined majority in <i>Shiple v. Cates</i>; Joined majority opinion in <i>State ex re. Simmons v. Roper</i>. See relevant case discussions <i>supra</i>. - Speeches/Articles: Addressed questions regarding the influence of personal preferences in deciding cases and his

			<p>judicial philosophy; In response to the former, Judge Teitelman responded, “We should always be governed by precedent, the constitution and statutes in reaching our decisions.”¹⁴⁹ As for his judicial philosophy, Judge Teitelman stated, “I have no judicial philosophy. My goal is to be fair to all parties that come before me. I have no favorite cases or opinions; all the cases that we hear are important.”¹⁵⁰</p> <p>- Other: Received various awards including the “Good Guy Award” from the Women’s Political Caucus, a pro-abortion organization that endorses female candidates for political office¹⁵¹; The first Jewish judge to serve on the Court.</p>
Ronnie L. White	Carnahan/1995.	2008 (but effectively July 6, 2007 ¹⁵²)	<p>- Biographical information: J.D. University of Missouri-Kansas City Law School 1983; B.A. St. Louis University 1979; A.A. St. Louis Community College 1977; A Democrat, he served three terms in the Missouri House of Representatives; Worked at the public defender’s office in St. Louis, both city and county; Principal at the Cahill, White and Hemphill law firm; City</p>

¹⁴⁹ 20 Questions for Judge Richard Teitelman of the Supreme Court of Missouri, http://howappealing.law.com/20q/2004_05_01_20q-appellateblog_archive.html (last visited February 23, 2007).

¹⁵⁰ *Id.*

¹⁵¹ The bio maintained by the Missouri Court of Appeals, Eastern District designates this award coming from the Women’s Political Caucus, *see Former Judges of the Missouri Court of Appeals*, <http://www.courts.mo.gov/appellate/index.nsf/0/719f5f6c7b7515cf86256a770055e0b1?OpenDocument> (last visited February 23, 2007). Whereas his bio designates this award coming from the Women’s Legal Caucus, *see Judge Richard B. Teitelman – Biography*, <http://www.courts.mo.gov/page.asp?id=197> (last visited February 23, 2007). The National Women’s Political Caucus is “a multi-partisan, multi-racial grassroots organization with caucuses in 38 states,” that endorses only women. Women’s Political Caucus, Frequently Asked Questions, <http://www.nwpc.org/ht/d/Faqs/pid/945>. It opposes partial birth abortion bans and waiting periods for abortions and supports access to RU486. *Id.*; Issues, <http://www.nwpc.org/ht/d/Issues/pid/984>. Featured websites on the “Links” page of the Women’s Political Caucus’s website include Catholics for Free Choice, Alan Guttmacher Institute, EMILY’s List, Center for Reproductive Law and Policy, National Abortion Federation, NARAL, National Organization for Women, and Planned Parenthood among others. National Women’s Political Caucus, Links, <http://www.nwpc.org/ht/d/Links/pid/944> (last visited February 23, 2007).

¹⁵² Virginia Young, *Ronnie White Leaving Mo. High Court*, ST. LOUIS POST-DISPATCH, May 18, 2007, <http://www.stltoday.com/stltoday/news/stories.nsf/missouristateneews/story/4A6ABC11591E0CDC862572DF006A7F1F?OpenDocument> (last visited May 31, 2007).

			<p>Counselor in St. Louis; Taught trial advocacy at Washington University School of Law.</p> <ul style="list-style-type: none"> - Professional affiliations: The Missouri Bar; Judicial Conference of Missouri; Faculty member, National Institute of Trial Advocacy, St. Louis. - Noteworthy opinions/dissents: Joined majority in <i>Shiple v. Cates</i>; Joined majority opinion in <i>State ex re. Simmons v. Roper</i>; See relevant case discussions <i>supra</i>. - Other: Nominated by President Bill Clinton to be a judge on the United States District Court for the Eastern District of Missouri in June 1997, Judge White's confirmation was rejected along a straight party-line vote¹⁵³; An Advisory Board Member of the Jamison Memorial C.M.E. Church Youth Group.
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CONCLUSION

The Missouri Supreme Court has been described by some as an activist Court, a well-deserved label in light of its 4-3 decision to strike the state's juvenile death penalty statute under the federal Constitution in direct disregard of then-existing United States Supreme Court precedent. That decision, one of the few in which the judges rendered individual opinions, is particularly illustrative of particular judges' willingness to push the law, and indeed their roles as judges, to the very limit. Nevertheless, in the limited instances that the Court has been called upon to review the numerous pro-life initiatives passed by the state Legislature, it has always upheld those provisions. Very often those decisions are *per curiam* decisions, perhaps demonstrating the desire of the Court to present a unified front on these matters.

A thorough review, however, of the law in Missouri demonstrates that the real battleground for the sanctity of life in the state is the hearts and minds of the people themselves.

¹⁵³ 145 CONG. REC. S11,918-19 (1999).

Missouri is known as the “Show Me State,” and its people are known for having strong convictions. Those people have elected representatives who have staunchly defended the sanctity of life, from conception to natural death. And yet, it is those people who, by the narrowest of margins, approved the constitutional amendment to allow the destruction of cloned human embryos. Although at least four of its judges have demonstrated judicial activism, the Court has been loath to overturn the expressed will of the people of Missouri. It remains to be seen whether, on the day after *Roe*, the people will remain united in their defense of human life or whether they will continue down the path of a new “Missouri Compromise.”