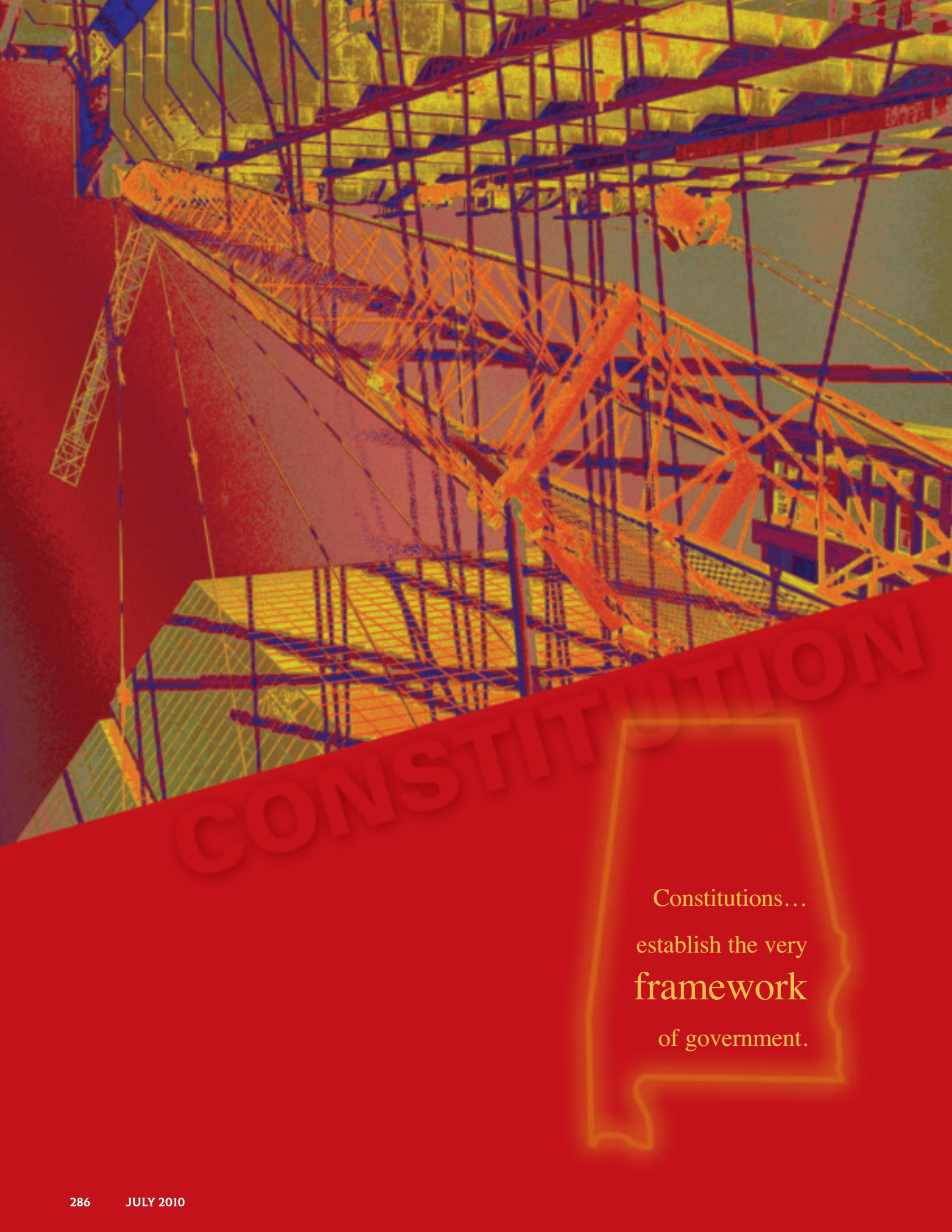

Constitutions…

establish the very

framework

of government.

