

THE ROLE OF STARE DECISIS IN CONSTRUING THE ALABAMA CONSTITUTION OF 1901

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A constitution does not exist in isolation from the body of law it generates. This body of law shapes and defines, as well as reflects, our understanding of constitutional text. The dialectic between text and judicial commentary on that text aspires to yield a synthesized set of rules and principles by which we are governed. The respect that we afford such rules and principles depends not only on our faith in the fairness and utility of such rules, but also on our faith that such rules and principles have been derived, articulated, and applied in a consistent, contemplative manner that transcends the personal preferences and predilections of individual judges as well as of powerful or highly motivated individuals or interest groups.¹

Therefore, to understand the Alabama Constitution of 1901 we must enter the maw of constitutional interpretation. A singularly important legal tool for understanding constitutional law and, hence, the 1901 Constitution, is the doctrine of stare decisis. This venerable doctrine, which unfortunately has been formulated and applied with less rigor in state constitutional construction than in federal constitutional construction, is the focus of this Article.

Part I will examine the roots, rationale, and application of stare decisis in federal constitutional interpretation. Part II examines the manner in which the Alabama Supreme Court employs or ignores federal stare decisis principles. Part III discusses the stare decisis implications of a paradigmatic federal application of stare decisis principles in *Bat-*

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1. See generally Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107 (1995); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 371 & n.13 (1988) (alluding to the well-documented belief in American government that Supreme Court opinions should not hinge on the Justices' personalities).

son v. Kentucky.² Part IV contrasts this approach with the use of stare decisis doctrine by the Alabama Supreme Court, paying particular attention to the ongoing debate concerning the presence or absence of equal protection guarantees in our state constitution.³ Accordingly, Part IV closely scrutinizes the stare decisis implications of *Ex parte Melof*,⁴ revealing the flawed and inconsistent manner in which this important doctrine is invoked and applied by several members of the present supreme court. This Article argues that the inherent and marked differences in the structure and function of the state constitution and the federal constitution require a more faithful adherence to constitutional precedent in state constitutional adjudication. While congressional correction of a federal constitutional decision is nearly impossible, amending the state constitution is substantially easier. Because it is far easier for the Legislature and the people to make extra-judicial corrections to any clearly erroneous interpretations of the state constitution, the doctrine of stare decisis should be applied with heightened rigor to the 1901 Constitution.

I. GENERAL OVERVIEW OF THE USE OF STARE DECISIS IN FEDERAL CONSTITUTIONAL INTERPRETATION

As a prelude to examining the role of stare decisis in the adjudication of state constitutional claims by the Alabama Supreme Court, it is worthwhile to review the doctrine of stare decisis generally. The term "*stare decisis*" is shorthand for the cumbersome Latin phrase "*stare decisis et non quieta movere*," which may be translated as "stand by the thing decided and do not disturb the calm."⁵ The virtues of the doctrine encompass efficiency, stability, reliability and predictability, legitimacy and the appearance of impartiality, non-capriciousness, and consistency.⁶ Stare decisis is also recognized as supplying some guarantee of substantive equality.⁷

2. 476 U.S. 79 (1986).

3. The Alabama Supreme Court has expressly addressed the debate over whether article I, §§ 1, 6, and 22, of the Alabama Constitution combine to create an equal protection guarantee. *Hutchins v. DCH Reg'l Med. Ctr.*, 770 So. 2d 49, 59 (Ala. 2000) (per curiam).

4. 735 So. 2d 1172 (Ala. 1999). A detailed discussion of the textual and historical aspects of the debate are beyond the scope of this Article. For such a discussion, see Martha Morgan & Neal Hutchens, *The Tangled Web of Alabama's Equality Doctrine after Melof: Reflections on Equal Protection and the Alabama Constitution*, 53 ALA. L. REV. 135 (published concurrently in this Symposium issue 2001); Albert P. Brewer & Robert R. Maddox, *Equal Protection Under the Alabama Constitution*, 53 ALA. L. REV. 31 (published concurrently in this Symposium issue 2001).

5. James C. Rehnquist, Note, *The Power That Shall be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986).

6. See Maltz, *supra* note 1, at 368-72.

7. *Melof*, 735 So. 2d at 1206 (Johnstone, J., dissenting). "[P]recedent provides guidance to

In federal constitutional interpretation, the rigor with which stare decisis is imposed is somewhat relaxed. Justice Brandeis wrote that for constitutional cases, "[s]tare decisis . . . is not a universal, inexorable command."⁸ In advocating the application of stare decisis to a particular non-constitutional context, Justice Frankfurter contrasted the different demands of stare decisis depending on the body of law implicated and wrote:

We are not dealing here with a ruling which cramps the power of Government; we are not dealing with a constitutional adjudication which time and experience have proved a parochial instead of a spacious view of the Constitution and which thus calls for self-correction by the Court without waiting for the leaden-footed process of constitutional amendment. We are dealing with an exercise of this Court's duty to construe what Congress has enacted with ample powers on its part quickly and completely to correct misconstruction.⁹

There are numerous similar statements of different justices derived from the undisputed fact that amending the federal Constitution has proved to be a nearly impossible task.¹⁰

Even taking account of the relaxed adherence to stare decisis in the constitutional context, there are three traditionally accepted rationales for overruling a holding of federal constitutional law. Such a holding is generally amenable to overruling when the promulgated rule has proved unworkable,¹¹ when there has been an intervening development of law,

later parties similarly situated and to later courts similarly addressed." *Id.*

8. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 238 (1924) (Brandeis, J., dissenting). See also *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-11 (1932) (Brandeis, J., dissenting)); *id.* at 954 (Rehnquist, C.J., dissenting) (citing *Burnet*); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991); *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986) (citing *Burnet*).

9. *Comm'r v. Estate of Church*, 335 U.S. 632, 677 (1949) (Frankfurter, J., dissenting). Justice Frankfurter further stated:

We do not have here a situation comparable to *Mahlich v. Southern S.S. Co.*, 321 U.S. 96, where we overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The *Classic* case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded . . . We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent reexamination.

Id. at 676 n.6.

10. See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 518 (1989) (citing *United States v. Scott*, 437 U.S. 82, 101 (1978)); see also Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1346 (1990).

11. See, e.g., *Casey*, 505 U.S. at 857 (arguing that no subsequent decision converted *Roe v. Wade*, 410 U.S. 113 (1973), into an anomalous, antiquated relic that necessitated its overruling). This situation may arise, for example, if it becomes apparent that the rule is not capable of providing manageable standards for its application. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 542-49 (1985) (overturning the rule of *Nat'l League of Cities v. Usery*, 426 U.S.

or when the underlying reasoning is outdated or inconsistent with contemporary values.¹² Implicit in each of these rationales is the view that the foundational case, if decided by the present Court, would come out differently.

