

A FEW OF JIMMY ROBERTSON'S GREATEST HITS

*Christopher R. Green**

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INTRODUCTION

I first heard about Justice Robertson when I was doing appellate litigation with Luther Munford, then at Phelps Dunbar, between 1999 and 2001. Very early in my time at the firm, Luther was explaining some particular detail of the very-long-running dispute involving the Sixteenth Section land in Columbus,¹ and Luther mentioned Jimmy as if everyone who knew anything about Mississippi legal history during the 1980s would know who he was. Alas, I had managed to get through a Fifth Circuit clerkship

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¹ See *Lipscomb v. Columbus Mun. Separate School Dist.*, 1996 WL 671715 (N.D. Miss. 671715), *rev'd*, 145 F.3d 238 (5th Cir. 1998), *on remand*, 88 F.Supp.2d 640 (N.D.Miss. 2000), *affirmed*, 269 F.3d 494 (5th Cir. 2001); *on remand*, 191 F.Supp.2d 736 (N.D. Miss. 2002).

without really learning anything about Mississippi legal history of the 1980s, and Luther perhaps began to have doubts about hiring me. I quickly, however, came to smile whenever I had the opportunity to look up a Mississippi Supreme Court opinion from the time Justice Robertson was on the Court. Even when he was wrong—perhaps especially so²—his writing was always great fun to read. A few years later, when I taught Mississippi Constitutional Law a few times, I had the same experience many times over. The day before I heard of his passing, I had gathered several of the Justice’s opinions to use as the basis of the Mississippi section of my Conflict of Laws notes, looking forward with relish to reading them in detail. Given how much joy Justice Robertson’s opinions have given me over the years, I could think of no better way to remember him than to reprint a few bits of his contributions to Southern Second.

*Pennington v. State*³

It is a familiar aphorism that it takes a judge approximately six months after going on the bench to forget completely what it was like to practice law. I have just passed that temporal line of demarcation, and as I look back I already see substantial evidence which would support my conviction of that offense. Section II of today’s majority opinion is additional evidence toward the conviction of my colleagues.

To preserve an error for appeal, more and more, the Court is imposing technical requirements the quickest witted lawyer would have difficulty complying with. In *Holifield v. State*, 431 So.2d 929 (Miss.1983), for example, we were hypertechnical in our enforcement of the rule that, before an assignment of error predicated upon the giving of a jury instruction could be considered on appeal, objection must have been made in the trial court “stating the particular ground or grounds for such objection”. I plead guilty,

² See Channing J. Curtis & Christopher R. Green, *Forty Years Across the Rubicon*, 92 MISS. L.J. 681 (2023) (taking our title from Justice Robertson’s opinion in *Hall v. State*, 539 So. 2d 1338, 1345 (Miss. 1989) (“On May 26, 1981, we crossed the Rubicon as the Court entered its Order Adopting the Mississippi Rules of Civil Procedure.”)). To be sure, the Court was right to compare its assertion of the authority to override procedural statutes with something paradigmatically unlawful.

³ 437 So.2d 37, 41-43 (Miss.1983) (Robertson, J., specially concurring).

for I joined in the *Holifield* opinion. Upon reflection, I think Justices Hawkins, Bowling and Dan M. Lee were closer to the mark when they wrote, “The majority makes a technical and unrealistic demand on trial attorneys as to the adequacy of an objection.” 431 So.2d at 931. Even if the technical legal correctness of their position is a matter on which reasonable minds may differ, the *Holifield* dissenters were indisputably right in fact. A realistic appreciation of those inevitable human frailties of even the most competent trial lawyers faced with the tensions and pressures of trial simply must undergird our rules of practice.

Put in historical context I find what we are doing all the more disturbing. For years our courts were governed by rigid rules of pleading and practice. One false step by the pleader and his client’s claim was lost forever. If the proof varied from the cause of action pled, that too could be fatal. We endured such foolishness as the two witness rule, the necessity for waiving answer under oath in chancery, and so much more.

In the past two decades our rules of practice have gradually undergone long overdue corrective surgery. The primary impetus for these reforms has been that ultimately irrepressible imperative of substantial justice, coupled with a realistic recognition of what it is like to practice law. One by one, needless technicalities have been discarded. I had thought we were approaching the point where lawyer and litigant could concentrate on the merits of the case, without having their attention constantly diverted by a procedural mine field. I fear my optimism has been premature.

In a very real sense, this case shows that the cancer has not been uprooted at all. It has simply changed its home. It has come to rest in the appellate process. More and more, appeals to this Court are marked by controversies over the preservation of error, not the justice of the case. Procedural bars are invoked here as demurrers were once filed in the trial courts. We have merely changed the location of the mine field—with the familiar results: Needless consumption of judicial resources hearings and deciding technical procedural questions, harsh substantive results resulting from the bobbles of less than nimble counsel.

In Section II of the majority opinion here we continue apace in our imposition of unrealistic requirements for preservation of error. The majority holds that objection should have been made the first

time the word “polygraph” was mentioned. I have no doubt that there are many trial judges in this state who, had an objection been made at that point, would have held that it was premature. Construing the trial colloquy in favor of the majority, it seems to me at most that the state’s attorney was laying a predicate for an impermissible question. Even if defense counsel’s performance at this point was not textbook perfect, it was certainly adequate to preserve the point for appeal.

The lawyer in the course of trial has a million things on his mind. He may simultaneously be listening to the witness who is testifying, taking notes, fielding a whispered question from his client, weighing possible lines of cross-examination, worrying about his (unsubpoenaed) witness who is late showing up, watching the jurors for their visceral reactions, recalling the testimony of prior witnesses for consistency with what the current witness is saying, considering the witness’ prior written statement or deposition—if he is doing his job, there are at least a dozen other thoughts racing through his mind.

In this context, why are we demanding such perfection of the trial lawyer? When counsel opposite hints at an impermissible line of proof, we here require an instantaneous objection. Not only that, we require, again instantaneously, an articulation of each and every ground on which the proposed evidence might not be admissible. Why? We did the same in the *Holifield* case. We seem on the verge of requiring that when objections are made, the lawyer be as well versed on the point of law as we would expect him to be here—after full opportunity to brief the questions, to review the brief of counsel opposite, and to prepare for argument.

We are demanding that lawyers in a second or two at trial do that which from observed experience we know they frequently fail to do in oral argument before this Court when they have had a year or more to prepare.

What of the situation at trial where—with a million other things on his mind—the lawyer hears an impermissible question asked? He instinctively objects, but for the moment his mind is blank as to the possible basis for the objection. Quite likely the trial judge will be fully aware of one or more grounds on which the objection might be sustained. And surely most trial judges would

rule immediately though no grounds be stated. It is his duty to do precisely that.

I fear that by this decision, by *Holifield* and others we are undermining this salutary practice. We are beginning to lay the groundwork for the case where the trial judge, faced with an inarticulate objection to inadmissible evidence, and even where he knows why the evidence is inadmissible, may nevertheless overrule the objection and not be held in error by this Court on appeal.

A trial is not a chess game. It is a search for justice, or perhaps more modestly, for acceptable dispute resolution. The single dominant trend in judicial reform in the past century has been the elimination of needless formalities and technicalities in trial procedure. Yet our rules on preservation of error have become as hypertechnical, as conducive to mischief and injustice, as were the rules of pleadings of several decades ago.

I have participated in many lawsuits as a trial lawyer. I am confident that the other members of this Court have done likewise, and I know that some members of this Court have tried many more cases than have I. We disserve justice *and* the bar when we forget what it was like to practice law.

*Thornton v. Breland*⁴

What is at issue here is not whether we are going to enforce vigorously the Disciplinary Rules in our Code of Professional Responsibility, but how and when. In our view it is ordinarily inappropriate for this Court, or any other court of this state for that matter, to restrain or enjoin in advance threatened or anticipated violations of our Disciplinary Rules.

Let us be clear about several things. We have no doubt of our inherent and exclusive jurisdiction in bar disciplinary matters. We have full authority to do that which we have been asked to do. Nor do we have patience with the idea that petitioners have invoked the wrong “form of action” by seeking here a writ of prohibition instead of some remedy. We ought adjudicate matters presented to us according to the substance of the charge and the justice of the cause, not the label attached to the pleading. In any event, we have

⁴ 441 So.2d 1348 (Miss. 1983) (Robertson, J., for the Court).

elasticized the ancient writ of prohibition so that it is more than sufficient unto this day.

These things said, we are of the opinion we should in this case decline the exercise of the authority we undoubtedly possess. We therefore concur in the denial of the application for a writ of prohibition without prejudice to the merits of the issues tendered. We set forth briefly the reasons for our actions.

Preliminarily, we are concerned with the adequacy of the hearing given Kitchens. We view this aspect of the case against the backdrop of the well-established proposition that in bar disciplinary matters the accused attorney has been vested with important due process rights. Due process demands reasonable advance notice and full opportunity to be heard.

The present application has been presented to us on short notice and without an adequate record. In our view the complaints procedure authorized by law make possible a far more adequate hearing than has been given Kitchens to date. This statutory complaints procedure has been ordained for the precise purpose of vindicating and protecting the public interests identified by Justice Bowling in his dissenting opinion. The employment of that procedure would, in our opinion, more effectively serve the competing legitimate interests here at stake than would the writ of prohibition sought this day.

Our principal concerns are the client and the office of the attorney as a hopefully fearless advocate for the client. In this case, if on the eve of trial we hold that attorney Kitchens may not proceed further, we inevitably punish the client as well as the offending attorney. That Kitchens may be in the process of violating Canon 9 is not a sin that ought be visited upon his client.

Beyond that, we cannot support a procedure that would, absent the most egregious facts, sanction prior restraints upon the professional activities of attorneys. We predicate this conclusion upon a romantic view of the ideals of our adversary system as well as a realistic appraisal of the darker side of the lawyering process. That latter first.

A lawsuit, civil or criminal, is often a small war. We may wish it weren't and hope that it may some day cease to be so. Still, we put our heads in the sands if we ignore this reality. The stakes are often high, and even when they aren't litigants are often guilty of

(if not consumed by) the sin of pride. Lawsuits engender tensions, emotions, and partisanship like no other experience in life. Civility is often a thin veneer covering limited altruism.

The system we exalt encourages, indeed demands, more than warm zeal on behalf of one's client. A lawyer is charged with the responsibility of seeking every fair advantage honorably available to his client. In the heat of battle, not surprisingly, lawyers from time to time are less than objective in their judgment what advantages are fair and honorably available. We have seen litigation where the primary strategem [sic] employed by one side or the other was to "destroy" counsel opposite. The lawyer is put on trial instead of the client.

If we granted this writ, we would in effect announce to the bar the availability of a new and potentially destructive tactical opportunity. In tough litigation where the stakes are high, lawyers would seek ways to disqualify counsel opposite, particularly competent counsel opposite. The granting of this writ would encourage sharp practices on the part of the bar. The legitimate interests of clients would necessarily suffer. Indeed, if we had granted this writ, it would surely have followed as the night the day that other such efforts to remove counsel opposite from the case would be made, not to vindicate the lofty aims of our Canons of Ethics but as a strategem designed to cripple one's opposing litigant.

There is another point of view. It is the essence of our adversary system that each litigant have the assistance of a lawyer who is prepared, if it be appropriate, to defy hell on his or her client's behalf.

To many, the lawyer is a mere extension of the will of the client. The client wishes to pursue certain ends but is without technical, legal skills. The lawyer provides those skills. He is in a sense a conduit through which the client pursues his ends. The lawyer at once is both highly partisan and completely neutral. He aggressively pursues the ends of his client, yet he remains personally indifferent to those ends.

A lawyer is and must be the ultimate advocate. He speaks for and in the interest of his client. He seizes every fair advantage available to his client. And when his client is on the ropes, the lawyer, standing alone if need be, is that one person who, in the

interest of his client, skillfully defies the state, the opposing litigant, or whoever threatens. The lawyer is prepared to stand against the forces of hell though others see that as his client's just desert. He assures all adversaries, in the vernacular of the streets, "You may get my client but you're got to come through me first."

If the lawyer is to perform these vital functions, he must be unfettered, he must in the course of his advocacy be indulged freedom from prior restraints, even when he skates close to the edge.

We recognize without hesitation that society expects, indeed, demands a quid pro quo from the lawyer who has been given this freedom to roam as a hired gun. And, though the ultimate and primary source of discipline of attorneys is, and always will be, self-discipline the state has established a mechanism (albeit imperfect) for exacting that quid pro quo from lawyers who stray. This mechanism establishes a regimen of discipline and sanctions post-offense, appropriately eschewing prior restraints.

Whether viewed from the vantage point of the lawyer or the clients, rights of free speech are implicated here. The lawyer's right and responsibility of zealous advocacy is and ought be protected speech. Certainly the client's right to the assistance of counsel is protected.

It is established constitutional law that prior restraints on speech are not tolerated absent the clearest imminent danger. Prior restraints on expression bear a heavy presumption against their legality. The party seeking such restraint bears the heaviest burden of justification.

To our minds the free speech analogy is wholly appropriate. We regard the lawyer's right and responsibility of zealous advocacy on behalf of his client among the most precious forms of speech. As such we would pretermitt advance enforcement of the canons of ethics and place our faith in the integrity of most of our lawyers and in the effectiveness of our quasi-criminal complaints procedures. Plagiarizing Judge Learned Hand, to many this is and always will be folly; but upon it we have staked our all.

*Ferguson v. Watkins*⁵

This is a libel action brought against a newspaper and its editorial columnist.

Three physicians operating the emergency room in a publicly funded hospital demanded ouster of the hospital administrator. They were subjected to searing commentary by an editorial columnist in a local newspaper.

We hold that such persons are not libeled even though described in caustic if not contemptuous language and even though to a neutral observer the criticism is unfair, so long as clear falsity of fact is not found in the editorial commentary. Alternatively, we hold that such persons are vortex or limited purpose public figures who may not recover in a libel action absent proof of actual malice.

The Marshall County Hospital was built in Holly Springs, Mississippi, many years ago. Construction was publicly funded under the old Hill-Burton Federal Hospital Construction Program. Substantial funding for the operation of the hospital since that time has been provided by the Marshall County Board of Supervisors from funds derived from taxes levied upon the citizens of that county. The hospital receives other public funds via payments on behalf of patients under the Medicare and Medicaid Programs.

The hospital operates an emergency room the medical services in which are under the direction of three physicians, Drs. Robert P. Tate, Charles B. Ferguson, and David S. Anderson. The emergency room is open from 5:00 p.m. to 8:00 a.m. on weekdays and 24 hours a day on weekends. These three doctors are paid \$135,000 per year for their services in the emergency room. In the past, these same three doctors also operated a publicly funded clinic, physically located next door to the hospital, and received from public funds \$1,000 a week for this service.

For a number of years the hospital had operated at a financial loss. On June 1, 1977, the hospital Board of Trustees employed Alvin Word, III as hospital administrator. One of Word's principal assignments was to get the hospital operating on a sound fiscal basis. However, Word "stepped on toes" and soon came into conflict with Drs. Tate, Ferguson and Anderson. This conflict culminated on April 12, 1978, when the doctors delivered to the Trustees a "him

⁵ 448 So.2d 271 (Miss. 1984) (Robertson, J., dissenting).

or us” ultimatum. The Board elected not to renew Word’s contract. Word left the hospital when his contract expired on May 31, 1978. Insofar as the record reflects, Drs. Tate, et al. are still working at the hospital.

On June 15, 1978, William E. Watkins, one of the Defendants below and one of the Appellees here, published an editorial column in *The North Mississippi Times* entitled “Marshall Viewpoint”. *The North Mississippi Times* is a weekly newspaper having its primary circulation in DeSoto County. It also has a limited circulation in adjoining Marshall County.

The commentary in question, the entire text of which is an appendix to this opinion, gave Watkins’ assessment of the situation at the Marshall County Hospital. It represents Watkins’ somewhat inept defense of Administrator Word whose contract had not been renewed. Watkins claimed that Word had attempted to upgrade the hospital “without asking taxpayers to foot the bill”. After listing some of Word’s contributions to the hospital, Watkins turned his attention to the problems he perceived. Watkins insisted that many local residents refused to use the hospital because they thought of it as a “welfare hospital”.

Much of this editorial column criticized the hospital in general. Only two of eleven paragraphs refer to Drs. Tate, Ferguson and Anderson directly. In those, Watkins opined that Marshall County taxpayers were being “raked over the coals” with the emergency room operation at the hospital. He wrote:

To be guaranteed \$135,000 for three internists to man the emergency room from 5:00 p.m. to 8:00 a.m. and 24 hours on weekends seems very lucrative, especially insomuch as the doctors are not at the hospital all the time but rather available for immediate response if needed.

I don’t blame Drs. Robert Tate, David Anderson and Charlie Ferguson for wanting to get rid of Alvin Word, III, as if I had such a good setup, I wouldn’t want someone to come along and tear up my little playhouse either.

Watkins then returned to his criticism of the hospital in general. He charged improper political influence in staffing and administration. He alleged that some people in power preferred to keep the hospital operating in “the red” than to see it become a self-

supporting operation. He expressed his opinion that Word had been “let go” because he tried to upgrade the hospital.