Interpreting the Alabama Constitution

By Marc James Ayers

The interpretation of statutory text is guided by fairly well-known policies (like separation of powers) and rules (the "canons" of construction). What about constitutional text? Constitutional text is somewhat different in nature than that found in statutes. Does this difference affect how courts do or should interpret the text of Alabama's Constitution? And what are the guiding principles that govern Alabama appellate courts' interpretation of the Alabama Constitution?

Of course, a complete survey on this subject could be the task of much larger work. This article is intended to summarize the Alabama appellate courts' basic philosophy governing the interpretation of the Alabama Constitution, and then to provide examples of some of the recognized rules of interpretation stemming from that underlying philosophy.

Constitutions Versus Statutes

Statutes are purely majority-rule matters that can concern virtually any topic and change back-and-forth with the political winds. Constitutions, on the other hand, recognize and identify fundamental rights and powers, and establish the very framework of government.[1] While initially established by a majority, a constitution exists to be somewhat anti-majority and undemocratic with regard to those rights and powers that the people consider to be fundamental, thus helping protect important, long-recognized legal rights or principles against sudden, unwise changes sought by, for example, a temporary but passing political majority. Constitutions recognize that "change" (particularly drastic change from well-established practices or traditions) is not always a good thing—it all depends on the direction. Accordingly, while constitutions can be amended, it is intentionally a difficult thing to accomplish.

Although a legislature is presumed to be the "voice of the citizens," in many ways a constitution is more directly and forcefully so. A legislature can pass wholly unpopular legislation—and can do so unilaterally with an override of a gubernatorial veto—and the people have no direct power to intervene to stop it. (In fact, debate over this very issue was seen in recent days with regard to the controversial health care legislation passed by Congress despite, by most accounts, a consistently strong majority of the citizenry in opposition.) However, unlike with statutes, it is virtually impossible to pass an unpopular constitutional amendment, because the people themselves have the ultimate say and are, in a real sense, a constitution's authors.

This distinction between the nature of statutory and constitutional text is relevant to how such text is interpreted by the courts. In interpreting statutes, Alabama courts are ultimately guided by Section 43 of the Alabama Constitution, which requires a strict separation between the three branches of government:

> 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*.[2]

Because it is the province of the legislature to make and change statutes, courts have to be cautious to avoid usurping the legislative role under the guise of "interpretation."

However, an improper judicial "revision" of *constitutional* text is not technically a separation of powers violation because the judiciary is not usurping the role of the legislative or executive branches. *No* branch has the "role" or ability to amend the constitution; it is solely the province of the Alabama citizenry to revise what is correctly called "*their* Constitution."[3] The legislature certainly plays a part in the people's revision of their fundamental charter, but, unlike with statutes, the legislature cannot rewrite the constitution itself.

The Limited Role of *Stare Decisis* in Constitutional Interpretation

Perhaps where this distinction is most often illustrated is in the Alabama appellate courts' application of the doctrine of *stare decisis*. "*Stare decisis* is '[t]he doctrine of precedent under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.'"[4] The Alabama Supreme Court has repeatedly held that *stare decisis* carries much less weight in analyzing previous interpretations of constitutional provisions than it does in analying prior interpretations of statutes because, as stated above, erroneous constitutional interpretations are much more difficult to correct than are erroneous interpretations of statutes.[5]

The Alabama Judiciary's Guiding Philosophy for Interpreting the Alabama Constitution: Judicial Restraint and *Ex Parte Melof*

Every method of constitutional interpretation is ultimately guided by some fundamental judicial philosophy, and that philosophy will be determined to a great extent on how the judiciary views its own role in the constitutional system. In the words of Judge Learned Hand, does the judiciary exist to "do justice" as the judiciary defines "justice" from case to case, or does the judiciary exist to "apply the law [as set forth by the people] and hope that justice is done?"[6] The former philosophy tends toward the view that a constitution is a "living document" that can and must change on its own as society changes. The latter philosophy, that of "judicial restraint," tends more toward the view that a constitution is a *legal* document that by definition resists change,[7] as it is for the authors—i.e., the people—who should judge when a social "change" is a good change that should receive constitutional recognition. By all accounts, Alabama courts are in the latter camp.

