

# **THE RULE OF LAW RULES TEXAS**

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Over the past decade, the Texas Legislature has enacted multiple statutes involving a variety of life issues consistent with the State's interest in protecting the unborn.<sup>2</sup> The Texas Legislature and Texas courts, for the most part, have attempted to restore as much protection for women of Texas and their unborn children as *Roe v. Wade*<sup>3</sup> and its progeny allow. The success of pro-life protection is attributable not only to competent legislators but to the courts' adherence to their proper role under the Texas Constitution;<sup>4</sup> namely, the exercise of judicial restraint by the Texas Supreme Court ("Court").<sup>5</sup>

## **I. LIFE ISSUES**

In contrast to prior courts, the current Court has not been petitioned to rule on issues relating to human life. The present trend of the Court is remarkably different than it was during the late 1900s, when the Court was considered by many to be more liberal. As the following discussion provides, although the present Court has yet to decide any case involving a life issue, it has demonstrated its commitment to following the rule of law.

### **Abortion**

Texas criminalized abortion by statute in 1854.<sup>6</sup> However, on January 22, 1973, the United States Supreme Court ("USSC") declared the Texas abortion law unconstitutional in

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<sup>2</sup> *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 98 (Tex. 2004) (acknowledging the state's interest in the life of a fetus before birth).

<sup>3</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>4</sup> TEX. CONST. art. II, § 1. "Division of Powers; Three Separate Departments; Exercise of Power Properly Attached to Other Departments: The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."

<sup>5</sup> Hereinafter "Court".

<sup>6</sup> *Jacobs v. Theimer*, 519 S.W.2d 846, 851 (Tex. 1975) (Pope, J. dissenting and contending Texas had a long standing rule against abortion which had "stood since 1854").

*Roe*.<sup>7</sup> Thirty-four years later, *Roe* continues to be an impenetrable barrier to legislation that would provide meaningful protection of the unborn, not only in Texas but throughout the nation. Although *Roe* prohibits criminal prosecution, the Texas criminal abortion statutes have never been repealed, either expressly or by implication.<sup>8</sup> The Texas Penal Code was revised after *Roe* was decided, but the abortion provisions were expressly not repealed. The Disposition Table clearly denotes that certain articles were unrepealed, even though they were not transferred into the new Code. In fact, the Table was entitled “Disposition of Unrepealed Articles of the Texas Penal Code of 1925 and Vernon’s Texas Penal Code.” The instructions for the Disposition Table stated the Legislature was giving new official citations of unrepealed articles.<sup>9</sup> The historical note states they are unconstitutional because of *Roe*. Thus, the Legislature directly stated the abortion articles are unrepealed.

In 1974, then-Attorney General John Hill wrote an opinion concerning the present status of Texas abortion laws.<sup>10</sup> After *Roe*, he concluded that “[t]herefore, there presently are no effective statutes of the State of Texas against abortion, per se.”<sup>11</sup> The Attorney General did not say they were repealed; he only said the provisions were not “effective” because of *Roe*.

Furthermore, the Attorney General was asked, because *Roe* declared the Texas statutes unconstitutional, “[W]hat guidelines and standards should now be used in reference to ‘abortions’ in this State?” Outlining the types of laws permitted under *Roe*,<sup>12</sup> the Attorney General said “sponsors ... should be guided by the principles discussed herein....”<sup>13</sup> The Legislature passed legislation based on the constitutional limitations of *Roe* and the Attorney General’s guidelines.

If *Roe* is vacated, the just and legal result would be to revive the Texas law; namely, to automatically re-activate the statute previously declared unconstitutional and forgo any

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<sup>7</sup> *Roe*, 410 U.S. at 113.

<sup>8</sup> The following discussion regarding statutory repeal by implication was initially presented by Linda Schlueter, J.D., in *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004).

<sup>9</sup> The instructions for the Disposition Table stated in relevant part: “Pursuant to the authority granted by Section 5 of Chapter 399, Acts of the 63<sup>rd</sup> Legislature, the Texas Legislative Council has compiled the following table showing the new official citations of unrepealed articles of the 1925 Texas Penal Code and the new classifications of unrepealed statutes compiled as articles of Vernon’s Texas Penal Code.”

<sup>10</sup> Op. Tex. Att’y Gen. No. H-369 (1974).

<sup>11</sup> *Id.* at 3.

<sup>12</sup> *Id.* at 4-13.

<sup>13</sup> *Id.* at 13.

legislative involvement. Although the USSC has not authoritatively resolved the issue of revival, it has been its practice,<sup>14</sup> and the Court “weighs in favor of revival.”<sup>15</sup> Several state courts have explicitly addressed the revival issue. With one exception, they have concluded invalidated statutes are immediately enforceable, when the invalidating decision is overturned.<sup>16</sup> Prior to the overruling decision, an invalidated statute “is dormant, but not dead.”<sup>17</sup> Although few cases are on point, one court has stated:

There are comparatively few cases dealing squarely with the question before us, but they are unanimous in holding that a law once declared unconstitutional and later held to be constitutional does not require reenactment by the legislature in order to restore its operative force. They proceed on the principle that a statute declared unconstitutional is void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished; that so long as the decision stands the statute is dormant but not dead; and that if the decision is reversed the statute is valid from its first effective date. (citations omitted).<sup>18</sup>

By statute, Texas presumes the intention of its Legislature is to be in “compliance with the constitutions of this state and the United States...”<sup>19</sup> and that “a just and reasonable result is intended.”<sup>20</sup> If *Roe* is vacated, the just and legal result would be to revive the Texas law. Furthermore, “in interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy.”<sup>21</sup> The statutes are “the law of this state and shall be liberally construed to achieve their purpose and to promote

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<sup>14</sup> See generally William Michael Treanor & Gene B. Sperling, *Prospective Overruling and the Revival of “Unconstitutional” Statutes*, 93 COLUM. L. REV. 1902, 1908-09 (1993) (recognizing United States Supreme Court cases, state court cases, and almost every other commentator).

<sup>15</sup> *Id.* at 1911; See also Stuart Minor Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, note 63 (1999) (commenting on the Treanor & Sperling article and stating that “an invalidated statute simply becomes dormant, ready to be enforced as soon as a court finds that it is no longer invalid”); See also David M. Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without Roe: Applying the Doctrine of Implied Repeal to Abortion*, 11 ST. LOUIS U. PUB. L. REV. 385, 392 (1992) (stating overwhelming consensus is that statutes automatically revive).

<sup>16</sup> Treanor & Sperling, *supra* note 13, at 1913-14 (citing *Pierce v. Pierce*, 46 Ind. 86, 95 (1874); *State ex. Rel. Badgett v. Lee*, 22 So. 2d 804, 806 (Fla. 1945); *Christopher v. Mungen*, 55 So. 273, 280 (Fla. 1911); *State v. O’Neill*, 126 N.W. 454, 454 (Iowa 1910); *McCollum v. McConaughy*, 119 N.W. 539, 541 (Iowa 1909); *State ex. Rel. Moore v. Molpus*, 578 So. 2d 624, 638 (Miss. 1991)).

<sup>17</sup> *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952).

<sup>18</sup> *Id.*; see also 39 Op. Att’y Gen. 22 (1937) (stating unconstitutional statute remains on the “statute books” and is valid from the date it became effective).

