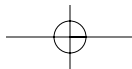
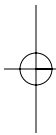
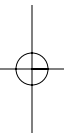


The Road Back from "Tort Hell": The Alabama Supreme Court, 1994-2004

By Michael DeBow
Cumberland School of Law
Samford University







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It would be difficult to find a state supreme court that has changed more in the last decade than the Alabama Supreme Court. In 1994, all nine justices on the court were Democrats – including two conservative, traditionally-minded jurists. Today, on the eve of the 2004 general election, the court is composed of eight Republicans and one Democrat – and it is possible that after the election all the justices will be Republicans.

The Alabama Supreme Court of 1994 was identified in the minds of many with a litigation climate in the state that was hostile to defendants – particularly corporate defendants. The controversial jury verdicts and large damage awards that led to the widespread perception of Alabama as a “tort hell” for defendants¹ stretched back into the 1980s. In 1994 the state supreme court provided a very memorable illustration of this reputation – its decision in *BMW of North America v.*

Gore.² There, the court ordered BMW to pay an Alabama customer \$2 million in punitive damages because the company had touched up the paint job on the vehicle it sold to him without disclosing the repair (which had lowered the resale value of the auto by \$4,000). This \$2 million paint job appears, in hindsight, to have been the last straw for many Alabama voters.

The Alabama Supreme Court of 2004 follows a much more conservative judicial philosophy – one which understands the judicial function as necessarily bound up with the protection of the rule of law, and the separation of powers among the different branches of state government.

The remarkable transformation of the Alabama Supreme Court was the result of the decisions of Alabama voters and the conservative judicial philosophies of the people they elected to that court over the past decade. This paper offers a largely positive evaluation of the recent performance of the court, focusing on the last five years. Section I provides some needed background on the political dynamics of the past decade. Section II then reviews the court’s approach to punitive damages and other civil justice reform matters. Section III takes up the court’s view of its relation to other branches of state government. Section IV offers some brief concluding remarks.

¹ Gregory Jaynes, *Where the Torts Blossom: While Washington Debates Rules About Litigation, Down in Alabama, the Lawsuits Grow Thick and Wild*, TIME, Mar. 20, 1995, at 38.

² 646 So.2d 619 (Ala. 1994).

I. Judicial elections in Alabama, 1994-2006

Judges in Alabama are elected in partisan races. Of course, from the end of Reconstruction until fairly recently, Alabama was a one-party state. Accordingly, for most of the past hundred years, Alabama's judiciary was comprised overwhelmingly, if not entirely, of Democrats.

This *status quo* changed radically in the 1990s.

In the 1994 election cycle, supporters of civil justice reform – including much of the state's business sector – contributed heavily to judicial candidates. Two of the candidates they supported in the supreme court races prevailed. Hugh Maddox – a conservative Democrat – defeated his challenger in the Democratic primary, who received most of his campaign contributions from the plaintiffs' bar. And Perry Hooper, Sr., successfully challenged the incumbent Democratic chief justice, E.C. ("Sonny") Hornsby, a former president of the Alabama Trial Lawyers' Association who enjoyed the unstinting support of the plaintiffs' bar.

Hooper based his campaign on a critique of Alabama's civil justice system and the failure of the "Hornsby Court" to rein in its excesses. On election night 1994, it appeared as though Hooper's critique had found enough of an audience for him to have succeeded in the very difficult task of unseating an incumbent state judge – albeit by a very slim margin. Hornsby, however, challenged the election results. He argued that approximately 2,000 absentee ballots should be counted, even though they were not properly witnessed (by a notary public or by two witnesses) as the relevant state statute had previously been clearly understood to require.³

A voter filed suit in federal court in Mobile to challenge the counting of unwitnessed absentee ballots as a violation of his and other voters' rights of due process and equal protection under the U.S. Constitution. To make a long story short,⁴ by a 4-1 vote the state supreme court ignored the plain meaning of the text of the relevant statute and ruled that absentee ballots need not be witnessed in order to be counted.⁵ Although the federal district judge accepted the state court's answer as determinative, he went on to rule that the state court's answer constituted a change in election procedure that denied the plaintiffs their

Constitutional rights. The district court declared that the unwitnessed absentee ballots could not be counted, and the 11th Circuit affirmed its decision.⁶ As a result, Perry Hooper was sworn in as chief justice of Alabama in late 1995.