There is no specific constitutional provision addressing how Alabama courts are to interpret constitutional text. The Section 43 separation of powers provision gives some general guidance, but that provision is more directly applicable to statutory interpretation, as discussed above. Perhaps the most illuminating provisions in the Alabama Constitution are the amendment provisions,[8] which make clear (1) that it is ultimately for the people–not the courts or anyone else–to change the constitution, and (2) that this process is intentionally difficult and time-consuming (much more difficult to pass

than statutes). These principles help illustrate that the Alabama judiciary's guiding principle of *constitutional* interpretation is and must be guided not precisely from the notion of separation of powers (as with statutes), but from the inherent nature of a constitutional system where the judiciary holds the enormous (and potentially dangerous) power of "judicial review"—the final say on what the Alabama Constitution means.[9] Perhaps the best discussion of this issue occurred in the debate over Alabama's "phantom equal protection clause" found in the Alabama Supreme Court's decision in *Ex parte Melof*, 735 So. 2d 1172 (Ala. 1999).

In *Melof*, the court corrected an erroneous line of decisions that had actually created and relied upon a constitutional provision—an "equal protection provision"—where none existed in the 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[10] in an overall effort to hinder black Alabamians. However, in 1977 the court ruled (based on a scrivener's error, as it turns out[11]) 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.[12] This "provision" had no specific text (and therefore no history to be examined), but was merely the "spirit" behind several different provisions.

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. And as this "provision" was allegedly part of the Alabama Constitution, any ruling by the Alabama Supreme Court under that provision would not be reviewable by the United States Supreme Court. The "phantom equal protection provision" was used in striking down as unconstitutional tort reform legislation[13] and in attempting to judicially restructure the funding of Alabama's educational system.[14]

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 decisions had relied on the phantom provision, the principle of *stare decisis* could not—for the reasons discussed above—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[15]—Justice Houston even included in his special writing a letter to members of all three branches of Alabama's government expressing this desire[16]—they also made it clear that a strong desire to see the constitution written differently does not provide grounds for the judiciary to simply declare it to be so.

Three justices dissented, led by Justice Cook.[17] Although admitting that the Alabama Constitution of 1901 did not have an express "equal protection provision," the dissenting justices argued that the essence of such a provision is found in and among other constitutional provisions. Justice Cook accurately described how the actions of the Constitutional Convention of 1901 were explicitly undergirded with racist motivations, including the Convention's elimination of the equal protection provision. Justice Cook's eloquent 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.[18]

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 felt the force of Justice Cook's arguments (especially Justice Cook's accurate description of the racist motivations behind the framing of the Alabama Constitution of 1901), but explained how the framers' abuse of power only served as more reason to show judicial restraint, even when it hurts in the short term:

> 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.
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> . . . .
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> We must recognize that we cannot change our history, no matter how egregious or embarrassing our history might be. It is precisely because individuals who govern can do some egregious things with the power that has been given them that we have the concept of the constitution–a legal document

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meant to achieve two primary goals. First, a constitution establishes a particular form of government. Second, a constitution, as the solidifying agent of the rights recognized by the government, protects the individual against the whim of those in power.

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.

. . . .

Such is the danger of sitting on the highest court of any sovereign when that court is interpreting the sovereign's own constitution. With no threat of being overruled, we can wield our words in any way that we like, knowing that they will be given the full effect of law. In this way, the nature of being Supreme Court Justices creates a dangerous dynamic. As we are sworn in, we are handed–by the people–a powerful sword: our ability to state what the law is. At the same time, we are placed inside a paper boundary–a written constitution–and told by the people "this far you may go, and no further." The problem is that the sword can easily sever the boundary and we can escape its limits, perhaps with the notion of "doing justice." Once the boundary is severed, however, it is not easily repaired; and the next judge, now not bound, is free to do either justice or evil. As judges, then, we are entrusted by the people to use that sword wisely and with restraint; to stay within the boundary no matter how strongly we think it too small to meet the people's needs. The people made the boundary; it is for the people to enlarge it.