In conclusion, Watkins asked, “Do we have a bad hospital or do we have a bad county government?” He urged citizens to call the United States Department of Health, Education and Welfare and demand an investigation into alleged improprieties in the administration of the hospital.

Soon after the publication of Watkins’ column, the three physician plaintiffs in this lawsuit sent a letter to Pam McPhail, editor of the North Mississippi Times. The letter advised Ms. McPhail that the doctors considered the article libelous and asked that she print a retraction. Ms. McPhail refused to do so. . . .

Two restrictions upon the action for defamation are and must be strictly enforced. First, the words employed must have clearly been directed toward the plaintiff. Beyond that, the defamation must be clear and unmistakable from the words themselves and not be the product of innuendo, speculation or conjecture.

There is no such thing as a libelous idea. Still, a defamatory communication may consist of a statement in the form of an opinion. Opinion statements are actionable only if they clearly and unmistakably imply the allegation of undisclosed false and defamatory facts as the basis for the opinion.

On the other hand, nothing in life or our law guarantees a person immunity from occasional sharp criticism, nor should it. Short of becoming a hermit, no person avoids a few linguistic slings and arrows, many demonstrably unfair. It may be true that our law, quite wisely, has moved beyond the child’s retort, “Sticks and stones may break my bones but words can never hurt me”. Still our sensitivity to the destructive power of words hardly suggests we assess damages for all bruised feelings.

These considerations have shaped a rule of law in our “fair comment” cases. Caustic commentary is simply not actionable libel.

Viewed fairly, the thrust of Watkins’ commentary is an attack upon the governing authorities of Marshall County. Watkins’ complaints about the way the hospital is run are directed primarily toward persons other than Drs. Tate, Ferguson and Anderson. Only two of the eleven paragraphs of the article fairly target three physicians at all.

Watkins does state that these three physicians are guaranteed \$135,000 a year “to man the emergency room from 5:00 p.m. to 8:00 a.m. weekdays and 24 hours on weekends”. He further charges that “the doctors are not at the hospital all the time but rather available for immediate response if needed”. No one has questioned the factual accuracy of these statements.

What are challenged are two opinions offered in the same paragraph. First, Watkins charges that “Marshall County taxpayers are being raken over the coals with this emergency room operation”. These words in context suggest that the primary rakers are the Marshall County government officials who agreed to pay \$135,000 a year, not the physicians who contracted to receive it.

Second, the doctors are offended that Watkins describes their arrangement as “very lucrative”. Here Watkins is suggesting that these doctors are being paid too much, or at least he is expressing his opinion to that effect. It is within our actual and judicial knowledge that vast numbers of our citizens think doctors’ fees are too high. We have no doubt that most who think this are quite sincere in their beliefs. The medical association may have a persuasive response. In an objectively structured debate, the medical association may well have the best of the argument. Still we would appear a bit silly if we held it libelous for one to express the opinion that Dr. So-and-so’s fees are too high. We are surprised that the suggestion is even made. Physicians’ skins should be toughened with sterner stuff.

In the next paragraph, Watkins implies the fact that Drs. Tate, Anderson and Ferguson played a part in getting rid of hospital administrator Alvin Word, III. We find no place in the record where this fact has been denied. Rather, these doctors admit that on April 12, 1978, they submitted to the Board of Trustees a “him or us” ultimatum. There is no fact in this paragraph which could be said to be false or defamatory.

Beyond that, we find Watkins charging caustically and a bit ineptly that,

if I had such a good setup I wouldn’t want someone to come along and tear up my little playhouse either.

These words fit many descriptives: impertinent, sophomoric, ineffectual. They are an opinion Watkins had the right to express. They are not libelous.

There is a second, independent reason why the jury verdicts in favor of the three physician plaintiffs should not be reinstated. These three doctors, in First Amendment/Law of the Press terminology, were vortex public figures. In the language of the case law of this state, their activities were the subject of fair comment. Accordingly, Watkins' commentary was qualifiedly privileged. As explained below, the qualification placed on the privilege has not been violated. Indeed, the evidence is without contradiction on this point.

Freedom of the press is a fundamental requisite for the vitality of any democratic society. It is constitutionally secured in this democratic society. It is secured to William Watkins, Pam McPhail and The North Mississippi Communications, Inc. by both state and federal constitutions. In the Constitution of the United States, freedom of the press is among the rights proclaimed in the First Amendment, made binding on the states via the Fourteenth Amendment. The Constitution of this state refers to freedom of the press as a "sacred right". . . .

Our inquiry then is whether Drs. Tate, et al, are "public figures", for if they are, they cannot recover absent proof of actual malice on the part of defendants.

These three physician plaintiffs hold no public office. Yet within *Edmonds* there is the liberal concept of the quasi-public figure, one who though otherwise a private figure becomes active or involved in a matter of public concern. Further, there is within the *Sullivan* doctrine the recognition of the vortex public figure. Such a person is one who is otherwise a private figure but who thrusts himself or becomes thrust into the vortex of a matter of legitimate public interest. ". . . . A quasi- or vortex public figure must prove actual malice when he brings a defamation action arising out of the matter of legitimate public interest. In all other aspects of his life, he remains a private figure whom some argue can recover with a lesser degree of proof or culpability on the part of the defendant.

We emphasize that the matter of legitimate public interest need not produce actual controversy. It is enough that the matter is in the public domain. Any person who becomes involved,

voluntarily or involuntarily, in any matter of legitimate public interest—and this certainly includes the method of administration of any program of services financed in whole or in substantial part by public monies,— becomes in that context a vortex public figure who is subject to fair comment.” . . .

Before applying these principles to the facts of this case, we need to make clear the current state of our law. Several of our post-*Sullivan* cases have continued to apply separately the fair comment doctrine *Edmonds* and progeny and the constitutionally based public figure/actual malice standards of *Sullivan*. Having considered well both doctrines, we regard it beyond debate that the *Sullivan* doctrine has for the most part subsumed—and broadened (in the direction of further shielding the press from libel liability)—our fair comment cases.

Whereas, *Edmonds*, et al, arguably protected only commentary, the *Sullivan* doctrine protects commentary, opinions as well as statements of fact.

Whereas *Edmonds* defines malice in terms of a state of mind, *Sullivan* imposes a more objective test—actual knowledge of the defamatory character of words or reckless disregard thereof.

On the other hand, we regard the definition of a quasi-public figure in *Edmonds*—the *Edmonds* vortex public figure, if you will—as broader than that found in *Sullivan* and *Gertz*. Nothing in *Sullivan* or *Gertz* requires that we more restrictively define the *Edmonds* vortex public figure. Similarly, nothing in the law of this state or its public policy suggests such.

Consequently, we hold that under the law of this state all otherwise actionable utterances—commentary, opinion or fact—made regarding a public figure or a vortex public figure are qualifiedly privileged. The qualification on the privilege is that the person defamed may yet recover if he proves that at the time of the utterance the defendant either

- (a) knew clearly that the utterance was false, defamatory and otherwise actionable, or
- (b) acted in reckless disregard of whether it was false, defamatory and otherwise actionable.

This rule is a part of the positive law of this state. It is grounded in our Constitution which declares that “the freedom of speech and of the press shall be held sacred”. . . . It has been foreshadowed by the liberal spirit of *Edmonds* and *Reaves*. Because it is consistent with the Constitution of the United States and the *Sullivan* doctrine, we may enforce it.” . . .

The only task that remains, then, is to apply this rule to the facts presented here.

The subject matter of Watkins’ column was the operation of the Marshall County Community Hospital. This hospital was built with public monies under the old Hill-Burton plan. In substantial part it is operated with public funds, both through direct appropriations via the Marshall County Board of Supervisors and indirectly through funding of public insurance programs known as Medicare and Medicaid. Beyond that, the Marshall County Hospital is the only hospital serving the residents of that county. It is the nerve center of the county’s health care delivery system. Without more, the operation of the hospital is a matter of legitimate public interest.

Alvin Word, III, hospital administrator, was the center of controversy within the hospital and county government generally. He instituted efficiency programs that rankled the medical staff, including the three plaintiffs. He discharged three medical assistants. The matter culminated when Drs. Tate, et al., issued their ultimatum to the Board of Trustees: him or us. Even if they had not theretofore been public figures, the three doctors at that moment became vortex public figures.” . . . As such under the rule of law articulated above, these three doctors have no right of recovery here absent proof by clear and convincing evidence of actual malice on the part of Watkins and the other defendants. Based upon our careful review of the entire record, we hold that there is not the slightest iota of proof of actual malice on the part of Watkins and the other defendants. Indeed, we do not understand plaintiffs to argue to the contrary. Accordingly, these plaintiff physicians are not entitled to reinstatement of the jury verdicts rendered in their favor.” . . .

There is a broader context. All readers of this opinion should read in its entirety the editorial column written by William E. Watkins upon which this action has been predicated. It is within

the actual and judicial knowledge of this Court that newspapers around this country each year print hundreds of editorial columns equally as caustic and cynical with no one ever dreaming of filing suit.

One can pick up the editorial page of almost any newspaper in the country any day of the year and find commentary arguably “worse” than this. Commentators from Jack Anderson to Hunter S. Thompson to William F. Buckley, Jr., to Murray Kempton differ from William E. Watkins not in the verve of their editorial verdicts but only in the articulate style in which they express them.

If plaintiffs’ construction of the First Amendment had been in effect over the years, we are confident no one today would ever have heard the name of H.L. Mencken, or in this state of Frederick Sullens, of Hodding Carter or of P.D. East—with the consequence that we may have come to take ourselves too seriously.

*Reikes v. Martin*⁶

I write separately because I believe the majority opinion sends out misleading if not down right erroneous signals regarding the meaning of Rule 24 of the Mississippi Rules of Civil Procedure. I refer here to that portion of the opinion for the majority which holds that the Mississippi Medicaid Commission as an intervening plaintiff was erroneously allowed to participate in the trial.

Without any doubt whatsoever, if Rule 24 had been in effect at the time this action was commenced, there would be no error in the trial judge’s action in allowing the Mississippi Medicaid Commission to participate fully in the trial below. The Medicaid Commission was an intervenor as of right within the meaning of Rule 24(a)(1). Once an intervening plaintiff is in the case under Rule 24(a)(1) or otherwise, that intervenor must be afforded the opportunity to prove its claim. To that end the intervenor once in the case has the right to participate at trial as fully as if that party had been the only plaintiff in the case. . . . This means that the intervening plaintiff has the right to proceed to make his or its proof in any manner permissible under the rules of evidence. That some other party in the case, even the original plaintiff, may feel inconvenienced is a factor I regard as wholly irrelevant. I regard

⁶ 471 So.2d 385 (Miss. 1985) (Robertson, J., specially concurring).

that there is no authority in Rule 24 for a restriction of the manner of proof of an intervening plaintiff as the majority seems to find.

Where an intervening plaintiff's case will substantially prejudice another party already in the case, the remedy is not to be found in any discretion of the trial judge to limit or control the intervenor in the presentation of its proof. Rather, under such circumstances the trial judge's discretion is that provided under Rule 42 (b), Miss. R. Civ. P., to order served the trial. of [sic] those issues involving the intervenor which will result in inordinate prejudice to someone else.

This is a pre-Rules case. This action was commenced prior to January 1, 1982, the effective date of the Mississippi Rules of Civil Procedure. Accordingly, Rule 24 has no application per se. I reluctantly concur in the result reached by the majority on the intervention issue (a) because this case seems to be controlled by *Merchants Company v. Hutchinson*, 199 So.2d 813 (Miss.1967), a decision which I regard as most unfortunate and (b) because, with the advent of the Mississippi Rules of Civil Procedure, the rule of *Merchants* [sic] and, indeed, the rule of this case and all other pre-Rules cases will quite appropriately be relegated to the junk heap.

*Cinque Bambini Partnership v. State*⁷

Though great public interests and neither insignificant nor illegitimate private interests are present and in conflict, this in the end is a title suit. Plaintiffs, Cinque Bambini Partnership and others ("Cinque Bambini"), have brought an action to confirm title and remove clouds from title to 2400 acres of largely undeveloped property in Hancock County near the Mississippi Gulf Coast. As the lands are arguably tidelands, the State of Mississippi claims title in its capacity as trustee of the federally created public trust, vintage 1817, the year of statehood.

Accepting the State's view of the geographical contours of the public trust, the Chancery Court of Hancock County ruled that the State owns 140.863 of the 2400 acres Cinque Bambini claims. Ninety-eight of the 140 plus acres consist of two lakes that were dredged by the State's general contractor in the mid-1960s to obtain fill material for construction of Interstate Highway I-10. The

⁷ 491 So.2d 508 (Miss. 1986) (Robertson, J., for Court).

remaining forty-two plus acres consist of the north branch of Bayou LaCroix and eleven small drainage streams ranging in size from .44 acres to 9.966 acres. The total surface area for six of the streams is less than one acre each.

The private landowners, Cinque Bambini, et al, claiming under Spanish grants purportedly confirmed by the Congress of the United States, have appealed arguing, inter alia, that the Chancery Court erred in the definition of the geographical contours of the public trust.

For the reasons explained below, we hold that fee simple title to all lands naturally subject to tidal influence, inland to today's mean high water mark, is held by the State of Mississippi in trust. On the other hand, lands brought within the ebb and flow of the tide by avulsion or by artificial or non-natural means are owned by their private record titleholders. We affirm in part and reverse in part.

There are no material disputes in the facts. Cinque Bambini and others are vested with record title, derived from pre-statehood Spanish land grants said to date back to April 15, 1813 and to have been expressly confirmed by Acts of the Congress, and from federal and state patents. This avails Cinque Bambini nothing, however, if the lands in dispute are a part of those held by the State of Mississippi by virtue of a trust created at the time Mississippi was admitted to the Union in 1817. For all practical purposes, the case turns on whether the disputed lands are a part of the public trust.

The present dispute seems to have its genesis in the Coastal Wetlands Protection Law enacted by the Mississippi Legislature in 1973. . . . This law charged the Mississippi Marine Resources Council (MMRC) with preparing maps identifying the state-owned wetlands. These maps were made by state employees who "eyeballed" aerial photographs to determine the boundaries of the wetland areas. The purpose of these maps was to provide a method whereby the MMRC could determine whether any given event was occurring on land in its jurisdiction—that is, in a wetlands area. These wetland maps were recorded in the office of each chancery clerk in the three coastal counties.

Notwithstanding these beginnings, the issue of the day, pragmatically speaking, appear to be, who will enjoy the revenues from anticipated oil and gas exploration. Contrary to instructions

from the MMRC—who warned that the maps were inaccurate and for jurisdictional purposes only—the Mississippi Mineral Lease Commission used these wetland maps to delineate the state-owned land upon which it would then sell oil and gas leases. In following this practice, the Lease Commission leased 600 acres of land—record title to which resided in Cinque Bambini, et al—to Saga Petroleum U.S., Inc. in 1977. These leases were recorded in the Office of the Chancery Clerk for Hancock County, Mississippi.

When Cinque Bambini, et al, learned of these oil leases, they brought suit to confirm and remove clouds from their title. The State of Mississippi answered and counterclaimed. From an adverse ruling regarding the geographical contours of the public trust, Cinque Bambini and the other private landowners appeal.

Prior to Mississippi's statehood, title to all property within what became this state's geographical confines was vested in the federal sovereign, the United States of America, subject to exception to be explained in Section V below. This included all surface waters, as well as the lands and beds of those waters and streams.

At the time of statehood, the United States created two great public trusts and conveyed to each new state, including the State of Mississippi, lands to be held by the state for the public purpose. The first of these was the familiar school lands trust into which the sixteenth section from each township has been placed. . . . The second trust, the one with which we are concerned today, had placed within it the tidelands and navigable waters of the state together with the beds and lands underneath same. . . . In each instance the federal sovereign, in recognition of public concerns which seem to override mere private interests, granted to the state fee simple title in certain properties to be held by the state for the benefit of all of its people.

The public purposes to which these lands and waters placed in the public trust may be devoted are not static. Over the years those purposes have come to include navigation and transportation, . . . commerce, . . . fishing, . . . bathing, swimming and other recreational activities, . . . development of mineral resources, . . . environmental protection and preservation, . . . the enhancement of aquatic [sic], avian [sic] and marine life, sea agriculture and no doubt others. . . . Suffice it to say that the purposes of the trust have

evolved with the needs and sensitivities of the people—and the capacity of trust properties through proper stewardship to serve those needs.

All of this came about as an outgrowth of federal implementation of the familiar equal footing doctrine. . . . The original states withheld their tidelands and navigable waters from the United States at the time of adoption of the Constitution. Those lands and waters so reserved by the states were held in trust for the public benefit. . . . Thereafter, each new state was admitted to the Union on an equal footing with the original thirteen, *viz.* as each one of the thirteen held its tidelands and navigable waters in public trust the United States created like trusts in each new state. . . . The point for the moment is that once Mississippi had been admitted to the Union and once the public trust had been created and funded, the role of the equal footing policy ended and title to the lands conveyed in trusts became vested in the state, subject, of course, to the trust. . . .