While Congressional correction of a federal constitutional decision is nearly impossible, amending the state Constitution is substantially easier by comparison. The Alabama Constitution of 1901 is the longest, most frequently amended constitution in the nation.¹³ In 1997, there were just over 615 constitutional amendments.¹⁴ At the present writing, there have been over 700 amendments to the Alabama Constitution.¹⁵ A leading commentator on Alabama constitutional law confidently predicts that "the constitutional amendment process will continue to be a crucial part of the functioning of state government."¹⁶ By contrast, the federal Constitution has been amended a mere twenty-seven times.¹⁷

II. THE ALABAMA SUPREME COURT'S RELIANCE ON FEDERAL STARE DECISIS DOCTRINE

A cohesive body of law governing the doctrine of stare decisis as applied to the adjudication of state constitutional disputes has failed to emerge. This has been the state of affairs since the enactment of the 1901 Constitution, with the present members of the supreme court apparently unable to consistently reach a consensus about the proper use of stare decisis in state constitutional adjudication. Indeed, as recently as this year, at least four supreme court justices have stated that they

833 (1976), which defined the scope of Congress' Commerce Clause powers based on the concept of traditional governmental functions, as both impracticable and inconsistent with the idea of federalism).

12. E.g., Ruggero J. Aldisert, *Precedent: What It Is and What It Isn't; When Do We Kiss It and When Do We Kill It?*, 17 PEPP. L. REV. 605, 629 (1990); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 68 (1991); Jerold H. Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 220-25; Survey, *The Supreme Court, 1990 Term-Leading Cases*, 105 HARV. L. REV. 177, 182 (1991); Note, *supra* note 10, at 1346. See also *Casey*, 505 U.S. at 855-62 (holding that the application of the principles of stare decisis require that the central holding of *Roe v. Wade*, 410 U.S. 113 (1973), be affirmed because it has not proved unworkable, has induced reliance, is not an abandoned doctrine, and was not based on background facts that have since changed); *Alabama v. Smith*, 490 U.S. 794, 803 (1989) (noting that later developments of constitutional law relating to guilty pleas justified overruling *Simpson v. Rice*, 395 U.S. 77 (1969)).

13. The 1901 Constitution "began as a long document and has grown increasingly longer ever since." WILLIAM H. STEWART, *THE ALABAMA STATE CONSTITUTION: A REFERENCE GUIDE* 17 (1994).

14. Albert P. Brewer, *Constitutional Revision in Alabama: History and Methodology*, 48 ALA. L. REV. 583, 585 n.13 (1997).

15. See ALA. CONST. amend. 705.

16. Brewer, *supra* note 14, at 585.

17. See U.S. CONST. amend. XXVII.

would overrule a series of constitutional decisions.¹⁸ The court's casual disregard of stare decisis was exemplified by the main opinion, which displayed an intent to overrule an established line of constitutional precedent without mentioning stare decisis and without explaining the basis of its decision.¹⁹

A. *The Reliance on Federal Constitutional Standards*

Justices of the Alabama Supreme Court have repeatedly referred to, and claimed to rely upon, principles of constitutional stare decisis enunciated by Justices of the United States Supreme Court. For example, Justice Lyons has written that Justice Black "believed strongly that *stare decisis* had no role in matters of constitutional error."²⁰ In support of his view that Justice Black defended the Supreme Court's "duty to strike down even long-standing misconstructions of the Constitution," Justice Lyons quoted the following from Justice Black:

That decision [striking down a century-old rule as unconstitutional] rested upon the sound principle that the rule of stare decisis cannot confer powers upon the courts which the inexorable command of the Constitution says they shall not have. State obedience to an unconstitutional assumption of power by the judicial branch of government, and inaction by the Congress, cannot amend the Constitution by creating and establishing a new "feature of our constitutional system." No provision of the Constitution authorizes its amendment in this manner.²¹

Justice Lyons again quoted this passage while inviting future litigants to address whether "the doctrine of stare decisis [even] applies to rectification of erroneous constructions of the [Alabama] Constitution."²²

18. *Ex parte Apicella*, No. 1992273, 2001 Ala. LEXIS 87, at *1-*20 (Ala. Mar. 30, 2001).

19. *Ex parte Apicella*, 2001 Ala. LEXIS 87, at *1-*20. Indeed, the main opinion in the case stated tersely: "To the extent [that *Henderson and Schulte*] . . . held that § 11 restricted the Legislature from removing from the jury the unbridled right to punish, *Henderson and Schulte* were wrongly decided." *Id.* at *19-*20.

20. *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So. 2d 33, 42 n.10 (Ala. 1998) (Lyons, J., concurring specially).

21. *Ex parte Dan Tucker Auto Sales*, 718 So. 2d at 42 n.10 (quoting Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 454-55 (1939) (Black, J., dissenting)).

22. *Goodyear Tire and Rubber Co. v. Vinson*, 749 So. 2d 393, 399 & n.4 (Ala. 1999) (Lyons, J., concurring specially). Similarly, Justice Lyons wrote in *Marsh v. Green*:

The strongest obstacle to sustaining § 6-5-545 is the doctrine of stare decisis, given the *Leahey* case, where, four years ago, a divided Court struck down § 12-21-45, a counterpart of § 6-5-545 that related to civil cases generally. However, when 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 . . . (1996), the United States Supreme Court stated that, while the doctrine of stare decisis counsels against a reconsideration of precedent, the Court has

The reason most prominently and frequently given for a relaxed adherence to stare decisis in evaluating constitutional questions and resolving constitutional disputes is that errors of statutory interpretation are more readily rectified by the Congress than are errors of constitutional interpretation by the amendment process.²³ An amendment to the United States Constitution is arduous by design, requiring a time and resource intensive process that takes a massive effort and ratification by three-fourths of the states.²⁴ Serious errors in constitutional interpretation are quite enduring and are accordingly far less susceptible to extra-judicial correction than are errors in statutory interpretation. The doctrine of stare decisis must account for this discrepancy, the argument goes, by more readily permitting revision of constitutional precedents than statutory ones.

This conceptual framework collapses when applied to the evaluation of constitutional claims under our state's 1901 Constitution. Unlike our federal Constitution, which has only been amended twenty-seven times in the 200-plus years since its ratification, our state's constitution has been amended no fewer than 700 times as of this writing.²⁵ Because it is relatively easier to amend the state constitution,²⁶ the Legislature appears to feel substantially less responsibility, if any, for approving amendments to be sent to the people for a vote. Consequently, correction of erroneous rulings through legislative action at the state level is anything but "practically impossible."²⁷

been particularly willing to reconsider constitutional cases because, in such cases, "correction through legislative action is practically impossible." *Id.* at 63 . . . (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 . . . (1991), in turn quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 . . . (1932) (Brandeis, J., dissenting)). See, also, *Ex parte Dan Tucker Auto Sales, Inc.*, 718 So. 2d 33, 42-43 n.10 (Ala. 1998) (Lyons, J., concurring specially).

We reject Marsh's invitation to substitute our judgment for the policy-making decision the Legislature made in enacting § 6-5-545. We conclude that § 6-5-545 has not been shown to violate the constitution, and we overrule *American Legion Post No. 57 v. Leahey* to the extent that case held § 12-21-45, Ala.Code [sic] 1975, unconstitutional.