It is true, as Justice Cook points out, that racist motives were behind the action of the 1901 Constitutional Convention eliminating the equal-protection clause from our Constitution. The fact that we still do not have an equal-protection clause in our Constitution is certainly troubling. It is just this kind of situation that sparks in all of us such an emotional indignation that we want to correct this wrong as fast as possible, in any way possible.... 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. ...[19]

The Alabama Supreme Court has continued to hold fast to this interpretive philosophy of judicial restraint.[20] And, as it must be, this philosophy is at the heart of the various rules and methods of constitutional interpretation that have been adopted by the Alabama appellate courts.

Particular Canons of Constitutional Interpretation Used by the Alabama Appellate Courts

Except when impacted by the difference between constitutional and statutory text discussed above, the canons of statutory construction appear to be generally applicable to the interpretation of constitutional provisions.[21] Indeed, many of the recognized principles that guide the interpretation of statutes have been

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applied without difficulty to the interpretation of constitutional texts, for example, the canons of *expressio unius est exclusion alterius* (the expression of one thing is the exclusion of another)[22] and *ejusdem generis* (general words at the end of a list will be construed as encompassing things of the same nature as the specifically enumerated items in the list),[23] the rule that provisions are to be read *in pari materia*,[24] the rule that general provisions give way to specific provisions on the same topic,[25] and the rule that all provisions of the constitution should be interpreted so as not to nullify any other provision, if possible.[26] Other rules, however, are specific to the interpretation of constitutional texts. Some of these (at times competing) rules of interpreting the Alabama Constitution are discussed more fully below.

A. The "plain meaning rule"

The "plain meaning rule" is the primary canon of Alabama *statutory* construction,[27] and also has been applied in interpreting Alabama constitutional provisions.[28] Indeed, the Alabama Supreme Court has made clear that Alabama courts are "not at liberty to disregard or restrict the plain meaning of the provisions of the [Alabama] Constitution."[29]

However, Alabama courts also appear to recognize that the inherent differences between statutory and constitutional texts might, at times, require a different approach. Recognizing that "[c]onstitutions usually deal with larger topics and are couched in broader phrase than legislative acts," the Alabama Supreme Court has stated that "their just interpretation is not always reached by the application of similar methods" and that constitutional provisions are not always "to receive a technical construction, like a common-law instrument, or statute."[30]

B. The hunt for the "original" meaning

To the extent that a straight application of the "plain meaning rule" is used, an additional question is what is the proper frame of reference (i.e., the "plain meaning" then or now)? For example, if looking for the "dictionary definition," does one look at a 2010 dictionary or a 1901 dictionary? Words can adopt new meanings over time, and original references can be lost on a modern reader. Given that a constitution is intended to be the most secure means by which the people can firmly fix certain fundamental governing principles against such "meaning drift," the Alabama Supreme Court has indicated that the search for the "plain meaning" is in fact a search for the "original meaning":

> The [Alabama] Constitution is a document of the people. Words or terms used in that document must be given their ordinary meaning *common to understanding at the time of its adoption by the people*.... We are, therefore, not at liberty to disregard or restrict the plain meaning of the provisions of the Constitution.[31]

Accordingly, "[i]n construing the Constitution, the leading purpose would be to ascertain and effectuate the intent and object *originally intended to be accomplished.*"[32]

In order to determine the original meaning of a constitutional provision, "it is permissible in ascertaining their purpose and intent to look to the history of the times, the existing order of things, the state of the law when the instrument was adopted, and the conditions necessitating such adoption."[33] Because "[t]he Constitution was written to be understood by the voters, its words and phrases were used in their normal and ordinary as distinguished from technical meaning. Normal meaning may, of course, include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation."[34] Accordingly, when interpreting the Alabama Constitution, Alabama courts frequently look to the proceedings of the Constitutional Convention of 1901,[35] the common law,[36] and the related laws existing at the time,[37] contemporary dictionaries,[38] and anything else that might reveal the original purpose or object of the constitutional provision at issue.[39]