The addition of Chief Justice Hooper meant that the court now included three justices who adhered to conservative philosophies of judging. A fourth was added as a result of the 1996 election, in which Republican Harold See defeated incumbent Kenneth Ingram. See, a professor at the University of Alabama school of law, had been an outspoken critic of the Hornsby Court.

The year 1998 saw the arrival of a Republican majority on the Alabama Supreme Court for the first time in its history. In March, Justice Terry Butts retired. Republican Governor James appointed Champ Lyons to the vacancy. In addition, Justice Gorman Houston changed his party affiliation, and ran successfully for re-election as a Republican. Also elected in 1998 were Jean Brown (a Republican) and Douglas Johnstone (a Democrat).

In 2000, Chief Justice Hooper could not run for re-election, and was succeeded by Republican Roy Moore. In addition, Justice Lyons was re-elected, and Justices Lyn Stuart, Thomas Woodall, and Robert Harwood – all Republicans – were elected to the court for the first time.

In 2002, Justice See was re-elected. In November 2003, for reasons explored below, Chief Justice Moore was removed from his position. Republican Governor Bob Riley appointed Drayton Nabers to succeed Moore in June 2004. Largely because of the Moore episode, Republican Tom Parker defeated incumbent Justice Jean Brown in the party primary in 2004 and faces Democrat Robert Smith in November. Two more "open" seats are also on the 2004 ballot: Republican Mike Bolin faces Democrat John Rochester, and Republican Patti Smith faces Democrat Roger Monroe.

There will be five seats at stake in the 2006 election.

The repudiation of the Hornsby Court's approach to judging by the voters of Alabama is one of the most dramatic examples of popular engagement with judicial politics in American history. And it led to substantial changes in Alabama's legal system.

³ Ala. Code § 17-10-7.

⁴ See Winthrop E. Johnson, *Courting Votes in Alabama: When Lawyers Take Over a State's Politics* (1999) (written by the deputy director of Hooper's campaign).

⁵ *Roe v. Mobile Co. Appointment Bd.*, 676 So.2d 1206 (S.D.Ala. 1995).

⁶ *Roe v. State of Alabama*, 68 F.3d 304 (11th Cir. 1995).

Since the 1998-99 watershed, the Alabama Supreme Court has made substantial progress in returning Alabama tort law to the national mainstream, and in curbing some judges' appetite for the expansion of judicial power at the expense of the other branches of state government. We will first examine the current court's approach to punitive damages and other features of civil litigation in Alabama.

Alabama juries began to award large amounts of money on account of conduct that seemed to critics to fall far short of the kinds of "reprehensible" behavior that had been required for punitive damages in the past. Also troubling was the fact that juries were not awarding punitive damages only in cases involving personal injury or death, but were awarding them in contract-based cases – often involving insurance companies and other financial institutions – in which the plaintiffs were alleging fraud on the part of the defendants.

II. Punitive damages and all that

Alabama's early '90s reputation as a dangerous place to be a defendant was based in substantial part on an increasing number of increasingly large punitive damage awards in Alabama courtrooms, and the inability or unwillingness on the part of the Hornsby-era supreme court to do anything about this trend.

A word of explanation about punitive damages is in order. Punitive damages should not be confused with compensatory damages. The latter are designed to compensate plaintiffs for their actual losses. Every plaintiff who seeks compensatory damages and wins his case is entitled to compensatory damages.

In contrast, no plaintiff has a "right" to receive punitive damages and, in fact, the award of such damages is far from ordinary. Punitive damages are damages over and above compensatory damages. Put another way, punitive damages are not paid to a plaintiff in order to compensate him; they are paid to a plaintiff in order to punish the defendant and to deter others from engaging in the kind of outrageous conduct in which the defendant has engaged and which historically was required for punitive damages to be awarded. Accordingly, up until relatively recently, American courts awarded punitive damages in only a very small number of cases, involving very bad conduct on the part of the defendants so punished. Thus, it is not unreasonable to compare punitive damages to criminal fines – except that punitive damages are paid to the prevailing plaintiff and not to the state, as are fines.

