This Alabama Judge Has Figured Out How to Dismantle Roe v. Wade

by Nina Martin, ProPublica, 10/10/14

In 2005, the Witherspoon School of Law and Public Policy held a conference in Virginia’s Blue Ridge Mountains. The school’s name was something of a misnomer: Rather than grant JDs, Witherspoon staged seminars and lectures offering lessons in what it summarized as “the comprehensive biblical foundation for our common law and constitutional government.” Its target audience was homeschooled
young men. The school itself was a project of Vision Forum, a Texas-based ministry whose founder was also a leader in the Christian Patriarchy movement, which preaches, among other things, that husbands should vote for their wives.

Where it came from and where it stands today.

Most sitting judges would go to great pains to avoid such a gathering. But Tom Parker, then a few months into his first term on the Alabama Supreme Court, gladly accepted an invitation to speak at that year’s Witherspoon retreat. Before his election to Alabama’s highest court, Parker had been an aide-de-camp to Chief Justice Roy Moore, whose installation of a granite Ten Commandments monument in the state judiciary building had touched off what became for Alabama both a considerable embarrassment and a genuine constitutional crisis. At Parker’s swearing-in, he made it clear that he had sought the bench to continue his old boss’s spiritual fight.

“The very God of Holy Scriptures, the Creator, is the source of law, life, and liberty,” he declared to an audience that included his eight unsmiling fellow justices.

The atmosphere at Parker’s Witherspoon appearance was far warmer, and his remarks there were even more candid. A DVD of the session shows him gripping the lectern, dressed in a gray suit and blue tie, as he railed against the perceived sins of jurists at every level. “It’s the judges who have legalized abortion and homosexuality … They are shaking the very foundation of our society.” Parker made it clear that he had no intention of letting legal precedent get in his way. “We cannot fall under that trap,” he insisted. “We have to stand for what’s right.” The one thing he most wished for the young men before him was that they find a way to gain positions of influence and turn them to God’s purpose. No opportunity to do so should be shrunk from or wasted.

In the nine years Parker has now served on the court, he has made the most of his opportunities. Child custody disputes, for instance, have made good occasions to expound on the role of religion in parental rights. (“Because God, not the state, has granted parents the authority and responsibility to govern their children, parents should be able to do so unfettered by state interference,” he wrote in one case.) But Parker has been the most creative in his relentless campaign to undermine legal abortion. Again and again, he has taken cases that do not directly concern reproductive rights, or even reproductive issues, and found ways to use them to argue for full legal status for the unborn.

Those efforts have made Parker a pivotal figure in the so-called personhood movement, which has its roots in a loophole in Roe v. Wade. While that 1973 ruling was creating a broad new right to abortion grounded in a constitutionally protected right to privacy, an often-overlooked passage left an opening for those who would seek its undoing. During oral arguments, the justices had asked Roe’s lawyer what would happen if a fetus were held to be a person under the Constitution. “I would have a very difficult case,” she had replied. In his majority opinion, Justice Harry Blackmun noted that the Supreme Court could find no basis for such status, before adding, “If this suggestion of personhood is established, [Roe’s] case, of course, collapses, for the fetus’ right to life would then be guaranteed.”

Roe’s fiercest critics immediately took up the challenge, launching a push for a constitutional amendment affirming that life begins at conception. But that first effort fizzled, and it’s only in recent years that a new wave of pro-life activists—many of them born after Roe and educated in fundamentalist Christian settings—have once again seized on personhood as a way not just of weakening Roe, but of overturning it. In state after state, they have been pushing to have their beliefs enshrined in policy. This November 4, in Colorado, voters will cast ballots on Amendment 67, an initiative that would include unborn human beings under the definition of person and “child” throughout the state’s criminal code. North Dakotans, meanwhile, will decide on Measure 1, which would alter the state constitution to recognize the “inalienable right to life” at every stage of human development.

Even if both initiatives fall short, others will follow. The first one to pass doubtlessly will then be challenged in court, igniting the potentially decisive battle that personhood advocates really want. Their goal is to get to the U.S. Supreme Court — as quickly as possible, while conservatives still dominate.

Christian-educated lawyers have been preparing for that day, churning out articles published by Christian law journals, which are then cited in briefs submitted to courts by Christian-right legal
organizations. But given their provenance, the impact of those arguments has been limited. Parker, a graduate of Dartmouth and Vanderbilt who counts Clarence Thomas as a role model, has the imprimatur of his office behind him, and he has used it to build a body of reasoning that can be cited and re-cited, helping to frame and refine the thinking of other lawyers and judges in the battles ahead. “Now, it’s not just an obscure law-review article making these arguments,” said Glen Halva-Neubauer, a Furman University political scientist who studies anti-abortion activism. “It’s not just some treatise that twenty-five of your right-to-life friends know about and nobody else. The mainstream effect is not inconsequential.”