C. Interpreting text in light of similar provisions in earlier versions of the Alabama Constitution

If the constitutional text at issue has predecessor provisions—similar or related provisions in earlier versions of the Alabama Constitution—such predecessor provisions can help illuminate the text being interpreted. The Alabama Supreme Court has long recognized "that constitutions are to be construed in the light of previously existing constitutions."[40]

D. Some provisions are interpreted like similar federal provisions

If the constitutional provision being considered has a similar federal counterpart, Alabama courts may interpret the provision in light of established federal law. For example, Alabama's constitutional guarantee of due process of law has long been construed "to be coextensive with the due process guaranteed under the United States Constitution."[41] Of course, state courts are not limited in their interpretations of state constitutional provisions by federal interpretations of similar federal provisions, and can interpret state provisions as providing greater protections than provided by the federal constitution.[42]

E. Exceptions to constitutional prohibitions are narrowly construed

When a constitutional amendment is, in reality, an exception to an established constitutional provision generally prohibiting some activity, such an amendment is narrowly construed.[43]

F. Use of similar phrases in other constitutional provisions

If the language being interpreted is similar to language used in other provisions of the Alabama Constitution, those other provisions may guide a court's interpretation.[44] Indeed, the Alabama Supreme Court has held that "[a] phrase that is used repeatedly in [constitutional] provisions relating to the same object or subject matter shall 'be interpreted to have the same meaning' throughout."[45] "Moreover, 'where, in a constitution or statute, a word or phrase is repeated, and in one instance its meaning is definite and clear, and in the other it is susceptible of two meanings, it will be presumed to have been employed in the former sense.'"[46]

G. Deference to interpretations of other branches and to those branches' longstanding practices

To the extent that the legislature or the executive has interpreted a constitutional provision–either by statute, by established practice or otherwise–that interpretation may receive deference by the judiciary.[47] Of course, "a legislative act cannot change the meaning of a constitutional provision."[48] However, "the uniform legislative interpretation of doubtful constitutional provisions, running through many years, is of weighty consideration with the courts."[49]

H. "Political Question Doctrine"–Some constitutional provisions are only for other branches to interpret

A step beyond mere deference, if the constitutional text at issue shows that the people entrusted the ultimate interpretation of the provision to either the legislative or executive branches, the interpretation of that text may be completely the duty of that branch, and not of the judiciary. (Of course, it will be for the judiciary to make the determination whether that textual commitment to a particular branch is actually present.) The Alabama Supreme Court applied this "political question doctrine" in *Birmingham-Jefferson Civic Center Authority v. City of Birmingham,* 912 So. 2d 204 (Ala. 2005) ("*BJCC*").

In *BJCC*, the court refused to get into the middle of what it saw as a purely legislative matter regarding when 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*...."[50] 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 in the presence of a quorum.

Only the propriety of the voting in the Alabama House of Representatives was challenged. There are 105 members of the House of Representatives, making a quorum–the amount necessary to be present in order to do business–53 members. 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 (not counting abstentions).

The Alabama Supreme Court unanimously held that the case presented a nonjusticiable 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 and judicial restraint:

> 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.[52]

The 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 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.'" 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. 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.[52]

Conclusion

The above list of rules of Alabama constitutional interpretation is not intended to be, and certainly is not, an exclusive list of available rules. However, regardless of the rule of construction being applied, when presenting an argument which requires an interpretation of some provision of the Alabama Constitution, practitioners should try to frame their argument and the applicable rules of construction with an eye toward the Alabama judiciary's underlying philosophy of constitutional interpretation. If a court has to choose between competing rules of construction, it should select the rule most in harmony with that core philosophy of judicial restraint. ▲▼▲