Federal law recognizes state authority over trust properties as plenary; once the trust was funded, so to speak, the federal role was spent. . . . State law in turn prohibits disposition or use of trust property except in furtherance of the public purpose. . . . The Attorney General repeatedly and correctly states in his brief that the State may not convey fee simple title to properties so held in trust “unless it is for a higher public purpose and then only by legislative enactment”. . . .

We are concerned fundamentally with the inland reach of the trust boundaries, with identification, geographically and topographically, of the lands held by the State of Mississippi in trust *today*. The initial step in that identification process requires that we ascertain exactly what properties were granted to the State in trust in 1817. As the federal settlor held title to all lands prior to statehood and the creation of the trust, and as it was that same federal settlor which determined under the equal footing doctrine which lands it would grant to the State and which it would reserve for patent to private citizens, the question of what lands were given to the State in trust is necessarily a question of federal law. . . .

What then are the federal principles by which we may establish on-the-ground surveyable boundaries of the properties granted the State of Mississippi in trust in the year 1817? We

regard as settled the proposition that, insofar as federal law is concerned, the identity of properties granted by the United States in trust became fixed at the time of statehood. . . .

The early federal cases refer to the trust as including all lands within the ebb and flow of the tide. *Cinque Bambini* argues, nevertheless, that “ebb and flow of the tide” should be translated “navigable waters” and cites several admiralty jurisdiction cases beginning with *The Genessee Chief*, 53 U.S. (12 How.) 443, 13 L.Ed. 1058 (1851). *Cinque Bambini*’s position is that the surveyable boundaries of trust properties were redefined in a series of cases beginning with *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 10 L.Ed. 997 (1842) to include only those waters navigable in fact in 1817, tidal influence being essentially irrelevant. The State’s position is that, in addition to such navigable waters, the trust also includes all lands subject to the ebb and flow of the tide in 1817 and below the then mean high water mark. Resolution of this issue is outcome determinative of much of this case—and, apparently, is of enormous importance to the Mississippi Gulf Coast. We proceed with some temerity as we find no federal case expressly deciding this point of federal law—whether at the time of statehood tidally influenced non-navigable waters were included in the state owned public trust.

The evolution of the so-called redefinition of the trust suggests a clue or two. Originally, “tidewaters”, “ebb and flow of the tide”, and similar language dominated discussions of the trust. It soon became apparent, however, that many of the new states had no coastline and hence had no lands within the ebb and flow of the tide. If the equal footing doctrine was to have meaning in those inland states, something had to be done to the theretofore restrictive delineation of the trust lands. Following the comparable expansion of admiralty jurisdiction in *The Genessee Chief*, the Supreme Court expanded the definition of the trust to include all navigable freshwaters. . . . The question posed by these and many like cases is whether the advent of the navigable waters test is, on the one hand, a complete redefinition of the geographical scope of the trust, or, on the other hand, a mere addition to the tidelands/tidewaters trust applicable only in the case of non-tidally influenced freshwaters. Put another way, did the navigable waters test have the effect of removing from the Mississippi public trust properties once within it?

It is our view that, as a matter of federal law, the United States granted to this State in 1817 all lands subject to the ebb and flow of the tide and up to the then mean high water level, without regard to navigability. . . . The more recent navigable waters test provides the insight which explains why this must be so. Navigable waters—whether the Mississippi River, the Pearl River, the Yazoo River or any other natural waterway in this state navigable in fact—by their very nature contain deeper areas that are navigable and more shallow areas, near the riverbank, up in chutes, over bars and the like, that are not. The State's original title to these waters included the navigable as well as the non-navigable parts. . . . The same of tidewaters. The State of Mississippi was granted in trust certain tidelands fronting the Gulf of Mexico, extending inland up to the 1817 mean high water mark. Some of those areas were at the time navigable in fact and some were not. But the Gulf of Mexico as a whole—even only to the outer limits of Mississippi's territorial limits—is navigable by anyone's definition. That there may be non-navigable areas held by the State in trust is no more anomalous in the case of tidewaters than freshwaters.

Navigable freshwaters do not always strike the riverbank at the same point. Rivers rise and fall, seasonally and with the rains. A more constant boundary of necessity has been found—the high water mark. The Gulf of Mexico, however, shifts its boundaries far more often—as the tide daily ebbs and flows, or, more precisely, as the waters interact gravitationally with the moon. Established and accepted scientific methods enable us to establish a mean high water mark—frequently referred to as mean high tide. . . . That mark is not a line observable on the ground, although it may be plotted by surveyors trained in the field. When plotted we confront the geographical reality of a continuous, unbroken line wildly meandering, to be sure, but reaching from Alabama on the east in uninterrupted sequence to Louisiana on the west. This line is—in theory, at least—ascertainable as of 1817. Federal law recognizes it as the inland boundary of the navigable tidewaters of the State of Mississippi. Fee simple title to all areas south of it was granted to the State in trust.

What emerges is that the legal boundaries of navigable tidewaters are conceptually and functionally the same as those for navigable freshwaters. The high water mark concept is used in both

instances. That sophisticated geophysical study by reference to the tidal epoch and the like may customarily be employed in the establishment of mean high tide, while simpler processes are used with navigable rivers, is of no moment. Recognition of the conceptual equivalence of these two approaches to the establishing certain boundaries for present purposes serves to make clear that the navigable waters test was no new test but the removal of an arbitrary and irrational limitation on the old ebb and flow test. In each instance—freshwaters or tidewaters—the central focus is upon navigable waters, but no one has ever suggested that the boundaries of that granted in trust were the contours of the navigable channel. The boundary of each waterway navigable in fact is that point where mean high water mark (variously determined) strikes land. Within that surveyable, territorial boundary (and outside the navigable channel/area) will always be some non-navigable areas. Yet so long as by unbroken water course—when the level of the waters is at mean high water mark—one may hoist a sail upon a toothpick and without interruption navigate from the navigable channel/area to land, always afloat, the waters traversed and the lands beneath them are within the inland boundaries we consider the United States set for the properties granted the State in trust.

What was granted the State in trust in 1817 is a function of the positive law of the United States. We are not so much concerned with ascertaining what the federal government intended to grant as with what it did grant. Still, when there is a haze about the contours of what the federal government did grant, it is by no means inappropriate to consider purposes then known as an aid to extrapolation of the geographical boundaries of the grant.

No doubt commerce and navigation were considered vitally important. But fishing and bathing have long co-existed with commerce and navigation as public purposes. . . . Waters that are valuable for fishing and bathing purposes often are not navigable in fact—at least not at the point where the fishing and bathing takes place. The point is that exclusion of non-navigable tidewaters from the trust in 1817 would have been inconsistent, if not downright irrational, given then accepted public purposes.

We are reinforced in our view by the fact that the federal cases have continued to use “tide” terminology long after the recognition

that non-tidal freshwaters were included in the trust. . . . If the navigable waters test had replaced the ebb and flow test, rather than merely extending it to freshwaters, one would have expected the former language to have disappeared. Of course, as explained above, subject to geophysical differences between tidewaters and freshwaters, what has happened in the case of the inland states' public trusts at the time of *The Genessee Chief* and since has been nothing more than a principled extension to freshwaters of the test long employed with tidewaters.

Though we consider here a question of federal law, we may hardly ignore our prior public trust cases. We find those cases consistent with what has been said above. . . .

Cinque Bambini argue that our cases to date have failed to recognize as within the federal grant any tidal waters which were not navigable in fact. . . . Cinque Bambini overlooks the fact that, from the area of the waters in controversy in each of these cases, our proverbial toothpick sailboat may navigate landward in a generally northward direction toward the point where mean high water mark intersects with land and, always afloat, cross naturally existing areas comparable to those in controversy here.

That today's case may arguably require that we confront for the first time the State's claim to tidally influenced lands that were not navigable in fact in 1817 need not detain us. Whatever unique facts may appear in the various cases that have heretofore been adjudicated, we have always proceeded upon general principles. Those principles—federal principles—have been repeated too often—here as elsewhere—to admit of serious doubt. . . .

In summary, effective upon statehood on March 1, 1817, we understand federal law to provide that the United States granted to the State of Mississippi in trust all lands, to which the United States then held title, including their mineral and other subsurface resources, subject to the ebb and flow of the tide below the then *mean* high water level—regardless of whether the water courses were commercially navigable at the time of Mississippi's admission into the Union, regardless of how insignificant the tidal influence, or how shallow the water, regardless of how far inland and remote from the sea. Similarly granted were the beds and streams of all non-tidal waters which were navigable in fact in 1817. This act of creation consummated, the federal sovereign rested

To be sure, shallow, non-navigable freshwater streams and the beds beneath same are under our law susceptible of private ownership. Neither federal nor state law has ever held such areas inalienable from the public trust. This premise, however, has never been held, directly or by implication, to exclude tidally influenced, non-navigable streams from the public trust.

What Cinque Bambini, et al, have identified here is not support for their claims but a logical incongruity in our law. It may well be that there is no reasoned basis for including small, non-navigable tidewaters within the trust while non-navigable freshwaters are without. That the distinction may not be well reasoned, however, does not keep it from being well settled.

A similar logical incongruity appears in the treatment of the beds of navigable freshwaters as distinguished from the beds of tidewaters. Thanks to the redefinition work done in *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894); *McGilvra v. Ross*, 215 U.S. 70, 30 S.Ct. 27, 54 L.Ed. 95 (1909); and other similar cases—brought about by the application of the equal footing doctrine to new, interior states having no tidewaters, navigable freshwaters are held by the states in trust. This is true in Mississippi as elsewhere. Yet before anyone perceived that the trust extended to navigable freshwaters, Mississippi had already adopted the common law rule that riparian owners hold the beds of such waters to the center of the stream.... This has placed Mississippi's trust in an anomalous position: while the lands below tidewaters may not be alienated except for high public purposes and generally only with consent of the legislature, lands below navigable freshwaters are susceptible of wholly private ownership. The United States Supreme Court has ducked this anomaly by holding that, after statehood, state law controls practically everything. . . .

In the end, rather than affording Cinque Bambini a basis for relief, these anomalies are merely further evidence of the perceptiveness of Holmes' sage observation that the life of the law has been experience, not logic. . . .

A corollary of the federal rule articulated in Section IV above is the invalidity of an interest in trust lands claimed under a federal patent granted *after* the funding of the trust. . . . If the federal patent was granted *before* statehood, it ran afoul the obligation of

the United States to hold such tidelands only in trust for the state. . . . If the federal patent was granted *after* statehood, it was a nullity as it necessarily purported to operate upon interests in real property which, at least insofar as federal law was concerned, had been conveyed to the states in trust—and irrevocably so.

These principles hold only with respect to property fee simple title to which was in the United States at and prior to statehood. If, at the time of acquisition by the United States in its sovereign capacity, property was *already* privately owned, it follows on reason that the title was never in the United States and therefore could not have been held by the United States in trust nor thereafter at statehood granted to the state.

Against this backdrop *Cinque Bambini, et al*, argue that they hold under Spanish grants dating from April 15, 1813—four years pre-statehood. These Spanish grants, we are told, had the effect that the United States never acquired title; hence, none could be held for or granted to the State of Mississippi as a part of the public trust. There is precedent for this view in the case of ceded territory where tidelands were, prior to cession, privately owned under grants from Mexico. . . .

We find it suggested, however, that no recognition is accorded titles to lands in Spanish West Florida held under Spanish grants after 1783. . . .

All of the cases noted above—*Pollard, Henderson, Montgomery* and *Nevitt*—factually concern lands and waters above 31 degrees North latitude. Concededly, the Spanish claim to West Florida below the 31st parallel was far more legitimate than above it. In our view the same result obtains. On October 27, 1810, President Madison proclaimed West Florida south of the 31st parallel a part of the United States. On February 12, 1812, the Congress authorized the President to take West Florida below the 31st parallel. . . . On May 14, 1812, the area with which we are here concerned was formally annexed to the Mississippi Territory. . . .

Cinque Bambini, et al, claim under Spanish grants said to be dated from April 15, 1813. Such grants came too late. The Acts of Congress of March 3, 1819, May 8, 1822, and May 28, 1830 are of no force and effect, for such title to these lands as may ever have been held by the United States was effectively and irrevocably

granted to the State of Mississippi on the occasion of statehood in 1817.

The extent of the federal grant settled, we know only of the content of the trust in 1817. Waters and the courses they follow and the contours of the lands they adjoin are dynamic, though often imperceptibly so. Properties placed in Mississippi's public trust—tidelands or navigable freshwaters—share this characteristic. This leads to our concern whether the legal boundaries of the trust properties are similarly dynamic.

As explained above, effective upon statehood all tidelands and navigable waters were granted to the State in trust. The trust properties as of that date had distinct surveyable boundaries. The question is whether those boundaries today are the same as those fixed and surveyable—in theory, at least—in 1817. Federal law, it will be recalled, spent its force when the trust was originally funded. As of that moment, in the eyes of federal law, the State became a titleholder in this context like unto any private owner. The trust conditions and purposes subject to which the State then held in no way altered its status from that of a mere titleholder vis-a-vis adjoining or contiguous landowners.

Whether the operation of the forces of nature could thereafter add to or subtract from the properties so held by the State is a matter wholly governed by state law. . . .

Insofar as may be relevant to the case at bar, our law has generally accepted contours. Ordinarily the owner of water bounded lands is entitled to accretions thereto. . . . These include gradual deposit of alluvial soil upon margin of water or gradual recession of waters. . . . Accretions may grow and develop adjacent to tidelands or the shores of freshwaters. . . . With regard to public trust tidelands, our law is settled that title to tracts not in existence at the time of the federal grant but formed subsequently by deposits of silt, soil, etc. from a river, is held by the state. . . . The public trust, vintage 1817, may be augmented by accretions and by the natural inland expansion of the tidal influence.

Ordinarily, of course, a private landowner may lose title to lands via reliction as well as gain it via accretion. . . . Our cases suggest that, once held by the state in trust, properties are committed to the public purpose and may be alienated from the state only upon the authority of legislative enactment and then only

consistent with the public purposes of the trust. . . . Today's decision does not require that we decide whether the State may lose title to trust lands through reliction and we intimate no opinion thereon, except again to note that the question is wholly one of state law. . . .

The geophysical tidal experience may enlarge the trust properties. If over decades, epochs or even centuries the tides rise—that is, the mean high water mark rises (and there is reason to believe this has happened and may continue to happen)—the inward reach of the tidal influence expands. More lands are tidally affected. On principle there is no way our law may allow a riparian freshwater title holder the benefit of accretions and deny the owner of tidelands the benefits of the natural inland expansion of the tidal influence. Sufficient unto this day is our holding that, where the forces of nature—gradually and imperceptibly—have operated to expand or enlarge the inland reach of the ebb and flow of the tide, the new tidelands so affected accrete to the trust. Put otherwise, state law decrees that the surveyable outer boundary of the trust in the area here in controversy is *today's* mean high water line, regardless of the absence of a tidal influence in 1817, of how far inland and remote from the sea, and regardless of how shallow or how insignificant the tidal influence, subject only to the exception discussed in Section VII below. . . .

By way of contrast to our law regarding accretion and reliction, boundaries and titles are not affected by avulsion. . . . It is this general principle that generates doubt regarding at least a part of the Chancery Court's decision, that declaring as the property of the state lands theretofore without the surveyable boundaries of the trust but brought within the ebb and flow of the tide by the dredging for fill material used in construction of Interstate Highway I-10.

An avulsion is a change in a boundary body of water so rapid or sudden, or in such a short time, that the change is directly perceptible or measurably visible at the time of its progress. . . . We perceive no reason on principle for exclusion from this notion of a change of water course boundary artificially induced by the dredging process.

Put more broadly, under the laws of this state neither artificially created water courses, inlets, slips, marinas and the like, nor physical improvements or alterations made thereto, become a

part of the public trust, even though they may become tidally affected. Leaving aside claims of navigation, ingress and egress, title to such artificially created “tidelands”, and the beds beneath the waters as well, remains in the record titleholder. Only those lands, not tidelands in 1817, which have become such via the natural process of accretion or the general rising or inland expansion of the tide have in law been added to the trust so that title is held by the State.

For an additional reason, the two lakes created by dredging for fill material used in construction of Interstate Highway I-10 (to the extent that each lake was not naturally within the ebb and flow of the tide on the date the dredging commenced) do not belong to the state. The State has not paid for these lands. To strip these artificially created tidelands from their record title holders would constitute a taking within the Fifth and Fourteenth Amendments to the Constitution of the United States and Article 3, § 17, Mississippi Constitution of 1890, which at the very least would require that the state pay just compensation. . . .

Finally, Cinque Bambini argues that the grants and patents under which they hold are entitled to a presumption of validity. In the alternative, the State should in equity be estopped from challenging same.

The first argument is answered by what has been said above. Grants and patents which as a matter of law could convey nothing—because the properties were already in the public trust—are entitled to no presumption of validity. Even those grants and patents which in other contexts may be presumed valid . . . are subject to gain or loss via accretion or reliction.

In support of its alternative theory, Cinque Bambini have called to our attention no case wherein the State of Mississippi has been held estopped, equitably or otherwise, to assert title to and dominion over properties otherwise within the public trust, and our independent research has revealed no such case. Furthermore, the facts presented here do not support a claim of equitable estoppel. . . .