And that, of course, was the idea all along. “What Justice Parker has done,” said Lynn Paltrow, executive director of the nonprofit National Advocates for Pregnant Women, “is explicitly lay out the roadmap for overturning Roe v. Wade.”

The Human Life Amendment, as personhood advocates’ first big push was commonly known, was ahead of its time. In the wake of Roe, pro-choice groups — which then included many centrist Republicans — had the momentum. Personhood proponents hoped in vain that Ronald Reagan’s election and the GOP’s capture of the Senate in 1980 would turn the tide, but the comparatively moderate pro-life mainstream wasn’t fully on board. By the time the Supreme Court reaffirmed a core right to abortion in the landmark 1992 case Planned Parenthood v. Casey, the movement had shifted to its own incremental approach. Targeting legislatures in conservative states, it sought tougher penalties for fetal homicides, and, later, birth certificates for stillborn babies. The revised approach alarmed abortion-rights advocates because it was so emotionally resonant — and effective.

The basic holding of Roe obviously remains in place, and more than one million legal abortions are performed in the United States every year. Yet the personhood movement has made significant inroads. Today, 38 states have fetal-homicide statutes that make it a crime to cause the death of an unborn child during an act of domestic violence, for example, or while driving drunk. At least 15 have laws that make the pregnancy of a homicide victim an aggravating factor that can lead to the death penalty. And more and more jurisdictions have begun policing pregnant women themselves. In almost every state, women have been arrested or detained for exposing their fetuses to illegal drugs; in more than half of them, mothers can lose some or even all of their custody rights if they or their newborn tests positive for controlled substances. In some places, legislators have written laws expressly authorizing such steps. (Tennessee’s new statute goes the furthest, allowing pregnant drug-users to be charged with criminal assault.) More commonly, it’s constables and prosecutors who’ve taken the initiative, reinterpreting existing laws to detain and arrest mothers. “One clever thing about using drug cases this way,” said Sara Zeigler, a feminist scholar and dean at Eastern Kentucky University, “is that the average person is not going to be at all sympathetic” to a pregnant woman who gets high. Thanks to moves such as these, the idea that a fetus has rights separate from its mother’s has taken root in the law and flourished, even when the more controversial subject of fetal personhood is not directly invoked.

In sum, although, as the petitioners correctly state, a majority of jurisdictions have held that unborn children are not afforded protection from the use of a controlled substance by their mothers, they nonetheless fail to convince this Court that the decisions of those courts are persuasive and should be followed by this Court.

— Tom Parker, writing in Ex Parte Ankron and Kimbrough

A big reason that these piecemeal personhood triumphs haven’t translated into something more sweeping is because courts haven’t been willing to explicitly take up the issue. “If you are a careful, strict constructionist kind of judge, you don’t necessarily connect the dots,” Halva-Neubauer said. Parker not only connects the dots, “he uses a rocket launcher to go after these cases and say, ‘Hey, this is a case that could be used to overrule Roe, and I’m going to show you how.’” In 2011, for example, Parker and his fellow justices heard a case involving a wrongful death lawsuit brought by a woman who blamed her miscarriage on the negligence of her doctors. Under Alabama precedent, such suits weren’t allowed unless the fetus had developed to the point where it could survive outside the womb. But in Hamilton v. Scott, the court voted to strike down that limit. Parker wrote the majority opinion.

Then he wrote some more. As a judge, Parker has developed the decidedly unusual habit of authoring concurring opinions to his own majority rulings in cases that hold particular interest for him. In his...
concurrence to Hamilton, he cited advances in medical and scientific technology as part of a larger, painstaking argument asserting that a centerpiece of Roe — that states cannot ban abortion before the point of viability — was “arbitrary,” “incoherent,” and “mostly unsupported by legal precedent.”

Zeigler marvels at how Parker has used the concurrence to strategic effect. “It’s like he’s writing a law-review article without having to go through that process, plus he gets a much wider audience,” she said. And unlike a dissent, a concurrence conveys a certain legitimacy — the idea that the author is on the winning side. “It is much likelier to be noticed and captured and repeated in future cases.”

Montgomery, the city where Parker was raised and where the Alabama Supreme Court sits, wears its faith on its sleeve — and its t-shirts, and its restaurant menus, and its license plates. Crosses are more ubiquitous than the American flag. Every other block seems to have a church, sometimes two or three of them. The Frazer United Methodist Church, where Parker worships, is particularly modern and prosperous looking, with a TV station and a playground inside the main lobby. When you park in the immense lot — the church claims a congregation of 8,000 — you remember where you left your car not by the usual Section A, B or C but by one of the virtues: Love, Self-Control, Patience.