<sup>19</sup> TEX. CODE ANN. § 311.021 (Vernon 2007).

<sup>20</sup> *Id.* at § 311.021(3).

<sup>21</sup> *Id.* at § 312.005.

justice.”<sup>22</sup> The pre-*Roe* statutes allowed some abortions to save the life of the mother. These pre-*Roe* abortion statutes would still be governed by the newer statutes that place limitations on abortion but are silent on the reason for which an abortion is obtained.<sup>23</sup> It is not reasonable to assume that the Legislature would repeal by implication what it expressly refused to repeal. More logical is the interpretation that, since 1974, the Legislature has followed the Attorney General’s guidelines in regulating abortion and providing administrative, civil, and criminal penalties to the full extent of the law. If *Roe* were vacated, Texas would consider its original ban revived. As one author of an article directly on point states: “[T]hey should generally be viewed as measures intended to fill a gap created by *Roe* rather than as impliedly repealing pre-*Roe* legislation.”<sup>24</sup> As the discussion below provides, Texas requires parental notification;<sup>25</sup> it denies funding to provide abortion services unless the mother’s life is in danger;<sup>26</sup> it requires informed consent and provides penalties for violations;<sup>27</sup> it does not require employers to pay for health insurance benefits for abortion unless the life of the mother is endangered;<sup>28</sup> private entities are not required to make facilities available for abortion unless the life of the mother is in immediate danger;<sup>29</sup> and it provides criminal and administrative penalties for physicians who perform or procure criminal abortions.<sup>30</sup> By not funding abortions and restricting them to the greatest extent possible consistent with *Roe*, these provisions show the legislature’s desire to protect unborn human life. The Fifth Circuit Court of Appeals noted that an exception to mootness “where there is evidence, or a legitimate reason to believe, that the state will reenact the statute or one that is

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<sup>22</sup> *Id.* at § 312.006.

<sup>23</sup> Unlike the statute in *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990), Texas had an exception to save the life of the mother. *Weeks* has been criticized for its flawed analysis. See generally, Smolin, *supra* at note 14.

<sup>24</sup> Smolin, *supra* note 14, at 402.

<sup>25</sup> TEX. FAM. CODE ANN. §§ 33.001-011 (Vernon 2007).

<sup>26</sup> TEX. HEALTH & SAFETY CODE ANN. § 32.005 (Vernon 2007); see also *Bell v. Low Income Women of Texas*, 95 S.W.3d 253, 255 (Tex. 2002) (funding restrictions were constitutional and do not discriminate on the basis of sex and are rationally related to a legitimate governmental purpose).

<sup>27</sup> TEX. HEALTH & SAFETY CODE ANN. §§ 171.001-005 (Vernon 2007) (Women’s Right to Know Act), and §§ 171.011-018 (requiring informed consent and penalties for violations).

<sup>28</sup> TEX. LAB. CODE ANN. § 21.107 (Vernon 2007).

<sup>29</sup> *Id.* at § 103.004.

<sup>30</sup> TEX. OCC. CODE ANN. § 164.052 (Vernon 2007) (prohibiting physician to perform or procure a criminal abortion or aids, abets, or attempts one); § 164.055 (allowing the board to take disciplinary action concerning abortion); and § 201.502 (refusing, revoking, or suspending a chiropractors license for procuring or assigning in procuring an abortion).

substantially similar.”<sup>31</sup> As the following analysis of post-*Roe* statutes illustrates, it is clear Texas would enforce its existing law, since it has never repealed it in any way.<sup>32</sup>

Although abortion remains legal, the Texas Legislature has been quite successful in ameliorating the damage caused by *Roe*.<sup>33</sup> For example, during the past decade, pregnant minors have been increasingly protected. In 1999, the Texas Legislature enacted the Texas Parental Notification Act, which provides that a physician may not perform an abortion on a pregnant unemancipated minor unless the physician gives at least 48-hour notice, either in person or by telephone to the parent, guardian, or a judge issuing a judicial bypass.<sup>34</sup> After Texas’s Parental Notification Act<sup>35</sup> became effective on September 1, 1999, a flurry of litigation ensued, with the Parental Notification Act’s opponents filing appeal after appeal of various trial court determinations regarding whether minor girls should be allowed to have an abortion without notifying the parents as stated by the Court in *In re Jane Doe*:

The trial court in this case concluded that although the minor ‘shows signs of being mature, she has not demonstrated that she is sufficiently well informed about the medical procedures and the emotional impact of the procedure.’ The court of appeals affirmed, and the minor has appealed to this Court. We conclude that in this case, the minor has not met the statutory standard. Because this Court has not previously provided guidance to trial and appellate courts about what a minor must show under section 33.003 of the Texas Family Code to demonstrate that she is mature and sufficiently well informed, we remand this case to the trial court in the interest of justice.<sup>36</sup>

Initially, it appeared that the Court recognized that a pregnant minor is not in a position to make a life-and-death decision alone, but after remand and the subsequent appeal, the Court hurriedly granted this young woman’s application for a judicial bypass,<sup>37</sup> as the dissenting Justice Nathan L. Hecht describes:

The trial court denied Jane Doe's application for authorization to have an abortion without telling her parents, and the court of appeals affirmed without opinion. This Court reversed and remanded the case for a further hearing. The trial court immediately

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<sup>31</sup> *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004).

<sup>32</sup> *In re Jane Doe 2*, 19 S.W.3d 278, 284 (Tex. 2000) (finding the trial court’s ruling that the Parental Notification Statute was unconstitutional was in error and accordingly reversed that part of the trial court’s judgment determining the statute to be unconstitutional and, without reference to the merits, vacated that part of its judgment).

<sup>33</sup> 410 U.S. 113 (1973).

<sup>34</sup> TEX. FAM. CODE ANN. § 33.002 (Vernon 2007).

<sup>35</sup> *Id.* at § 33.001 *et seq.*

<sup>36</sup> *In re Jane Doe*, 19 S.W.3d at 251.

<sup>37</sup> *Id.* at 361-62.

conducted a second hearing and again denied Doe's application, issuing more specific findings as this Court directed. Again the court of appeals affirmed, this time indicating that it would issue an opinion as permitted by Rule 3.3(e)(2)(A) of the Parental Notification Rules. Doe appealed to this Court a second time, and we received the record about 7:00 p.m. on March 8, 2000. Now, less than forty-eight hours later, without a request by Doe for expedited consideration, and without benefit of the court of appeals' opinion, this Court adjudicates the merits of the case and holds, with no word of explanation, that the lower courts are both wrong as a matter of law, and that Doe is entitled to an abortion without telling her parents. From this hasty and ill-considered action I dissent.<sup>38</sup>

In the months that followed, a number of judicial bypass cases were filed, challenging the statute's constitutionality, but the Parental Notification Statute withstood judicial scrutiny. Eventually, the flurry of bypass cases died down,

The legislature subsequently passed a parental involvement law that require informed consent and provided that a pregnant minor may not abort her child until Texas's notice and consent requirements are fulfilled. A pregnant minor may not obtain an abortion unless the abortionist has notified at least one parent:

If actual notice is not possible after a reasonable effort, 48 hours constructive notice by certified mail must be given. If notice is delivered by certified mail, the 48-hour period begins to run at the time of mailing. at least 48 hours after actual notice has been delivered, in person or by telephone, by the attending physician to one parent, unless the parent waives notice by an affidavit.