Endnotes

1. *See, e.g., State ex rel. Meyer v. Greene*, 154 Ala. 249, 254, 46 So. 268, 270 (1908) (stating that "the Constitution is a limitation, not a grant, of power [and] its mandates are the supreme law to the legislative, executive, and judicial departments of this government").
2. 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 confined 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.").
3. *E.g., Ex parte Cranman*, 792 So. 2d 392, 398 (Ala. 2000) (discussing governmental immunity as being "almost invincible, *made so by the people through their Constitution*") (internal quotations omitted); *accord Black v. Pike County Comm'n*, 360 So. 2d 303, 305 (Ala. 1978) ("[S]overeignty itself remains with the people, by whom and for whom all government exists and acts.").
4. *Goldome Credit Corp. v. Burke*, 923 So. 2d 282, 292 (Ala. 2005) (quoting *Black's Law Dictionary* 1443 (8th ed. 2004) (emphasis added)).
5. *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."); *see also Hexcel Decatur, Inc. v. Vickers*, 908 So. 2d 237, 241-42 (Ala. 2005); *Marsh v. Green*, 782 So. 2d 223, 232-33 (Ala. 2000).
6. *See 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,* 306-07 (Dilliard ed. 1960)).
7. *See Alabama State Docks Terminal Ry. v. Lyles*, 797 So. 2d 432, 439 (Ala. 2001) (noting that "the Constitution does not change from year to year").
8. *See* Art. XVIII, §§ 284-287, ALA. CONST. 1901 (providing the exclusive methods for amending the Alabama Constitution).
9. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). The power of judicial review of the Alabama Constitution is truly an extraordinary power. In theory, it is a power over the other branches, in that, upon the institution of a court action, the Alabama judiciary could actually declare *any* act taken by either the executive or the legislative branch to be "unconstitutional." *See Rice v. English*, 835 So. 2d 157, 162-63 (Ala. 2002) (discussing judicial review and noting that that power had been described as "no doubt a dangerous liberty, not lightly to be resorted to....") (internal quotations omitted). This is perhaps one of the reasons that the people of Alabama have held so staunchly to their right to elect their judges, and explains why the courts have adopted such a high standard for determining when a legislative act violates the Alabama Constitution—only where the violation is shown "beyond a reasonable doubt." *See, e.g., Cole v. Riley*, 989 So. 2d 1001, 1015 (Ala. 2007) ("[T]his Court may not interfere with the action of a coordinate branch of government unless it is shown beyond a reasonable doubt that the action is unconstitutional.")
10. *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.").
11. 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.*
12. *See* U.S. CONST. amend. XIV ("no state shall … deny to any person within its jurisdiction the equal protection of the laws.").
13. *See Smith v. Schulte*, 671 So. 2d 1334, 1337 (Ala. 1995) (holding that a 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 a limit on noneconomic damages in medical malpractice cases violated Alabama's equal protection guarantee) (plurality opinion).
14. *See Pinto v. Alabama Coalition for Equity*, 662 So. 2d 894, 901-10 (Ala. 1995) (Houston, J., concurring in the result).
15. *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).
16. *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*, *supra*, 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.").
17. 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).