The problem was that Alabama juries began to award large amounts of money on account of conduct that seemed to critics to fall far short of the kinds of "reprehensible" behavior that had been required for punitive damages in the past. Also troubling was the fact that juries were not awarding punitive damages only in cases involving personal injury or death, but were awarding them in contract-based cases – often involving insurance companies and other financial institutions – in which the plaintiffs were alleging fraud on the part of the defendants.

To this extent, the phrase "tort hell" is somewhat misleading. Alabama's liability explosion was not at all limited to personal injury suits – it quickly leached into garden-variety contract litigation as well.

The expansion of tort-type doctrines into contract law was aided by one 1991 decision of the Hornsby Court in particular. *Johnson v. State Farm Ins. Co.*⁷ lessened the showing a plaintiff must make to prove fraud. It adopted a more plaintiff-friendly standard of "justifiable reliance" to replace the traditional test of "reasonable reliance." By removing some of the burden on the plaintiff to show that he had relied, reasonably, on the alleged misrepresentation of the defendant, the court encouraged the filing of claims that would not have survived motions to dismiss in other states' court systems. In many of these cases, plaintiffs would seek punitive as well as compensatory damages.

⁷ 587 So.2d 974 (Ala. 1991).

In an attempt to get some control over the changes in the state's civil justice system, in 1987 the Alabama legislature passed a number of tort reform measures. Most of the new statutes were challenged in court, and the Hornsby Court wound up striking down most of the package in a series of opinions in the early 1990s. In particular, in 1993 it struck down a \$250,000 cap on punitive damages (in most cases) as violative of the state constitution's guarantee of a right to a jury trial.⁸

“An indispensable characteristic of a sound legal system is the production of predictable results. This Court's punitive damages jurisprudence has failed to produce predictable results.”

4 For its critics, the legacy of the Hooper Court in the civil justice area was aptly summed up by Justice See in his separate opinion in a 1997 case:

An indispensable characteristic of a sound legal system is the production of predictable results, which guards against the arbitrary use of governmental power and allows the bench, the bar, and, most importantly, the people to order their affairs. This Court's punitive damages jurisprudence has failed to produce predictable results.⁹

This was the legacy which the Hooper Court inherited. Shortly after Chief Justice Hooper's arrival, the U.S. Supreme Court decided the *Gore* case. It reversed the Alabama Supreme Court's decision, holding that the 500-to-1 ratio of punitive to compensatory damages was so “grossly excessive” that it violated the due process rights of BMW, as guaranteed by the Fourteenth Amendment to the U.S. Constitution.¹⁰ The case was remanded to the Alabama state court system, with instructions to consider three factors: “the degree of reprehensibility of the nondisclosure; the dispar-

ity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.”

This second time around, the Alabama Supreme Court placed greater emphasis on the three *Gore* factors – which the court said were already present in the long list of factors it considered under its own precedents — and reduced the amount of punitive damages to \$50,000.¹¹

After *Gore*, the Alabama Supreme Court began a more robust – if not altogether transparent – review of punitive awards. In the words of one lawyer who reviewed the court's first ten post-*Gore* decisions in 1998:

The only real lesson...is that it is better for a civil defendant to appeal an award of punitive damages than to accept it. The odds appear quite high that a large punitive award in a non-wrongful death case will be reduced significantly on appeal, though the reasons for this may not always be clear.¹²

In addition to this, the court during this same period, returned to the traditional requirement of “reasonable reliance” in fraud cases, thus bringing Alabama back into the mainstream nationally on this point.¹³ It also bears mention that the Alabama Supreme Court has managed to “hold the line” with respect to the certification of class actions in state court,¹⁴ sparing the state the troubles Mississippi has recently experienced in this vein. It has also declined to recognize a “medical monitoring” remedy in toxic tort litigation, thus keeping litigation focused on actual – as opposed to possible future – injury.¹⁵

In 1999, the Alabama legislature adopted a new set of punitive damages caps. The current statute¹⁶ does not apply to cases involving death or intentional infliction of physical injury. In cases involving all other physical injuries, punitive damages cannot exceed three times the compensatory damages, or \$1.5 million, whichever is greater. In cases involving “small businesses” (defined as a net worth of \$2 million or less), punitive damages cannot exceed \$50,000 or 10% of the business' net worth, whichever is greater. In all other civil cases, punitive damages cannot exceed three times the compensatory damages, or \$500,000, whichever is greater. To date, there has been no court challenge to this set of caps.

