STAYING THE COURSE: AN UPDATE ON THE ALABAMA SUPREME COURT

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From 1994-2004, the Alabama Supreme Court underwent a significant transformation—a transformation in both legal philosophy and how the court views its own constitutional role. Some of the highlights of this transformation were detailed in the excellent work of Professor Michael DeBow of the Cumberland School of Law at Samford University entitled *The Road Back From "Tort Hell": The Alabama Supreme Court, 1994-2004*, published in 2004 by the Federalist Society.[1]

This paper is something of a supplement to Professor DeBow's work. In many respects, it simply picks up where Professor DeBow left off, and focuses on the court's jurisprudence of the last few years to provide a quick "snapshot" of the current court's general judicial philosophy. As described below, it appears that the court has made a determined effort to "stay the course," to remain consistent with its heightened respect for the separation of powers doctrine.

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To set the stage for an examination of the current Alabama Supreme Court, a brief recapitulation of Professor DeBow's observations of the 1994-2004 court is necessary:

* By 1994, Alabama had, according to many, acquired the reputation of "tort hell." Punitive damages, which were traditionally awarded in only a small number of cases for particularly egregious conduct, began to be awarded much more frequently, in larger and larger amounts, and for behavior that some thought did not justify such a penalty. Breach of contract actions (which do not allow for punitive damages) were cast as fraud actions (which do allow for punitive damages). Conflating breach of contract and fraud claims was aided by a 1989 Alabama Supreme Court decision adopting a "justifiable reliance" standard for fraud claims, which allowed a person to ignore clear contract terms and bring a fraud action based on an allegation that they relied on a representation different from what clearly appeared in the contract.[2] Attempts at tort law reform (such as caps on punitive damages) were deemed unconstitutional under the Alabama Constitution by the Alabama Supreme Court.[3]

* Beginning with the highly contested 1994 election of Perry Hooper, Sr. to the position of Chief Justice, the court underwent a drastic change in its membership. Before the election of Chief Justice Hooper, the court was made up of nine Democrats. At the time of the election of 2004, there were eight Republicans, and the only Democrat left on the court was retiring. The primary thrust of the Republicans' judicial campaigns during this ten-year period was to combat Alabama's reputation as a place to find "jackpot justice"—a place where businesses and individuals did not have confidence in the stability or predictability of the courts. The Republicans claimed that Alabama needed judges that would strictly follow the law, and would not rule based upon personal or political desires.

* Following the United States Supreme Court's 1996 decision in *BMW v. Gore*[4]—a case that garnered national attention and criticism when an Alabama court awarded a plaintiff $4 million in punitive damages because the plaintiff had not been told by BMW that his car had been repainted before he received it—the Alabama Supreme Court intensified its review of punitive damages awards to ensure that they comported with the evidence

in the case and the purposes of punitive damages, and did not violate a defendant's due process rights. Although it had not yet been directly challenged, the court strongly indicated that the 1999 tort reform legislation would be considered a legitimate legislative act and would not violate the right to a trial by jury as the court had ruled in 1993.[5]

* In 1997, the court abandoned its experiment with "justifiable reliance" for fraud claims and returned to the traditional test of "reasonable reliance."[6] The traditional test bars fraud claims where a plaintiff ignored clear contract terms that conflicted with an alleged misrepresentation by a defendant.

* In 2002, the court again backed away from its previous positions and dismissed the "Equity Funding Case," a long-standing case stemming from a trial judge's attempt to judicially manage the *purely* legislative task of determining how Alabama was to fund its school system.

I. Separation of Powers

As it did in finally dismissing the "Equity Funding Case" in 2002,[7] the Alabama Supreme Court continues to rigorously enforce the Alabama Constitution's express separation of powers provision—a characteristic that appears to be one of the hallmarks of this court. Indeed, that constitutional provision—Section 43—appears to call for such rigorous enforcement, as it is, in the court's words, "a command stated with a forcefulness rivaled by few, if any, similar provisions in constitutions of other sovereigns strongly worded."[8] Section 43 states:

> In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall *never* exercise the executive and judicial powers, or either of them; the executive shall *never* exercise the legislative and judicial powers, or either of them; the judicial shall *never* exercise the legislative and executive powers, or either of them; *to the end that it may be a government of laws and not of men*.[9]

Looking at recent case history, it appears that the current court is quite willing to resist involving itself in areas reserved to the Legislature or the Executive, even when its members might personally desire that those branches take a different course on a particular issue. Further, the court does not hold to a mere formalistic, blind following of the separation of powers doctrine (although such formalism is arguably preferable to a more "creative" approach to constitutional provisions). Instead, the court has articulated why maintaining the separation of powers doctrine is important. This understanding is reflected in the court's 2005 decision in *Birmingham-Jefferson Civic Center Authority v. City of Birmingham* ("*BJCC*").[10]

In *BJCC*, the court refused to interfere with what it saw as a purely legislative matter: whether sufficient votes were cast to pass a bill in the legislative houses. At issue was the interpretation of Section 63 of the Alabama Constitution, which provides that "no bill shall become a law, unless on its final passage it be read at length, and the vote be taken by yeas and nays, the names of the members voting for and against the same be entered upon the journals, *and a majority of each house be recorded thereon as voting in its favor* . . . ."[11] The question presented was whether the phrase "a majority of each house" meant (1) a majority of a quorum of that house, or (2) a majority of the votes actually cast (either yea or nay, not counting abstentions) in the presence of a quorum.

