From the Crossing of the Rubicon to the Return of a Republic: The Mississippi Supreme Court's View of the Judicial Role, 1980–2004

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"On May 26, 1981, we crossed the Rubicon as the Court entered its Order Adopting the Mississippi Rules of Civil Procedure"

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"'The duty of this Court is to interpret the statutes as written….' This Court cannot ignore the will of the people of the State…"

Mauldin v. Branch, 866 So.2d 429, 435 (Miss. 2003) (Waller, P.J.)[2]

"[I]t is not for the courts to decide whether a law is needed and advisable in the general government of the people. That is solely a matter for the wisdom of the Legislature. But, it is our duty to construe the law and apply it to the case presented, and determine whether the Constitution of this State authorizes this legislation."

Belmont v. Miss. State Tax Comm'n, 860 So.2d 289, 307 (Miss. 2003) (Carlson, J.)[3]

As we all learned in Ancient History, the crossing of the Rubicon was the moment when Julius Caesar abandoned the principles of the Roman Republic and appropriated to himself the power to decide what was best for the people. The great lawyer Cicero opposed Caesar in the name of the old Republic – a system of divided power that often moved slowly, but rarely without the consensus of the citizens.

In a time of public need, there is a great temptation to use judicial power to make the kinds of general decisions about society that a democracy ordinarily entrusts to the will of the people. Judicial restraint is not a "conservative" or "liberal" value. It is a philosophy that affirms that major social decisions should be made by the people as a whole, or not at all. The Mississippi Supreme Court, for two decades, abandoned judicial restraint. It has now restored its own faith in that democratic principle.

1 The analysis and opinions expressed in this paper are those of the authors as individuals; we do not purport to be expressing the views of Phelps Dunbar, LLP, where we are both partners in the Jackson, Mississippi, office.

2 Quoting *Stockstill v. State*, 854 So.2d 1017, 1022-23 (Miss. 2003) (Carlson, J.).

3 Quoting *Moore v. Grillis*, 205 Miss. 865, 39 So.2d 505, 506 (1949).

A. The Era of Judicial Supremacy

As the 1980s began, there was a widespread conception that Mississippi's government was afflicted with inertia, and that the reason for this standstill was the unchallenged power of the Legislature over the other branches. Calls to radically amend the Mississippi Constitution of 1890, or to replace it altogether, were commonly issued by commentators, but silenced in the legislative process.

The Mississippi Supreme Court stepped into this perceived breach. It began with a series of reforms of the judicial process itself. The business community had been unsuccessful in securing legislative passage of efforts to align the state's civil procedure code with the principles of the Federal Rules of Civil Procedure. The Mississippi Supreme Court had tendered proposed procedural rules to the Legislature; those proposals were buried in legislative committees considered friendly to trial lawyers. As the Mississippi Supreme Court later characterized the next step, "[o]n May 26, 1981 we crossed the Rubicon as the Court entered its Order Adopting the Mississippi Rules of Civil Procedure." *Hall v. State*, 539 So.2d 1338, 1345 (Miss. 1989). The 1981 Order cited *Newell v. State,* 308 So.2d 71, 76 (Miss. 1975), in which the Mississippi Supreme Court announced that "[t]he inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts."

But prior to 1981, the supreme court had invoked *Newell* primarily to save the Legislature from itself. In *Jackson v. State,* 337 So.2d 1242, 1253-57 (Miss. 1976), the court applied its "inherent power" to substantially re-write Mississippi's capital sentencing statute to rescue it from certain invalidation in the wake of the United States Supreme Court's rulings in the 1976 capital punishment cases. The Legislature promptly passed a new statute that adopted *Jackson's* imaginative re-interpretation.

The 1981 Order was far different. It promulgated "Rules of Practice and Procedure in all Chancery, Circuit, and County Courts of this State" and specifically provided that "in the event of a conflict between these rules and any statute or court rule previously adopted these rules shall control." This unilateral declaration of judicial supremacy was highly controversial. *See* Page, *Constitutionalism and Judicial Rule Making: Lessons from the Crisis in Mississippi,* 3 Miss. Coll. L. Rev. 1 (1982); Herbert, *Process, Procedure and Constitutionalism: A Response to Professor Page,* 3 Miss. Coll. L. Rev. 45 (1982).

In 1983, the court struck again. A series of statutes had created multiple "commissions" which exercised executive power.[4] These commissions were largely independent of the executive department, however; their members were appointed equally by the Governor, the Lieutenant Governor, and the Speaker of the House of Representatives. It was common for the latter two appointing authorities to name sitting legislators to these executive commissions.

The Mississippi Supreme Court struck down the practice of dual service in *Alexander v. State ex rel. Allain*, 441 So.2d 1329 (Miss. 1983). The court had previously held that the State Attorney General had "the inherent right to intervene in all suits affecting the public interest when he has no personal interest therein." *State ex rel. Allain v. Mississippi Public Service Comm'n,* 418 So.2d 779 783 (Miss. 1982). Attorney General Allain used this new power to bring suit against legislators who served on executive branch commissions. Invoking the doctrine of separation of powers, the supreme court held that no officer of one branch of government could exercise authority at the core of the power constitutionally assigned to one of the other departments. *Alexander,* 441 So.2d at 1345-46.