⁸ *Henderson v. Alabama Power Co.*, 627 So.2d 878 (Ala. 1993).

⁹ *Life Ins. Co. of Georgia v. Johnson*, 701 So.2d 524 (Ala. 1997) (See, J., concurring in part and dissenting in part) (footnotes omitted).

¹⁰ *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

¹¹ *BMW of North America, Inc. v. Gore*, 701 So.2d 507 (Ala. 1997).

¹² E. Berton Spence, *Punitive Damages in Alabama After BMW v. Gore: Are Outcomes Any More Predictable?*, 59 Ala. Lawyer 314, 320 (1998).

¹³ *Foremost Ins. Co. v. Parham*, 693 So.2d 409 (Ala. 1997).

¹⁴ See, for example, *Regions Bank v. Lee*, 2004 WL 1859678 (Ala. 2004) (denying class certification).

¹⁵ *Hinton v. Monsanto Co.*, 813 So.2d 827 (Ala. 2001).

¹⁶ Ala. Code § 6-11-21.



In 2001 the Alabama Supreme Court followed the lead of the U.S. Supreme Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,¹⁷ and announced that it would conduct *de novo* review of such punitive damage awards.¹⁸ A 2002 analysis of this practice looked at the first five cases the court heard *de novo*, noting that

the court affirmed two awards of \$600,000 and \$150,000 and it reduced three others with [reductions] of \$120,000 (approximately 40% remitted), \$2,000,000 (50% remitted), and \$450,000 (75% remitted). Again the court inconsistently used the 3:1 ratio as a benchmark, and allowed awards to exceed this ratio if reprehensibility was considered high.¹⁹

The author tentatively concluded that *de novo* review would enhance “overall predictability” of the process.²⁰

That the state supreme court is currently oriented toward a serious review of punitive awards finds some support in the report of a task force report to the state Department of Insurance, which notes that

On appeal during 2002, the Alabama Supreme Court reviewed eight cases in which jury awards of punitive damages had resulted in judgments totaling \$6 million. The court reversed seven of those eight cases, upholding only one in the amount of \$600,000.²¹

My own quick review of the court’s review of eleven cases involving punitive damages during 2004 showed similar results. In five of them, the court found that the defendants had deserved judgment as a matter of law, thus knocking out the punitive awards. Four cases were reversed and remanded for further proceedings. In only two cases were punitive damages affirmed – one case was decided without opinion; the other involved a \$5 million jury award that had been reduced by the trial judge to \$1.5 million, and was further reduced to \$300,000 by the supreme court.

Pretty clearly, Alabama punitive damages practice has changed a great deal since the days of *BMW v. Gore*.²² This change – in the direction of a fairer and more predictable civil justice system – should be credited to the seriousness with which the current members of the court view this issue.

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¹⁷ 532 U.S. 424 (2001).

¹⁸ The new procedure was first announced in *Acceptance Ins. Co. v. Brown*, 832 So.2d 1 (Ala. 2001), and fleshed out in *Horton Homes, Inc. v. Brooks*, 832 So.2d 44 (Ala. 2001), *cert. denied sub nom. Southern Manufactured Homes, Inc. v. Brooks*, 535 U.S. 1054 (2002).

¹⁹ David E. Hogg, Comment, *Alabama Adopts De Novo Review for Punitive Damage Appeals: Another Landmark Decision or Much Ado About Nothing?*, 54 Ala. L. Rev. 223, 234 (2002).

²⁰ *Id.* at 240.

²¹ Report of the Legal Environment Committee, Alabama Department of Insurance, Health Issues Task Force, Nov. 5, 2003 (copy on file with author).

²² One practicing lawyer opined that the implications of the U.S. Supreme Court’s most recent decision concerning punitive damages, *State Farm Ins. Co. v. Campbell*, 538 U.S. 408 (2003), have not yet been incorporated into Alabama caselaw.