In September 2006, the Texas Medical Board adopted an administrative rule mandated by the Texas Legislature that requires the written consent of a parent to be notarized before an abortion procedure may be performed on a minor. The affidavit is extremely comprehensive, and the listed risks include infection, blood clots, hemorrhage, uterine perforation, sterility, injury to the bowel and/or bladder, and even death.<sup>39</sup> Overall, during the past few years, Texas has made great strides in protecting women and minors through abortion legislation

Texas has also been very successful in protecting mothers, by mandating that women be provided information to assist them in understanding their irreparable choice. For example, in 2003, the Texas legislature enacted a very stringent informed consent law prohibiting "abortion

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<sup>38</sup> *Id.* at 300 (Hecht, J. dissenting).

<sup>39</sup> 22 TEX. ADMIN. CODE §165.6(f) (West 2007).

without the voluntary and informed consent of the woman . . .”<sup>40</sup> This seemingly benign statute is a very powerful tool in assuring women are informed of the consequences of abortion. The statute defines informed consent to include, among other requirements, the medical risks associated:

- (i) the risks of infection and hemorrhage;
- (ii) the potential danger to a subsequent pregnancy and of infertility; and
- (iii) the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer[.]<sup>41</sup>

Additionally, the woman must be informed of the probable gestational age; the risks associated with carrying the child to term; that benefits may be available for prenatal care, childbirth, and neonatal care; and that the father is liable for child support regardless of whether he offered to pay for the abortion.<sup>42</sup> Women seeking abortions must be provided this information 24 hours prior to the procedure and informed that they have the right to review the printed materials provided by the Texas Department of Health, which describe the unborn child and list agencies that offer alternatives to abortion.<sup>43</sup> The woman is required to certify in writing, before the abortion is performed, that the information has been provided to her and that she has been informed of her opportunity to review the information before the abortion is performed.<sup>44</sup>

The Texas Legislature recognized that a woman may feel compelled to abort her child because of her financial inability to care for her child and that many women are uninformed that help is available. To assist women in making an informed choice, the Legislature now requires women seeking an abortion to be provided with Texas statistical information regarding the likelihood of collecting child support and adoption information for public and private adoption agencies.<sup>45</sup> The information lists those agencies available to assist a woman through pregnancy, childbirth, and the child’s dependency.<sup>46</sup>

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<sup>40</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.011 (Vernon 2003).

<sup>41</sup> *Id.* at § 171.012.

<sup>42</sup> *Id.*

<sup>43</sup> A physician or the physician's agent is not required to furnish copies of the materials if the woman provides the physician with a written statement that she chooses to view the materials on the Internet website sponsored by the department. TEX. HEALTH & SAFETY CODE ANN. § 171.013 (Vernon 2007).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at § 171.015.

<sup>46</sup> *Id.*

Although under *Doe v. Bolton*,<sup>47</sup> the companion case to *Roe*, abortion is legal throughout all nine months of pregnancy for any reason, Texas prohibits bans third trimester abortions. The law prohibits a physician from performing “an abortion on a woman who is pregnant with a viable unborn child during the third trimester of the pregnancy unless: (A) the abortion is necessary to prevent the death of the woman; (B) the viable unborn child has a severe, irreversible brain impairment; or (C) the woman is diagnosed with a significant likelihood of suffering imminent severe, irreversible brain damage or imminent severe, irreversible paralysis.”<sup>48</sup>

Texas prohibits public funding for abortion for women who are eligible for state medical assistance for general health care, unless the procedure is necessary to preserve the life of a woman or the pregnancy is the result of rape or incest.<sup>49</sup> The Court has upheld this statute and found that the State is not obligated to fund all medically necessary abortions.<sup>50</sup> The Court found that:

Obviously, the denial of funding for medically necessary abortions affects only women, at least directly. But, as the Pennsylvania Supreme Court noted in considering a challenge to similar abortion funding restrictions, the mere fact that only women are affected by [the restriction] does not necessarily mean that women are being discriminated against on the basis of sex. In this world there are certain immutable facts of life which no amount of legislation may change. As a consequence there are certain laws which necessarily will only affect one sex.<sup>51</sup>

The challenge to the legislature’s decision to not fund abortions was based on an equal protection, the right to privacy, and the Texas Equal Rights Amendment but all the arguments failed.

Although Texas has made some strides in the area of wrongful death, the unborn child remains a sub-citizen with respect to wrongful death recovery.

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<sup>47</sup> 410 U.S. 179 (1973) (stating, “[w]e agree with the District Court, 319 F.Supp., at 1058, that the medical judgment may be exercised in the light of all factors -- physical, emotional, psychological, familial, and the woman’s age -- relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment”).

<sup>48</sup> TEX. OCC. CODE ANN. § 164.052 (Vernon 2007).

<sup>49</sup> 1 TEX. ADMIN. CODE § 354.1167 (West 2007).

<sup>50</sup> *Bell v. Low-Income Women of Tex.*, 95 S.W.3d 253 (Tex. 2002).

<sup>51</sup> *Id.*

In 2003, the Legislature did grant the parents of a stillborn child a cause of action under the Wrongful Death Act. See TEX. CIV. PRAC. & REM. CODE ' 71.001(4) (defining "individual" under the wrongful death act to include "an unborn child at every stage of gestation from fertilization until birth"). However, the statute expressly does not apply to claims "for the death of an individual who is an unborn child that is brought against . . . a physician or other health care provider licensed in this state, if the death directly or indirectly is caused by, associated with, arises out of, or relates to a lawful medical or health care practice or procedure of the physician or health care provider." See TEX. CIV. PRAC. & REM. CODE ' 71.003(c)(4). . . . The parties do not contend that this case involved anything other than a lawful medical procedure, so this case would not be covered even if the new statute were applicable.<sup>52</sup>

Essentially, the Texas wrongful death statute allows recovery for the wrongful death of an unborn child against any tortfeasor other than a doctor who is performing a lawful medical procedure and the unborn child's mother.<sup>53</sup>

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

In February 2007, a recently enacted unborn victims' law<sup>54</sup> allowed a San Antonio jury the opportunity to convict 24-year-old Adrian Estrada of capital murder. After a few hours of deliberation, Estrada was sentenced to death for killing his 17-year-old girlfriend, Stephanie Sanches, and their three-month-old unborn child. During the trial, it was discovered that, when Sanches was 16, Estrada, a youth minister at a local church, took her for an abortion.<sup>55</sup> Subsequently, she became pregnant again and miscarried their second child.<sup>56</sup> On December 12, 2005, Estrada choked Sanches and stabbed her 13 times.

Estrada's prosecution under the new law did not go unnoticed, as the media across the nation published numerous articles that interpret the law, with titles such as: "Texas man convicted of killing fetus." *Estrada* is the second case decided since 2003, when the Texas Legislature defined capital murder to include an individual under the age of six,<sup>57</sup> and the definition of an individual now includes a human being who is alive, including an unborn child at every age of gestation from fertilization to birth.<sup>58</sup> Because *Estrada* is the first *capital*

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<sup>52</sup> Fort Worth Osteopathic Hosp., Inc. v. Reese, 148 S.W.3d 94, 97 (Tex. 2004).