Moreover, the State’s delay in assertion of dominion over these tidelands does not give rise to an estoppel. The State’s title may not be lost via adverse possession, limitations or laches. . . . Under no

circumstances may title held by the State for the public use or benefit be so lost. . . .

Finally, we consider the State's counterclaim which is presented via cross-appeal. In the court below the State sought to recover from Cinque Bambini the value of dirt removed from the bottom of Bayou Enceinte and its adjacent land area in conjunction with the Highway I-10 construction project. From the Chancery Court's denial of this counterclaim, the State appeals.

To the extent that this dirt or fill material may have come from areas today held outside the public trust—see Section VII above, the counterclaim and cross-appeal, of course, must fail. To the extent that this dirt may have come from properties within the trust, we concur with the Chancery Court that the claim must fail for impossibility of proof.

In the proceedings below much technical data regarding surveying methods and the like was presented and considered. The Chancery Court's comprehensive memorandum of decision and final decree necessarily concluded with the establishment of precise, surveyed boundaries separating the properties held by the State in trust from those owned by Cinque Bambini, et al.

This appeal and the assignments of error we have been tendered, however, address only the broad, general principles which must be settled before permanent surveyed or surveyable boundaries may be established. Above we have discussed and tried to make clear the applicable general principles, and in one important particular we have found the Chancery Court in error.

In simpler cases with less at stake, we would finally decide the matter here, *viz.*, we would affirm in part and reverse in part and render. Establishment on the ground and in the land records of the precise outer boundaries of the public trust properties—today—will necessarily involve an interaction between counsel, surveyors and other experts, and the court, an interaction of an extent and nature more compatible with the institutional structure of the Chancery Court than this Court. Accordingly, so much of the final decree below as may be found inconsistent with what we have said above is vacated and the matter is remanded to the Chancery Court for such further proceedings as may be appropriate.

*White v. Malone Properties, Inc.*⁸

I concur unreservedly in the result reached by the majority affirming as it does the judgment below dismissing the complaint of Jeffrey Owen White. With respect, I suggest that en route to that result my colleagues in the majority commit two major errors in their understanding of and conceptualization of the controlling principles of law.

First, the question of whether we will enforce in this state the exclusiveness of liability provisions of the Louisiana Workers' Compensation Act is a garden variety choice of law question. It ought be resolved via application of our center of gravity doctrine adopted by this Court in 1968 and followed without deviation since that time. For reasons I do not understand, the majority finds controlling precedent in *Bethlehem Steel Company v. Payne*, 183 So.2d 912 (Miss.1966) and *L & A Construction Co. v. McCharen*, 198 So.2d 240 (Miss.1967). These cases reach a result consistent with today's. But as choice of law cases, they proceed upon principles we discarded in 1968 and to which we have not since given the time of day.

Reliance upon *Bethlehem Steel* and *L. & A. Construction* in a 1986 choice of law case is as about as sound as reliance upon Ptolemaic astronomy after Copernicus. It is like arguing for a post-Einstein resurrection of Euclidian geometry because in a given instance Euclidian principles produce a satisfactory result. To use a more lawyer-like metaphor, what the majority does today is analogous to a federal court in a 1986 diversity case relying upon pre-*Erie* federal precedents to furnish the rule of decision on a question of state law. In such a case I doubt any knowledgeable lawyer would suggest that, because the pre-*Erie* case reached a consistent result, that case was authoritative precedent in the post-*Erie* era.

Second, the majority resurrects a conceptual distinction between rights and remedies I have long regarded as nonsense and had thought well on its way to the junkheap of discarded legal fictions. I refer here to the notion that, in a choice of law/statute of limitations context, the forum state take seriously whether the foreign jurisdiction conceptualizes the running of the limitations

⁸ 494 So.2d 576 (Miss. 1986) (Robertson, J., concurring).

period as extinguishing the right, thus precluding the action everywhere, or merely barring the remedy, leaving the right available to be sued upon in any other state having jurisdiction of the matter. . . . It would seem on principle that if an action is time barred in the state which furnishes the center of gravity, it should be held time barred everywhere. . . .

A bit of flesh should be added to my premises.

To begin with, this action was wholly within the subject matter jurisdiction of the circuit court—it may not be seriously argued to the contrary. The complaint sounds in tort and charges negligence, matters which when well pleaded (as here) are sufficient to bring a case within the subject matter jurisdiction of any circuit court of this state. . . . Matters such as domicile of the parties and where the tort occurred may affect the resolution of questions of in personam jurisdiction, venue and choice of law. Logically, they may not implicate subject matter jurisdiction. In the present context the choice of law inquiry is outcome determinative.

White's only practical hope on this appeal is that he might somehow persuade this Court that his claim is controlled wholly by Mississippi law, including our familiar six year statute of limitations on tort claims, . . . and that his claim is not barred by the limitations or exclusiveness of liability sections of the Mississippi Workers' Compensation Act

If Louisiana law applies, White's plight is hopeless as a workers' compensation claim—Louisiana law presents him the twin barriers of an exclusiveness of liability clause . . . and a two year statute of limitations. As a tort claim for negligence, White fares no better under Louisiana law for there he confronts a wholly valid and enforceable one year statute of limitations. . . .

Two decades of undisturbed precedent mandate that today's choice of law question may *only* be decided by a proper application of our familiar center of gravity test, first applied by this Court in tort cases in 1968. . . . This Court's adoption of the center of gravity test in *Mitchell*, 211 So.2d 509 (Miss.1968) and *Craig v. Columbus Compress & Warehouse Co.*, 210 So.2d 645 (Miss.1968) represented a major reformulation of choice of law doctrine in this state. The traditional rule of *lex loci*—the law of the place—was effectively abandoned. Since that time we have employed the center of gravity analysis in *every* choice of law case coming before this Court. . . .

For this reason, pre-*Mitchell* and pre-*Craig* cases, no matter how similar to a given case under consideration on their facts or on the questions of law presented, are of little or no precedential value and should be cited and relied upon with great caution.

This test directs that we inquire regarding the extent of the contacts the competing states, Louisiana and Mississippi, have with the parties and the action. The significant contacts here appear as follows: (1) White was a resident of Louisiana before he accepted the job with Malone Properties. (2) White was hired in Louisiana. (3) White worked exclusively in Louisiana while employed by Malone Properties. (4) White's injury occurred while on the job in Louisiana. (5) White was treated for and hospitalized for this injury in Louisiana. (6) Malone Properties, Inc. and Carroll D. Malone d/b/a Malone Construction Company were doing business in Louisiana. (7) The insurance was paid in Louisiana. (8) Jeffrey and Ida Mae White considered Mississippi home. (9) Malone also does business in Mississippi.

A balance of these significant contacts makes it apparent that Louisiana furnishes the center of gravity. Under our law, therefore, Louisiana law is appropriate for application. White was not hired in Mississippi nor was he employed regularly in Mississippi at the time of his accident. Rather, at the pertinent times he was permanently assigned to work in Louisiana and was in fact working there at the time of his injury. Because his claim is barred under the exclusiveness of liability provision of the Louisiana Workers' Compensation Act, it is barred when asserted in Mississippi under whatever guise. . . .

To the extent that this case is precluded under either of the Louisiana statutes of limitations cited above, note by analogy Miss.Code Ann. § 15-1-65 (1972), which provides:

When a cause of action has accrued in some other state or in a foreign county, and by the law of such state or country, or of some other state and country where the defendant has resided before he resided in this state, an action thereon cannot be maintained by reason of lapse of time, then no action thereon shall be maintained in this state.

Though Malone does not appear to have resided in Louisiana in the sense contemplated by Section 15-1-65, the principle embedded in that statute as a matter of elementary legal reasoning compels the view that White's action should be held barred. . . .

We are urged that the Louisiana limitations rule applicable here is procedural and hence not enforceable in this state. Candor requires acknowledgement that in years past we have given the label "procedural" to some statutes of limitations. . . . Reflection produces the recognition that the label is misleading and the source of much forum shopping mischief.

The argument pressed here proceeds on the assumption that there are in the law of the fifty states of this nation two types of statutes of limitations radically different in their nature. One is said to be attached to the right so that the running of the limitations period extinguishes right; hence, the right may not be sued upon anywhere. . . . Such limitations statutes are labeled substantive. The other type of limitations statute is said to bar the remedy only, leaving the right available for suit in any other state that might be persuaded to accept jurisdiction. . . . Louisiana, we are told, has this latter type of statute of limitations.

The idea that some limitations statutes extinguish the right while others bar only the remedy is the height of judicial legerdemain, nonsense in every respect. [Footnote:] Federal courts sitting in Mississippi have been vigorous in propagation of the right-remedy distinction I suggest be condemned. . . . Judge Dan Russell perceived in *Fieldman By Fieldman v. Roper Corp.*, 586 F.Supp. 936 (S.D.Miss.1984) that the court was enforcing an "abstract semantical difference", 586 F.Supp. at 938. The same court had earlier bought the distinction hook, line and sinker. [Main text:] It has been roundly condemned by the commentators

What the forum state should regard as important is that the suit is time barred under the law of the foreign state, not notions of whether this state or that regards the limitations rule as substantive or procedural, nor whether the foreign state's bar extinguish the right or merely the remedy. What is—and should be—outcome determinative here is that the lawsuit is time barred in the foreign state. . . .

A more fundamental inquiry may in this context be substituted for the unworkable substance—procedure dichotomy. Is the choice of local (Mississippi) or foreign (Louisiana) rule one which may influence substantially the choice of the forum selected by the plaintiff? . . . Where the answer to this question is in the affirmative—as is obviously the case here—the law that ought to be enforced is that of the state in which lies the center of gravity, regardless what state may be persuaded to accept jurisdiction of the case.

This state has a legitimate interest in discouraging forum shopping, particularly where we are the shoppee. More specifically, we have an interest in seeing that our overcrowded dockets are not further clogged by actions the center of gravity of which lies in another state and where the plaintiff's obvious attraction to this state is our relatively lenient statutes of limitations. . . . Section 15-1-65 is a valid expression of these interests. If the fair and evenhanded administration of justice be our collective goals, we would regard it unseemly that, absent powerful counterveiling considerations, a given action may have different outcomes depending upon which state's courts furnish the forum. . . .

This is an action whose outcome should, to maximum extent feasible, subject only to the vindication of important local judicial interests regarding the management and conduct of the trial (and subject, of course, to the vagaries of the trial process itself), be the same wherever it be heard. As the claim arose in Louisiana and as that state furnishes the center of gravity, we should enforce the law which would have been enforced had the action been brought in Louisiana. This is particularly so, as there have been identified here no legitimate Mississippi interests which would be compromised by our doing so. Under Louisiana law, as explained above, the action is barred. For these reasons, I concur in the result announced by the majority.

*Thomas v. State*⁹

How the Court errs may be simply put: Elisha Thomas, Jr., is defaulted for failure to claim a right now available to him retroactively but which had no existence at the time of the default. Put otherwise, under the law as it existed at the time of Thomas' said-to-be-procedural-default, the trial judge would have been reversed summarily had he given Thomas' point the time of day.

Beyond this, enforcement of a procedural default today is incapable of serving and for the future promoting the purposes of the contemporaneous objection rule. What good does it do to give a trial judge the opportunity to pass on a point he has no discretion but to deny? How can a defendant sandbag regarding a right that has no existence?

The Court today convicts Thomas for failure to make an objection which the trial judge on his oath would have been obligated to overrule. In so doing, we convict ourselves in the court of common sense. And, as for Elisha Thomas, Jr., perhaps there is a certain poetic justice as he this day experiences figuratively that which he did literally back on October 2, 1983. . . .

The contemporaneous objection rule, that is, the rule that says that a party is entitled to but one bite at the apple, presupposes that the party knows which apple to bite and that the bite when taken is one the trial judge on his oath must allow. Where, as here, there was no basis short of the proverbial gleam in the eye to think, prior to April 30, 1986, that is, that *Batson* would be decided as it was, it may not fairly be said that Elisha Thomas, Jr. or his counsel knew which apple to bite or the consequences of failure. Nor may it be said that the Circuit Court at that time had the remotest semblance of an obligation to honor the bite.

Ordinarily, we require a contemporaneous objection to assure that the opposing party has notice of the claim and the opportunity to offer evidence or take curative action before it is too late. There is no question of sandbagging. Our discussion in *Williams* makes clear what the fair-minded must concede: that no one foresaw *Batson* enough to sandbag. In the case before us, there is one reason, and one reason alone, for the defendant's procedural faults: neither Thomas, nor his counsel, foresaw that *Batson* would be

⁹ 517 So.2d 1285, 1288-94 (Miss.1987) (Robertson, J., dissenting).

decided as it was. Indeed, prior to April 30, 1986, I doubt that a single member of this Court would have predicted *Batson*.

Another purpose of the contemporaneous objection rule is to afford the trial judge a meaningful opportunity to consider the point at a time where the trial has not been so infected by error that a mistrial is necessary. Because ordinarily the case will be tried but once (because the social costs of doing otherwise are too great), we consider that the trial judge should be given a chance to correct his own errors before the matter comes up on appeal. Here, as *Williams* and *Harper* make clear, a contemporaneous objection would have been promptly overruled, and on appeal we would under *Griffith* have ordered a *Batson* hearing; an inefficient result. And, yet another of the policies undergirding the contemporaneous objection rule is seen incapable of being served by what we do today.

Without doubt, *Batson* rights, like any other constitutional rights, may be waived. . . . But before there can be a fair waiver, the defendant must be given a meaningful and realistic opportunity to assert the right. If he is given that opportunity and he intelligently and voluntarily declines to assert the right, it is then waived.

*Jones v. State*¹⁰

More so than in the case of Elisha Thomas, Jr., Jones' case should be *Batson*-scrutinized because Jones has been sentenced to die. The Supreme Court of the United States in recent years has repeatedly recognized that the penalty of death is qualitatively different from any other form of punishment known to our society and, because of its uniqueness, proceedings and procedures precedent to its imposition simply are not the same as in other cases. . . .

Only because there are some who would have it otherwise, I would note that the death is different principle has been recognized by the Supreme Court on occasions almost too often to enumerate.

. . .

A comparable principle recognized in this state is that of heightened appellate scrutiny of criminal trials which have resulted in imposition of the sentence of death. The idea has roots deep in our past. . . .

¹⁰ 517 So.2d 1295, 1311 (Miss.1987) (Robertson, J., dissenting).

This Court hardly stands alone among state courts of last resort in recognizing that death is different. In many other jurisdictions we find the same careful approach to appellate review of capital cases, although on occasion the juridical logic offered in support appears fuzzy. . . .

That this approach on the part of our sister states is not of recent vintage may be seen by a perusal of the cases discussed in my separate opinion in *Hill v. State*, 432 So.2d 427, 446–47 (Miss.1983) (Robertson, J., dissenting).

But what is the juridical content of “death is different?” How ought judges administer that content in specific cases? We are not of one mind on the point, nor have we spoken with clarity.

One red herring may be quickly dispatched. The rules themselves do not change as the penalty of death is sought. Neither the contemporaneous objection rule nor any other rule of procedure or substance becomes metamorphosed into something more favorable to the capital defendant. Any contrary thought may be safely branded error.

Beyond its intuitive factual plausibility, death-is-different derives from two points about the nature of law. First, law is not an end but a means to the end of a society in which we should want to live. Features of that society I have thought widely accepted include unconditional reverence for life, procedural fairness and giving one the benefit of doubt in proportion to the consequences of error discounted by their probability. As law is a purposeful enterprise subjecting human conduct to the governance of rules, . . . so its rules should not be enforced so that their purpose be thwarted. Nor are courts mandated to apply, mechanically, the open textured rules that constitute our law to cases beyond the reach and concern of those purposes.

Second, rules of law being made by man are incapable of perfection. Because of our relative ignorance of fact and the relative indeterminacy of aim, . . . we make rules which include that we should wish excluded and which exclude that we would prefer included. . . . The judicial process is not to be confused with Newton’s thermodynamics or Einstein’s gravity (although quantum mechanics does present an attractive physical analogue). Law makers and law appliers are prone to err, the consequences of which we may not responsibly ignore.

We are of necessity called to (imperfectly) sensitive application of the law. To be sure, as internal participants within the system we have no discretion other than as the law allows. . . . But that which we have we should exercise by reference to systemic purposes, those undergirding the specific rule, the penumbra of doubt inherent in all rules, the penchant for indeterminacy in all of our rule making efforts, our bent for error in application, and the discounted gravity of consequences. Death is the harm in the harmless error calculus.

In death penalty cases we give flesh to these ideas in quite specific ways, as noted above. We consider trial errors for their cumulative impact. . . . We apply our plain error rule with less stinginess. . . . Enforcement of our contemporaneous objection rule is relaxed. . . . We resolve serious doubts in favor of the accused. . . . And, as indicated above, we afford heightened scrutiny on appeal. Translated, what becomes harmless error in a case with less at stake becomes reversible error when the penalty is death, . . . as death really is different.