The only issue in the case was the propriety of the voting in the Alabama House of Representatives. There are 105 members of the House of Representatives, making 53 members a quorum (i.e., the amount necessary to be present in order to do business). The trial court had held that two bills passed by the Legislature were unconstitutional because, although there was a quorum present at the vote on each bill, they had only received 21 and 18 yea votes, with most of the members (55 and 53, respectively) abstaining. The trial court read Section 63's voting requirements to require a majority of the quorum present. However, under the Legislature's long-standing interpretation of Section 63's voting requirements, all that was necessary to pass a bill was that (1) a quorum be present, and (2) the bill receive a favorable majority of the votes actually cast.

Justice See, writing for a unanimous court, held that the case presented a non-justiciable political question, one that was solely within the province of the Legislature to determine. The court began its analysis by noting that its jurisdiction to hear the matter was governed by a

concern for the separation of powers, listing its decision in the "Equity Funding Case" as an example:

> Great care must be exercised by the courts not to usurp the functions of other departments of government. § 43, Constitution 1901. No branch of the government is so responsible for the autonomy of the several governmental units and branches as the judiciary. Thus, just as this Court will declare legislative usurpation of the judicial power violative of the separation-of-powers provision of our Constitution, so it must decline to exercise the judicial power when to do so would infringe upon the exercise of the legislative power.
>
> The separation-of-powers provision of the Alabama Constitution limits the jurisdiction of this Court. In *Ex parte James*, 836 So. 2d 813, 815 (Ala. 2002), the "Equity Funding Case," this Court considered the justiciability of the question of the constitutionality of the State's method of funding the public-school system. After issuing four opinions over the course of nine years, we were finally compelled by the mandate of § 43 to dismiss the Equity Funding Case. We dismissed the Equity Funding Case because the judicial branch of government must "'never exercise the legislative and executive powers, or either of them.'" 836 So. 2d at 819 (quoting Ala. Const. 1901, § 43). By finally dismissing the Equity Funding Case as nonjusticiable, we "retreat[ed]" from the "province of the legislative branch" and "return[ed] the Equity Funding Case in toto to its proper forum"- the legislature. 836 So. 2d at 819.[12]

The *BJCC* court vacated the trial court's judgment and dismissed the appeal, unanimously holding that it was without jurisdiction because the interpretation of Section 63's voting requirements was for the Legislature, not the courts, to determine. The court listed three reasons for this holding. First, the court examined the text of the Alabama Constitution and determined that "there is a textually demonstrable constitutional commitment to the legislature of the question of how to determine what constitutes a 'majority of each house . . . voting in [the bill's] favor.'"[13] Second, the court noted that there were no specific, discoverable standards in the text of the constitution by which a court might attempt to resolve the question. This fact "strengthen[s] the conclusion that there had been a textually demonstrable commitment of the question" to the Legislature.[14] Third, the court stated that becoming involved in this question would demonstrate a lack of respect for the Legislature as a co-equal branch of government that, like the judiciary, has a duty to uphold the constitution:

> "The preservation of the constitution in its integrity and obedience to its mandates, is exacted alike from the legislative and the judicial departments of the government." Legislators take the same oath of office that judges and justices take—to "support the Constitution of the United States, and Constitution of the State of Alabama." *See* § 279, Ala. Const. 1901. The Constitution provides that "[e]ach house [of the legislature] shall have power to determine the rules of its own proceedings," and the judiciary should presume that the legislators comply with their oath of office when they determine and apply those rules. If the judiciary questions the legislature's declaration that Act No. 288 and Act No. 357 were validly enacted by the legislature, we would be demonstrating a lack of the respect due that coordinate branch of government.[15]

Justice Parker's special concurrence further emphasized the point that the Legislature has a role in interpreting the constitution, and those interpretations should be given deference, particularly when the constitutional provision at issue relates to the Legislature's inner workings.[16] Notably, Parker's opinion contained a quotation made by a congressman early in our country's history, which highlights the dangers of judicial usurpation of power (the subject of many modern legal debates) by failing to defer to the constitutional interpretations of co-equal branches of government:

> By what authority are the judges to be raised above the law and above the constitution? Where is the charter which places the sovereignty of this country in their hands? Give them the powers and the independence now contended for, and they will require nothing more; for your government becomes a despotism, and they become your rulers. They are to decide upon the lives, the liberties, and the property of your citizens; they have an absolute veto upon your laws by declaring them null and void at pleasure; they are to introduce at will the laws of a foreign country, differing essentially with us upon the great principles of government; and after being clothed with this arbitrary power, they are beyond the control of the nation, as they are not to be affected by any laws which the people by their representatives can pass. If all this be true; if this doctrine be established in the extent which is now contended for, the constitution is not worth the time we are now spending upon it. It is, as it has been called by its enemies, mere parchment. For these judges, thus rendered omnipotent, may overleap the constitution and trample on your laws; they may laugh the legislature to scorn and set the nation at defiance.[17]

It would seem from the unanimous language of the *BJCC* decision, in accordance with the "Equity Funding Case" decision and others, that the Alabama Supreme Court will now carefully scrutinize issues that come before it to make sure that the court—or any other branch of government—does not overstep its proper bounds.[18]

II. State Constitutional and Statutory Interpretation

A. Constitutional Interpretation

In light of the recent "gay marriage" dispute, where some state courts have construed their state's constitution to include the right to homosexual marriage,[19] there has been a great deal of discussion across the country about the proper method of state constitutional interpretation. This is an important issue because a state's highest court has the last word on the meaning of that state's constitution.

One example not mentioned in Professor DeBow's paper, but that illustrates to some degree a clash of differing interpretational philosophies, is the Alabama Supreme Court's 1999 decision in *Ex parte Melof*.[20] In *Melof*, the court reversed a line of previous decisions that had actually created and relied upon a constitutional provision—an "equal protection provision"—where none existed in Alabama Constitution of 1901. It was undisputed that such a provision existed in earlier Alabama constitutions, but that it had been intentionally removed in the 1901 Constitutional Convention[21] in an unfortunate overall effort to hinder black Alabamians. However, in 1977, the court mistakenly ruled[22] that various other constitutional provisions somehow combined to form the essence of an "equal protection provision" similar to, but not necessarily identical to, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[23] This "provision" had no specific text, and therefore no history to be examined, but was merely the "spirit" behind several different provisions.[24]

Like the federal Constitution's Equal Protection Clause, an equal protection provision in the Alabama Constitution would carry with it certain substantive limitations on the state, and could be interpreted as providing much greater limitations than those provided under the Equal Protection Clause. Because this "provision" was found to be part of the Alabama Constitution, any ruling by the Alabama Supreme Court under the provision would not be reviewable by the United States Supreme Court. The Alabama Supreme Court would go on to use what came to be known as the "phantom equal protection provision" to strike down tort reform legislation as unconstitutional[25] and to restructure the funding of Alabama's educational system.[26]

The phantom equal protection provision finally met its end in *Melof*. In that decision, the court stressed that it could not simply create constitutional provisions under the guise of "interpretation," and that, even though several past decisions had relied on the phantom provision, the principle of *stare decisis* could not apply to uphold a wholly unfounded constitutional interpretation. Although several of the justices made it clear that they personally desired that the Alabama Constitution contain an equal protection provision[27]—Justice Houston even

included in his special writing a letter to members of all three branches of Alabama's government expressing this desire[28]—the court ultimately found that a strong desire to see a state constitution written differently does not provide grounds for a court to simply declare it to be so.

Justices Cook, Kennedy and Johnstone dissented from the majority in *Melof*.[29] Acknowledging that the Alabama Constitution of 1901 did not have an express "equal protection provision," the dissenters found the essence of such a provision in and among other constitutional provisions. Justice Cook described in detail how the Constitutional Convention of 1901—including the elimination of the equal protection provision from earlier constitutions—was explicitly under-girded with racist motivations. Justice Cook's opinion provided much support for the general concept of equal protection under the law and for the inclusion of an equal protection clause in Alabama's Constitution. He also argued that some other states do not have an explicit "equal protection provision," but have nonetheless construed their state constitutions to include one.[30]

Although he wrote the majority opinion, Justice Houston also filed a special concurrence in which he responded to Justice Cook's impassioned defense of an implicit equal protection provision. Justice Houston acknowledged the strength of Justice Cook's arguments (especially Cook's accurate description of the racist motivations behind the framing of the Alabama Constitution of 1901), but, in a concurrence that provides a classic example of a restrained judicial philosophy, Houston explained how the framers' abuse of power served only as more reason to show judicial restraint:

> Among Supreme Court Justices, the notion of truth should be paramount. As demonstrated by Justice Cook's well-documented account of the racially biased forces that were present at the Constitutional Convention of 1901, we have all seen how much damage can be done by the State when truth is overlooked in favor of expedience and power. If I have done anything by consistently pointing out what is unfortunately but unmistakably true—that Alabama's Constitution currently has no equal-protection clause—I have attempted to keep the Court from corrupting not only the Constitution, but itself as well. We pour corruption on both sacred entities by failing to resist the urge to drink from the chalice of illegitimate, but available, power. With that understood, I want to underscore one unavoidable truth: that the power to amend the Constitution rests with the people of the State of Alabama, not with the members of this Court. . . .
>
> As a legal document, a constitution does not change on its own. The very purpose of protecting individuals would be undermined if those in charge of interpreting the constitution were to add or delete provisions to reflect "changes in society." Why? Because both the question of who selects the interpreter and the question of what counts as a "change in society" will be decided by those in power at any particular time. No, as a legal document, a constitution can change only if the parties who gave effect to the document—the people—call for change. This recognition of the exclusive right of the people to change their own constitution is inherent in the amendment procedure. . . .
>
> To be sure, a judicial declaration [creating an "equal protection provision"] would be much faster and easier than a constitutional amendment. Also, I am sure that the general population would overwhelmingly support such a declaration. There would be very little resistance or grumbling among the citizens of Alabama, so why not?
>
> The problem, of course, as I have illustrated above, is that while such a popular declaration may be all right today, we must ask: What about tomorrow's judge and tomorrow's issue? If we are not restrained to the text of the Constitution; if we current Justices can amend it today by judicial declaration to include a provision that the people have not put there, will the next "declaration" be so favorable? As Justice Cook has made clear in his dissent, those with power can do some horrible things for some horrible reasons. It is naive to think that something like that could

not happen again. As the saying goes, those who do not pay attention to history are doomed to repeat it.

Might does not make right. We should not, simply because we can, shift the power to amend the Constitution from the hands of the people into the hands of nine Supreme Court Justices. I wholeheartedly believe that the Alabama Constitution should have an equal-protection clause, but I do not believe in obtaining it by a method that would turn this Court into an autonomous super-legislature.[31]

Justice Johnstone concurred in Justice Cook's reasoning, but wrote separately contending that the principles of *stare decisis* precluded the abrogation of the phantom provision, given the court's reliance upon that provision since 1977.[32] However, as Justice Houston noted in his special concurrence,[33] and as the court has made clear since,[34] *stare decisis* cannot remedy a wholly baseless constitutional interpretation. The limited role of *stare decisis* in constitutional interpretation has been explained by the court as follows:

> [W]hen the Constitution is misinterpreted, the doctrine of stare decisis is not entitled to the deference it otherwise receives. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), the United States Supreme Court stated that, while the doctrine of stare decisis counsels against a reconsideration of precedent, the Court has been particularly willing to reconsider constitutional cases because, in such cases, correction through legislative action is practically impossible.[35]

There have not been many opportunities for the newer members of the Alabama Supreme Court to write to these issues. However, their strong respect for the separation of powers doctrine, and their "strict constructionist" approach to statutory construction discussed below, are indicators that the current court members will follow the same philosophy of judicial restraint shown by the *Melof* majority in the area of constitutional interpretation.

B. Statutory Interpretation

The current Alabama Supreme Court takes a "strict constructionalist" approach to constitutional interpretation (i.e., following the meaning of the actual text to which the people of the state have agreed to be bound through their representatives in the Legislature). This approach, which is guided by a concern for separation of powers, was fleshed out in 1999 in *DeKalb County LP Gas Co. v. Suburban Gas*.[36] In that case, the court stated:

> Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.
>
> It is true that when looking at a statute we might sometimes think that the ramifications of the words are inefficient or unusual. However, it is our job to say what the law is, not to say what it should be. Therefore, *only if there is no rational way to interpret the words as stated will we look beyond those words to determine legislative intent.* To apply a different policy would turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers.[37]

The court has made a strong effort to maintain this strict constructionist approach,[38] an approach that has been adopted by the newer members of the court.[39] However, the court has recently emphasized that the doctrine of *stare decisis* carries much greater weight in analyzing previous interpretations of statutes than it does in constitutional interpretation, because erroneous interpretations of statutes are much easier to correct than are erroneous constitutional interpretations.[40] As the court stated in a 2005 decision rejecting a "plain meaning" argument:

> We note that we are not here concerned with a constitutional issue, but rather a statute whose meaning has been settled by caselaw. When revisiting this Court's interpretation of a statute, we will afford greater deference to the doctrine of stare decisis than we would if asked to revisit an interpretation of a constitutional provision.[41]

III. Tort Reform

On the matter of tort reform, it should be beyond dispute that, just as a court should not be "pro-defendant" or "pro-plaintiff," a court should not have a "position" on tort reform. Rather, a court should instead resist the urge to allow personal prejudices or passions divert it from following the law—regardless of which side's interests are ultimately victorious. This type of judicial restraint follows the sentiments of former United States Supreme Court Chief Justice Warren Burger:

> The temptation to exceed our limited judicial role and to do what we regard as the more sensible thing is great, but it takes us on a slippery slope. Our duty, to paraphrase Mr. Justice Holmes in a conversation with Judge Learned Hand, is not to do justice but to apply the law and hope that justice is done.[42]

Some have argued that in this way (i.e., through predictability and stability in the legal system) the judiciary might have kept Alabama from becoming "tort hell." The judiciary can provide this predictability and stability by allowing the people to be governed by the laws that the people choose, rather than the laws that a handful of judges think they should have chosen.