782 So. 2d 223, 232-33 (Ala. 2000).

23. See Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 404 (1988) (arguing that a major weakness of stare decisis is that it propagates error and inhibits correction).

24. U.S. CONST. art. V.

25. See ALA. CONST. amend. 705. It is worth noting, moreover, that three of the amendments to the United States Constitution were the direct result of the Civil War, and that scholars generally agree that the first ten amendments were part of the original constitutional package required for ratification. This means that, in the ordinary course, the amendment process envisioned by the Constitution has resulted in a total of only fourteen amendments to the document.

26. It stands to reason that amending a state constitution should be far easier than amending a federal constitution, particularly given the vast differences in population size and diversity of interests and human opinions.

27. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).

B. Amending the Federal and State Constitutions

The permissible procedures for amending the federal Constitution are set forth in broad terms in Article V of the Constitution.²⁸ This Article reads, in its entirety:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Convention in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.²⁹

Thus, the Constitution identifies two distinct methods for initiating the amendment process. First, by a two-thirds vote, Congress may propose a constitutional amendment for ratification by three-fourths of the states. Second, two-thirds of the states may apply to Congress and request that Congress call a constitutional convention to propose one or more amendments. This second route has never been successfully employed; indeed, the nation has never witnessed at least two-thirds of the states apply for a constitutional convention. The difficulty of ratifying an amendment to the Constitution is revealed by the facts that the Constitution has been amended a mere twenty-seven times and that three of the amendments would not have been ratified without a civil war.³⁰

The process of amending the Alabama Constitution is not onerous.³¹ Indeed, former governor and current professor Albert Brewer has written that the "proliferation of amendments to the 1901 Constitution is the most often cited factor in support of calling a constitutional convention."³² Article XVIII of the 1901 Constitution, as amended by amendment 24, sets forth the means by which the constitution may be

28. U.S. CONST. art. V.

29. *Id.*

30. The Thirteenth, Fourteenth, and Fifteenth Amendments are commonly referred to as the Civil War Amendments.

31. See Brewer, *supra* note 14, at 611-12 (summarizing the procedure for proposing constitutional amendments).

32. *Id.* at 596.

amended.³³ Regarding the breadth of the power of amendment, our supreme court has stated:

[I]t is self evident that with the ultimate sovereignty residing in the people, they can legally and lawfully remove any provision from the Constitution which they previously put in or ratified, even to the extent of amending or repealing one of the sections comprising our Declaration of Rights, even though it is provided that they "shall forever remain inviolate."³⁴

Additionally, article IV section 45 of the Alabama Constitution, which stipulates that an amendment can include but one subject, has been held inapplicable to acts of the Legislature that propose constitutional amendments.³⁵ A proposed constitutional amendment, moreover, does not require the governor's approval.³⁶

Although the Legislature must follow the constitution's prescribed procedures for submitting proposed constitutional amendments, our supreme court will find an amendment to be valid if there has been merely "substantial . . . compliance" with regard to legislative details.³⁷ Indeed, the supreme court grants presumptive validity to all ratified amendments.³⁸ Furthermore, such constitutional amendments may be presented to the Legislature either by bill or by resolution.³⁹ Most significantly, a proposed constitutional amendment requires a mere majority vote of the electors to become effective and incorporated into the Constitution.⁴⁰

Given the asymmetry in ease of amendment and the significance of this reality to the doctrine of stare decisis, one would expect the Alabama Supreme Court to adhere more faithfully to the doctrine in deciding questions of state constitutional interpretation than the United States Supreme Court does in deciding questions of federal constitutional interpretation. As the next two parts show, however, this is not the case.

33. *State v. Manley*, 441 So. 2d 864, 878 (Ala. 1983) (Tolbert, C.J., concurring specially).

34. Opinion of the Justices No. 148, 81 So. 2d 881, 883 (Ala. 1955).

35. Opinion of the Justices No. 224, 335 So. 2d 373, 375 (Ala. 1976) (citing *Bonds v. State Dep't of Revenue*, 49 So. 2d 280 (Ala. 1950)).

36. ALA. CONST. art. XVIII, § 287.

37. *Storrs v. Heck*, 190 So. 78, 81 (Ala. 1939); *Doody v. State ex rel Mobile County*, 171 So. 504, 506 (Ala. 1936).

38. See *Swaim v. Tuscaloosa County*, 103 So. 2d 769, 772 (Ala. 1958) (citing *In re Opinion of the Justices No. 113*, 47 So. 2d 643, 646 (Ala. 1950)).

39. *Jones v. McDade*, 75 So. 988, 991 (Ala. 1917).

40. ALA. CONST. art. XVIII, § 284.

III. APPLICATION OF STARE DECISIS IN FEDERAL
CONSTITUTIONAL ADJUDICATION: THE ILLUSTRATION
OF *BATSON V. KENTUCKY*

A. *The Nature of the Peremptory Challenge*

A proper understanding of the stare decisis principles embedded in the illustrative case of *Batson v. Kentucky*⁴¹ requires a basic background in the mechanics of jury selection. The jury selection process is a triple-tiered phenomenon. The first tier consists of creating a jury pool from a list of eligible jurors.⁴² A venire for a particular case is then randomly selected.⁴³ The second tier of the process removes jurors based on excuses such as "undue hardship."⁴⁴ The third tier, which is grounded in the procedure known as voir dire, is composed of two parts: challenges-for-cause and peremptory challenges.⁴⁵

Challenges-for-cause "permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality."⁴⁶ Because the grounds for challenges based on cause are narrowly specified, any dismissal based on cause must be ruled upon and authorized by the trial judge.⁴⁷ Either actual or implied bias will justify dismissing a prospective juror.⁴⁸ Actual bias is defined by the juror's subjective state of mind and is notably more difficult to prove than implied bias.⁴⁹ The contours of implied bias are generally statutorily prescribed and embody the law's presumption of bias "from the existence of certain relationships or interests of the prospective juror."⁵⁰ Challenges-for-cause are unlimited in number.⁵¹

Peremptory challenges, on the other hand, are finite in number.⁵² Peremptory challenges are "exercised without a reason stated, without inquiry and without being subject to the court's control."⁵³ The ostensible goal is the attainment of a jury that is impartial and unbiased.⁵⁴ The peremptory challenge purports "not only to eliminate extremes of parti-

41. 476 U.S. 79 (1986).

42. Lee Goldman, *Toward a Colorblind Jury Selection Process: Applying the "Batson Function" to Peremptory Challenges in Civil Trials*, 31 SANTA CLARA L. REV. 147, 148-49 (1990).

43. *Id.* at 149.

44. *Id.*

45. *Id.*

46. *Swain v. Alabama*, 380 U.S. 202, 220 (1965).

47. Goldman, *supra* note 42, at 149.

48. *Id.*

49. *Id.* at 149 n.9.