18. *Id.* at 1195-1205 (Cook, J., concurring in the result; dissenting from the rationale).
19. *Id.* at 1188-90 (Houston, J., concurring specially).
20. *See, e.g., King v. Campbell*, 988 So. 2d 969, 981 (Ala. 2007) ("We do not have the prerogative, by judicial fiat, of reviving a practice once permitted by our Constitution but subsequently repealed.").
21. *See Hunt v. Hubbert*, 588 So. 2d 848, 862 (Ala. 1991) (Houston, J., concurring in the result) ("The Constitution is subject to the same general rules of construction as are other laws ... due regard being had to the broader objects and scope of the constitution as a charter of popular government.").
22. *See Wood v. Booth*, 990 So. 2d 314, 332 (Ala. 2008) (Smith, J., concurring specially) (noting that "This Court has applied the *expressio unius* maxim in interpreting provisions of the Alabama Constitution") (citing *Griggs v. Bennett*, 710 So. 2d 411, 413-14 (Ala. 1998); *Alabama State Bar ex rel. Steiner v. Moore*, 282 Ala. 562, 565, 213 So. 2d 404, 406 (1968)). However, Justice Smith opined that the *expressio unius* maxim should have a limited applicability in state constitutional interpretation, because, unlike with the federal constitution, a state constitution is limitation, not a grant, of power. *See Wood*, 990 So. 2d at 332 & n.24.
23. *Alabama State Docks Dep't v. Alabama Pub. Serv. Comm'n*, 288 Ala. 716, 724, 265 So.2d 135, 143 (1972).
24. *House v. Cullman County*, 593 So. 2d 69, 72 (Ala. 1992).
25. *See, e.g., Chambers County Comm'n v. Chambers County Bd. of Educ.*, 852 So. 2d 102, 107 (Ala. 2002) (holding that "the last sentence of Amendment No. 202 is a general provision, which, as a matter of construction, cannot countermand the express, specific provisions of the first sentence limiting the five-mill taxing power to the county governing body").
26. *See Bouchelle v. State Highway Comm'n*, 211 Ala. 474, 477, 100 So. 884, 886 (1924); *see also City of Bessemer v. McClain*, 957 So.2d 1061, 1092 (Ala. 2006) ("[W]e cannot adopt an interpretation of § 149 of the Judicial Article that requires the Court to ignore words in the constitutional scheme.").
27. *See, e.g., DeKalb County LP Gas Co. v. Suburban Gas, Inc.*, 729 So. 2d 270, 275-76 (Ala. 1998 (setting forth the "plain meaning rule"); *see also* Marc James Ayers, *Unpacking Alabama's Plain-Meaning Rule of Statutory Construction*, 67 Ala. Law. 31 (Jan. 2006) (discussing *DeKalb County* and its progeny).
28. *See, e.g., Padgett v. Conecuh County Comm'n*, 901 So. 2d 678, 688 (Ala. 2004) (applying *DeKalb County* in interpreting constitutional amendment); *State ex rel. Robertson v. McGough*, 118 Ala. 159, 166-67, 24 So. 395, 397 (1898) ("Whenever a constitutional provision is plain and unambiguous, when no two meanings can be placed on the words employed, it is mandatory, and the courts are bound to obey it. . . . In such a case, as has been said, there is no room for construction, and certainly none for disobedience by the courts. If so, there would remain no certainty or stableness in the written Constitutions of the states, or federal government.").
29. *Brown v. Board of Educ.*, 863 So. 2d 73, 90 (Ala. 2003) (internal quotations omitted).
30. *See, e.g., Realty Inv. Co. v. City of Mobile*, 181 Ala. 184, 187, 61 So. 248, 249 (1913) (internal quotations omitted).
31. *Holsbrooks v. Stacy*, 830 So. 2d 708, 710 (Ala. 2002) (quoting *McGee v. Borom*, 341 So. 2d 141, 143 (Ala. 1976) (emphasis added)).
32. *Alexander v. State ex rel. Carver*, 274 Ala. 441, 446, 150 So. 2d 204, 208 (1963) (emphasis added).
33. *Barber v. Cornerstone Cmty. Outreach, Inc.*, ___ So. 3d ___, 2009 WL 3805712, at *10 (Ala. 2009) (quoting *Houston County v. Martin*, 232 Ala. 511, 514, 169 So. 13, 16 (1936)).
34. *Barber*, 2009 WL 3805712, at *10 (quoting *District of Columbia v. Heller*, 554 U.S. ___, 128 S. Ct. 2783, 2788 (2008)).
35. *See Hunt, supra*, 588 So. 2d at 854 ("The proceedings of constitutional conventions are valuable in determining the meaning and purpose of constitutional provisions. Accordingly, we look first to the proceedings of the 1901 Constitutional Convention for aid in interpreting § 125."); *accord, e.g., Chism v. Jefferson County*, 954 So. 2d 1058, 1083 (Ala. 2006); *Zeigler v. Baker*, 344 So. 2d 761, 764-67 (Ala. 1977).