<sup>53</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 71.003 (Vernon 2007).

<sup>54</sup> TEX. PENAL CODE ANN. §§ 19.02, .03, 1.07(a) (26) (Vernon 2007).

<sup>55</sup> Elizabeth Allen, *Ex-Pastor Called a Wolf in Sheep's Clothing*, San Antonio Express News, (Jan. 31, 2007) at 1B.

<sup>56</sup> *Id.*

<sup>57</sup> TEXAS PENAL CODE ANN. § 19.03(a) (8) (Vernon 2007).

<sup>58</sup> *Id.* § 1.07(a) (26).

conviction under the unborn victims law, the case will undoubtedly be appealed, regarding the constitutionality of imposing the death penalty for killing the child. The constitutionality of the initial Texas case involving the “unborn victims” law, *Flores v. State of Texas*, has been decided by the Texas Ninth District Court of Appeals, Beaumont:<sup>59</sup>

In the early morning hours of May 7, 2004, an ambulance carried E. B. to the hospital emergency room. She had delivered twins prematurely at home. Medical evidence reveals the twins had been dead in utero for at least twenty-four to forty-eight hours. At the hospital, nurses noticed bruises on E. B.'s arms and ‘massive bruising’ on her abdomen. The police were notified. Officers questioned Flores, E.B.'s boyfriend with whom she was living at Flores's parents' house. In a hand-written statement, Flores stated he and E.B. had argued that night and he struck her. Further, Flores admitted he had in the seven days prior to her delivery stepped on her abdomen on two different occasions. Flores was charged with capital murder of the two unborn children.<sup>60</sup>

“A national wire service published a story that questioned the fairness of the decision to prosecute the defendant [the father]. . . . The article ran the next day in the local paper with the headline ‘Conspired miscarriage case tests Texas law.’”<sup>61</sup> Despite the media’s inflammatory headlines, such as “convicted of killing fetus” and “conspired miscarriage,” cases such as *Estrada* and *Flores* demonstrate Texas’s strong determination to protect life, as articulated by the Beaumont Court of Appeals: “The State's interest in protecting life does not arise only at the point of viability, and the Texas legislature's decision to define "individual" as including an unborn child is not arbitrary.”<sup>62</sup> Whereas the media has attempted to obscure the fact that the life of a child has been taken, the Texas legislature has seen fit to punish those who kill a child regardless of whether the child was in utero.

### **Assisted Suicide**

With the recent release of Jack Kervorkian, The legislative discussion regarding assisted suicide is gaining attention. Assisted suicide has been an issue in Texas for at least a century. It is interesting to note that, while abortion was illegal in the late 1800s, assisted suicide was not illegal:

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<sup>59</sup> *Flores v. State*, 215 S.W.3d 520, 2007 *Tex. App.* LEXIS 516 (2007).

<sup>60</sup> *Id.* at 1-2

<sup>61</sup> *Id.* at 17.

<sup>62</sup> *Flores v. State*, 215 S.W.3d 520 (Tex. Crim. App. 2007), citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (“State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child”).

So far as our law is concerned, the suicide is innocent of any criminality. Therefore, the party who furnishes the means to the suicide is also innocent of violating the law. It may be a violation of morals and ethics and reprehensible that a party may furnish another poison or pistols or guns or any other means or agency for the purpose of the suicide to take his own life, yet our law has not seen proper to punish such persons or such acts. A party may furnish another with a pistol, knowing such party intends to take his own life, yet neither would be guilty of violating any statute of Texas. So it may be said of furnishing poison to the suicide.<sup>63</sup>

Today, however, it is illegal to assist another in committing suicide. Although the underlying premise in most criminal statutes is the culpability of the person accused of a crime, the Texas Aiding Suicide statute is, instead, result oriented. The statute provides that a person who assists another to commit suicide, by providing the means to do so, will receive a punishment similar to a speeding ticket, basically a citation and fine, if the suicide attempt does not result in death or serious injury.<sup>64</sup> However, if the suicide is successful, the punishment for the person assisting is the far more severe punishment of a state jail felony.

However, for more than a century, the distinction between homicide and assisted suicide has remained consistent, with the degree of participation being the critical element in determining the distinction between assisted suicide and homicide. Assisted suicide involves providing another with the means to commit suicide, whereas homicide contemplates killing the other person at his or her request:

We believe the aiding suicide statute encompasses action which indirectly contributes to another's voluntary suicide, such as providing access to poison or a gun. We do not believe that this offense includes action on the part of an accused which directly causes the death of another, even if done at the deceased's request. The statute defines the offense as promoting or assisting *the commission of suicide by another*. *Id.* Although few Texas cases address this distinction, the Court of Criminal Appeals has stated that: [A] party would not be justified in taking the life of the party who desires to forfeit his life by shooting the would-be destroyer at his request, for in that case it would be the direct act of the accused, and he would be guilty of homicide, although he fired a shot at the request of the would-be suicide. *Sanders v. State*, 54 Tex. Crim. 101, 112 S.W. 68, 70 (1908). Likewise, when one goes further than providing poison to another, and with knowing intent administers the poison, the offense is murder even though the deceased voluntarily swallows it. See *Aven v. State*, 102 Tex.Cr.R. 478, 277 S.W. 1080, 1083

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<sup>63</sup> *Sanders v. State*, 112 S.W. 68, 70 (Tex. Crim. App. 1908).

<sup>64</sup> TEX. PENAL CODE ANN. §22.08 (Vernon 2007) (Aiding Suicide: “ (a) A person commits an offense if, with intent to promote or assist the commission of suicide by another, he aids or attempts to aid the other to commit or attempt to commit suicide. (b) An offense under this section is a Class C misdemeanor unless the actor's conduct causes suicide or attempted suicide that results in serious bodily injury, in which event the offense is a state jail felony”).

(1925). Aiding suicide, therefore, requires proof of an element, action that indirectly allows or encourages another to kill himself, which is not included in murder.<sup>65</sup>

The Texas Court of Criminal Appeals has set a bright line distinction between assisting and killing another.

### **Healthcare Rights of Conscience**

In Texas, physicians, nurses, staff members, or employees of a hospital or health care facility who object to participating directly or indirectly in an abortion may not be required to participate in abortions.<sup>66</sup> Additionally, hospitals, healthcare facilities, and educational institutions may not discriminate against those persons who refuse to participate in abortions.<sup>67</sup> If a person's rights are violated, they are entitled to "appropriate affirmative relief, including admission or reinstatement of employment with back pay plus 10 percent interest."<sup>68</sup> Private hospitals are permitted to refuse to perform abortions, unless a physician determines that a woman's life is immediately endangered.<sup>69</sup>

### **Cloning & Destructive Embryo Research**

The Court has not issued any rulings on issues relating to cloning or destructive embryo research. Recently, however the Court had the opportunity to hear a case involving the issue of whether an embryo agreement which called for the destruction of the embryos was enforceable.<sup>70</sup> The Texas First Court of Appeals discussed the public policy of the State of Texas and stated:

Currently, the State of Texas has laws regarding children of assisted reproduction and gestational agreements, both contained within the Uniform Parentage Act. n11 See TEX. FAM. CODE ANN. § 160.701-.707 (Vernon 2002), §§ 160.751-.763 (Vernon Supp. 2005). Assisted reproduction means a method of causing pregnancy other than sexual intercourse, including IVF and transfer of embryos. Id. § 160.102(2)(D) (Vernon 2002). The statute requires that both husband and wife consent to assisted reproduction. Id. § 160.704(a). However, section 160.704(b) acknowledges that a child may be born without the husband's consent. Id. § 160.704(b). Section 160.706 addresses paternity in the event of divorce as follows: "if a marriage is dissolved before the placement of eggs, sperm, or

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<sup>65</sup> *Goodin v. State*, 726 S.W.2d 956, 958 (Tex. App. 1987) *aff'd*, 750 S.W.2d 789 (Tex. Crim. App. 1988).