Over the decades, as Parker has learned to seize his opportunities, he has also learned the value of self-control and patience. “We have to rely on the Holy Spirit so that we don’t rush out into a battle that God did not call us to,” he told a roomful of admirers at the Witherspoon conference in 2005. “With youthful zeal I wanted to get involved in so many fights. But it was so important for me to remember this truth: that the existence of the need is not evidence of the call.”

Parker’s own calling wasn’t clear for many years. He was born to a middle-class Montgomery family in 1952, at the dawn of the modern civil rights era, a few miles from the bus stops and churches where it all began. At a time when many white families were fleeing to segregated Christian academies, he attended the city’s public schools. (His senior year, he was student body president and, according to his classmates, “Most Sincere.”) At Dartmouth, he thought he might become a historian, but ultimately chose law school instead.

What he found at Vanderbilt Law School in the mid-1970s shocked him. The religious roots of American law were a forbidden topic. There were no classes specifically devoted to the founding document of American jurisprudence, he said.

“They teach you about what judges say about the Constitution rather than having you go back and study the Constitution,” he told a gathering last year.

As a young lawyer, Parker led fights to restore God to everyday life in the state — particularly in its schools and textbooks. But he often wound up frustrated, never more so than when a landmark school prayer case he worked on went down to defeat before the U.S. Supreme Court. He complained that the court’s 1985 decision in Wallace v. Jaffree was “the greatest setback to religious liberty that has ever occurred in this country.”

After a stint as a lobbyist, during which he helped establish two think tanks affiliated with James Dobson’s hugely influential Focus on the Family, Parker became a confidant of Roy Moore, then a county judge. When Moore became chief justice of the state Supreme Court in 2000, Parker served as his legal lieutenant, strategist and spokesman. And when Moore’s final Ten Commandments crusade ended in debacle, Parker was ousted, too.

If unemployed, Parker was hardly finished. He went to work at Moore’s Foundation for Moral Law, a think tank devoted “to protect[ing] the Constitution and protect[ing] the heritage of our Country.” It promoted the far-right strain of Christianity known as Reconstructionism — supporters believe that the Bible should be the governing text for all areas of civil and political life; that America’s Christian founders intended it to be a Christian land; that there is no law without God; that the law and the Constitution don’t evolve any more than humans do, but are fixed and immutable. The Foundation was also a champion of the newly revived personhood movement — indeed, it claimed the group PersonhoodAlabama as one of its projects.

Parker won a spot on the state’s top court in 2004. Once elected, he freely recruited the kinds of committed, somewhat eclectic culture combatants who made up Moore’s circle. For the powerful behind-the-scenes job of chief of staff, he chose John Eidsmoe, an ex-law professor and author of several seminal Reconstructionist works — “the top Biblical law commander of the era,” according to Frederick Clarkson, a journalist and historian of far-right religious movements and senior fellow at

http://bit.ly/1EJ2bfQ
Political Research Associates.

Two of Parker's quirkiest hires were Alex and Brett Harris, 16-year-old homeschooled twins from outside Portland, Ore., whose blog, Rebelution (tagline: “a teenage rebellion against low expectations”) had made them the Jonas Brothers of the Christian homeschool world. After they blogged about one of his opinions, Parker took them on for a two-month legal internship; despite their lack of training, they quickly progressed from filing memos to researching and drafting legal opinions. A few months after that, in 2006, Parker made them the grassroots directors in his (failed) campaign to become chief justice. “They demonstrated a maturity comparable to the law students we’ve had, and sometimes exceeding that maturity,” Parker raved.

Parker soon gained a kind of celebrity in the world of Christian talk radio. He appeared at conferences and conventions and had little compunction about voicing his opinions in public forums. “The liberals on the U.S. Supreme Court already look down on the pro-family policies, Southern heritage, evangelical Christianity and other blessings of our great state,” Parker declared in one particularly blistering op-ed, in which he excoriated his fellow justices for following that court’s precedent and overturning the death penalty for a man convicted of murder as a juvenile. “We Alabamians will never be able to sufficiently appease such establishment liberals, so we should stop trying and instead stand up for what we believe without apology… It does no good to possess conservative credentials if you surrender them before joining the battle.”

Parker didn’t expect those battles to be easy. But knew that judges had strategic weapons at their disposal that could alter the course of the fight in the long term. Dissents and concurrences, for example, might not have the force of precedent, but they could signal new tactics, raise new arguments — and eventually change minds.

Parker liked to invoke scripture when referring to judges as “gods with little g’s.”

“When judges don’t rule in the fear of the Lord, everything’s falling apart,” he would argue, citing the Book of Psalms. “The whole world is coming unglued.”