The discussion of the Alabama Supreme Court and tort reform has two primary aspects. The first is the current court's deference to the Legislature's enactment of tort reform statutes. As reflected in Professor DeBow's paper, the "post-transformation" court's more recent line of decisions[43] rejecting the rationale from *Henderson v. Alabama Power Co.*[44] (where the court ruled that caps on damages were unconstitutional as a violation of the right to a trial by jury)—and the unavailability of concepts like the "phantom equal protection provision"—demonstrate that tort reform legislation, such as that passed in 1999, will not be targeted for "special" constitutional treatment.[45] Rather, such enactments will be upheld as a legitimate exercise of legislative power unless it can be shown "beyond a reasonable doubt" that those statutes violate an express constitutional provision.[46]

The second aspect of this discussion involves the Alabama Supreme Court's decisions that enforce Alabama's tort reform statutes and follow the United States Supreme Court's decisions ensuring punitive damages awards do not violate federal constitutional due process standards. By statute, Alabama has set a high burden of proof that plaintiffs must satisfy in order to be entitled to punitive damages. A plaintiff must prove "by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."[47] Of course, these are, in reality, just words subject to interpretation. However, the current Alabama Supreme Court, consistent with its view of separation of powers and its strict approach to statutory construction, has taken this strong statutory language quite seriously.[48] As one Justice indicated, this language should probably preclude many breach-of-contract claims involving sometimes tough, but legal, business decisions that have been improperly converted into fraud claims[49] for the purposes of acquiring punitive damages.[50]

With regard to the due process review of punitive damages awards mandated by the United States Supreme Court, Professor DeBow noted that, in 2004, the Alabama Supreme Court was rigorously reviewing such awards *de novo*[51] (i.e., not giving deference to the lower court's conclusions regarding the propriety of punitive damages) in accordance with the standards outlined in *BMW v. Gore* and its progeny.[52] The current Alabama Supreme Court shows no signs of changing that course, although there have not been many post-2004 punitive damages decisions of note.

One decision of some interest, however, is *Robbins v. Sanders*,[53] as it shows the court's attempt to keep sharply in mind the traditional purposes of punitive damages, even in the face of egregious conduct. In *Robbins*, the court ruled that, although the defendant's conduct was reprehensible, any award of punitive damages would be excessive where defendant's payment

of even part of the substantial compensatory damages award[54] would leave that defendant financially destroyed (i.e., with a negative total net worth). According to the court, such a result would be inconsistent with the purpose of punitive damages, which "must not exceed an amount that would accomplish society's goals of punishment and deterrence."[55]

IV. Role of the Court, the Federal Constitution, and the Rule of Law

Although the Alabama Supreme Court is not monolithic and its members do not always come to the same conclusions,[56] they do for the most part share the same philosophy of judicial restraint and respect for separation of powers when it comes to interpreting constitutional or statutory texts, as we have seen in the cases above. The primary *major* philosophical division on the Alabama Supreme Court concerns its role when faced with certain interpretations of the federal Constitution by the United States Supreme Court. This issue came to light in a most public way during the 2006 Alabama Republican primaries, when Justice Tom Parker sought the office currently held by Chief Justice Drayton Nabers.

Justice Parker, reflecting the stances he previously voiced as spokesman for former Chief Justice Roy Moore, took the other court members to task in a newspaper Op. Ed piece[57] for reversing the death sentence of Renaldo Adams.[58] Adams had been convicted of a particularly heinous rape and murder of a pregnant mother and her unborn child in front of her other children. The court, however, had not made an independent decision to reverse; it reversed in light of the United States Supreme Court's decision in *Roper v. Simmons*,[59] in which the Supreme Court held 5-4 that it was unconstitutional under the Eighth Amendment to the federal Constitution to execute any convicts who were less than 18 at the time of their crimes. Because the Eighth Amendment is binding on the states, and because Renaldo Adams was 17 when he committed his crimes, the Alabama Supreme Court was compelled to reverse his death sentence. In reversing, the Alabama Supreme Court followed the conventional, and almost unanimously held, model of the rule of law that the United States Supreme Court is the last word on the meaning of the federal Constitution, and because state judges take an oath to follow that Constitution, they are compelled to follow the United States Supreme Court's interpretations of it.