However, I do not mean to suggest that the civil justice system in Alabama cannot be improved upon. It should be acknowledged that, in some counties, juries still return enormous punitive damage awards. For example, in 2002 a jury returned a \$122 million verdict against General Motors in a crashworthiness/personal injury case that included a \$100 million punitive award. This was reduced by the trial judge to a mere \$60 million (three times the compensatory damages of \$20 million), and the supreme court granted GM's motion for a new trial, albeit on grounds of irregularities in the selection of the jury.²³ Justices See, Brown and Stuart dissented, arguing that the plaintiff had failed to prove a design defect as required by Alabama law. The ultimate disposition of this case will be interesting to see. For now, it is clear that the court's new procedures for reviewing punitive damages have not yet completely eliminated the possibility of runaway juries. This is likely to remain a problem – but not one solely for Alabama.

Another problem facing Alabama courts is the treatment of “mental anguish” damages. To the extent that plaintiffs may inflate this inherently difficult to quantify category of damages, then the reform of punitives can be undermined. A recent Alabama Supreme Court decision is worrisome in this regard.²⁴ Plaintiffs sued an insurance company for “fraud, breach of contract, and negligent or wanton failure to procure life insurance.” Plaintiffs claimed that the company's agent had represented that the insurance policies they were buying would be “paid up” in 15 years. This was not the case, and the written policies themselves contradicted this claim. Plaintiff Magnolia Jackson testified that upon learning that the policies were not paid up, she felt “like a big bomb had just exploded” and that the situation made her “worry.” The plaintiffs' out-of-pocket loss was \$2,340. In addition to this, the jury gave them \$497,660 in mental anguish damages, and \$5 million in punitive damages. The trial judge reduced the punitive award to \$1.5 million (three times the “compensatory” damages, including mental anguish).

A five-member majority of the state supreme court ordered the mental anguish damages reduced to \$97,660, and the punitive damages reduced to \$300,000 (or, in the alternative, a new trial for the defendant). Three justices – See, Brown, and Stuart – dissented.

They argued that the majority had departed from clear precedent as to the kind of evidence needed to sustain a claim of mental anguish. Because the evidence produced by the plaintiffs was so skimpy, the dissenters would reduce that amount to \$10,000, and the punitive amount to \$30,000.

Whether the court can hold the line on proof of mental anguish thus remains to be seen.

III. The Courts and the Alabama Constitution

The current supreme court justices, as a group, deserve high marks for the fidelity to the constitutional principle of separation of powers,²⁵ and to the rule of law.

Perhaps the most dramatic evidence of this came in 2002, when the court dismissed a lawsuit challenging the way the state funds K-12 education. The suit had been rattling around in the Alabama court system since 1990. It was based on the 1901 state constitution's provision that “The legislature shall establish, organize, and maintain a *liberal* system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years” (emphasis added). The plaintiffs' basic theory was that the word “liberal” required the state to make per pupil expenditures more nearly equal across local school districts, necessitating some amount of redistribution of public funds from wealthier to poorer school districts.

The plaintiffs managed to convince the Montgomery County trial judge to whom the case was initially assigned to issue an “order” that declared that “equitable and adequate educational opportunities shall be provided to all schoolchildren regardless of the wealth of the communities in which the schoolchildren reside.”²⁶ The order defined “adequate educational opportunities” with respect to nine categories, such as – “sufficient oral and written communication skills to function in Alabama, and at the national and international levels, in the coming years.” The order concluded: “the state officers charged by law with responsibility for the Alabama public school system, are hereby enjoined to establish, organize and maintain a system of public schools, that provides equitable and adequate educational opportunities to all school-age children...”

²³ General Motors Corp. v. Jernigan, 2003 WL 22929111 (Ala. 2003).

²⁴ Alfa Life Ins. Co. v. Jackson, 2004 WL 1009367 (Ala. 2004).

²⁵ According to Section 43 of the Alabama constitution: 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.

²⁶ Reprinted in Opinion of the Justices, 624 So.2d 107, 166 (Ala. 1993).



The trial judge's order rested on an unprecedented reading of the state constitution, and a blatant disregard for ninety-plus years of history and for the principle of separation of powers.²⁷ The legislature asked the supreme court for a ruling on whether they had to follow the trial judge's order. The 1993 court said that the legislature was bound to follow it, "unless changed by a competent court having the power to overturn it..."²⁸ The legislature's response to the trial judge's order was, shall we say, restrained.