In 2013, a case landed on the Alabama Supreme Court docket that presented Parker with yet another opportunity to attack Roe v. Wade. One of the plaintiffs, Hope Ankrom, from Coffee County south of Montgomery, had pleaded guilty after her son tested positive for cocaine and marijuana at birth. The other, Amanda Kimbrough, from rural northwestern Alabama, had used methamphetamine while pregnant, giving birth 15 weeks prematurely to a boy who soon died. Facing the possibility of life in prison, she opted for a plea deal and a 10 year sentence in the notorious Tutwiler state penitentiary for women. But no Alabama laws specifically authorized the women’s arrests and convictions. Instead, prosecutors had charged them under a felony “chemical endangerment” statute enacted in 2006 to protect children from the noxious fumes and explosive chemicals that make home-based meth labs so dangerous.

Lawyers for Ankrom and Kimbrough argued that the state had grossly overreached, pointing out that legislators had debated — and rejected — expanding the meth-lab law to cover pregnant women. Parker, along with five other justices, didn’t buy it. He declared that the chemical-endangerment law did indeed apply to fetuses exposed to drugs in the womb. The other, Amanda Kimbrough, from rural northwestern Alabama, had used methamphetamine while pregnant, giving birth 15 weeks prematurely to a boy who soon died. Facing the possibility of life in prison, she opted for a plea deal and a 10 year sentence in the notorious Tutwiler state penitentiary for women. But no Alabama laws specifically authorized the women’s arrests and convictions. Instead, prosecutors had charged them under a felony “chemical endangerment” statute enacted in 2006 to protect children from the noxious fumes and explosive chemicals that make home-based meth labs so dangerous.

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This time, Parker’s goal was to establish the many ways that existing statutes recognize fetuses as persons with legally enforceable rights. The document is a kind of masterpiece of pro-life reasoning. “He’s someone who really takes time to read history and the development of jurisprudence,” said Mat Staver, the head of Liberty Counsel and a leading Christian legal theorist. “He’s not a surface thinker.” Step by step, Parker lays out his evidence: laws that give inheritance rights to unborn children, laws that ban pregnant inmates from being executed, laws that give fetuses legal guardians for the purposes of protecting their interests, laws that allow parents to sue for damages if fetuses are injured or killed as the result of negligence or some other wrongful act. Several pages of the concurrence consist almost entirely of lists of statutes from around the country conferring fetal rights. “Today, the only major area in which unborn children are denied legal protection is abortion,” he concluded, “and that denial is only because of the dictates of Roe.”

This past spring, as if to punctuate its reasoning, the Alabama Supreme Court confronted a virtually identical case, and, with Parker again writing the majority opinion, reached a virtually identical
conclusion. In this concurrence, Parker called on the U.S. Supreme Court to resolve the matter of full fetal rights once and for all.

(Will Widmer, special to ProPublica)

The Court will soon have its chances, if it wants to take them. The U.S. Court of Appeals for the Fifth Circuit just upheld a set of abortion regulations in Texas that have shut down most of that state’s abortion clinics, the appeal of which the justices could well agree to hear. Meanwhile, the National Advocates for Pregnant Women is putting together a lawsuit that would challenge Alabama’s chemical-endangerment prosecutions, which now number at least 130. Going to the Supreme Court on any issue that touches on abortion feels increasingly risky for pro-choice supporters. Anthony Kennedy remains the swing vote, and, on the one hand, he has argued that people must be allowed “to define one’s own concept of existence.” On the other, he has upheld almost every abortion restriction to come before him. Staver is hopeful that Kennedy’s concern for the dignity of the individual, a recent theme of his ever-unpredictable reasoning, may make him newly amenable to overturning Roe on personhood grounds.

Pro-choice advocates, not surprisingly, are deeply worried about any ideas that Parker’s writings could give the justices in Washington. “Parker is pointing out all the ways the law treats the fetus as a person already,” Zeigler, the feminist scholar, said. “The pro-choice argument, meanwhile, is that the personhood of the fetus hinges entirely on the women’s perception of it.” To the question of what constitutes life, she continued, “Parker has answers. The pro-choice side is more, ‘It depends.’ … People will really struggle with that.”

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With Obummer’s appointment of two left leaning/progressive SCOTUS judges, Sotomeyer and Kagan, it may very well be an up-hill battle.

If he is able to get one more liberal/progressive appointment through the Senate and House, the party is over.

Bruce A. Frank

This is a step in the right direction. The right to murder unborn children should never have been impressed into law at a national level. R v W should have been rejected in its climb to the Supreme Court and referred back to state legislatures.

In this day of thoughtless sex, the exponential extrapolation of the ‘60s mantra, “If it feels good, do it,” abortion has become the “thoughtless birth control” method of the unrestrained “it’s just sex” society. Leading to “it’s just the life of a human baby!”