<sup>66</sup> TEX. OCC. CODE ANN. § 103.001 (Vernon 2007).

<sup>67</sup> *Id.* at § 103.002.

<sup>68</sup> *Id.* at § 103.003.

<sup>69</sup> *Id.* at § 103.004.

<sup>70</sup> *Roman v. Roman*, 193 S.W.3d 40, 48-49 (Tex. App. 2006) *pet. for rev. denied by Roman v. Roman*, 2007 Tex. LEXIS 724 (Tex., Aug. 24, 2007).

embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce the former spouse would be a parent of the child." *Id.* § 160.706(a). This section also provides that consent of the former spouse may be withdrawn at any time before the placement of eggs, sperm, or embryos. *Id.* § 160.706(b). Noticeably absent from these sections is any legislative directive on how to determine the disposition of the embryos in case of a contingency such as death or divorce. Nor is there anything in the case law that is incompatible with the recognition of the parties' agreement as controlling.<sup>71</sup>

The case was decided on basic contract principles by the Appellate Court without any real discussion regarding whether the contract was void because the contract called for the destruction of life; nevertheless, the Court did not accept the case.

## II. JUDICIAL RESTRAINT

The Texas court system is unique, in that Texas does not have only one "supreme" court. Of the two "supreme" courts, the final court of appeals regarding criminal matters is the Texas Court of Criminal Appeals. The final court of appeals for civil matters is the Texas Supreme Court. This system appears to work well and does not require the justices to be familiar with both civil and criminal law. This paper focuses, for the most part, on civil matters and, therefore, the analysis is predominantly of the Texas Supreme Court.

In the late 1980s, beginning with the appointment of Chief Justice Phillips, conservative justices began replacing liberal justices on the Court, and by the 1990s, the Court had turned Texas law one-hundred-and-eighty degrees. In 2000, the Court set out the Court's position on judicial review:

When we interpret our state constitution, we rely heavily on its literal text and must give effect to its plain language. We strive to give constitutional provisions the effect their makers and adopters intended. We avoid a construction that renders any provision meaningless or inoperative. In construing a constitutional amendment, we may also consider its legislative history.<sup>72</sup>

A very recent case describes the Court's adherence to perform statutory construction in a manner consistent with the Texas Constitution:

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<sup>71</sup> *Id.*

<sup>72</sup> *Stringer v. Cendant Mortg. Corp.*, 23 S.W.3d 353, 355 (Tex. 2000) (internal citations omitted).

When construing a statute, we begin with its language, which, when possible, we discern from the plain meaning of the words chosen. If the statute is clear and unambiguous, we must apply its words according to their common meaning without resort to rules of construction or extrinsic aids. We may consider other matters in ascertaining legislative intent, including the objective of the law, its history, and the consequences of a particular construction. Statutory construction is a question of law, and our review is accordingly de novo.<sup>73</sup>

Currently, Republicans hold all statewide elected offices in Texas, including Governor, Lieutenant Governor, Comptroller, and all seats on the Texas Supreme Court and the Court of Criminal Appeals. The 2006 Republican Party of Texas Platform “supports the principal of judicial restraint, which requires judges to interpret and apply rather than make law.”<sup>74</sup> On the issue of human life, the platform states: “We believe that human life is sacred, created in the image of God. Life begins at the moment of fertilization and ends at the point of natural death.<sup>75</sup> All innocent human life must be protected.”<sup>76</sup> Although some candidates have been known to snub their noses at the party platform and even state that they have not read it, in recent years, Republican activists who helped shape the platform have given more attention to the election of Court justices and have attempted to learn candidate positions, through questionnaires and personal interviews.

Not surprisingly, the National Abortion Rights League (NARAL) gives Texas an “F” grade on abortion law and labels Governor Rick Perry, Lieutenant Governor David Dewhurst, the Texas House, and the Texas Senate as “*anti-choice*.”<sup>77</sup> NARAL opposes Texas laws designed to regulate abortion and protect women and minor girls, including the informed consent law, the prohibition of healthcare providers who are not physicians from performing abortion, the parental notification and consent laws, restrictions on public funding of abortion, and the regulation of abortion providers.<sup>78</sup>

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<sup>73</sup> *State v. Shumake*, 199 S.W.3d 279 (Tex. 2006).

<sup>74</sup> See, 2006 Republican Party of Texas Platform, at [http://www.texasgop.org/site/PageServer?pagename=library\\_platform](http://www.texasgop.org/site/PageServer?pagename=library_platform).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See, the official website of NARAL Pro-choice America, *Who Decides? The Status of Reproductive Rights in the United States-Texas*, at [http://www.prochoiceamerica.org/choice-action-center/in\\_your\\_state/who-decides/state-profiles/texas.html](http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/state-profiles/texas.html).

<sup>78</sup> *Id.*

In writing about a “new conservative uprising,” well-known conservative Phyllis Schlafly hammered “big-government spenders in legislatures” and “supremacist judges who order the spending,” also noting a grassroots backlash.<sup>79</sup> She criticized Justice Nathan Hecht’s ruling that ordered the Texas Legislature to revise public school funding, lumping him into a category of judges who “have convinced themselves they are wise enough to know how much taxpayer money is ‘equitable’ or ‘adequate.’”<sup>80</sup> Hecht, she said, is “infected with the same judicial conceit.”<sup>81</sup> On the other hand, Schlafly commended Justice Scott Brister’s “vigorous” dissent in the case, saying he wasn’t “fooled” by the Court’s decision.<sup>82</sup>

The Court’s judicial philosophy is best understood by considering the Court’s entire body of jurisprudence.<sup>83</sup> Overall, the current Court is “supremely conservative.”

### III. THE COURT

Nine justices, including the chief justice, serve on the Texas Supreme Court, which is the court of last resort for civil matters.<sup>84</sup> Seven of nine sitting justices have been on the Court since 2003, and six of nine have been on the Court since 2001. Governor Rick Perry, a pro-life Republican, appointed the majority of the justices (five of nine). Two justices elected to the Court were previously appointed to lower courts by then-Governor George W. Bush. Justices are elected in statewide general elections to staggered six-year terms (three each two years).<sup>85</sup> When a vacancy exists, the Governor may appoint a justice, subject to confirmation of the Texas Senate, to serve the remainder of an unexpired term, until the next general election.<sup>86</sup>

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<sup>79</sup> Phyllis Schlafly, *Conservative Insurgency*, Eagle Forum (May 3, 2006), at [http://www.newsbull.com/forum/topic.asp?TOPIC\\_ID=32597](http://www.newsbull.com/forum/topic.asp?TOPIC_ID=32597).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Phyllis Schlafly, *The Drums are Beating to a Conservative Crescendo* (May 1, 2006), at [http://www.townhall.com/columnists/PhyllisSchlafly/2006/05/01/the\\_drums\\_are\\_beating\\_to\\_a\\_conservative\\_crescendo](http://www.townhall.com/columnists/PhyllisSchlafly/2006/05/01/the_drums_are_beating_to_a_conservative_crescendo).