The matter came before the supreme court again in 1997. Stripped of its considerable procedural complexity, the court's decision basically held that the action was justiciable, and that the doctrine of separation of powers did not prohibit "judicial review" of the constitutionality of the public school system.²⁹ The decision moved the state further down the road toward a judicially-prescribed restructuring of its K-12 finances. Justices Maddox, Houston, and Chief Justice Hooper all dissented (in relevant part), to no avail.

Inertia in state government is, however, no small matter. By 2002, the case was once again in a procedural posture such that the supreme court could rule on it. On this occasion, by an 8-1 vote, the court dismissed the action.³⁰ The majority opinion held:

(1) that this Court's review of the merits of the still pending cases commonly and collectively known in this State, and hereinafter referred to, as the "Equity Funding Case," has reached its end, and (2) that, because the duty to fund Alabama's public schools is a duty that—for over 125 years—the people of this State have rested squarely upon the shoulders of the Legislature, it is the Legislature, not the courts, from which any further redress should be sought.

This refreshingly modest view of the courts' role in the state's governance is a much closer fit with a textualist approach to the state constitution than the earlier supreme court opinion – and certainly more so than the activist trial judge's opinion in 1993.

²⁷ For a further discussion of this point, see Susan Thompson Spence, Comment, *The Usurpation of Legislative Power by the Alabama Judiciary: From Legislative Apportionment to School Reform*, 50 Ala. L. Rev. 929, (1999). It is interesting to note that the trial judge was unsuccessful in his 1994 run for a supreme court judgeship. 28 624 So.2d at 110.

²⁹ Ex parte James, 713 So.2d 869 (Ala. 1997).

³⁰ Ex parte James, 836 So.2d 813 (Ala. 2002).

Another way in which the supreme court demonstrates its respect for the separation of powers is in its case law construing statutes. Judges should strive to read statutory law as it is written by the legislature, and resist the temptation to rewrite it according to their own view of what constitutes good public policy. The Alabama case law on this point is generally pretty good.³¹ The court's disastrous opinion in the Hooper-Hornsby absentee ballot case, noted earlier, was anomalous. In a recent decision, the court summarized the basic concepts:

"The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature as manifested in the language of the statute. . . . Absent a clearly expressed legislative intent to the contrary, the language of the statute is conclusive. Words must be given their natural, ordinary, commonly understood meaning, and where plain language is used, the court is bound to interpret that language to mean exactly what it says...Where the language of a statute is clear and "there remains no room for judicial construction[,] ...the clearly expressed intent of the legislature must be given effect...." When construing a statute, this Court "has a duty to ascertain and effectuate legislative intent expressed in the statute, which may be gleaned from the language used, the reason and necessity for the act, and the purpose sought to be obtained."³²

The court's regard for separation of powers does not, however, always work to diminish its own power. In *Ex parte Jenkins*, the court ruled that a statute permitting reopening of final judgments of paternity based on DNA evidence could not be applied retroactively to cases closed at the time the statute went into effect,³³ citing separation of powers principles.

Allow me to mention one more case where the current court demonstrated a commitment to the rule of law – even where that commitment involved a substantial political risk to themselves. In August 2001, Chief Justice Moore unveiled a 5280-pound granite monument in the rotunda of the State Judicial Building. A representation of the Ten Commandments covers the top of the monument; other, related quotations appear on the other surfaces.

Predictably, this public display of the Ten Commandments was challenged as a violation of the Establishment Clause of the First Amendment. Plaintiffs won in federal district court, and on appeal.³⁴ The district judge ordered Chief Justice Moore to remove the monument; he refused, and announced that he had no intention of obeying the court's order. Reflect for a moment on how unpopular the plaintiffs' position is in terms of the religious and political views of most Alabamians, and on how unpopular the courts' decisions and orders were to most Alabamians. A moment's thought here puts the subsequent actions of the other eight members of the court in perspective.



31 For a short summary of the major cases, see J. Gorman Houston, Jr., *Judicial Restraint and the Doctrine of Separation of Powers*, 59 Ala. Law. 166, 169-70 (1998) (suggesting, somewhat obliquely, that *Roe* was wrongly decided).

32 *Ex parte University of South Alabama*, 761 So.2d 240, 243 (Ala. 1999) (citations omitted).

33 723 So.2d 649 (Ala. 1998). For an essay discussing this case by the authoring judge, see Harold F. See, *The Separation of Powers and the Public Policy Role of the State Court in a Routine Case*, 8 Tex. Rev. L. & Pol. 345 (2004).