50. *Id.* at 149 n.10.

51. *Id.* at 149.

52. Goldman, *supra* note 42, at 150.

53. *Swain*, 380 U.S. at 220.

54. See Goldman, *supra* note 42, at 150.

ality . . . but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise."⁵⁵ Peremptory challenges may be justified as a means of eliminating bias that a challenge-for-cause would be unable to detect.⁵⁶

The theoretical goals of the peremptory challenge fail, however, when litigants use them to reinforce their own stereotypes and prejudices. Because "[r]ace prejudice is the most obvious and prevalent bias in America,"⁵⁷ peremptory challenges can work to deny fairness to parties on the basis of race and to prevent members of targeted racial groups from serving on juries. The possibility of such abuse was condemned by the United States Supreme Court in 1965,⁵⁸ but the Court did not effect any noticeable change in peremptory procedures until 1986. At that time, *Batson v. Kentucky*⁵⁹ overturned an unworkable prior precedent that was inconsistent with intervening major developments in the Court's equal protection jurisprudence, thereby subjecting race-based peremptory challenges to a manageable standard of judicial review. *Batson* illustrates the Court's approach to reexamining settled constitutional precedent.

B. The Batson Example

The Court's attempt to address the racially discriminatory use of the peremptory challenge has occurred primarily in the criminal context, where a disproportionately large number of African-Americans are prosecuted and sentenced.⁶⁰ Because the criminal justice system has a long history of abuse against African-American defendants,⁶¹ prosecu-

55. *Swain*, 380 U.S. at 219.

56. A litigant may perceive the existence of bias in a given juror, "but cannot prove it to the judge according to the guidelines set down for challenges-for-cause." JON M. VAN DYKE, *JURY SELECTION PROCEDURES* 146 (1977). Because jurors are selected from a wide array of experiences and backgrounds, "[t]hey may possess a range . . . of . . . biases that do not rise to the level justifying a challenge-for-cause." Goldman, *supra* note 42, at 150. Furthermore, a vast body of research reveals that "prospective jurors will tend to sympathize with parties who share a group identity." *Id.* at 152 n.20. The peremptory may thus narrow the range of possible biases while simultaneously creating the appearance of impartiality for the litigant. Indeed, one Supreme Court justice supports peremptory challenges as "a means of winnowing out possible (though not demonstrable) sympathies and antagonisms on both sides, to the end that the jury will be the fairest possible." *Powers v. Ohio*, 499 U.S. 400, 425 (1991) (Scalia, J., dissenting). See also *Holland v. Illinois*, 493 U.S. 474, 476-84 (1990) (discussing the history of the peremptory challenge).

57. JON M. VAN DYKE, *JURY SELECTION PROCEDURES* 144 (1977).

58. *Swain*, 380 U.S. at 202.

59. 476 U.S. 79 (1986).

60. See, e.g., James S. Bowen, *Peremptory Challenge Discrimination Revisited: Do Batson and McCleskey Relieve or Intensify the Swain Paradox?*, 11 NAT'L BLACK L.J. 291, 301-02 (1990).

61. See, e.g., *Developments in the Law-Race and the Criminal Process*, 101 HARV. L. REV.

tors have been primarily responsible for using peremptories in a discriminatory manner.⁶² The Supreme Court was quick to condemn the role of racial bias in jury selection and the administration of justice but slow to effect its abolition.

*Strauder v. West Virginia*⁶³ marked the first time the Fourteenth Amendment was used to combat racial exclusion in the selection of jurors. In *Strauder*, the Supreme Court struck down a state statute that prohibited African-Americans from qualifying as jurors.⁶⁴ The statute violated the Fourteenth Amendment's command that African-Americans should enjoy an "exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy."⁶⁵ This central tenet of nondiscrimination extended to grand juries as well: "Whenever . . . all persons of the African race are excluded, solely because of their race or color, from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied."⁶⁶

Such early pronouncements from the Court reflected a firm theoretical commitment toward protecting an African-American defendant's interest in being tried by a jury whose composition was not dictated by racism. This theoretical commitment soon proved ineffectual as a practical matter, failing to secure compliance with its anti-discrimination mandate. As it became apparent that minorities could be as effectively excluded at the challenge stage as at the initial selection stage, the Court continued to talk in egalitarian terms, that were not implemented in practice. The anti-discrimination barriers erected by the Court were proving to be too permeable to racism to be effective. Concerning this trend, Justice Marshall wrote, "There is no point in taking elaborate steps to ensure that Negroes are included on venires simply so they can then be struck because of their race by a prosecutor's use of peremptory challenges."⁶⁷

Eliminating racial bias from jury selection was so intractable in large measure because of the enforceability problems occasioned by the

1472, 1475-93 (1988) (reviewing the law's capacity to accommodate the ideology and practice of racial subordination from slavery through the present); Bowen, *supra* note 60, at 301.

62. See *Batson*, 476 U.S. at 103-04 (Marshall, J., concurring) (reviewing data that depict the peremptory challenge as a device routinely employed by prosecutors to exclude African-Americans from juries).

63. 100 U.S. 303 (1880).

64. *Strauder*, 100 U.S. at 312.

65. *Id.* at 308.

66. *Carter v. Texas*, 177 U.S. 442, 447 (1900). *Smith v. Texas*, 311 U.S. 128 (1940), repeated the principle in emphatic terms: "For racial discrimination to result in the exclusion from jury service of otherwise qualified groups . . . violates our Constitution and the laws enacted under it [and] is at war with our basic concepts of a democratic society." *Id.* at 130.

67. *McCray v. New York*, 461 U.S. 961, 968 (1983) (Marshall, J., dissenting).

standard articulated in *Swain v. Alabama*,⁶⁸ the first case to examine the equal protection rights of criminal defendants at the peremptory challenge stage. The petitioner in *Swain* was an African-American man who had been convicted of rape and sentenced to death by an all-white jury in a segregated Southern town.⁶⁹ The prosecutor had used his challenges to strike all six African-Americans from the jury.⁷⁰ Swain sought to quash the indictment on equal protection grounds.⁷¹

The Supreme Court upheld the conviction by erecting a statistical burden of proof that, as a practical matter, effectively permitted invidious discrimination to be permissible in individual cases.⁷² In order for a defendant to prevail on an equal protection claim, the defendant would have to show systematic discrimination.⁷³ The standard for determining whether there had been systematic discrimination was explained as follows:

[W]hen the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges-for-cause, with the result that *no Negroes ever serve on petit juries . . .* the presumption protecting the prosecutor may well be overcome.⁷⁴

Application of this vague standard in *Swain* was telling: Although no African-Americans had served on a Talladega County jury in fifteen years, the Court was unwilling to make a finding of systematic discrimination. *Swain* survived untouched through twenty-one years of criminal prosecutions, with the practical effect of permitting prosecutors' peremptory challenges to operate in an environment "largely immune from constitutional scrutiny."⁷⁵

It was not until *Batson v. Kentucky* that the evidentiary burden announced by a unanimous Court in *Swain* was rejected.⁷⁶ *Batson* is a classic example of the Supreme Court's overruling a well-established,⁷⁷ twenty-one year old precedent grounded in constitutional law. Although the majority opinion does not mention stare decisis, *Batson* relied upon

68. 380 U.S. 202 (1965).