<sup>83</sup> Significant recent opinions from the Court include *Norris v. Thomas*, 50 Tex. Sup. Ct. J. 398 (Tex. 2007) (deciding whether a yacht can be a homestead in Texas); *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371 (Tex. 2006) (considering governmental immunity); *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) (same); *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746 (Tex. 2005) (considering the constitutionality of the state’s school finance system).

<sup>84</sup> For more information, see generally the official site of the Supreme Court of Texas, at <http://www.supreme.courts.state.tx.us/>.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

**Biographical information on the current members of the Texas Supreme Court**

<b>Member</b>	<b>Appointed</b>	<b>Term</b>	<b>Miscellaneous</b>
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	<b>by/ Year</b>	<b>Expires</b>	
Wallace B. Jefferson, Chief Justice	Perry/ 2001; Elected 2002; <sup>87</sup> Appointed Chief Justice Perry/ 2004.	2008	<p>- Biographical information: J.D. University of Texas School of Law; B.A. James Madison College at Michigan State University; began law practice with Groce, Locke and Hebdon; Partner with the San Antonio appellate-specialty law firm of Crofts, Callaway &amp; Jefferson, which he helped found, 1991-2001;</p> <p>- Professional affiliations: San Antonio Young Lawyers Association's Outstanding Young Lawyer; San Antonio Bar Association president 1998-1999; Certified in civil appellate law by the Texas Board of Legal Specialization; Among the "40 Under 40 Rising Stars" named by the San Antonio Business Journal; "Pillars of the Foundation" award by the Northside Independent School District in San Antonio; Director of the San Antonio Public Library Foundation and the Alamo Area Big Brothers/Big Sisters; Education committee of the San Antonio Area Foundation.</p> <p>- Notable Speeches: "State of the Judiciary in Texas," February 20, 2007, Austin, Texas</p> <p>- Notable Quotes: When he was appointed chief justice in Sept. 2004, Jefferson articulated the role of the judiciary: "It is not a judge's role to make law but to interpret it."<sup>88</sup></p> <p>- Judicial evaluations/surveys: Chief Justice Jefferson appears to have a reputation for fairness. According to State Senator Leticia Van de Putte, a Democrat, "I have spoken to both plaintiff's and defense bar [attorneys] and they all agree that Wallace is very fair, very hardworking and has a calm demeanor even when all others are riled up."<sup>89</sup></p> <p>- Other: Argued two cases before U.S. Supreme Court, winning both on 5-4 votes; along with Dale Wainwright, is one of the first African Americans elected to the Court.</p>
Nathan L. Hecht	1988	2012	<p>- Biographical information: J.D. <i>cum laude</i> from the Southern Methodist University School of Law; B.A. in philosophy at Yale University with honors; Law clerk to Judge Roger Robb of the U.S. Court of</p>

<sup>87</sup> *Id.*

<sup>88</sup> Supreme Court of Texas official website, *supra* note 85.

<sup>89</sup> *Id.*

		<p>Appeals for the District of Columbia Circuit; Lt. in the U.S. Naval Reserve JAGC; Practiced law with Locke, Purnell, Boren, Laney, &amp; Neely; Appointed in 1981 to the 95<sup>th</sup> District Court of Dallas County, elected in 1982 and re-elected in 1984; Elected in 1986 to the Court of Appeals for the Fifth District of Texas.</p> <p>- Professional affiliations: Member of the American Law Institute, the Texas Philosophical Society, and a Fellow of the American, Texas, and Dallas Bar Foundations.</p> <p>- Notable quotes: Justice Hecht rates himself as a strict constitutionalist, having “deep reservations about the reasoning” in <i>Lawrence v. Texas</i>, <i>Santa Fe ISD v. Doe</i>, and <i>Roe v. Wade</i>;<sup>90</sup> According to a Planned Parenthood article, Alex Winslow, executive director of Texas Watch, told <i>The New York Times</i>, “Hecht is the godfather of the conservative judicial movement in Texas;”<sup>91</sup> , the Texas Observer, one of the State’s most far-left publications, credits Hecht with being the leader of the Court’s “well-documented rightward drift.”<sup>92</sup>; Planned Parenthood characterized him as “an extreme conservative on both business and social issues”; <i>The Kansas City Star</i> described him as “second only” to Priscilla Owen [then on the Court] as the Court’s “most adamant anti-abortion judge,”<sup>93</sup> a characterization that his judicial record supports, according to Planned Parenthood<sup>94</sup>;</p> <p>- Notable articles: “Jury Trials Trending Down in Texas Civil Cases,” Texas Bar Journal, Vol. 69, 9,</p>
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<sup>90</sup> Free Market Foundation Voters’ Guide, Plano, Tex., at <http://www.freemarket.org>.

<sup>91</sup> *Id.*

<sup>92</sup> Nate Blakeslee, *The Worst Judges in Texas*, Texas Observer (Feb. 10, 2006), at <http://www.texasobserver.org/article.php?aid=2132>.

<sup>93</sup> *Id.*

<sup>94</sup> An additional concern of the pro-abortion organization is the fact that, in his dissents in two decisions concerning the judicial by-pass provision in the parental notification law, Justice Hecht found that the criteria set by the Court’s ruling would be too easy to meet and that one of the minors did not consult with a clergy member. Pushing the issue in subsequent cases and arguing that an amicus brief from some members of the Texas Legislature supported his views earned Hecht Planned Parenthood’s indignation. Jon Platner, *Who Is Nathan Hecht?* (Oct. 13, 2005), at <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/courts-judiciary/nathan-hecht-6610.htm>.

<sup>95</sup> For more information, see generally the official site of the Supreme Court of Texas, Nathan L. Hecht, at [http://www.supreme.courts.state.tx.us/court/justice\\_nhecht.asp](http://www.supreme.courts.state.tx.us/court/justice_nhecht.asp).