34 *Glassroth v. Moore*, 229 F.Supp.2d 1290 (M.D. Ala. 2002), *aff'd* 335 F.3d 1282 (11th Cir.), *cert. denied*, *Moore v. Glassroth*, 124 S. Ct. 497 (2003).

Former Alabama attorney general Bill Pryor describes the resolution of this standoff:

The day after the expiration of the deadline for compliance set by the federal district court, the eight associate justices unanimously ordered the manager of the State Judicial Building to comply with the injunction as soon as practicable. I immediately provided my support of their order, which I believe preserved the rule of law, even though I have long contended that it is constitutional to depict the Ten Commandments in a courthouse.³⁵

The Alabama Supreme Court's order, dated August 21, 2003, was not published, but is available online.³⁶ In relevant part, the order explains that

(12)...The justices of this Court are bound by solemn oath to follow the law, whether they agree or disagree with it, because: "All of the officers of the government, from the highest to the lowest are creatures of the law, and are bound to obey it." United States v. Lee, 106 U.S. 196, 220 (1882).

(13) The refusal of officers of this Court to obey a binding order of a federal court of competent jurisdiction would impair the authority and ability of all of the courts of this State to enforce their judgments.

The political risk to the justices who signed this order was substantial. Chief Justice Moore remains a popular figure in Alabama politics, and this order was interpreted by Moore and doubtless by many of his followers as an act of treachery and disloyalty.

Justice Jean Brown was one of the eight signatories. She was a candidate for re-election in 2004, but lost the Republican primary to Tom Parker, a former staffer and close ally to Chief Justice Moore. It seems highly unlikely that Judge Brown would have lost her re-election bid if the Moore affair had not intervened, and if she had not taken her oath of office as seriously as she did.

Chief Justice Moore was eventually removed from his office because of his refusal to obey the federal court's order.³⁷ The long-term implications of this episode for judicial politics in Alabama do not seem at all clear to me at this point.

IV. Conclusion

Overall, Alabama's experience over the past ten years should give heart to proponents of civil justice reform. This state is a case study of what can be accomplished when voters become sufficiently fed up with the more absurd results of America's litigation explosion.

While significant questions remain about certain aspects of civil litigation in Alabama, those questions are not very much different from the questions that could be asked in many, if not most, other states. Surely the state deserves some credit for this turnaround.

Perhaps, but it is coming very slowly – in some quarters at least. The U.S. Chamber of Commerce's annual opinion survey relating to litigation ranked Alabama 48th overall in 2004.³⁸ Only in the punitive damages category does the state do much better than that – with a ranking of 43rd. On the positive side, Alabama is not mentioned in the American Tort Reform Association's 2003 ranking of "judicial hell-holes" – for the first time ever!³⁹

Alabama's experience shows that the road back from a bad reputation is a long one indeed. Other states' legislatures and judiciaries would do well to consider this example.

Alabama judicial races remain competitive, expensive affairs. Doubtless opponents of judicial elections will continue to point out these traits in seeking to convince voters of the wisdom of adopting some other form of judicial selection. Such arguments are exceedingly unlikely to sway voters in Alabama and, I would guess, most other southern states, where the Jacksonian preference for full-throated democracy is still strong.

In closing I note that the 2006 election season will feature five Alabama Supreme Court races. Put another way, a majority of the seats on the high court will be determined in one election. What will the plaintiffs bar do to try to regain their former sway over the court? What will the business community do to try to protect and solidify the progress made in reforming the civil justice system in Alabama over the last decade?

Stay tuned.

³⁵ William H. Pryor, Jr., *Christian Duty and the Rule of Law*, 34 Cumb. L. Rev. 1, 1-2 (2003-04).

³⁶ <http://news.findlaw.com/hdocs/docs/religion/glsrthmre82103alsc.pdf>

³⁷ Moore v. Judicial Inquiry Comm'n of the State of Alabama, 2004 WL 922668 (Ala. 2004).

³⁸ 2004 U.S. Chamber of Commerce State Liability Systems Ranking Study (March 3, 2004), available through <http://www.LegalReformNow.org>

³⁹ *Bringing Justice to Judicial Hellholes 2003*, available at <http://www.atra.org/reports/hellholes/>