69. *Swain*, 380 U.S. at 203.

70. *Id.* at 205.

71. *Id.* at 203.

72. *See id.* at 227-28.

73. *Id.*

74. *Swain*, 380 U.S. at 223-24 (emphasis added).

75. *Batson*, 476 U.S. at 92-93.

76. *Id.* at 82-100.

77. *See, e.g., id.* at 112 (Burger, C.J., dissenting) (describing constitutional principles enunciated in *Swain* and governing use of peremptory challenges as "settled").

two of the traditional, core principles calling for the subordination of stare decisis principles.⁷⁸ *Batson* recognized that the *Swain* rule had become unworkable and ineffectual.⁷⁹ *Batson* also recognized that an intervening change or development in the law required overruling *Swain*.⁸⁰ To a lesser extent, *Batson* was also grounded in a third core principle used to override stare decisis: the underlying reasoning of *Swain* was outdated and/or inconsistent with contemporary values.⁸¹

In *Batson*, an African-American man was convicted of second degree burglary and receipt of stolen goods.⁸² The prosecutor used his peremptory challenges to dismiss all four African-Americans on the venire; an all-white jury remained.⁸³ The trial court refused to prevent the prosecutor from violating the defendant's equal protection rights, but the Supreme Court reversed.⁸⁴

The *Batson* opinion began by asserting that a "State's purposeful or deliberate denial to Negroes . . . participation as jurors in the administration of justice violates the Equal Protection Clause."⁸⁵ The Court then traced the evolution of the standards needed to show equal protection violations since *Swain*.⁸⁶ The principles announced in the intervening years convinced the Court that "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory

78. *Id.* at 82-100.

79. *Id.* at 92-93 & n.17. In the years after *Swain* was decided, little progress had been made in eradicating race discrimination from the jury selection process. *Swain*'s ineffectiveness in engendering compliance with the Court's anti-discrimination norms apparently contributed significantly to its displacement as precedent. This factor helped to persuade Justice White, *Swain*'s author, to join the *Batson* majority in overruling *Swain*. *Batson*, 476 U.S. at 101 (White, J., concurring) (acknowledging that after *Swain*, discriminatory jury selection "remains widespread").

80. *Id.* at 93-96, 100 n.25; see also *id.* at 93 (stating that "we reject [*Swain*'s] evidentiary formulation as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause"). The Court cited several intervening cases that heralded major changes in equal protection jurisprudence as a basis for overturning *Swain*. *Id.* at 95-96 The Court noted:

[S]ince the decision in *Swain*, the Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case. These decisions are in accordance with the [equality principles articulated in other intervening cases].

Id. Similarly, the Court noted that in other contexts, such as employment discrimination, an employee need not show a pattern of discrimination before possessing a cognizable claim. *Batson*, 476 U.S. at 95-96 & n.19.

81. *Id.* at 93-96.

82. *Id.* at 82-83.

83. *Id.* at 83.

84. *Id.* at 83-84.

85. *Batson*, 476 U.S. at 84 (quoting *Swain v. Alabama*, 380 U.S. 202, 203-04 (1965)) (internal quotations omitted).

86. *Id.* at 93-98.

challenges at the defendant's trial."⁸⁷ The defendant no longer needed an historian, or an archaeologist, to demonstrate that he had been denied the equal protection of the laws.

The circumspect manner in which the *Batson* Court overruled *Swain* exemplifies the way the Court applies stare decisis principles to settled constitutional doctrines. The prior, "crippling" constitutional precedent had been unworkable: it had made "prosecutors' peremptory challenges . . . largely immune from constitutional scrutiny."⁸⁸ The contribution of this fact to the decision to overrule *Swain* should not be underestimated, but the Court also considered other factors in evaluating *Swain's* continued viability.

One factor the Court considered before replacing the *Swain* rule with the *Batson* rule was how to address the potential new "serious administrative difficulties."⁸⁹ It would not have made sense for the Court to substitute one unworkable standard for another. Because the Court found the increased burden to be slight in states that had implemented their own version of the *Batson* showing, and because the *Batson* framework had proved successful in other equal protection contexts, this concern hardly tilted the balance.⁹⁰ A second factor the Court carefully considered was whether the new rule in *Batson* would "undermine the contribution the [peremptory] challenge generally makes to the administration of justice."⁹¹ The Court found that concerns about partiality and fair trial values would not be noticeably diminished by overruling *Swain*.⁹²

The meticulous consideration of all these factors shows that stare decisis doctrine plays a vital role in federal constitutional adjudication. Even when the Court ultimately overrules a constitutional precedent, as the Court did in *Batson*, the Court carefully considers reasons to preserve the precedent. Rather than tersely asserting that *Swain* was incorrectly decided, the Court reviewed the state of the law with exacting scrutiny in order to demonstrate the need for replacing *Swain* as controlling authority. This sort of analytical rigor is frequently absent from the Alabama Supreme Court opinions overturning established constitutional principles, as several justices appear to feel unconstrained by the doctrine of stare decisis in constitutional cases. The main opinion of *Ex parte Melof*⁹³ is revelatory of the radical, unsettling potential repercussions of this approach.

87. *Id.* at 96.

88. *Id.* at 92-93.

89. *Id.* at 99.

90. *Batson*, 476 U.S. at 99 & nn.22-23.

91. *Id.* at 98-99.

92. *See id.* at 98-99 & n.22.

93. 735 So. 2d 1172 (Ala. 1999).

IV. APPLICATION OF STARE DECISIS IN STATE CONSTITUTIONAL ADJUDICATION

A. *Equal Protection Under the 1901 Constitution: The Emerging Stare Decisis Crisis*

Although the phrase "equal protection of the laws" appears nowhere in the Alabama Constitution, the Alabama Supreme Court has repeatedly found that the state constitution embraces equal protection guarantees despite the absence of an explicit equal protection clause.⁹⁴ Only two cases, on the other hand, have been cited as intimating the possible absence of equal protection guarantees.⁹⁵ Most recently, the position that the principles of equal protection do not inhabit or animate the 1901 Constitution appeared in a main opinion of the supreme court.⁹⁶ The fact that a majority of the justices did not join the main *Melof* opinion on the question of the existence of equal protection guarantees will ensure that the equal protection debate continues. And given