<sup>96</sup> *Id.*

			<p>www.texasbarjournal.com.</p> <p>- Other: The senior Texas appellate judge, with the longest tenure on the Court,<sup>95</sup> Received the Distinguished Alumni Award for Judicial Service in 2000 and the Hatton W. Sumners Foundation Distinguished Public Service Award in 2004, the Southern Methodist University School of Law; For more than 30 years, Hecht was a member of Valley View Christian Church in Houston.<sup>96</sup></p>
Harriet O'Neill	1998	2002	<p>- Biographical information: J.D. University of S. Carolina School of Law 1982; B.A. Converse College; Practiced law with Porter &amp; Clements and Morris &amp; Campbell; Elected to the 152<sup>nd</sup> District Court in Houston in 1992; Appointed in 1995 by then-Governor George W. Bush to the 14<sup>th</sup> Court of Appeals and elected to the seat in 1996.</p> <p>- Professional affiliations: Texas Access to Justice Commission 2003; Member, American Law Institute, the Robert W. Calvert Inns of Court; Fellow, Houston and Texas Bar Foundations; appointed by Attorney General Alberto R. Gonzales to serve on the National Advisory Council on Violence Against Women;<sup>97</sup> Court's Liaison to the Task Force on Foster Care;</p> <p>- Notable speeches: the First-Prize Winner in the National Law Day Speech Awards in 2002 for her speech entitled: "Protecting the Best Interests of Our Children."<sup>98</sup></p> <p>- Notable quotes: Judge Elizabeth Ray, a close friend of O'Neill's and the chief administrative district judge in Houston, articulates the reason O'Neill is so well-respected: "I think most people who know Harriet know that she doesn't do things for political reasons, and that gives lawyers a great sense of comfort."<sup>99</sup> "Lawyers are very comfortable with what Harriet does because they know she believes it was the right thing to do under the law and not because there is any political favoritism being played;"<sup>100</sup></p> <p>- Notable article: "Society must be Committed to</p>

<sup>97</sup> *Id.*

<sup>98</sup> See, *supra* note 108.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

			<p>Justice for All,” Texas Access to Justice Commission, 2003, <a href="http://www.texasatj.org/PressRoom/MediaReleasesArchive/AprilCJ.asp">http://www.texasatj.org/PressRoom/MediaReleasesArchive/AprilCJ.asp</a>.</p> <ul style="list-style-type: none"> <li>- Judicial evaluations/surveys: 91 percent approval rating, 1998 Houston Bar Poll.</li> <li>- Other: Named Appellate Justice of the Year by the Texas Association of Civil Trial and Appellate Specialist, 2002 and 2006; She and her husband, Kerry Camack, have three children and are members of Good Shepherd Episcopal Church in Austin.</li> </ul>
Dale Wainwright	2002	2008	<ul style="list-style-type: none"> <li>- Biographical information: J.D. University of Chicago Law School; B.A. Howard University, summa cum laude; Practiced with the firms of Haynes and Boone and Andrews &amp; Kurth in Houston; Appointed in 1999 to the 334th Civil District Court in Harris County by Gov. George Bush.</li> <li>- Professional affiliations: Co-founded the Aspiring Youth Program, a national program to assist inner-city youth; Board of directors, Houston Bar Association, the Houston Volunteer Lawyers Program, and the Texas Young Lawyers Association;</li> <li>- Notable quotes: Wainwright believes a judge’s job is to apply and interpret the law fairly and consistently, even if personal views are not in agreement:<sup>101</sup> “Judges who decide to follow their own political agendas may violate the statutes, which are written by the elected legislature and governor, and represent the will of the people. There are things in statues that I personally may not agree with, but it is not my job to write or rewrite the statutes. I think it is very important to apply the law fairly and consistently as written.”<sup>102</sup></li> <li>- Judicial evaluations/surveys: Admired as a jurist by many, the Houston bar gave Wainwright a 90 percent approval rating in the judicial evaluation poll, with almost two-thirds of that rating being “outstanding.”<sup>103</sup></li> <li>- Other: First African-American elected president of</li> </ul>

<sup>101</sup> Davis, *supra* note 121.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

			Houston Young Lawyers Association; Received the Legal Excellence Award NAACP in 2000; He and his wife, Debbie, have three sons and are members of the Second Baptist Church, Houston.
Scott A. Brister	Perry/ 2004.	2010	<p>- Biographical information: J.D. Harvard Law School, cum laude; B.A. Duke University, summa cum laude; Practiced law with Andrews &amp; Kurth in Houston; Briefing attorney for Chief Justice Joe Greehill, Texas Supreme Court, 1980-1981; Appointed in 1989 by Gov. Bill Clements to the 234 District Court in Harris County; then Elected in 1990 and re-elected in 1994 and 1998; Elected in 2000 to the First District Court of Appeals in Houston; Appointed chief justice of the 14<sup>th</sup> Court of Appeals by Gov. Perry in 2001.</p> <p>- Professional affiliations: Supreme Court Advisory Committee, Supreme Court Jury Task Force; Fellow, Houston and Texas Bar foundations; Member, College of the State Bar of Texas; Board-certified in civil appellate, civil trial, and personal injury trial law.</p> <p>- Notable quotes: The Texas Observer opines that Justice Hecht may be in danger of being “outflanked on the right” by Justice Brister.<sup>104</sup> The Observer criticized Brister because he once provided <i>pro bono</i> legal assistance to an “anti-abortion” group and for his refusal to remove the Ten Commandments from his courtroom wall.<sup>105</sup></p> <p>- Notable articles: Co-author of "Texas Pretrial Practice" and has written law review articles in the Baylor, Oak Brook, South Texas, and St. Mary's law reviews.</p> <p>- Other: In 2004, Justice Brister cited Justices Clarence Thomas and Antonio Scalia and former Texas Supreme Court Chief Justice Tom Phillips as his role models<sup>106</sup> Member, Redeemer Presbyterian Church, Austin; He and his wife Julia, have four daughters.</p>
David Medina	Perry/ 2004. Elected	2012	- Biographical information: J.D. South Texas College of Law 1989; B.S. Southwest Texas State University (now Texas State University-San

<sup>104</sup> Blakeslee, *supra* note 107.

<sup>105</sup> *Id.*

<sup>106</sup> Dallas Morning News Candidate Quiz, at <http://www.vgt2004.org/a-dallas/candidate-detail.go?id=181732>.

	2006.		<p>Marcos); 1996-2000, 157<sup>th</sup> Harris County State District Court, appointed by then-Gov. George W. Bush, elected in November 1996 and again in November 1998; Served as Texas Governor Perry's general counsel.</p> <p>- Professional affiliations: Associate general counsel for Cooper Industries Inc., Houston; Rejoined Cooper in 2000 as associate general counsel for litigation, responsible for supervising Cooper's litigation and product-safety matters throughout the world; American Bar Association Regional Moot Court National Championship Team; Former Board Member of Habitat for Humanity and Houston Metro; Board for the Spring Klein Baseball Association; Adjunct professor for South Texas College of Law, where he taught advanced civil trial litigation.</p> <p>- Notable quotes: Governor Perry credited Medina with resolving more than 5,000 cases and "earning a reputation as a fair-minded jurist who weighed his decisions with great deliberation."<sup>107</sup> Announcing Medina's appointment to the Court, Governor Perry said, "I looked for a person who would further the court's philosophy of judicial restraint, a person of integrity who would keep faith with the people of Texas, and a person whose courtroom experience would add new talent and continued professionalism to the Supreme Court. I found all of those qualifications and more in Judge David Medina."<sup>108</sup></p> <p>- Other: Manager of his son's Select baseball team; Voted as one of the top jurists in Harris County by the Houston Bar Association.</p>
Paul W. Green	2004	2010	<p>- Biographical information: J.D. St. Mary's University School of Law 1977; Business degree University of Texas at Austin 1974; Litigation practice with his father for 17 years; 1994-2004, Elected to the Fourth Court of Appeals.</p> <p>- Professional affiliations: Served as president of the San Antonio Bar Association, director of the State Bar of Texas, and as a member of the House of Delegates of the American Bar Association;</p>

<sup>107</sup> *Id.*

<sup>108</sup> Gov. Rick Perry, Press Release (Nov. 9, 2004), at <http://www.governor.state.tx.us/divisions/press/pressreleases/PressRelease.2004-11-09.3100>.