Today's question is whether the contemporaneous objection rule should be enforced to bar Jones' *Batson* claim. The relevant considerations are these:

(1) The rule's content excludes this case. *Batson*-specific rights had no existence on April 3, 1985, though the law be regarded not as that which is but instead as a continuous process of becoming. The contemporaneous objection rule contemplates a realistic opportunity to assert a right which exists at that time.

(2) One purpose of the rule is the prevention of sandbagging. A litigant should not be allowed to lie silently in the bushes and strike only after his adversary has lost the opportunity for effective defense. But how may one sandbag an opponent regarding a rule the content of which is wholly unknown? Even if Jones and his counsel were disposed to sandbag (and exposure to the penalty of death certainly provides the incentive), the then-unforeseeable content of the *Batson* right made defense sandbagging quite simply impossible.

(3) The interest of judicial efficiency ordinarily mandates that a party have but one meaningful opportunity to assert a right. Where, as here, the trial judge on April 3, 1985, had no authority but to overrule any *Batson* claim, assuming counsel possessed the

prescience to know how to assert one, no such meaningful opportunity has been afforded.

(4) The judicial efficiency interest ordinarily mandates a meaningful trial court opportunity to hear and finally resolve points, to the end that precious appellate judicial resources may be preserved. Timely assertion of rights in trial courts enables those courts to resolve matters and correct or avoid errors that might otherwise necessitate costly appellate review and retrials. Since the law as it existed on April 3, 1985, recognized rights not remotely resembling those fashioned a year later in *Batson*, this efficiency interest fails. The point is driven home by a brief look at *Williams v. State*, 507 So.2d 50, 52 (Miss.1987); and *Harper v. State*, 510 So.2d 530, 532 (Miss.1987), where the said-to-be-necessary contemporaneous objection was made. The appellate result: remand for a *Batson* hearing, precisely the sort of inefficient result the rule is designed to prevent. Enforcement of the contemporaneous objection rule simply makes no sense in a change of law context. At the time the objection should have been made, April 3, 1985, the trial judge was prohibited by this Court's reading of *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) from taking any action which may have avoided the costly rehearing. [Footnote:] The majority's suggestion that Jones should have made a *Swain* objection is so much sophistry. First, the record reflects that on April 3, 1985, Jones didn't have a *Swain* objection. He did, however, have a *Batson* claim, but he had no way of knowing that fact. Second, prior to April 3, 1985, this Court had consistently rejected, if not ridiculed, *Swain* objections. . . . Third, the trial judge on his oath would have been obligated to overrule any *Swain* objection. So seen, the majority condemns Jones because of his lawyer's failure to make a vain and wholly useless objection.

(5) In *Williams* and *Harper*, we afforded the prosecution a "second bite" at the *Batson* apple on grounds it could not fairly be held to have foreseen what the Supreme Court would wrought. On what principle of even-handed justice may we do an about face and hold a similarly defaulting defendant now barred?

(6) If there be a reasonable probability that the prosecuting attorney in fact used peremptory challenges to exclude black persons from the jury in a *Batson*-violative manner, the systemic

policies mentioned at the outset mandate that we find this out before Gregory Montecarlo Jones' date with the state's executioner.

We emphasize again that we do not change the content of the contemporaneous objection rule. Realism requires recognition that it is an open textured rule. I have found that the rule has no content mandating enforcement of the procedural bars against assertion of rights non-existent at the moment of procedural opportunity, nor does such enforcement enhance or vindicate any of the rules policies. If nothing else, this is an appropriate case for plain error treatment. . . . For these reasons, staying within the rule, I would resolve the doubt for Jones, for death *is* different.

A less than proud page of this state's history is an appropriate postscript. *Brown v. Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682 (1936) is one of the great cases in American criminal constitutional procedural jurisprudence. The case concerned confessions coerced from three black youths in a Kemper County murder case and has been ably chronicled by Richard C. Cortner in *A "Scottsboro" Case In Mississippi* (1986). The three had been convicted and sentenced to be hanged. This Court affirmed. . . .

Before the Supreme Court of the United States, the State then as now invoked procedural bars and argued that the defendants should hang because their lawyer had not made the right objection at the right time—there really is nothing new under the sun. Cortner tells this story of oral argument in the Supreme Court.

William Maynard, [the Assistant Attorney General arguing for affirmance] pointed out that there had been no motion to exclude the confessions at the trial as required by Mississippi procedure, but he too was interrupted by one of the justices. Should Brown, Shields, and Ellington be condemned to die "because their lawyer neglected to say, 'I object'?" the justice asked Maynard. Maynard was speechless in the face of the question, feeling that if he replied in the negative, he would be conceding his case, while if he answered "yes" to the question, he would appear to be heartless. Maynard instead of answering dropped his head in silence, and the justice said, "I thought so." . . .

The Supreme Court reversed and the rest is history.

*Frazier v. State*¹¹

There is a certain air of unreality about this case. The impression is about that a strict construction of Section 109 necessitates affirmance, notwithstanding this result may in fact only be reached via an expansive reading of the key Section 109 wording, a point I understand the majority to concede. Guidelines to the exercise of our undoubted authority of judicial review of legislative enactments, guidelines established in literally hundreds of cases spanning more than a hundred years, most thoroughly entrenched in our law and most assuredly pointing to reversal as to all Appellants except Supervisor Knox, are inexplicably ignored as though they had no existence.

The public perceives that Section 109 proscribes all conflicts of interest in state and local government. In truth and in fact, there are untouched by Section 109 potential public official conflicts far more inimical to the public weal than those challenged here. Indeed, the suggestion that the public coffers most need protection from the self-interest of poorly but publicly paid legislator-school teachers strains credulity.

And because the “conflict-of-interest” label has been attached to Section 109, much of the argument for affirmance proceeds upon the value judgment that such-and-such is a conflict of interest, generic variety, notwithstanding that a fair reading and application of the rather restrictive wording of the constitution produces no illegality. Indeed, I am struck by the penchant of all—the majority and the parties—for reading into Section 109 wording that simply is not there.

One may search the majority opinion in vain for a neutral, non-result oriented reading of Section 109 which when applied will yield the crazy quilt of results we announce today. Section 109 (once well expanded) is “relentlessly severe” when applied to the activities of legislator-public school teachers but must be “balanced” with the “logic of realities” when applied to legislators’ school teacher wives. Severity qua formalistic jurisprudence returns in the case of the school teacher-supervisor payment of whose salary is traceable to discretionary local tax levies, only to give way again to practical

¹¹ 504 So.2d 675, 706-07 (Miss. 1987) (Robertson, J., concurring in part and dissenting in part).

reality regarding a school teacher-alderman where the board of aldermen was mandated to fund the school budget. The majority is quixotic and schizophrenic at once.

I suggest, with deference to my colleagues, that today's decision would fare poorly under the grading pencil of persons competent in linguistics, ethics, logic and political science. It isn't very good law either. . . .

Section 109 reads:

No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city, or town thereof, *authorized by any law passed or order made by any board of which he may be or may have been a member*, during the term for which he shall have been chosen, or within one year after the expiration of such term. [Emphasis supplied]

On our oaths we must apply these words as best fits their common and ordinary meaning, our referents being the work of Noah Webster and Henry Campbell Black more than 1890's constitutional draftsmen. We have no interest in what the constitution makers intended, except insofar as that intent may be divined from the words employed, because in substantial part there is no other method of the remotest reliability of ascertaining the makers' intent. [Footnote:] The majority, for example, undergirds its reading of Section 109 with question begging truisms: "Such an interpretation would insult the common sense of our predecessors . . ." (p. 695). I find nothing in the opinion authoritatively identifying the common sense of our predecessors, nor do I know of any reliable way of obtaining such information.

We begin the enterprise of interpreting the constitution with its ratified meaning. We give that wording the most enlightened and coherent reading it may be given. That reading must not only fit the wording, it should provide the best fit. And that fit must be tailored today. But we dishonor the constitution qua law when we resort to subjective value judgments and ephemeral notions of grave risks which may not be found contemplated or incorporated within a fair reading of the constitution. This is particularly so when identification of and proof of the reality of those risks is found

in no authoritative historical source nor in the evidence before us or within our judicial knowledge.

Finally, one of the great and seemingly eternal wars among legal scholars has been fought between so-called formalists or objectivists, on the one side, and realists or criticalists, on the other. Admittedly oversimplified, the central issue in that war has been whether law should be seen as a mass of hard edged, case decider rules which once identified and applied, produce automatic (“self-executing”) results, or is law a sociological phenomenon practiced through identification of and balancing of interests and the exercise of judgment and discretion. Legal scholars on each side have expended passion and risked careers and professional reputations in this war. For the most part the two camps have found themselves on common turf about as often as Arab and Israeli, and about as congenially, although over a lifetime an occasional ambivalent jurist has wavered between the magnetic tensions of the two poles. All of which is to provide context for my thought that the majority’s opinion is striking in its formalistic march up the hill to affirm the cases of Appellants Anderson, Frazier, Nunnally, followed by a march back down to realism in the case of Nunnally’s wife, then back up the hill to formalism to nail Killebrew and, back down to realism for Logan. I don’t think I’ve ever seen such in a single opinion, nor as much.

*Estate of Smiley*¹²

I concur in the judgment the Court announces this day and in much that is said en route. There are points, however, where additional comment—and in one instance, critique—may be appropriate.

Why the Court does not reject forthrightly the constitutional attack upon Miss.Code Ann. § 91-1-15(3)(d)(ii) (Supp.1987)—at least in part—escapes me. The majority’s exposition on page 21 and the first part of page 22 is one I find quite convincing. I would have the Court declare that this statute is constitutionally valid as against a due process based attack that it divests vested rights of the legitimate heirs of Oscar Reuben Smiley, deceased.

¹² 530 So.2d 18 (Miss. 1988) (Robertson, J., concurring).

It seems to my mind that this is precisely the sort of issue most susceptible of resolution via summary judgment. The trial judge was right in this, only to err one hundred eighty degrees in his substantive ruling. I am not quite sure what of value might be added via “a more complete factual development”, for we consider what is essentially a question of law. The issue was presented four-square in the court below. It was decided below with a full rationale offered. It has been fully briefed on appeal. It is an issue which is of substantial importance and interest in this state. We have the responsibility to settle it once and for all. I would do so today.

This is not to say that there are not yet lurking two further questions of constitutional dimension regarding Section 91–1–15(3)(d)(ii). I refer first to the claims of the holders of another category of vested rights, the claims of bona fide purchasers and encumbrancers for value.

Second, there lurks the problem whether the three-year limitations period in that statute is long enough. If I understand the constitutional mandate, the period must be sufficiently long in duration to present a reasonable opportunity for those beneficiaries of the new right to assert their claims. This problem, of course, becomes particularly acute when the illegitimate children are still minors. . . .

I applaud the Court’s disposition of the res judicata issue and its reasoning en route. Of course, we should not fault or penalize one for not asserting in the earlier action a property right which at the time of the earlier action had no legal existence. I only wish the Court had been favorably disposed to such a view when the lesser rights to life and liberty were at stake. . . .

Finally, I join wholeheartedly in Section IV of the majority opinion rejecting as it does the claim that plaintiffs have somehow missed jumping through a few procedural hoops said prerequisite to this action. The multi-count complaint here is more than sufficient to provide plaintiffs their ticket to litigate their claims on the merits.

I understand why the majority tiptoes past *Ivy v. Illinois Central Gulf Railroad Co.*, 510 So.2d 520 (Miss.1987), but any close observer will surely note that today’s decision whittles away at the woodenness of *Ivy*, and, *sub silentio*, adds a touch of credibility to the one-lawsuit thesis I urged in my separate opinion in *Ivy*. . . .

*Hall v. State*¹³

Today's appeal implicates the grand form of our government. The making of rules of evidence to govern trials in our courts is a function at the core of the judicial power. We have exercised that power by adopting the Mississippi Rules of Evidence, effective January 1, 1986. While the ink was yet wet on the pages of our rules book, the legislature purported to change and enlarge upon the Rules of Evidence by enacting the Evidence of Child Sexual Abuse Act. The two clash here, as substantial hearsay evidence presented in prosecution of this child sexual battery case has been held admissible under the statute, although excludable under the rules.

The legislature has enacted upon a matter at the core of the judicial power. In such circumstances the statute should not be enforced. The integrity of the judicial department of the government of this state demands no less. . . .

Our outcome determinative question concerns the admissibility of the extensive testimony of the two social workers, Debbie Graham and Brenda Chance, of statements Chad made to them. Eschewing the child's graphics, Graham and Chance had Chad describing the ways in which his father had sexually abused him. Each of these statements is garden variety hearsay. Each is a statement made by another, Chad, to the respective witnesses, Graham and Chance, offered by the prosecution to convince the jury that Hall did to Chad what Chad said he did. *See* Rule 801(c), Miss.R.Ev.

We first consider our Rules of Evidence, for if the testimony at issue is there found admissible our inquiry is at an end, subject only to Hall's Confrontation Clause challenge. As we have said, what Chad told Graham and Chance, when relayed to the jury by Graham and Chance, is hearsay. . . . We search for a *valid law* under which such hearsay may be admitted.

Rule 803, Miss.R.Ev., itemizes twenty-three specific exceptions to the hearsay rule. Evidence falling within one of these exceptions is admissible, notwithstanding that it be hearsay or that the declarant, Chad, be available to be called as a witness. Each of the statements Chad is said to have made to Graham or Chance described events said to have occurred weeks, if not months, earlier.

¹³ 539 So.2d 1338 (Miss. 1989).

The prosecution gains no profit from the excited utterance exception, . . . nor do we have a statement of Chad's then existing state of mind. . . . Nor are these statements made for purposes of medical diagnosis or treatment. . . . Without doubt, Graham and Chance sought to aid and counsel Chad, but neither are they physicians nor may the services they rendered be stretched into the world of the medical. . . . No other specific exception within Rule 803 is remotely applicable.

Rule 803(24), Miss.R.Ev., furnishes a dynamic catchall. Hearsay not covered under any of the Rule's twenty-three specific exceptions may be admitted if it has "equivalent circumstantial guarantees of trustworthiness" and if certain other procedural requisites are met. . . . The record before us fails to reflect any "trustworthiness" finding by the Circuit Court, nor are we prepared to imply one. Moreover, neither we nor the Circuit Court have been presented argument that the statements Chad made to Graham and Chance are "more probative" than "any other evidence which the proponent can procure through reasonable efforts," *see* Rule 803(24)(B). Today's hearsay fails under Rule 803(24), but in so saying we are not saying similar evidence may never be received under this catchall hearsay exception, only that the proponent must satisfy the trial court that each of the requisites of the rule is met.... As we must review such matters, the trial court should preserve for the record its findings on each point suggested by the rule....

Rule 804 provides further exceptions to the hearsay rule. These are available to a party only where the declarant is unavailable as a witness. Chad, of course, was physically present within the jurisdiction. He simply was not called. Rule 804(a) legally defines "unavailability as a witness." We have considered carefully each of the five circumstances of "unavailability" provided in Rule 804 and find it inescapable that within the rule Chad was "available". The prosecution finds no aid or comfort in Rule 804's additional hearsay exceptions. . . .

These things said, we can but conclude that nothing in the Mississippi Rules of Evidence affords legal undergirding for Graham and Chance to tell the jury what Chad said. The State argues, however, that the Rules of Evidence are not the only form of law which may supply the rule it seeks. The State points to the Evidence of Child Sexual Abuse Act, . . . effective July 1, 1986—

some three weeks before trial. Section 13-1-403 of that statutory enactment does indeed appear to suggest admissibility. That section defines “unavailability” quite otherwise than Rule 804(a), providing that a child such as Chad is “unavailable” if “the child’s participation in the trial would result in a substantial likelihood of traumatic emotional or mental distress.” The record reflects expert testimony that, if required to testify in court against his father, Chad would likely experience such an adverse effect. . . .

When Rule 802 declares that hearsay is not admissible “except as provided by law,” it means “except as provided by valid law.” Law is valid only when it emanates from a source having authority to make it. . . . Our question then is whether the legislature had authority to confer legal validity upon the Evidence of Child Sexual Abuse Act. The question brings us face to face with whether the act invades the constitutionally grounded rule-making authority of this Court and is thus void.

The rules and standards by which evidence is adjudged competent for use in a trial are the concern of the department of government where trials take place: the judicial department. The authority to act upon that concern is similarly situated. That authority has become known as the rule-making power. However problematic the point may once have been, the rule-making power has become established as a permanent part of the authority of the Supreme Court of Mississippi. Still, it is helpful to reflect upon whence we have come. . . .

On May 26, 1981, we crossed the Rubicon as the Court entered its Order Adopting the Mississippi Rules of Civil Procedure. Since that time judicial rule making has proceeded at a dizzying pace. Best known are the two further sets of rules largely patterned after comparable federal rules: the Mississippi Rules of Evidence and, most recently, the Mississippi Supreme Court Rules. Lesser known, but quite significant and equally a product of this Court’s rule-making power, are the Uniform Circuit Court Rules, the Uniform Criminal Rules of Circuit Court Practice, the Uniform Chancery Court Rules, the Uniform County Court Rules and the Uniform Criminal Rules of County Court Practice. . . .