In his Op. Ed piece, Justice Parker claimed that the Alabama Supreme Court Justices had no duty to follow *Roper*, because, in his view, *Roper* was wrongly decided and decisions like *Roper* only bound the particular parties in that case. Parker contended that the Alabama Supreme Court had an independent duty to the Constitution, not the views of five members of the United States Supreme Court. Parker claimed that the Alabama Supreme Court should have "protested" the *Roper* decision in some way and given the United States Supreme Court a chance to reverse itself, just as the Missouri Supreme Court had done and which led to the United States Supreme Court's reversal of its own precedent (by affirming the Missouri court) in *Roper*.[60] Not surprisingly, Justice Parker's decision to publicly criticize the other members of his court in a newspaper Op. Ed did not elicit a positive response from his colleagues.[61]

This "rule of law" controversy dissipated following the primaries, where Parker's attempt to acquire the Chief Justice seat was defeated by a large margin, as were the judicial candidates associated with Parker. It is unclear, however, whether Alabama has heard the last of this controversy.

Conclusion

Overall, the Alabama Supreme Court has made a great effort to "stay the course" that it set during its transformation from 1994 to 2004. Court observers concerned about the tendency of courts in some other states to rule in a more activist manner are generally complimentary of the current Alabama Supreme Court's approach to the separation of powers. The court has stressed in its recent opinions that, when citizens make laws through their elected representatives or make contracts with each other, those written documents will be construed strictly in accord with their text and enforced, unless it is clear they are illegal. Such stability and predictability is precisely what the judiciary—the "least dangerous branch" of our government—should provide.[62]

Endnotes

[1] http://fed-soc.org/Publications/White%20Papers/alabama.pdf ("DeBow Paper").

[2] Hickox v. Stover, 551 So. 2d 259 (Ala. 1989). In his paper, Professor DeBow cites the Court's decision changing the fraud reliance standard as *Johnson v. State Farm Ins. Co.*, 587 So. 2d 974 (Ala. 1991). However, as the *Johnson* opinion notes, the standard was first proposed for consumer transactions by then-Chief Justice Hornsby in 1989 in a special writing in *Southern States Ford v. Proctor*, 541 So. 2d 1081, 1087-92 (Ala. 1989), and then was adopted by the Court in *Hickox* (which involved a commercial transaction). Following *Hickox* and before *Johnson*, the new standard was used in both consumer and commercial transactions. The *Johnson* opinion merely clarified the switch in standards that had already taken place. *See Johnson*, 587 So. 2d at 977-79.

[3] *See* Henderson v. Alabama Power Co., 627 So. 2d 878 (Ala. 1993).

[4] 517 U.S. 559 (1996).

[5] Professor DeBow noted that, in 2004, the U.S. Chamber of Commerce's annual opinion survey relating to litigation ranked Alabama 48th overall, and 43rd with respect to punitive damages. *See* DeBow Paper at 9. In the latest survey, Alabama is still ranked 48th overall, but has shown slow improvement in the area of punitive damages, coming in at 42nd. 2006 U.S. Chamber of Commerce State Liability Systems Ranking Study (March 17, 2006) *available at* http://www.instituteforlegalreform.com/harris/pdf/2006_FULL_Report_FINAL.pdf.

[6] Foremost Ins. Co. v. Parham, 693 So. 2d 409 (Ala. 1997).

[7] *See* DeBow Paper, *infra* note 1 at 6-7 (discussing *Ex parte James*, 836 So. 2d 813 (Ala. 2002)).

[8] *Ex parte James*, 836 So. 2d 813, 815 (Ala. 2002).

[9] Art. III, § 43, Ala. Const. 1901 (emphasis added). *See also* Art. III, § 42, Ala. Const. 1901 ("The powers of the government of the State of Alabama 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.").

[10] 912 So. 2d 204 (Ala. 2005).

[11] Art. IV, § 63, Ala. Const. 1901 (emphasis added).

[12] *BJCC*, 912 So. 2d at 212-13 (citations, internal quotations, and footnote omitted).

[13] *Id.* at 218.

[14] *Id.*

[15] *Id.* at 219 (citations omitted).

[16] *Id*. at 222-27 (Parker, J., concurring specially).

[17] *Id*. at 223 (quoting former Maryland Congressman Joseph Nicholson).

[18] *See* McInnish v. Riley, 925 So. 2d 174 (Ala. 2005) (holding a statute allowing a legislative committee to both determine *and disburse* education appropriations unconstitutionally usurped the power of the Governor; interestingly, both the Legislature and the Governor had filed briefs in support of the statute); *see also Opinion of the Justices No. 380*, 892 So. 2d 332 (Ala. 2004).