36. *See, e.g., Clark v. Container Corp. of Am., Inc.*, 589 So. 2d 184, 200 (Ala. 1991) ("A state constitution is always interpreted in the light of the common law, and if it be not the first constitution, in the light of its predecessors.") (internal quotations omitted); *Vining v. Board of Dental Exam'rs of Ala.*, 492 So. 2d 607 (Ala. Civ. App. 1985) ("Even in interpreting the constitution, recurrence may be had to the principles of common law."); *accord Fox v. McDonald*, 101 Ala. 51, 66-67, 13 So. 416, 419-20 (1893) (constitutional provisions should be interpreted in light of the history before their ratification).
37. *Bouchelle, supra,* 211 Ala. at 477, 100 So. at 886.
38. *Cf. Ex parte Alabama Alcoholic Beverage Control Bd.*, 683 So. 2d 952 (Ala. 1996) (Houston, J., concurring in the result) ("'Corporate' is defined as '[b]elonging to a corporation; as a corporate name. Incorporated; as a corporate body.' *Black's Law Dictionary* 339. This is the same definition that appeared in the 1891 *Black's Law Dictionary* 278 (the oldest Black's that I have been able to consult). I cannot find a particular or different meaning for the phrase 'corporate enterprise' in use at the time the 1875 Constitution or the 1901 Constitution was drafted.").
39. *See Ex parte Boyd*, 796 So. 2d 1092, 1093 (Ala. 2001) (examining early Alabama decisions concerning "[t]he object" of Section 45 of the Alabama Constitution) (internal quotations omitted).
40. *Moog v. Randolph*, 77 Ala. 597, 606 (1884); *see also Rice v. English*, 835 So. 2d 157, 163 (Ala. 2002) (examining older versions of separation-of-powers provision); *Lockridge v. Adrian*, 638 So. 2d 766, 768 (Ala. 1994) ("An amended or revised State constitution should be interpreted in the light of its predecessors; and when new provisions are introduced, they should be given a fair and legitimate meaning, and so construed, having regard, to their nature and purposes, as to accomplish the objects intended.").
41. *Ex parte DBI, Inc.*, 23 So. 3d 635, 643 (Ala. 2009); *see also, e.g., Vista Land & Equip., L.L.C. v. Computer Programs & Sys., Inc.*, 953 So. 2d 1170, 1174 (Ala. 2006). *Accord Cole v. Riley*, 989 So. 2d 1001, 1009 (Ala. 2007) (See, J., concurring specially) (looking to federal constitutional decisions as guidance "in construing the word 'necessary' when it is used in a constitutional context.")..
42. *See, e.g., Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 170 (1991); *Gilbreath v. Wallace*, 292 Ala. 267, 271, 292 So. 2d 651, 654-55 (1974).
43. *See Barber, supra*, 2009 WL 3805712, at *10; *see also Griggs v. Bennett*, 710 So. 2d 411, 413-14 (Ala. 1998) (stating that "general canons of construction" required strict construction of constitutional proviso of questionable application that would restrict the operation of a general constitutional rule).
44. *See Yellow Dog Dev., LLC v. Bibb County*, 871 So. 2d 39, 42-43 (Ala. 2003).
45. *House v. Cullman County*, 593 So. 2d 69, 72 (Ala. 1992).
46. *Id.* (quoting *Greene, supra*, 154 Ala. at 257, 46 So. at 271).
47. *See, e.g., Opinion of the Justices No. 323*, 512 So. 2d 72, 75-78 (Ala. 1987) (defining "appropriations for public education" by reference to what the Legislature had historically included in the education appropriation bill for the purpose of interpreting constitutional single-subject requirement).
48. *Jansen v. State ex rel. Downing*, 273 Ala. 166, 169, 137 So. 2d 47, 49 (1962); *see also State v. Tenaska Ala. Partners, L.P.*, 847 So.2d 962 (Ala. Civ. App. 2002) (quoting *Jansen*).
49. *Parke v. Bradley*, 204 Ala. 455, 459, 86 So. 28, 32 (1920).
50. Art. IV, § 63, ALA. CONST. 1901 (emphasis added).
51. *BJCC*, 912 So. 2d at 212 (citations, internal quotations, and footnote omitted).
52. *Id.* at 218-21 (citations omitted); *see also id.* 225-26 (Parker, J., concurring specially) (stating 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).

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