94. See, e.g., *Hamrick Const. Corp. v. Rainsville Hous. Auth.*, 447 So. 2d 1295 (Ala. 1984) (identifying Article I, §§ 1 and 13, of the Alabama Constitution as a source of equal protection); *Reese v. Rankin Fite Mem'l Hosp.*, 403 So. 2d 158 (Ala. 1981) (construing §§ 1 and 6 of Article I of the Alabama Constitution to provide equal protection by implication); *Crabtree v. City of Birmingham*, 299 So. 2d 282 (1974) (identifying Article I, § 22, of the Alabama Constitution as a source of equal protection); *McCraney v. Leeds*, 1 So. 2d 894 (Ala. 1941) (interpreting Art. I, § 6, of the Alabama Constitution as a source of equal protection); *Pickett v. Matthews*, 192 So. 261 (Ala. 1939) (relying upon equal protection guarantees of Article I, §§ 1, 6, and 22, of the Alabama Constitution); *City Council of Montgomery v. Kelly*, 38 So. 67 (Ala. 1904) (relying upon equal protection guarantees of Article I, §§ 1 and 35, of the Alabama Constitution), *overruled on other grounds by* *Standard Chem. & Oil Co. v. City of Troy*, 77 So. 383 (Ala. 1917); see also *Ex parte Melof*, 735 So. 2d 1172, 1197 n.20 (Ala. 1999) (Cook, J., concurring in the result, dissenting from the rationale) (observing that the presence of a state equal protection guarantee has been so often reaffirmed "throughout the years that the cases so holding are too numerous to cite"); *id.* at 1193 (See, J., concurring specially) (collecting cases).

95. *McLendon v. State*, 60 So. 392 (Ala. 1912); *Opinion of the Justices No. 102*, 41 So. 2d 775 (Ala. 1949). In refusing to provide an advisory opinion about whether a proposed bill violated the due process clause of section 6 of the 1901 Constitution, the 1949 *Opinion of the Justices* stated in pertinent part: "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." *Opinion of the Justices*, 41 So. 2d at 777. But simply stating the truism that "there is no equal protection clause" does not amount to saying that there are no state equal protection guarantees. See, e.g., *Melof*, 735 So. 2d at 1194 (See, J., concurring specially) (noting that "Although the main opinion correctly states that there is no single, express equal-protection provision in the Constitution of 1901, I do not believe it follows that there can be no claim of denial of equal protection cognizable under the Constitution of Alabama."); *id.* at 1186 (Hooper, C.J., concurring specially) (stating that the 1901 Constitution contains no "explicit equal-protection clause" but that it does "contain[] an aspect of equal protection"). *McLendon* is no more useful than the 1949 *Opinion of the Justices* for advocating an absence of equal protection guarantees. Justice See has noted that even in *McLendon*, the court acknowledged a general restriction on the legislature's power "to engage in unreasonable discrimination in the imposition of taxes." See *Melof*, 735 So. 2d at 1192 (See, J., concurring specially).

96. *Melof*, 735 So. 2d at 1172-94.

that the overwhelming weight of previous supreme court authority clearly recognized the presence of equal protection principles, the *Melof* debate implicates foundational stare decisis precepts. Reviewing the particular facts of the taxation dispute giving rise to *Melof* is unnecessary to discussing its stare decisis implications, which may determine the course of Alabama constitutional law for decades to come.

The justices who joined in the equal protection analysis of the main opinion in *Melof*,⁹⁷ thereby advocating that a century of constitutional precedent underlying state equal protection provisions be dismantled, utilized a far different analysis than the Justices in *Batson*.⁹⁸ The main *Melof* opinion justified its disregard of stare decisis simply by asserting that all of the prior cases premised in state equal protection guarantees were mistaken.⁹⁹

In stark contrast to the approach exemplified by *Batson*, the main opinion made no attempt to demonstrate that an intervening change or development in the law required the extirpation of equal protection principles from the 1901 Constitution. Indeed, the only development had been one justice's proclaimed discovery of the absence of an equal protection clause and a change in the court's composition.¹⁰⁰ Similarly, the main opinion did not contend that equal protection principles were antiquated or inconsistent with contemporary values. Instead, the author of the main opinion expressed his profound wish that the constitution contained equal protection provisions.¹⁰¹

There was, of course, no attempt to demonstrate that the allegedly make-believe equal protection provision had proved unworkable.¹⁰² Although there is ample room for disagreement over the *meaning* of an equal protection guarantee, no Alabama Supreme Court justice has indicated that the existence of such a guarantee would be objectionable. Such an announcement would, in any event, flatly contradict Justice Houston's stated desire that the 1901 Constitution include an equal protection clause.¹⁰³

The main opinion in *Melof* claims not to have traduced fundamental

97. 735 So. 2d 1172 (Ala. 1999).

98. See *Melof*, 735 So. 2d at 1181-86.

99. *Id.* at 1186.

100. *Id.* at 1188.

101. *Id.* at 1191-92 (Houston, concurring specially) (describing a letter he has written to the Legislature requesting that the constitution be amended to include an equal protection clause); *id.* at 1188 (stating that "I would certainly include an equal-protection clause if I were authoring a constitution for Alabama."); see also *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 175 (Ala. 1991) (Houston, J., concurring in the result) (stating that "[i]f I were drafting a constitution, I would make certain that there was an equal protection clause in that constitution").

102. See *Melof*, 735 So. 2d at 1207 (Johnstone, J., dissenting) (noting the absence of a showing that equal protection guarantees are "wreaking" a "practical injustice" on "our citizens").

103. See sources cited *supra* note 101.

principles of stare decisis for the proffered reason that stare decisis need not be followed when the underlying precedent is incorrect.¹⁰⁴ But this type of reasoning transforms stare decisis into a tautology. According to this line of thinking, if a judge believes a prior precedent is incorrect, he is not bound to follow it. If this were in fact the standard, then stare decisis would be deprived of all operational effect. This, of course, is not the way stare decisis operates; after all, the "whole function of the doctrine is to make us say that what is false under proper analysis must *nonetheless* be held to be true, all in the interest of stability."¹⁰⁵

As noted, unlike in *Batson*, the main opinion contains no argument that the constitutional principles at issue do not jibe with contemporary standards, that they are unworkable, or that intervening case law has made them irrelevant. There is no argument that they are superfluous because a superior sovereign bestows a separate guarantee. Rather Justice Houston says: "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."¹⁰⁶ Justice Houston similarly noted his desire for such a clause in *Melof*, stating, "[since the late 1980s], I made it manifest that I believed in equal protection for Alabama's citizens and that I would certainly include an equal-protection clause if I were authoring a constitution for Alabama."¹⁰⁷

Although Justice Houston has at times claimed to rely on Justice Scalia's vision of stare decisis principles to support a constitutional overhaul,¹⁰⁸ Justice Scalia's use of stare decisis is not congruent with

104. *Melof*, 735 So. 2d at 1186. Justice Houston wrote:

As to the role of the doctrine of stare decisis in this matter, we note that "courts are not bound by stare decisis to follow a previous interpretation [that is] later found to be erroneous." *Goodyear Tire & Rubber Co. v. J.M. Tull Metals Co.*, 629 So.2d 633, 638 (Ala. 1993) (quoting 2B Norman J. Singer, *Sutherland Statutory Construction*, § 49.05, at 16 (5th ed.1992)) [sic]. See also *Ex parte Marek*, 556 So.2d 375, 382 (Ala.1989) [sic] (noting that the doctrine of stare decisis does not render the courts helpless to correct their past errors). It would be difficult to imagine a more erroneous "interpretation" of Alabama constitutional law than to allow a wholly inaccurate unofficial annotation (which, by the way, has since been corrected by the Code publishers) to amend the Alabama Constitution.