[19] *See* Goodrich v. Department of Pub. Health, 440 Mass. 309, 798 N.E.2d 941 (2003) (unconstitutional under the Massachusetts Constitution to refuse to permit gay marriage); Baker v. State, 170 Vt. 194, 744 A.2d 864 (1999) (unconstitutional under Vermont Constitution to deny benefits of marriage to homosexual couples). Also, on February 15, 2006, the New Jersey Supreme Court held oral argument in *Lewis v. Harris*, a challenge brought under the New Jersey Constitution similar to that presented in *Goodrich* and *Baker*. A ruling in *Lewis* is imminent.

[20] 735 So. 2d 1172 (Ala. 1999).

[21] *See Opinion of the Justices No. 102*, 252 Ala. 527, 530, 41 So. 2d 775, 777 (1949) ("We point out that there is no equal protection clause in the Constitution of 1901. The equal protection clause of the Constitution of 1875 was dropped from the Constitution of 1901.").

[22] In creating the Alabama "equal protection provision," the court had adopted as law a clearly erroneous description of an earlier Alabama decision that appeared in a legal publication. *See Ex parte Melof*, 735 So. 2d at 1185-86 (discussing City of Hueytown v. Jiffy Chek Co., 342 So. 2d 761 (Ala. 1977), and Peddy v. Montgomery, 345 So. 2d 631 (Ala. 1977)). The publisher later corrected this obvious error, but, until *Melof*, the Court did not correct its reliance upon it. *Id.*

[23] *See* U.S. Const. amend. XIV ("no state shall … deny to any person within its jurisdiction the equal protection of the laws.").

[24] In this way, the "provision" was somewhat analogous to the infamous "right to privacy" in the federal

Constitution, which has no text but it is simply found in and among the "penumbras, formed by emanations from" certain guarantees contained in the Bill of Rights. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

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

[26] *See* Pinto v. Alabama Coalition for Equity, 662 So. 2d 894, 901-10 (Ala. 1995) (Houston, J., concurring in the result).

[27] *Ex parte Melof*, 735 So. 2d at 1186-88 (Hooper, C.J., concurring specially); *Id.* at 1188 (Maddox, J., concurring specially); *Id.* at 1192-96 (See, J., concurring specially).

[28] *Id.* at 1191 (Houston, J., concurring specially). In fact, Justice Houston had held that desire since the "phantom" status of Alabama's "equal protection provision" was discovered. *See Moore*, 592 So. 2d at 175 (Houston, J., concurring in the result) ("If I were drafting a constitution, I would make certain that there was an equal protection clause in that constitution; however, there is not one in the Alabama Constitution.").

[29] Justices Cook and Kennedy actually concurred in the result but dissented from the Court's reasoning concerning the phantom equal protection clause. *See Ex parte Melof*, 735 So. 2d at 1195-1205 (Cook, J., concurring in the result; dissenting from the rationale). Justice Johnstone dissented, but appears to have dissented only from the Court's rationale. *See id.* at 1205-08 (Johnstone, J., dissenting).

[30] *Id.* at 1195-1205 (Cook, J., concurring in the result; dissenting from the rationale).

[31] *Ex parte Melof*, 735 So. 2d at 1188-90 (Houston, J., concurring specially).

[32] *Id.* at 1205-08 (Johnstone, J., dissenting).

[33] *Id.* at 1191-92.

[34] *See, e.g.*, Hexcel Decatur, Inc. v. Vickers, 908 So. 2d 237, 241-42 (Ala. 2005); Marsh v. Green, 782 So. 2d 223, 232-33 (Ala. 2000).

[35] *Marsh*, 782 So. 2d at 232 (citations and internal quotations omitted).

[36] 729 So. 2d 270 (Ala. 1998).

[37] *DeKalb County*, 729 So. 2d at 275-76 (citations and internal quotations omitted; emphasis added).

[38] *See* Marc James Ayers, *Unpacking Alabama's Plain-Meaning Rule of Statutory Construction*, 67 ALA. LAW. 31 (Jan. 2006) (discussing the Court's use of the "plain meaning rule" in various contexts).

[39] *See, e.g.,* Munnerlyn v. Alabama Dep't of Corr., ___ So. 2d ___, 2006 WL 1578478 (Ala. June 9, 2006) (Smith, J., writing for the majority, citing *DeKalb County*; Parker, J., concurs); Tolar Constr., LLC v. Kean Elec. Co., ___ So. 2d ___, 2006 WL 1361127 (Ala. May 19, 2006) (Bolin, J., concurs).

[40] *See Ex parte James*, 836 So. 2d 813, 834 (Ala. 2002) ("[L]ike the United States Supreme Court's duty with regard to the federal constitution, our status as final arbiter imputes to us a particularly important duty with regard to the Alabama Constitution, because while our interpretations of statutes can be, in a sense, 'overruled' by subsequent legislative enactment, our interpretations of the Alabama Constitution are beyond legislative alteration.").

[41] *Hexcel Decatur*, 908 So. 2d at 241.