What is important to remember is that this Court’s rulemaking power is a function of our constitution’s command that the three great governmental powers be separate. . . . At its heart

that doctrine of separation of powers provides that no officer of one department of government may exercise a power at the core of the power constitutionally committed to one of the other departments. . . .

The powers vested in the judicial department and in this Court have been broadly declared. . .

The judicial power has been authoritatively read as including the power to make rules of practice, procedure and evidence. That reading of the power is as much a part of our constitution as the doctrine of judicial review, at no point written in so many words but recognized as a core reality within our constitution in an unbroken line of cases from *Runnels v. State*, Walker (1 Miss.) 146 (1823) through *Alexander v. State By and Through Allain*, 441 So.2d 1329 (Miss.1983).

We have today the question who sets the criteria by which we assign credibility to evidence so that it ought be considered by a court charged to decide life or liberty. The hearsay rule and its exceptions effect a delicate balance between the twin towering goals of the trial process: truth and fairness. We want our triers of fact to have all evidence that will aid them in the search for truth and at once we want every citizen brought before the bar of justice to have every fair opportunity to test the worth of that evidence. It is no truism but an article of faith that cross-examination is the best tool we have for exposing truth. . . . Admitting evidence that has not been cured in the crucible of cross-examination challenges the soul of the trial process. Deciding when and whether that fateful step may be taken is a matter lying “at the core of the judicial function.”. . .

Historically, admissibility *vel non* of hearsay evidence has been a subject of exclusive concern of the judiciary of this state. Our rules developed in a common law fashion and date back into the last century. . . . By order entered September 24, 1985, this Court invoked its rule-making power and declared a codification of the hearsay rule and exceptions thereto. This declaration took the form of the Mississippi Rules of Evidence, the hearsay provisions of which appear in Rules 801-806. Our order implementing these Rules is the ultimate authoritative declaration that the making of rules of evidence, and particularly rules regulating the use of hearsay evidence, lies on judicial turf. As trials are the core activity

of the judiciary, so the promulgation of rules for the regulation of trials lie at the core of the judicial power. That being so, it only follows that the officers of neither the legislative nor executive departments of government, acting jointly or severally, had authority to confer legal validity upon the Evidence of Child Sexual Abuse Act. As that act enjoys no legal validity, it may not be regarded "law" within Rule 802, Miss.R.Ev. . . .

To the point at hand, concern for the problems of hearsay evidence belongs to the judiciary historically, functionally, but practicably as well. We are well aware that the matters addressed by the Evidence of Child Sexual Abuse Act have been the subject of nationwide study and controversy. Suffice it to say that the empirical assumptions of the act are hotly disputed by experts in the field. We would regard it precipitous to enact such amendments to our Rules of Evidence without careful empirical investigation and thoughtful reflection.

The social phenomenon of child sexual abuse has been thrust upon society's collective conscience. Its cruelty has seared that conscience. Society demands vigorous prosecution of those who sexually abuse children, and rightly so. Among the difficulties we encounter en route to such prosecutions are the content of the rules for receiving or rejecting evidence. Few charges are more difficult to defend. Yet we are told that the needs of the victim and the practical realities of such prosecutions require rules of evidence different-and more relaxed-than those we would otherwise enforce.

We are fortunate that we have available the resources and dedication of the Advisory Committee on Rules. That Committee performed the gargantuan task of developing our Mississippi Rules of Evidence which this Court adopted with only a handful of changes. The *raison d'être* of that committee is to facilitate the competent study of proposed amendments to our Rules and, in the end, to make recommendations to the Court. That Committee has modest financial resources with which to obtain the services of experts with advice regarding difficult matters just such as that now before us. We take this means of referring to our Advisory Committee the entire subject of evidence of child sexual abuse and charge that with all deliberate speed the Committee study and investigate the matter and, in the end, recommend whether and to what extent we ought amend the Mississippi Rules of Evidence. In

the end, the Justices of this Court, with their training, experience and competence, aided by an able staff of law clerks, accept responsibility for adopting or rejecting any amendments that may be suggested. . . .

In view of what we have said above, we may only hold that the Circuit Court erred when it admitted Chad's out-of-court statements through the witnesses Graham and Chance. There is, to be sure, other evidence in the record suggesting Hall's guilt. We have the physical findings of Dr. Julia Sherwood suggesting that Chad had experienced unnatural sexual contact. Keith, Chad's ten-year-old brother, gave particularly damning testimony. Still, we attribute great impact to Chance's telling the jury the childlike but picturesque story Chad told her. And the same of Graham.

Our question becomes whether receipt of this evidence denied Hall a substantial right. . . . Our hearsay rules are designed to secure to both prosecution and defense a fair trial. Where, as here, substantial evidence of a material fact has been admitted in violation of our hearsay rules, it follows as the night the day that the defendant has been denied a fair trial. . . .

Two further points merit note.

The effect of our decision is that the Circuit Court erred as well in denying Hall's motion for a new trial. Hall will now get that new trial. When we reverse and remand for a new trial, both sides begin anew, no balls, no strikes. Except as we may otherwise direct, all issues are for trial *ab initio*. In the present context, the prosecution may have the opportunity to offer again Graham's and Chance's testimony and to attempt to qualify that testimony for admissibility under Rule 803(24), Miss.R.Ev.

We recognize that Hall has this day tendered to us numerous issues above and beyond that considered and decided above. Some of these issues are difficult or important, or both. At times where such issues are likely to recur at retrial, we give our views for the guidance of the court and counsel. What we have said above is adequate to adjudge this appeal. The bite is quite as much as we this day ought chew.

*Dycus v. Sillers*¹⁴

This is a case about a fishin' hole. It lies in western Bolivar County near the River, and at birth was named Beulah Crevasse, though many have long called it the Merigold Blue Hole. People who can get there without trespassing on land want to enter and fish. Landowners and their long time lessee hunting club want just as badly to keep the public out. The relative scarcity of good fishing spots, Landowners' bona fide needs for protection of their valuable timber and water resources, club members' desire for undisturbed aesthetic and sporting enjoyment of the blue hole they have long thought theirs, the violent life of Old Man River, notions of fish as *ferrae naturae*, and, as well, the human penchant for confusing want with right, desire with entitlement, and the familiar with the necessary—these and more form important background forces driving this civil warfare which we are charged to channel within the levees of the law.

This is also a case about a people, the waters they fish, and a unique culture and lore. These form an ambiguous but real part of our life whose pulse is preserved in the product of our poets from the famous to the obscure.

Many think fishing the most leisurely of leisure activities, the positive pursuit of the lazy. In describing his childhood in Yazoo County, Willie Morris recalls

We did cane-pole fishing, both to save money and because it was lazier, for we seldom exerted ourselves on these trips to Wolf Lake or Five Mile.

It was a leisure to be consumed and cherished, a spot in the shade preferred, and whether the fish were biting was secondary.

When the biting was good, we might bring home twenty or thirty white perch or bream or goggle-eye; when it was bad we would simply go to sleep in the boat.

¹⁴ 557 So.2d 486 (Miss. 1990) (Robertson, J., for Court).

But there was always a Miss Julia Mortimer, the local school marm, revered in time but then the scourge of every young Willie Morris, Miss Julia who'd "get behind some barefooted boy and push," said Uncle Percy. "She put an end to good fishing,"

Outside the home, we boys was more used to sitting on the bridge fishing than lining the recitation bench. Now she wanted that changed,

Uncle Curtis remembered of Miss Julia.

Fishing is a part of the very life and being of many in Mississippi, as with Eudora Welty's enigmatic Billy Floyd, of whom "it was said by the old ladies that he slept all morning for he fished all night," and who Jenny noticed when he walked down the street because "his wrist hung with a great long catfish." Ellen Douglas' Estella, who had just given birth said "Baby or no baby, I got to go fishing after such a fine rain," the same Estella in whose fishing style Douglas sees poetry, Estella who

addressed herself to the business of fishing with such delight and concentration. . . . She stood over the pool like a priestess at her altar, all expectation and willingness, holding the pole lightly as if her fingers could read the intentions of the fish vibrating through line and pole.

Then there is Walker Percy's Anna Castagna, Binx Bolling's mother, who "looks like the women you see fishing from highway bridges," who sits on the porch overlooking the water at Bayou des Allemands and

casts in a big looping straight-arm swing, a clumsy yet practiced movement that ends with her wrist bent in in a womanish angle. The reel sings and the lead sails far and wide with its gyrating shrimp and lands with hardly a splash in the light etherish water. Mother holds still for a second, listening intently as if she meant to learn what the fishes thought of it, and reels in slowly, twitching the rod from time to time.

Many Mississippians, including our own Chief Justice Roy Noble Lee,

feel that a person who has never . . . angled for bass or caught bream on a light line and rod, or taken catfish from a trotline and limb hook, has never lived.

Still, some of us are like Faulkner's Lucius Priest who at age 11, when Uncle Parsham asked, "Do you like to go fishing?," thought "I didn't really like it. I couldn't seem to learn to want—or maybe want to learn—to be still that long," but said quickly: "Yes, sir." Lucius, being led to Mary's fishing hole,

sat on the log, in a gentle whine of mosquitoes.... Then I even thought about putting one of Lycurgus's crickets on the hook, but the crickets were not always easy to catch. . . . [When nighttime finally fell and Uncle Parsham returned,] "had a bite yet?" [Lucius finally confessed,] "I ain't much of a fisherman," I said, "how do your hounds hunt?"

Binx Bolling was of Lucius' mind, though it is doubtful they had anything else in common. "You know I don't like to fish," Binx said to this mother.

"That's true," she says after a while, "You never did. You're just like your father. . . . He didn't like to fish?"

And so of Preston Cunningham, even though his unwitting son, Carroll, had had a pond dug for him beyond the yard "stocked with bass and perch."

But even for those who warm to it so much more than Lucius and Preston and Binx, and maybe even Binx' father, fishing is not the central motion of our outdoor life but is always second fiddle to the hunt. Not quite the afterthought, it is the interlude, the escape, relaxation, almost taken for granted until you can't fish, not nearly so enobling or paradoxical as hunting the deer, with its ritual rite of passage of adolescence and loss of innocence as when the old half-Indian Sam Fathers "dipped his hands into the hot blood" and marked young Ike McCaslin's face teaching him humility and pride.

Perhaps it is because the fish is less like us—and more plentiful and more familiar, it is not the centerpiece but the analogy, the simile, as Ike thought as the bear disappeared into the woods:

It faded, sank back into the wilderness without motion as he had watched a fish, a huge ole bass, sink back into the dark depths of its pool and vanish without even any movement of its fins.

Or Eudora Welty's "[m]uscadine spread under the waters rippling their leaves like schools of fishes." Will Barrett's "knee leapt like a fish." Gary, Larry Brown's lonesome night hawk, found Connie "cold as a fish." And from Beverly Lowry:

Might have been pleasant. Looking at his white behind-the-ear skin. White as a cooked perch, Emma Blue wistfully thought after she had refused John Robert's offer of a ride to school.

Fish furnish less pleasant images. Again, Welty, describing the house after the floodwaters had receded:

"That slime, that's just as slick! You know how a fish is, I expect," the postmaster was saying affably to both of them, . . . "That's the way a house is, been under water."

Mississippi's game fish are of many stripes, their personalities as different as our people. There are the bream, Nash Buckingham's "matchless little marauders", but the biggest, little bigger than the size of your hand, to any objective observer "the sweetest eatin' there is." There are the perch and crappie, but little poetry about these.

Then there is the large mouth bass, Buckingham's "leviathans," "placed in the waters of the South so that fishermen have a preordained reason for idleness and spending money." Outdoorsman Jim McCafferty says of bass: "This savage fighter will attack the right crank bait with all the fury of a treed wildcat." Fishing for white bass on the oxbow lakes in the Delta, McCafferty exaggerates only slightly when he talks of "his duels with bruising white bass tak[ing] on an image of a sheriff looking for the outlaws." David Chapman Berry, who grew up in the Delta, encounters the bass and is moved to poetry:

Stump in the pond, stump in my eye, My fly pops inches from the stump. Bass, all wrist, roiling deep in thought, wedge from the bottom of the headpan, and buckling the surface under the fly, blur through their tunnel of scales, shattering the mirrory surface, the fly engorged, the fly, the fly leading the bass by the lip. I break their heads with the butt of the Buck knife. They stiffen shimmering. Scaling rakes the silver off mirrors—my raw eye a dump of shimmers? I eat fish to keep my head stocked. Some fellows refinish mirrors, but I eat fish to restore ponds. Don't believe it that life's only a matter of how you look at it. Smell my hands.

Finally, is the ubiquitous catfish, of the family ictaluridae, the blue, the channel and the flathead, of whom legends transcend the fact-fiction dichotomy. A gargantuan catfish bumped into Marquette's canoe, almost prompting the French explorer to believe what the Indians had told him about the river's roaring demon. Huckleberry Finn and Jim caught a catfish that was as big as a man and "weighed over two hundred pounds." Hodding Carter claimed to have "gigged a catfish that measured almost five feet in length." Though still regarded rough fish, channel catfish farming has become the nation's leading aquaculture industry with Mississippi producing an estimated 200,000,000 pounds of farm-raised catfish a year.

The fisherman's tackle and gear vary widely, from the cane pole used to fish for bream and catfish. The legendary Kentucky reel is still the favorite of the bass fisherman. Brooks Haxton tells of jug fishing. "[Y]ou took gallon jugs. Empty Clorox bottles were the best." Hodding Carter jugfished for catfish.

In jug fishing—to explain to the uninitiated—empty, gaudily-painted gallon jugs float downstream, each dangling a heavy cord and hook and smelly bait from its corked mouth. The fisherman's boat follows lazily. When the catfish strikes, under go jug and fish and both remain there until the fish's strength is gone. There both erupt into the air and the fisherman approaches to pull in his catch. Incidentally, you don't scale a catfish. You nail him against a tree or barn and—since he has no scales, but a heavy, tough skin—you skin him.

The Encyclopedia of Southern Culture suggests a correlation between the economic and social stature of fishermen, the game fish they pursue, and the method they prefer to use. At the bottom of the economic scale, the preferred fishing is catfish/bream by cork or bobber fishing/bait casting, bass/spinner fishing is the choice of blue collar families, bass fly-rod fishing of white collar workers, and artificial fly fishing for native trout is the preserve of upper income professionals.

The point is belied by Ellen Douglas' ten-year-old Ralph Glover, hardly a child of poverty or disadvantage.

"I brought my gig," Ralph said, as they all trudged across the levee toward the Yacht Club. "I'm going to gig one of those great big buffalo or a gar or something."

Still few would deny Larry Brown's truth:

The rich have never seined minnows to impale upon hooks for pond bass. The rich do not camp out. The rich have never been inside a mobile home.

Not every Mississippi fisherman experiences what Mabry Anderson calls "the hypnotic lure of the outdoors." Consider the Yocono River, Faulkner's Yoknapatawpha River, starkly seen by James Seay in his "Grabbling in Yokna Bottom."

The hungry come in a dry time

To muddy the water of this swamp river

And take in nets what fish or eel

Break surface to suck at this world's air.

But colder blood backs into the water's wood—

Gills the silt rather than rise to light—

And who would eat a cleaner meat

Must grabble in the hollows of underwater stumps and roots,

Must cram his arm and hand beneath the scum

And go by touch where eye cannot reach,

Must seize and bring to light
What scale or slime is touched—
Must in that instant—on touch—
Without question or reckoning
Grab up what wraps itself cold-blooded
Around flesh or flails the water to froth,
Or else feel the fish slip by,
Or learn that the loggerhead's jaw is thunder-deaf,
Or that the cottonmouth's fangs burn like heated needles
Even under water.
The well-fed do not wade this low river.

Mississippi is “the only state with a season for . . . [grabblin’].” Others compelled to fish are left by law and society no choice but to fish in such undesirable places as the ramp at Ellen Douglas’ Lake Okatukla leading to the Phillipi Yacht Club.

Even in this terrible heat, at noon on the hottest day of the year, breathing this foul, fishy air, there will always be a few people fishing off the terminal barges, bringing in a slimy catfish or a half-dead bream from the oily water, raising their long cane poles and casting out their bait over and over again with dreamlike deliberation,

Of course, mention of Huck Finn’s and Hodding Carter’s catfish tales suggests another inexorable feature of fishing, what Nash Buckingham called “finwhoppers.”

The worst of us get fed up and bored with pure, unadulterated lying. But a certain amount of rod and reel spoofing is absolutely essential to salve conscience, offset temptation and lend color.

Barry Hannah tells us of water liars of another dimension in his story about “Farte Cove off the Yazoo River . . . where the old liars are still snapping and wheezing at one another.”

“MacIntire, a Presbyterian preacher, I seen him come out here with his son-and-law, anchor near the bridge, and pull up fifty or more white perch big as small pumpkins. You know what they was using for bait?”

“What?” asked another geezer.

“*Nuthin*. Caught on the bare hook. It was Gawd made them fish bite,” said Sidney Farte, going at it good.

“Naw. There be a season they bite a bare hook. Gawd didn’t have to’ve done that,” said another old guy, with a fringe of red hair and a racy Florida shirt.

Like tales are told at the Coffee Shop off the square in Clanton, Mississippi, where the folks talk “local politics, football and bass fishing.”