Id.

105. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 139 (Amy Gutmann ed., 1997) (emphasis added) (affirming his belief that stare decisis must be constrained by consistent rules); see also John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 9 (1983) (characterizing stare decisis as a consideration distinct from the question of whether a case was erroneously decided).

106. *Moore v. Mobile Infirmary Ass'n*, 592 So. 2d 156, 175 (Ala. 1991) (Houston, J., concurring in the result).

107. *Melof*, 735 So. 2d at 1188 (Ala. 1999) (Houston, J., concurring specially).

108. For instance, Justice Houston has responded to allegations that he has violated stare decisis principles by stating:

In answer to that challenge, I adopt Justice Scalia's statement in *BMW of North America v. Gore*: "When, however, a constitutional doctrine adopted by the Court

Justice Houston's. Justice Scalia has actually said that he does not advocate overturning "long-standing and well-accepted principles (not out of accord with the general practices of our people, whether or not they were constitutionally required as an original matter) that are effectively irreversible."¹⁰⁹ Indeed, "[o]riginalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of *stare decisis*; it cannot remake the world anew."¹¹⁰ Contrary to Justice Houston's view, "[w]here originalism will make a difference is not in the rolling back of accepted old principles of constitutional law but in the rejection of usurpatious new ones."¹¹¹

Furthermore, Justice Scalia's opinions reflect an attempt to avoid arbitrariness by using consistent rules to apply *stare decisis*.¹¹² By way of example, Justice Scalia's jurisprudence reveals a reluctance to unnecessarily destabilize settled law,¹¹³ as well as a desire to avoid exercises inherently "disruptive of the established state of things" for the sole perceived purpose of doctrinal purity.¹¹⁴ It would appear that Justice Scalia would take exception to the Alabama Supreme Court's disregard for over a hundred years of precedent in *James v. Langford*,¹¹⁵ where Justice Houston's opinion overruled, without initial comment, constitutional precedent spanning more than a century.¹¹⁶

Langford involved interpretation of the constitutional amendment governing appointments to the Auburn University Board of Trustees.¹¹⁷ Justice See explained that there was no substantial reason to depart from prior interpretations of amendment No. 161 to the 1901 Constitu-

is not only mistaken but also insusceptible of principled application, I do not feel bound to give it *stare decisis* effect—indeed, I do not feel justified in doing so."

Ex parte Knotts, 686 So. 2d 486, 487 (Ala. 1996) (Houston, J., concurring in the result) (quoting *BMW of North America v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting)) (citation omitted). Even this skeletal statement from *Gore* which requires a constitutional precedent to be insusceptible of principled application before it may be discarded, conflicts with Justice Houston's *stare decisis* position in *Melof*. No justice in *Melof* suggests that the Alabama Constitution's equal protection guarantees are incoherent, internally inconsistent, or incapable of principled application.

109. SCALIA, *supra* note 105, at 138.

110. *Id.* at 138-39.

111. *Id.* at 139.

112. See, e.g., *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting); *Planned Parenthood v. Casey*, 505 U.S. 833, 993 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part); *Walton v. Arizona*, 497 U.S. 639, 672-73 (1990) (Scalia, J., concurring in part and concurring in the judgment).

113. SCALIA, *supra* note 105, at 138-39.

114. *Id.* at 139.

115. 695 So. 2d 1164 (Ala. 1997).

116. *Langford*, 695 So. 2d at 1165-66 (See, J., dissenting).

117. *James v. Langford*, 695 So. 2d 1158 (Ala. 1997). The provision states: "The trustees shall be appointed by the governor, by and with the advice and consent of the senate, and shall hold office for a term of twelve years, and until their successors shall be appointed and qualified." ALA. CONST. amend. 161.

tion.¹¹⁸ Although the substance and import of the abandoned precedent were relatively pedestrian compared to the cases establishing equal protection guarantees, settled expectations were likely shaken by abandonment of a hundred years of case law. According to Justice See, stare decisis counseled against the abandonment.¹¹⁹ But it is certainly possible that Justice Houston felt more license to abandon prior case law because it had interpreted a statute rather than the Alabama constitution.¹²⁰

Although the basis for Justice Houston's reference to prior statutory law is somewhat cryptic,¹²¹ one might infer that Justice Houston adhered to his sometimes previously stated view that precedent may be given less weight in matters of constitutional interpretation. If this was indeed the majority's rationale, it highlights an unfortunate reliance upon a rule of interpretation developed to elaborate a federal Constitution lacking a statutory dimension. Given the Alabama Constitution's quasi-statutory nature, it seems unlikely that any United States Supreme Court Justice who purports to relax the doctrine of stare decisis for purposes of constitutional interpretation would advocate use of an identical approach with regard to the Alabama Constitution.

B. *The Melof Dissents*

Justices Cook and Johnstone analyzed the constitutional dispute presented by *Melof* in a manner that generally followed venerable stare decisis principles frequently enunciated and applied by the United States Supreme Court. For Justice Cook the determinative question was not whether the main opinion was correct on the merits of the presence or absence of an equal protection guarantee, but rather:

*The point is that this Court has so often reaffirmed that principle throughout the years that the cases so holding are too numerous to cite. Therefore, it is too late in the day to suggest, as the main opinion does, that Alabama's equal-protection guarantee springs from an erroneous annotation regarding the holding of Pickett.*¹²²

Justice Cook noted that "[t]he main opinion also ignores the body of caselaw emanating from this Court from 1901 until *Pickett*, finding general principles of equality and uniformity inherent in various provi-

118. *Langford*, 695 So. 2d at 1165-66 (See, J., dissenting).

119. *Id.* at 1168 n.7.

120. *See id.* at 1167 (See, J., dissenting).

121. *See id.*

122. *Melof*, 735 So. 2d 1172, 1197 n.20 (Ala. 1999) (Cook, J., concurring in the result, dissenting from the rationale) (emphasis added).

sions of the Constitution."¹²³ Given that the Alabama Supreme Court has "zealously defended its right to review legislation under standards other—and sometimes stricter—than those required by contemporary Fourteenth Amendment analysis,"¹²⁴ it was improper for the court to fail to identify any change in circumstances or any reason why recognizing equal protection guarantees would be somehow incompatible with contemporary values. Since no other state entertains a serious doubt about the presence of equal protection guarantees in its constitution,¹²⁵ Justice Cook noted that the court "usher[ed] in the new millennium, out of the mainstream of American constitutional thought and deficient in its application of the fundamental constitutional concept of equal protection of the laws."¹²⁶ The attempt to jettison all equal protection guarantees was particularly troubling in light of several textual provisions that have been cited as supplying such state equal protection rights.¹²⁷

Justice Johnstone's dissenting opinion elaborated upon Justice Cook's contention that it was "too late in the day" to "discover" or assert that Alabama's constitution failed to contain equal protection guarantees.¹²⁸ Justice Johnstone outlined a vision of constitutional stare decisis that, standing on its own, compels the conclusion that our state Constitution contains equal protection guarantees. Justice Johnstone delineated a traditional approach to stare decisis that provides some guidelines for the use of the doctrine.