			<p>Member of The American Law Institute, the American Judicature Society, the College of the State Bar of Texas, and the Austin and San Antonio Bar Associations; Founding member of the William S. Sessions American Inn of Court; Fellow of the Austin Bar Foundation and a Sustaining Life Fellow of the San Antonio and Texas Bar Foundations.</p> <p>- Other: Licensed to practice in the U.S. District Courts for the Western and Southern Districts of Texas, and the U.S. Fifth Circuit Court of Appeals.</p>
Phil Johnson	Perry/ 2005; Elected 2006.	2008	<p>- Biographical information: Texas Tech University and Texas Tech University School of Law, where he was a member of the law review; U.S. Air Force pilot 1965-1972; Practiced law with the Lubbock law firm of Crenshaw, Dupree &amp; Milam, L.L.P, primarily civil litigation matters, 1975-1998; Elected to the Seventh Court of Appeals in 1998; Elected chief justice the Seventh Court of Appeals in 2002.</p> <p>- Professional/political affiliations: Served as president of the Lubbock County Bar Association; Member of the College of the State Bar; Life Fellow of the Texas Bar Foundation and the American Bar Foundation, Board of Trinity Christian School, Southwest Lighthouse for the Blind, Golden Spread Council of the Boy Scouts of America, and the Lubbock Area Foundation; Active in and served as president of his local Kiwanis Club; Served on numerous committees of the State Bar of Texas and is a Life Fellow of the Texas and American Foundations; Board certified in civil trial law and personal injury trial law; Involved with numerous conservative organizations: AFA, Christian Coalition, Eagle Forum, FRC, Focus on the Family, Rutherford, Texas Right to Life, Trinity, Bannockburn Baptist Church (Austin).<sup>109</sup></p> <p>- Notable quotes: According to United States Senator John Cornyn, Johnson is committed to the rule of law: “As a former Justice on the Texas Supreme Court, the state of our judiciary is important to me. That is why we need Justice Phil Johnson re-elected to the high court. Phil Johnson believes, as I do, that our courts need judges who are qualified,</p>

<sup>109</sup> *Id.*

			<p>experienced and committed to the rule of law, not judges who legislate from the bench.”<sup>110</sup> Justice Johnson believes <i>Roe v. Wade</i>, <i>Santa Fe ISD v. Doe</i>, and <i>Lawrence v. Texas</i> were incorrectly decided.<sup>111</sup> Ronald Reagan best represents his political philosophy.<sup>112</sup> Justice Antonian Scalia best represents his judicial philosophy, and he sees himself a strict constitutionalist (9 on a 1-10 scale, with 10 being the highest).<sup>113</sup></p> <p>- Other: Vietnam veteran, U.S. Air Force fighter pilot; Military Honors: Silver Star, Distinguished Flying Cross, and Republic of Vietnam Cross of Gallantry; Married to Carla Jean Johnson, five children.</p>
Don R. Willett	Perry/ 2006.	2012	<p>- Biographical information: J.D. with honors and M.A. in political science, Duke University; B.A. Baylor University; Senior Editor of Law &amp; Contemporary Problems and Editor of the Duke International &amp; Comparative Law Annual at Duke University; Law clerk to Judge Jerre S. Williams of the U.S. Court of Appeals for the Fifth Circuit.; Employment/labor law, Austin office of Haynes and Boone, L.L.P; Pro bono matters for various nonprofit legal foundations; Deputy Texas Attorney General for Legal Counsel and chief legal adviser to Attorney General Greg Abbott; Deputy Assistant Attorney General for Legal Policy at the U.S. Department of Justice; Special Assistant to President George Bush in the White House; Advisor to then-Governor George W. Bush Bush-Cheney 2000 Presidential Campaign and Transition Team.</p> <p>- Professional affiliations: Fellow of the Texas Bar Foundation and member of the American Law Institute; Supreme Court Liaison to the Texas Center for Legal Ethics and Professionalism; Judicial Advisory Board of the Texas Association for Court Administration; Texas Commission on Volunteerism &amp; Community Service; Texas Commission on Judicial Efficiency (judicial selection reform task</p>

<sup>110</sup> See, the official homepage for Justice Phil Johnson, at <http://www.justicephiljohnson.com/default.php?category=home&content=home>.

<sup>111</sup> Free Market Foundation Voter Guide, at <http://www.freemarket.org>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

		<p>force); 1997–98 Class of Leadership Austin; National Fatherhood Initiative, Big Brothers Big Sisters of Central Texas, SafePlace, the Texas Lyceum Association, advisory board of the Texas Review of Law &amp; Politics, advisory board of the Federalist Society (Austin chapter), the national steering committee for Baylor University's proposed George W. Bush Presidential Library Center, and the Baylor University Council for Institutional Development; Class XXII member of the Governor's Executive Development Program; Senior Fellow with the Texas Public Policy Foundation; Non-resident fellow with the Program for Research on Religion and Urban Civil Society (PRRUCS) at the University of Pennsylvania.</p> <p>- Notable quotes: Texas Agriculture Commissioner Susan Combs called Willett “unflinchingly conservative” and his academic and conservative credentials “impeccable.” “[H]is steadfast strict constructionist philosophy is exactly what Texas needs on its highest Court.”<sup>114</sup></p> <p>Focus on the Family founder and Chairman James Dobson, not known to give political endorsements, gave Willett his “unqualified personal endorsement:” “He is a staunch judicial conservative, who will never legislate from the bench. He understands perfectly that the judiciary’s role in our constitutional system is limited to interpreting and applying law.”<sup>115</sup></p> <p>Founder and Chairman of Prison Fellowship Chuck Colson joined in the accolades of praise: “I’ve known and worked with Don Willett for years. He’s an able advocate with a deep passion for justice.”<sup>116</sup></p> <p>- Judicial evaluations/surveys: Voted most qualified in judicial bar polls, 2006.</p> <p>- Other: Outstanding Young Alumnus of Baylor University; Austin Under 40 Award for Government and Public Affairs; Faith and Integrity in Legal Services Award; He and his wife Tiffany have two sons; Tiffany, was also part of President Bush's White House staff, serving as Education Director for</p>
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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

			the President's Commission on White House Fellowships.
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## CONCLUSION

Although the Court has not been called to decide any cases involving life issues, one could surmise the judges would uphold prolife laws. The election of republican judges has resulted largely in a Court that says it is committed to the rule of law. Essentially, the judges say they are committed to the rule of law. Several factors have had an influence over the last several years on the election of conservative justices who support the rule of law: The Republican Party platform, the Republican sweep of all statewide elected offices, Republican majorities in both State Houses, and conservative groups playing more attention to judicial elections and providing voter guides. Indeed, when appointing justices, Governor Perry has made a point of stating he seeks justices who will interpret and not make law. The tenure of current justices is likely to be longer than previous justices, as salaries have been increased significantly.<sup>117</sup> Election challenges to conservative justices have not been successful over the last several years. For these reasons, the Texas Supreme Court is likely to remain conservative, interpreting law rather than making it.

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<sup>117</sup> In 2005, the Texas Legislature raised the annual salaries of the chief justice from \$115,000 to \$150,000 and associate justices from \$113,000 to \$150,000.