[42] Bifulco v. United States, 447 U.S. 381, 401-02 (1980) (Burger, C.J., concurring) (citing THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND 306-307 (Dilliard ed. 1960)).

[43] *See Ex parte Apicella*, 809 So. 2d 865 (Ala. 2001); Oliver v. Towns, 770 So. 2d 1059 (Ala. 2000); Goodyear Tire & Rubber Co. v. Vinson, 749 So. 2d 393 (Ala. 1999) (Houston, See, Lyons, and Brown, JJ., concurring specially); Tuders v. Kell, 739 So. 2d 1069 (Ala. 1999).

[44] 627 So. 2d 878 (Ala. 1993).

[45] *See* DeBow Paper, *infra* note 1, at 4.

[46] *See, e.g., McInnish*, 925 So. 2d at 178 ("This Court should be very reluctant to hold any act unconstitutional.... This is so, because it is the recognized duty of the court to sustain the act unless it is clear beyond reasonable doubt that it is violative of the fundamental law.") (citations and internal quotations omitted).

[47] Ala. Code § 6-11-20(a) (1975).

[48] *See, e.g*. Morgan Keegan & Co. v. Cunningham, 918 So. 2d 897, 905 (Ala. 2005) (reversing an award of punitive damages that was "not supported by clear and convincing evidence of conduct that would authorize a punitive-damages award"); *see also* Hunt Petro. Corp. v. State,

901 So. 2d 1, 18 (Ala. 2003) (Houston, J., concurring specially) ("Through § 6-11-20, the Legislature has set the burden of proof for determining punitive damages rather high; a party can prove [a tort] by 'substantial evidence' without having the 'clear and convincing evidence' described in the statute as necessary to justify punitive damages....").

[49] Recently, efforts have been made to clarify the difference between breach of contract and fraud, a development which should help stem such attempts to acquire punitive damages through what is truly a breach of contract claim. *See, e.g.*, Dickinson v. Land Dev. Constr. Co., 882 So. 2d 291, 303-05 (Ala. 2003) (Houston, J., concurring specially) (discussing the difference between breach of contract and fraud claims, and stating that "[t]here is a distinct difference between the two claims, but I fear that that distinction is all too often lost in Alabama. Simply put, a plaintiff cannot convert the mere failure to perform or to fulfill a contractual promise into a fraud claim, and that appears to be happening in this case.").

[50] *See Hunt Petro.*, 901 So. 2d at 18 (Houston, J., concurring specially) (stating that, in order to demonstrate "clear and convincing evidence" sufficient to justify punitive damages, "the State needed to present some very strong evidence indicating that Hunt was not acting simply as a business trying to maximize its profits by taking a position as 'aggressive' as possible on the interpretation of a contract provision."); *accord* Titan Indem. Co. v. Newton, 39 F. Supp. 2d 1336, 1348 (N.D. Ala. 1999) (examining Ala. Code § 6-11-20(a), and stating: "It is clear . . . under [Ala. Code § 6-11-20(a),] that punitive damages can never be awarded if there is an objectively good faith reason for the action.").

[51] *See* Horton Homes, Inc. v. Brooks, 832 So. 2d 44, 55-57 (Ala. 2001) (citing Cooper Indus., Inc., v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001)).

[52] DeBow Paper, *infra* note 1, at 4-5.

[53] 927 So. 2d 777 (Ala. 2005).

[54] Compensatory damages are awarded to make the plaintiff whole again; punitive damages are awarded to punish the defendant and to deter similar future activity. *See* DeBow Paper, *infra* note 1, at 3.

[55] *Robbins*, 927 So. 2d at 791 (quoting Williams v. Williams, 786 So. 2d 477, 482 (Ala. 2000), quoting in turn Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989)).

[56] *See, e.g.*, City of Bessemer v. McClain, __ So. 2d __, 2006 WL 2089923 (Ala. July 28, 2006); *Ex parte McCord-Baugh*, 894 So. 2d 679 (Ala. 2004).

[57] *Available at* http://www.alliancealert.org/2006/20060106.htm.

[58] *Ex parte Adams*, __ So. 2d __, 2005 WL 3506662 (Ala. Dec. 23, 2005). Justice Parker was recused from the case because he had participated in the prosecution of Adams.

[59] 543 U.S. 551 (2005).

[60] *See Roper*, 543 U.S. at 628-29 (Scalia, J., dissenting) (discussing how the Missouri Supreme Court "flagrantly disregard[ed]" clear United States Supreme Court precedent in ruling that execution of one who was a minor at the time of his crime was unconstitutional).

[61] *See* Eric Fleischauer, *Tom Woodall criticizes Justices Parker, Moore*, The Decatur Daily, http://www.decaturdaily.com/decaturdaily/news/060419/woodall.shtml.

[62] The Federalist No. 78 (Alexander Hamilton).

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