123. *Id. See, e.g.,* Woco Pep Co. v. City of Montgomery, 105 So. 214 (Ala. 1925); Maury v. State, 93 So. 802 (Ala. 1922); Birmingham-Tuscaloosa Ry. & Utilities Co. v. Carpenter, 69 So. 626 (Ala. 1915); State *ex rel.* Brassell v. Teasley, 69 So. 723 (Ala. 1915) (Mayfield, J., dissenting); McLendon v. State, 60 So. 392, 399 (Ala. 1912) (Mayfield J., dissenting); Alabama Consol. Coal & Iron Co. v. Herzberg, 59 So. 305 (Ala. 1912); Birmingham Water Works Co. v. State, 48 So. 658 (Ala. 1909) (relying on cases decided under the 1875 Alabama Constitution); City Council of Montgomery v. Kelly, 38 So. 67 (Ala. 1905), *overruled on other grounds by* Standard Chemical & Oil Co. v. City of Troy, 77 So. 383 (Ala. 1917); Toney v. State, 37 So. 332 (Ala. 1904).

124. *Melof*, 735 So. 2d at 1202.

125. *Id.* at 1196 n.19 (noting that only one justice on the Mississippi Supreme Court questions whether its state constitution possesses an equal protection clause and that the Delaware Supreme Court has rendered the question moot because it has recognized that the due process clause of its constitution embraces equal protection guarantees). *Accord* *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the due process clause of the Fifth Amendment inherently contains an equal protection provision).

126. *Melof*, 735 So. 2d at 1205.

127. For example, Article III, section 43 of the Alabama Constitution of 1901 provides:

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.

ALA. CONST. art. III, § 43.

128. *Melof*, 735 So. 2d at 1205 (Johnstone, J., dissenting).

Specifically, just as the Court did in *Batson*, Justice Johnstone focused upon the workability and practical justice worked by the constitutional principle at issue.¹²⁹ And recent precedents, according to Justice Johnstone, are entitled to less stare decisis effect than long-standing ones.¹³⁰ This is in accord with Justice Black's¹³¹ and Justice Scalia's¹³² approach to stare decisis. Indeed, according to Justice Johnstone:

[The doctrine of stare decisis] is most pronounced in constitutional jurisprudence, which recognizes, interprets, and applies the most fundamental legal principles on which all people rely in conducting and planning their lives and their businesses. Among the myriad of topics of constitutional jurisprudence are taxes, contracts, currency, commerce, crime, punishment, property, eminent domain, full faith and credit, rights, privileges, immunities, civil actions, defenses, judgments, legislation, executive powers, police powers, military defense, court procedures, and so forth, on and on. A reverence for *stare decisis* means that people and businesses can expect consistency in the judicial decisions on these topics. An irreverence for *stare decisis* means that people and businesses cannot know what to expect on these topics from one court decision to the next.¹³³

This approach recognizes the fact that "[l]iberty finds no refuge in a jurisprudence of doubt."¹³⁴ It also recognizes the salutary effect of avoiding marked discontinuities or sharp disruptions in the course of constitutional law. Thus, Justice Johnstone's vision of constitutional stare decisis doctrine, which reflects the analysis apparent in *Batson* and *Casey*, provides a needed guide to the development of a stable, cohesive body of constitutional law.

V. CONCLUSION

There is evident danger in disregarding the time-honored doctrine of stare decisis. Few attempts to undermine deeply embedded constitutional principles could be more disruptive of an ordered constitutional system than the wholesale jettisoning of equal protection guarantees.

129. See *id.* at 1206 (Johnstone, J., dissenting) (arguing that stare decisis should not be violated except to end some "practical injustice").

130. See *id.* at 1207.

131. See *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 454-55 (1939) (Black, J., dissenting) (criticizing precedent that was merely eight months old).

132. See *Payne v. Tennessee*, 501 U.S. 808, 835 (1991) (Scalia, J., concurring) (indicating that overruling a relatively recent opinion is less likely to disturb settled expectations).

133. *Melof*, 735 So. 2d at 1206 (Johnstone, J., dissenting).

134. *Planned Parenthood v. Casey*, 505 U.S. 833, 844 (1992) (main opinion). Indeed, Justice Johnstone's dissent employs an analysis similar to the main opinion in *Casey*.

There is, in fact, no traditional form of stare decisis that requires revisiting the phalanx of precedent establishing equal protection guarantees in the Alabama Constitution. Justice Houston finds his primary justification for abandoning the precedent in a rigid appeal to originalism that even originalism's most prominent proponent would not even endorse. When such a strong line of cases spans so many decades that it has become embedded in the fabric of constitutional adjudication, its displacement ought to require something more than a belief that the underlying constitutional issue was wrongly decided.¹³⁵ While some state justices have expressed the view that the doctrine of stare decisis does not meaningfully constrain the exercise of constitutional construction, stare decisis principles are assiduously considered and applied with regularity by Justices construing the federal Constitution. Given that the quasi-statutory character of our state constitution permits extra-judicial correction of erroneous constitutional rulings with comparative ease, constitutional adjudication in Alabama should be guided by an heightened attentiveness to stare decisis principles.

135. The point that it was wrongly decided, of course, is one of contention. See Martha Morgan & Neal Hutchens, *The Tangled Web of Alabama's Equality Doctrine after Melof: Historical Reflections on Equal Protection and the Alabama Constitution*, 53 ALA. L. REV. 135 (concurrently published in this Symposium issue 2001) (arguing that the 1901 Constitution contains a panoply of equal protection guarantees); see also *Melof*, 735 So. 2d at 1188 (Maddox, J., concurring specially) (noting previous concurrence with holdings that §§ 1, 6, and 22 guarantee equal protection in combination); *id.* at 1194 (See, J., dissenting) (stating that the absence of a "single, express equal-protection provision" does not compel the conclusion that an equal protection claim is not cognizable under the 1901 Constitution); *id.* at 1194 n.17 (cataloguing constitutional provisions in addition to §§ 1, 6, and 22 that may supply equal protection guarantees); *id.* at 1197 (Cook, J., dissenting) (identifying §§ 1, 6, 13, 22, and 35 as constitutional provisions previously found to guarantee equal protection); *id.* at 1206 (Johnstone, J., dissenting) (adopting Justice Cook's opinion and adding that Art. III, § 43, which guarantees "a government of laws and not of men," provides an additional textual source for equal protection).