Fishermen see a different world than the rest of us. According to Mabry Anderson, “Unless you are over forty years old and a bream fisherman, you probably think a cockroach is just a dirty black bug.” They humanize these unhuman-like piscators, often talking the fish into the boat. Lawyer Frank Wynne, a witness at trial, describing the contours of the Merigold Blue Hole, how the waters back out when the River is falling, lapses and tells of “a good fishing place” back where the waters come out of the woods and over the road. “I’ll tell you what, you can go in there and catch a nice bass,” and through the cold record his smile and priorities are seen.

The waters as well compete for bragging rights. The night before on what Doc had called “the best river dragging he’d ever been on,” William Wallace had said “There is nothing in the world as good as ... fish. The fish of the Pearl River.” But none is the source of more lore and awe than the Mississippi. David Cohn said in the Delta, folks “fear God and the Mississippi River.” Mabry Anderson said, “The Old Man just rolls on and on and wipes out most of man’s mistakes each spring when it charges right out of its banks.”

No man alive can bob about on its surface in a puny fourteen-foot boat when the gauge is showing fifty feet or more at Helena, Arkansas, without becoming a little more tolerant and just a little less sure of himself.

Still some see a flood a blessing, some like Luke Wallin's Watersmith and his sons Jesse and Bean and Robert Elmer who fish the Mock Orange Slough.

They waded in the muddy cool water up to their waists, On their first pass they got a bucketful of bluegills and a small catfish. They wiped the mud and sticks from the net to try again.

"Every time the river floods," Paw said, "it brings us all these here treasures."

"Sho does," Bean said.

"I think it's fine," Paw went on. "I think it's right nice of the old river."

This is a case about a fishin' hole, and the people who contest for it and care for it so variously, who are charged by the infinite to accept it in its ambivalence and antinomy. Such a fishin' hole is Lake Chatula in the far southwest corner of Ford County which

in the spring . . . hold[s] the distinction of being the largest body of water in Mississippi. But by late summer the rains were gone, and the sun would cook the shallow water until the lake would dehydrate. Its once ambitious shore lines would retreat . . . , creating a depthless basin of reddish brown water.

James Dickey has spoken of this connection between person and place, between man and a lake that once

. . . was deep flashing—

Tiny grid-like waves wire-touched water—

No more, and comes what is left

Of the gone depths duly arriving

Into the weeds belly-up:

one carp now knowing grass

And also thorn-shucks and seeds

Can outstay him:

* * * * *

A hundred acres of canceled water come down
To death-mud shaking
Its one pool stomach-pool holding the dead one diving up
Busting his gut in weeds in scum-gruel glowing with belly-
white
Unhooked around him all grass in a bristling sail taking off
back-
blowing. Here in the dry hood I am watching
Alone, in my tribal sweat my people gone my fish rolling
Beneath me and I die
Waiting will wait out
The blank judgment given only
In ruination's suck-holing acre wait and make the sound
surrounding NO
Laugh primally: be
Like an open-gut flash an open under-
water eye with the thumb
pressure to brain the winter-wool head of me,
Spinning my guts with my fish in the old place,
Suffering its consequences, dying,
Living up to it.

Beulah Crevasse is but ninety-two acres of not yet cancelled water, and to those who war so over it Dickey seems to say that, if you like it when it is beautiful and serene and full of life, you must accept it—love it—equally when it has been taken away by nature and become but a mudhole with a dead carp in it, or when it has

been taken by man, by the social invention he calls law. Dickey had these in mind when he said of such waters

[Y]ou have to accept the “gone depths” as well as the real depths that used to be there when the lake was whole, the dead fish as well as the live ones, the repulsive aspects of the scene as well as the beautiful ones that have disappeared: and if you are left with “ruination’s suck-holing acre” it is your due: you know this and accept it, even with a kind of exultation, because the bond between you and the lake still exists no matter what, and you can therefore “laugh primally,” maybe no better than the dead belly-up fish but still, like he, in the old place, where you both belong, and know it.

We are informed by these thoughts, knowing that law is about life, that law is not an end but a means to the end of a society in which all should want to live, with its paradox and ambiguity, its irony and contrariety even that the law has wrought. We proceed to our institutional responsibility: the right interpretation and application of our law regarding rights to these waters.

Named Plaintiffs include the heirs of Walter Sillers, specifically his widow, Lena R. Sillers, who died in 1983 after suit was filed, Mary S. Skinner, Evelyn S. Pearson, Lilian S. Holleman, John L. Pearson, Evelyn P. Weems, Vernon W. Holleman, Sr., and Florence H. Schoenfeld. Alice K. Jones, the widow of Roy Jones, is a named Plaintiff, as is the Merigold Hunting Club, Inc., a Mississippi corporation. These are the parties who have brought this action, and in the main we call them “Landowners”.

Landowners’ contestants—Defendants below and Appellants here—are fishermen. Walter Allen Ford grew up and lived but a few miles from Lake Beulah. He fishes commercially, the tools of his trade trot lines, nets and a small outboard motor boat. He fishes for “rough fish”—buffalo, catfish, gar. And so of the Dycuses and Charley Allen. They fish mainly at night.

At the center is the Merigold Blue Hole, formally though erroneously known as the Beulah Crevasse, and a remarkably good fishing hole in western Bolivar County, about six miles below Rosedale, covering in the main some ninety-two acres, a map of which appears as Appendix A. To the north and west a chute 112 feet wide from treeline to treeline and 192 feet from top bank to top bank runs to the southern end of Lake Beulah, an oxbow lake some

six to seven [sic] miles long. In the chute connecting crevasse and lake the water is ten feet deep six to eight months a year.

West of the southwestern end of the oxbow, and somewhat northwest of the Crevasse, a drain traverses some two miles of wooded lands, connecting Lake Beulah to the Mississippi River. A dam or plug lies across the drain, built to help maintain the water level in Lake Beulah. There is a washout around the dam and small boats may pass from the River to Lake Beulah and back again at some river stages. Water roughly four feet deep often runs down the drain or chute.

The Mississippi River substantially affects the waters of Lake Beulah and the Beulah Crevasse. It generates aquatic and, more specifically, piscatorial life. The River also affects human life through its influence on water levels. When the Arkansas City Gauge measures 22 feet, water flows from the River to Lake Beulah and into Crevasse, and when it reaches 31 feet the "water breaks the road on the south side of the Crevasse and flows south." Water flows in the opposite direction, from the Beulah Crevasse and Lake Beulah north to the Mississippi River even when the water level is quite low (i.e., 4.8 on the Arkansas City gauge). There is no continuous one direction flow between Lake Beulah, Beulah Crevasse or the Mississippi River. When the River rises, however, there is a southward current, and vice versa as the water recedes. There is no commercial navigation qua transportation in the area.

Even so, had it been ever thus few would doubt the public's right to enter the Beulah Crevasse by water and to fish.

But it was not always so. For one thing, in the days of Tom Sawyer and Huckleberry Finn, Lake Beulah was the River itself. The Napoleon Cutoff of 1863 "straightened" the River to the west and left its old bed an oxbow that became and has remained Lake Beulah. Alluvial deposits imperceptibly created batture land south and west of the new lake where Beulah Crevasse now lies, but in those days there was no crevasse and at least as early as 1883 the land was in cultivation. Before April 16, 1912, Landowners' predecessors in title farmed this land, as by then it was protected from the River and Lake Beulah by a levee to the north and west.

The world changed on April 17, 1912, as the levee broke and the River roared through at 208,000 cubic feet per second in the eighth greatest flood in history (but still the flood 1927 has made

us forget) scouring several blue holes out of the earth. When the waters receded some forty-five acres remained lakelike and covered with waters. The mighty Mississippi had destroyed much but had given birth to the Beulah Crevasse of 1912.

Still seventeen years lay before the advent of the wide chute, today joining Beulah Crevasse to Lake Beulah so completely that the Dycuses and Allen and Ford insist that there is but one body of water, Lake Beulah. After the River receded in 1912 two small waterways connected Beulah Crevasse to Lake Beulah. One lay near the present chute, and not all agree regarding its dimensions nor its utility as a waterway, though the map shows it less modest than human memory suggests. A second more easterly drain appears on a map made in June of 1912 but became silted and impassable within the next eight to ten years.

By far the most persuasive evidence of the capacities of these post-flood drains is the contour map prepared by W.J. Shackelford, Chief Engineer, Mississippi Levee District, dated June 20, 1912—sixty-four days after the levee broke. That map reflects the westerly drain (the present chute) being approximately 728 north-south feet in length, ranging in width from approximately 100 feet at either end narrowing to about 78 feet at its center. Its depth from top bank to bottom is some fourteen to fifteen feet. The easterly drain appears about 416 feet long. It is around 130 feet wide at its opening to Lake Beulah, narrowing to some 78 feet wide near its center and opening again to some 104 feet at its entrance to the Crevasse. Its top bank to bottom depth is about seven to eight feet. With all of this detail, the most critical facts are missing, as water levels are not shown on the Shackelford map.

Landowners produced a 1925 hydrographic-topographic survey map published by the Mississippi River Commission reflecting great and ultimately outcome determinative changes had occurred since 1912. The easterly drain from crevasse to lake had disappeared while the westerly one had greatly narrowed. This map appears as Appendix C. Beyond this Landowners brought forth anecdotal evidence in the form of three old-timers who testified that, as children, they played, visited, hunted and fished in the area. No one remembers the easterly drain, and the oldest takes us back to the present chute only to 1921, when he recalls but “a small ditch, disk shaped, sloping banks, maybe 12 feet wide at the top,

taken down to the bottom. Willow trees grew all up in it. In the middle was a small ditch, maybe a foot of water running during normal times.” He told of having to drag a small boat from Lake Beulah across the land to the Crevasse because there was not enough water to float. In the spring, however, the ditch would swell with water and one could navigate the chute from Lake Beulah to the Crevasse.

Landowners offered objective evidence through Austin B. Smith, a renown potamologist, who reviewed the relevant River gauge readings and testified that there “was no communication” between Lake Beulah and Beulah Crevasse. Smith’s opinion is quite consistent with the 1925 MRC map. Smith conceded the public record reflects a chute fifty feet wide and ten feet deep shortly after the crevasse in 1912, evidence that approaches what is shown on the Shackelford map. Smith’s testimony reflects a considerable though imperceptible evolution in the area from 1912 until 1925 and, as well, 1929 whose importance will presently appear.

The Dycuses and their companions relied on objective evidence. Their expert, Brian Winkley, did not offer an opinion as to the width or depth of the chute created by the 1912 flood, but did offer evidence that flooding occurred fifteen times in the ensuing 17 years, i.e., high water marks were reached frequently, suggesting much more of a waterway between the Beulah Crevasse and Lake Beulah than Landowners concede.

The Great Flood of 1927 made manifest the need for new levees and two years later the U.S. Army Corps of Engineers began to build a new levee east of Lake Beulah and the Crevasse. The dredging company purchased landfill from Landowners’ predecessors in title and sent its dredge boat and, with a ladder cutter and suction pipe, cut a swath from Lake Beulah to Beulah Crevasse, enlarging the chute and the crevasse to near their current size. As fate would have it, Austin Smith was there in 1929. “It was a very unique operation. I thought I would see it.” From this bird’s eye view Smith remembers

600 feet [of batture land] between the two bodies of water. There was only minor communication even in high water between the two bodies. Consequently, Beulah . . . crevasse scour hole waters were actually landlocked. All except at higher stages prior to the dredging of the access channel.

The Board of Mississippi Levee Commissioners paid the then record title holders some \$1,143.00 for the 76.2 acres of land taken as fill material.

No one disputes that the waters of Lake Beulah are public and anyone who wishes may fish there to his or her heart's content, subject only to the State of Mississippi's game and fish regulations which are enforceable precisely because the waters of Lake Beulah are public.⁶² By the same token, for close to half a century there has been a considerable dispute regarding public access to the Beulah Crevasse.

Record title to most of what is now the lake bed of the Crevasse was in the McLemore family in 1912. In 1937 Walter Sillers bought most of the area and later sold half to Roy Jones. To this day Sillers' and Jones' heirs own the property, the boundaries of which are reflected on the map appearing as Appendix B. Several remaining acres of the Crevasse to the west and near the chute are owned by the Anderson-Tully Company, which has apparently had its fill of litigation over the years, and, parting waters with the Sillers, was not involved in this action. The Merigold Hunting Club, Inc. leases the hunting, trapping, fishing, ingress and egress rights from the remaining plaintiffs. It appears this relationship has existed since 1921, at least with the Landowners' predecessors in title.

Over the years these parties have employed a variety of stratagems to exclude the general public from the Crevasse. They have placed pilings and wire fences across the chute linking the Crevasse to the lake. They have posted the entrance to the chute. They have had the Hunting Club's caretaker deputized, a common practice up and down the River, and have arrested and prosecuted numerous "trespassers". Indeed, a long time Bolivar County prosecuting attorney is a life member who said below that he had prosecuted between fifty and one hundred people for "trespassing" in the Crevasse.

Landowners find significance in Disclaimer No. 881 given by the State Land Commissioner, the import of which is that the State of Mississippi claims no interest in certain lands which include by legal description the Beulah Crevasse. Walter Sillers sought and obtained this Disclaimer in 1938, a year after he bought the property. Of course, no one denies Landowners' record title to the bed of the Crevasse, only their right to exclude the public from fishing its waters. Disclaimer No. 881 makes no reference to such waters. That Landowners pay no taxes on the Crevasse is interesting but similarly unpersuasive.

The year 1950 saw litigation not wholly unlike today's. On September 13 of that year, in an action styled *Merigold Hunting Club, et al. v. Paul Avant, et al.*, Docket No. 5198, the Chancery Court of the First Judicial District of Bolivar County held that the hunting club was "the lawful owner of the exclusive right and privilege to hunt, fish and trap wild game and fish on said lands and waters thereon...." None of today's defendants—the Dycus family, Allen or Ford, nor the members of the general public, were parties to that action, which insofar as the record reflects, hardly quieted anything.

Today's chapter begins in the spring of 1983 when Jimmy and Roger Dycus were caught in the crevasse and arrested. On April 29, 1983, a Bolivar County jury found Jimmy and Roger not guilty of trespass charges. This served only to enhance the frustrations of Landowners and the Hunting Club who soon thereafter—on May 11, 1983, to be exact—brought the present action in the Chancery Court of the First Judicial District of Bolivar County to quiet and confirm the title they claim in and to the Beulah Crevasse, and by injunction to exclude all others from the waters of the Crevasse. The Dycus family, Charley Allen, Allen Ford and, as well, the world were named as defendants, the named parties among whom promptly counterclaimed and sought to enjoin the Landowners and the Hunting Club from interfering with their right of ingress and egress through the chute and into the Beulah Crevasse and to fish its waters, always afloat.

The Chancery Court heard the case on September 12, 1984, and in due course entered final judgment, with findings of fact and conclusions of law, favoring Landowners and the Hunting Club and denying Dycus' counterclaim.

Amplifying the facts recited above, the Chancery Court further found:

1) The waters of Lake Beulah and the Crevasse are ponded waters which means that they are calm and at rest unless water is in from the Mississippi River. The Crevasse has no natural flow or channel. When waters enter the Crevasse through Lake Beulah from the Mississippi River, the waters flow in one direction and when high water recedes the waters flow back to the River in the opposite direction. Therefore, the Crevasse is not a natural flowing stream, a river, creek, or bayou, but is a lake or ponded waters. But, “waters from the Mississippi River flow in to the Beulah Crevasse for more than 30 days out of each calendar year.”

2) Lake Beulah, the Beulah Crevasse and the chute connecting the two have sufficient depth, width and length of water for more than thirty consecutive days in the year for the floating, but not navigation, of a steam boat with a carrying capacity of two hundred bales of cotton. A steamboat with a carrying capacity of two hundred bales of cotton would have difficulty navigating in and out of the Crevasse from Lake Beulah at low water stages and a modern day barge could not navigate in and out of the Crevasse from Lake Beulah as they presently exist at any water stage. There is nothing to prevent fish from swimming from the Mississippi River, to Lake Beulah, to the Beulah Crevasse and back again.

The Court made no direct findings regarding the geophysical state of these waters in the days and months immediately pre-1929, a point of importance as will presently appear.

The Dycuses, Allen and Ford appeal and ask that the Court reverse and declare a public right of access to the waters of the crevasse. . . .

No one denies that the Sillers and Jones families and Anderson-Tully Company own record title to the lands upon which the waters rest. Conversely, Landowners and the Merigold Hunting Club admit too much (though we exact no penalty) when they “make no claim to ownership of the waters in the Crevasse—water being unsusceptible to ownership,” nor do they claim title to or ownership of any interest in the fish. What is at issue is whether Landowners by virtue of their record title to the water bottoms, and the Hunting Club by its hunting and fishing lease, enjoy thereby any right to exclude others from placing their boats in the concededly public

waters of Lake Beulah and traversing the chute and on to the waters of Beulah Crevasse and fishing therein, always afloat.

Settled law sets our context.

At the time of statehood, the United States created two great public trusts and conveyed to each new state, including the State of Mississippi, lands to be held by the state for the public purpose.... The second trust, the one with which we are concerned today, had placed within it the tidelands and navigable waters of the state together with the beds and lands underneath same. In each instance the federal sovereign, in recognition of public concerns which seem to override mere private interests, granted to the state fee simple title in certain properties to be held by the state for the benefit of all of its people. . . .

Fishing was prominent among the federal sovereign's public purposes in withholding from private ownership trust lands and waters. . . . The State of Mississippi as well has long identified fishing as among the uses to which public waters have been and shall forever remain dedicated. . . .

History has produced anomaly in Mississippi's public trust. Almost a century passed before the nation perceived that navigable freshwaters were included, as well as tidelands and tidewaters.... Long before this Mississippi law had provided, notwithstanding the public right to the waters and their surface, that the beds of navigable freshwater rivers, lakes and streams were susceptible of private ownership. . . . Mississippi's view of the private property rights of riparian landowners has become firmly established and widely recognized ... despite public ownership of the tidelands.... Equally well settled, record owners of the beds and bottoms of navigable freshwaters have no right to exclude others from the waters' surface.

Though settled at statehood the public trust has proven dynamic at three points. Our legal language has evolved. What the state holds in trust for the people was once labeled tidewaters and lands within the ebb and flow of the tide, and then navigable waters, . . . urges a public-private dichotomy, begging the question by what criteria we may determine which is which. Second, the trust's purposes have evolved as human needs have evolved and as the public welfare has demanded, . . . though fishing—whether for

food, commerce, sport or recreation—has always been recognized and respected.

Over the years the legislature has provided an evolving definition of navigability, though the legal touchstone has been and remains navigability in fact. . . . And when that definition is fleshed out to mean “capable of being navigated by substantial commercial traffic,” . . . surely no one will suggest exclusion of the navigation of commercial fishermen because their craft are customarily (though not always) smaller than the vessels of common and private carriers of cargo and passengers. . . .

Our cases further define navigability in terms of the natural state of our waterways . . . and thus incorporates into the law of the public trust a third dynamic force, that of nature. . . . Rivers shift imperceptibly through accretion and reliction, or violently through flood or avulsion, and where their channels change their bottoms silt in and lose their depth. Some of the legal consequences of such changes have been settled. An avulsion does not alter title to lands or minerals, nor indeed state sovereignty, . . . but the public right to waters formed by an avulsion is as great as any other public waters.

The point is of importance and worth a pause. It is illustrated by the Mississippi River’s (in years past) not unfamiliar avulsive cutoffs causing a change of channel. Land on the east side of the thalweg one day may on the next find itself on the west. Neither record title nor state sovereignty is altered. Yet no one doubts the right of the public—the bargeline, the commercial fisherman, the weekend pleasure boater or some latter day Huck Finn—to use the waters of the new channel as fully as the old, though those waters rest and flow upon bottoms still owned by the pre-avulsion record title holder. If, for (admittedly farfetched, though pointedly illustrative) example, the flood and levee break of April 17, 1912, had resulted in the River changing its course so that its main channel included the area now covered by the Crevasse, we are confident Landowners would not think their record title afforded a right to exclude the public from the surface of those waters any more than the residents of the late, lamented Napoleon, Arkansas, a hundred and twenty-five years ago, had by virtue of their record titles any right to exclude the public from the River that roared through and ruined their little town in 1863—the Napoleon Cutoff.

By the same token, had the flood of 1912 left the Crevasse and chute in their current condition, Landowners and the Hunting Club would enjoy no right to exclude the public.

Under these settled views, Landowners (and Anderson–Tully) own the bottoms of the Crevasse as fully today as their predecessors prior to 1912. If oil, gas or other minerals were discovered beneath the beds of the Crevasse, they would belong to the record title holders as their interests may appear, and this notwithstanding that the waters may be regarded as navigable or otherwise public. . . . Yet this stops short of telling us whether the waters of the Beulah Crevasse are private so that Landowners may of right exclude the public therefrom.

The parties have stipulated that the waters of Lake Beulah itself are public, but the reasons why this is so need be stated. Simplistically one could say that Lake Beulah is an oxbow lake and all oxbow lakes are public. . . . Q.E.D. Each person who can without trespass reach the waters of an oxbow lake may of right fish there to his heart's content, subject only to a like use by others . . . and reasonable regulation by the state.

But there is more to the matter. These oxbow lakes by definition were once a part of the River. The Act of Congress authorizing formation of this state provided:

that the River Mississippi, and the navigable rivers and waters leading into the same, . . . , shall be common highways, and for ever free, . . .

Until 1863 what is now Lake Beulah served as the main channel of the River and was surely public prior to that time.

The avulsive Napoleon cutoff did not destroy the public character of those waters. To be sure, the River has made substantial deposits of silt in the northwest end of Lake Beulah and batture land has arisen wholly cutting off access from the North. Those areas where land now lies where the River once flowed are no longer public. But Lake Beulah still communicates with the River at its southwest end and indeed the River's freshwaters are the source of the public value of Lake Beulah (and as well Beulah Crevasse). It is public in the sense that either federal or state government would have authority to "improve" Lake Beulah and the drain connecting it to the River to make it much more navigable

than it is today, as navigable as it once was, . . . and we inquire not into the current desirability of doing so. Our constitution empowers the state to remove obstructions upon “navigable waters . . . whenever the public welfare demands”. . . . And when so improved such waters may be used by the public to the extent the improvements allow. . . .

There is a second—and independent—reason why Lake Beulah is public: the doctrine of prescription. Where the public has enjoyed access to waters for in excess of ten consecutive years, those waters belong to the state by adverse possession, to be held in trust for the people. . . . Under this view oxbow lakes formed before statehood and, as well, other waters used by the public under a claim of right, openly, notoriously, peacefully, continuously and uninterruptedly for in excess of ten years become public, and, once public, such waters may not be lost by prescription.

Landowners’ “concession” that they have no claim to the waters of the Crevasse would follow only if those waters be public, as are the waters of Lake Beulah proper . . . , for this Court was speaking of public waters when it said that “[i]n its ordinary or natural state water is neither land, nor tenement, nor susceptible of absolute ownership. It is a movable wandering thing and admits only of a transient, usufructuary property,” *State Game and Fish Commission v. Louis Fritz Co.*, 187 Miss. 539, 563, 193 So. 9, 11 (1940). . . . *Louis Fritz Co.* as well spoke of public waters when the Court held that owner of the beds of navigable waters “may not say that he has any sole ownership in that part of the water which rests upon his lake bed, for the unity of a lake is preserved not only by all parts of its entire bottom but also by all its banks, as to which other riparian owners contribute an essential part to the maintenance of the whole.” . . .

To further beg the question, neither would the fish in the public waters be susceptible of private ownership until captured in fact. . . .

But not all waters nor all fish swimming therein are public. . . . *Cinque Bambini* makes clear that “artificially created water courses, inlets, slips, marinas and the like, . . . [and, as well,] physical improvements or alterations thereto upon lands theretofore private under state law remain private,” the salt content of the waters notwithstanding. . . . Easiest are the now

familiar catfish ponds, wholly man-made, which dot the Delta and into which fingerlings are placed, fed, raised and harvested, at all times privately owned by reason of the law of property. Where a lake or pond is wholly man-made or “artificial”, the record title holders own the waters and all life within them as their interests may appear, . . . whether the lake or pond has been built for commercial, drainage, recreational or aesthetic reasons. By the same token, our law protects from interference a record titleholder’s interest in small, *completely* landlocked natural (spring fed) lakes. Were Beulah Crevasse entirely landlocked and had it been so since 1912, Landowners of right could exclude all others from access to the surface waters.

Cinque Bambini left aside “claims of navigation, ingress and egress” en route to holding that “neither artificially created water courses, inlets, slips, marinas and the like” remain privately owned though tidally affected. . . . Claims of a public right of access and fishing were not before us there. Still the principle at work in *Cinque Bambini* seems sufficient that small artificial man-made bodies of water upon lands theretofore private remain private, and as well small, naturally created ponded bodies of water by human means made accessible from public waters.

We described above the contours and characteristics of Beulah Crevasse and the chute leading to Lake Beulah and suggested that if it had been ever thus there could be no doubt that access to the waters of the Crevasse was available to the public. We are not at liberty to so view the matter, as our law ascribes great consequence to how what now is came to be.

If the Crevasse and chute had been entirely made by man, title thereto and the right to exclude others from the surface waters would reside in the owners of record. . . . This would not be true if the Crevasse and chute of today had been created *entirely* by a natural though avulsive process, as we have noted above. An avulsion may leave undisturbed title to lands or minerals, and indeed state sovereignty, . . . but the public right to waters formed by an avulsion is as great as any other public waters. . . .

The legal principles before us, we must apply them to the facts. . . . Our focus turns to the Flood of 1912 and, more pointedly, the flood’s wake. Had the Crevasse been completely landlocked once the floodwaters receded so that neither fish nor fisherman could by

water enter from Lake Beulah or by water exit the Crevasse, and had things remained so until 1929, the case would be easy. Landowners would win. Conversely, had the Flood of 1912 washed away the levee and merely expanded Lake Beulah a mile or so to the south, covering the entire of the Crevasse as shown on the Shackelford map of June 1912 *and, as well, what lay between the Crevasse and lake* so completely that the first time observer of the map or water would regard them as one, and had things remained so thereafter, the case would be easy. Landowners would lose. Thus our point of beginning becomes whether, once the waters receded in the summer of 1912, the Crevasse as the forces of nature had left it was legally a separate body of water, a point turning on whether the two chutes or drains leading from Lake Beulah to the Crevasse were at that time capable of supporting substantial navigation by commercial fishermen for the better part of the year. . . .

The Chancery Court made no finding on the point and the evidence is less than crystal clear. The dimensions of the two chutes as they appear on the Shackelford map, coupled with the fact that there was another major flood in 1913, though not so great as that of the year before, suggest quite likely the waters of the chutes were sufficient that the waters of the Crevasse were then public. But this only begins our inquiry as nature in its brutal neutrality may give and take away almost willy nilly. . . . Except for the avulsion exclusion above noted, the law leaves title holders at nature's risk and the State of Mississippi is as much at risk as any private landowner.

What is critical—and outcome determinative—is the state of the watercourses connecting the Crevasse and Lake Beulah immediately prior to the 1929 artificial enlargement of the chute and the Crevasse.

The Chancery Court made extensive findings of fact regarding (non) navigability of the chute. The problem is that these findings are not tied to any particular point in time, this in the face of the certain though imperceptible evolution of geophysical reality over the seventeen years from 1912 to 1929. In such a setting we hesitate to employ the familiar substantial evidence rule. . . . Instead, we review the evidence to see whether we may find with confidence the state of things immediately before 1929, or whether we should

remand for further findings under the principles of law articulated above.

For one thing, the 1925 survey map published by the Mississippi River Commission makes clear that Shackelford's 1912 easterly drain has vanished, at least 500 feet of land separating the Crevasse from Lake Beulah. The 1925 map reflects the westerly drain, but narrowed considerably from what it once was. Assuming accuracy of the map's scale, the chute would not be more than ten to twenty feet wide. Its depth and water levels are not given.

Austin Smith's personal observations of the conditions existing in 1929 at the time of the dredging powerfully support a non-navigability conclusion. Smith's analysis of River gauge readings suggests that in the last years before 1929 the waters between the Crevasse and Lake Beulah communicated only when the River was at flood stage. Immediately prior to 1929, the Beulah Crevasse was a separate and distinct body of water from Lake Beulah, and the Court below found "the communication of the waters [since 1929] is the direct result of the manmade outlet between the Crevasse and Lake Beulah created by the Corps of Engineers dredging."

We have indicated above that the Shackelford map calls into serious question the suggestion that the waters of the Crevasse and Lake Beulah did not communicate shortly after the Flood of 1912 and in the few years thereafter. However, the 1925 map together with the eye-witness testimony offered by Landowners and the Hunting Club leave us without doubt that in the days immediately pre-1929 the chute was non-navigable. Likewise, the evidence is clear that the navigability of the chute is directly attributable to the Corps of Engineers' 1929 dredging operation, an artificial source. We find the evidence essentially uncontradicted that, in the days just before 1929, there was so little water in the chute one could step across it. From this we derive the ultimate fact that, immediately prior to the 1929 dredging operation, Lake Beulah and the Beulah Crevasse did not communicate and were separate bodies of water, and upon this rock today's appeal founders. . . .

The Dycuses, Allen and Ford argue further that reversal is required because of a brief, mid-trial social visit between one of the Landowners, Circuit Judge John L. Pearson, and Chancery Judge Harvey Ross, the trial judge. Judge Pearson introduced his son to Judge Ross. The matter was thoroughly explored before another

Chancery Judge who found no impropriety. On its facts this case is a far cry from the likes of *Jenkins v. Forrest County General Hospital*, 542 So.2d 1180 (Miss.1988). We perceive no reason to reverse.

*In re Koestler*¹⁵

Negligently driving uninsured motorists are a plague upon society. They inflict severe losses and at random, losses not in the least less severe than they are less noticed—by the media and legislators—than drunk driving death and damage. Different states have responded to the uninsured motorist menace in different ways. This state's initial response was enactment of the Uninsured Motorist Act of 1966. . . . The statute's modest remedy has been demonstrably imperfect from the beginning, its required coverage being but the minimum amount required under the Mississippi Motor Vehicle Safety Responsibility Act. . . .

It has for years been a fact of life that many of our citizens and families own more than one automobile, and so we quickly began to find that persons injured by uninsured motorists held multiple minimum UM coverages, each of which by its terms afforded protection for the injuries inflicted by the uninsured motorist. . . . In the wake of the woeful inadequacy of the statutory minimum coverage, the question gradually arose whether the insured could recover on each of the insurance contracts he held—somewhat as in the case of life insurance or health and accident insurance where an insured or beneficiary often recovers under multiple policies—or whether the insured was limited to a single coverage. . . .

The theory of these cases without exception has been that insurer and insured have entered two or more contracts covering the same eventuality and that the insured may enforce these contracts according to their terms. To be sure, these contracts may have been encouraged by statute, and at times we have found ambiguities and resolved them in the insureds' favor. This does not alter the fact that the legal origin of stacking is contract and not statute. . . .

¹⁵ 608 So.2d 1258 (Miss. 1992) (Robertson, J., for the Court).

In the wake of our caselaw, CRE concedes—as it must—that it has a minimum liability on each of the five coverages of \$10,000.00, or a stacked aggregate of \$50,000.00, and it concedes that this point has been settled at least since *Lowery v. State Farm Automobile Insurance Co.*, 285 So.2d 767 (Miss.1973). CRE concedes as well that it has by contract obligated itself in excess of this minimum obligation, in that it has written UM coverage with a \$250,000.00 limit of liability. These concessions made, CRE insists the rule is, its liability after stacking is the mandatory minimum provided by law, multiplied by the number of coverages in force, or the limit of liability provided by contract, whichever is the greater. By appealing the Circuit Court’s judgment, CRE presents the question whether it must stack in its insured’s favor the five UM coverages in excess of the minimum statutory requirement for each vehicle, and in excess of the contractual limit of liability for one such coverage. CRE presents this question against the backdrop of unmistakable language in each of the two policies, applicable to each of the five coverages Koestler held, that its liability be limited to the maximum limit of liability under any one coverage, i.e., \$250,000.00. There is simply nothing unclear about these words.

Insurance policies are privately made law. Except as limited by the public law, we respect the right of insurer and insured to contract freely one with the other. . . . This is another powerful public policy our law accommodates with that regarding the UM menace. Our Uninsured Motorist Act does indeed inhibit freedom of contract, but not beyond its terms. . . .

It is no answer that CRE charged and Koestler paid a separate premium for each of his five UM coverages. This but begs the question, what coverage was purchased by what premium?, and we find our answer in contract and not natural law. . . . The “coverage” Koestler purchased with each premium was the aggregate UM package of each policy. This includes the act implicitly incorporated into each coverage. It includes as well the limits of liability, per person and per occurrence, and, as well, the multiple policies limit. But a moment’s reflection makes clear, actuarially, the premium charged for each coverage will be higher, if all five \$250,000.00 coverages may be stacked, than if the multiple policy limitation clause is enforceable. What is important is that the policies clearly told Koestler what coverage his premiums purchased for him, and

what limits of liability entailed that coverage. No one argues Koestler did not read his policies or was not aware of their contents, nor could they with legal effect. . . .

We see a two-fold remedy for those who covet Federal's (for the moment) view of the law. We have no doubt insureds like Koestler could pay *a greater premium* and purchase multiple UM coverages without the limitation clause, if not now, then soon. Money and the opportunity for profit can move the bureaucratically inert, even in the insurance industry. Beyond this, there is the public remedy across the street. If the Legislature disagrees with our action today, it may well amend the UM statute. It is within the legislative prerogative to provide, in the case of multiple UM coverages or policies, where the insured has paid and the insurer has received a separate premium, the insured may stack and thus recover on each such coverage or policy otherwise according to its terms, and that any language in any such coverage or policy to the contrary is a contract against public policy and is, thus, unenforceable. To date the Legislature has not so enacted, nor may we, consistent with our UM renderings heretofore.