The use of judicial declarations to supplement perceived legislative inadequacies was repeated in 1985, when the court issued its Order promulgating the Mississippi Rules of Evidence. Rule 1103 expressly provided that "[a]ll evidentiary rules, whether provided by statute, court decision or court rule, which are inconsistent with the Mississippi Rules of Evidence are hereby repealed." *See* McCormick, *The Repealer: Conflicts in Evidence Created by Misapplication of Mississippi Rule of Evidence 1103,* 67 Miss. L.J. 547 (1997).

The "repealer" in the Mississippi Rules of Evidence proved to be more controversial than anything in the Rules of Civil Procedure. Under that authority, the supreme court invalidated the spousal incompetence statute, *Fisher v. State,* 690 So.2d 268 (Miss. 1986); the statute on nonconsensual blood alcohol tests, *Whitehurst v. State,* 540 So.2d 1319 (Miss. 1989); and the Evidence of Child Sexual Abuse Act, *Hall v. State, supra.*[5] The last of these decisions – in which Mississippi Rule of Evidence 802 (the comment to

4 These included the Commission of Budget and Accounting, the Capitol Commission, the Board of Corrections, the Central Data Processing Authority, the Board of Economic Development, the Medicaid Commission, the Personnel Board, the Board of Trustees of the Public Employment Retirement System, and the Wildlife Heritage Committee. *Alexander v. State ex rel. Allain,* 441 So.2d at 1329, 1332-33 nn. 1-2 (Miss. 1983).

5 The court has also implied that the Dead Man's Statute was invalidated by Miss.R.Evid. 601. *In re Last Will and Testament of Dickey,* 542 So. 2d 903, 905 n.1 (Miss. 1989).

which advises that it merely incorporates the common law) was held to require "repeal" of a statute enacted after the Rules were promulgated – provoked a public outcry against judicial overreaching. The supreme court promulgated its own Rule 617 on the same issue – and with few substantive differences from the invalidated statute – in 1991.

Perceived legislative inertia led the Mississippi Supreme Court to assert an activist role within the branches of state government. The refrain, that "We can no longer sit idly by," was used as late as 1999, in Jackson v. State, to justify a judicially created right to State-compensated counsel in capital post-conviction proceedings. The Jackson court complained that "[t]he Legislature has been aware of this acute problem" but had failed to solve it. Id. In the Era of Judicial Supremacy, that was usually sufficient constitutional grounds for judicial action.

The abandonment of judicial restraint was not limited to procedural rules. In *Pruett v. City of Rosedale,* 421 So. 2d 1026 (Miss. 1982), the supreme court prospectively abrogated the doctrine of sovereign immunity, giving the Legislature a one-year reprieve within which to enact a state tort claims statute. The Legislature responded by passing a series of one-year extensions of sovereign immunity. In 1992, the court, frustrated with the decade of delay, invalidated the extensions. *Presley v. Miss. State Highway Comm'n,* 608 So. 2d 1288 (Miss. 1992). The Legislature obediently – and out of necessity – established a tort claims system to prevent unlimited suits against the public fisc. Miss. Code Ann. §11-46-1.

In this era of judicial supremacy, the supreme court even reached into the Capitol itself. In *Dye v. State ex rel. Hale,* 507 So.2d 332, 334 (Miss. 1987), the court declared that "[t]he powers of the Lieutenant Governor of the State of Mississippi are at issue this day." While the court upheld the rules challenged by two maverick Senators, and cautioned that "we will as a general rule decline adjudication of controversies arising within the Legislative Department of government where those controversies relate solely to the internal affairs of that department," *id.* at 338, the court took the case on the merits, indicating it held ultimate power to dictate the validity of the Legislature's internal rules. And the power of the purse was not exempt from the court's reach. In *Hosford v. State,* 525 So.2d 789, 798 (Miss. 1988), the court held that a circuit judge could order the county board of supervisors to appropriate funds to repair the county courthouse.

In short, perceived legislative inertia led the Mississippi Supreme Court to assert an activist role within the branches of state government. The refrain, that "We can no longer sit idly by," was used as late as 1999, in *Jackson v. State,* 732 So.2d 187, 191 (Miss. 1999), to justify a judicially created right to State-compensated counsel in capital post-conviction proceedings. The *Jackson* court complained that "[t]he Legislature has been aware of this acute problem" but had failed to solve it. *Id.* In the Era of Judicial Supremacy, that was usually sufficient constitutional grounds for judicial action.

B. The Rules of Standing

In order to enact substantive rules of law through the judicial process, the courts need a civil action filed in the traditional manner. That, in turn, requires a procedural vehicle that allows activists to file lawsuits against government agencies to determine abstract principles of law. As discussed above, several of the cases in which the supreme court intervened in traditionally legislative areas were brought by the Attorney General or other public officials. In *State ex. rel Allain v. Mississippi Public*

Service Comm'n, supra, the court granted broad standing to the Attorney General to bring declaratory judgment and injunction actions that were deemed to be in the public interest. That power was promptly used to evict legislators from executive commissions in *Alexander, supra.* In *Dye v. State ex rel. Hale,* the court taught that

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this standing was not exclusively held by the Attorney General, but could be exercised by any public officials who alleged that the challenged public action (there the Senate Rules) had an "adverse impact" on them. 507 So.2d at 338. In *Fordice v. Bryan,* 651 So.2d 998 (Miss. 1995), three legislators and the Attorney General secured a declaratory judgment that the Governor's partial vetoes of certain bills were unconstitutional. The court held that the legislators had standing because "[t]heir votes on these bills were adversely affected by the Governor's vetoes." *Id.* at 1003.

Those broad standing provisions were extended to private citizens in *Van Slyke v. Board of Trustees of State Institutions of Higher Learning,* 613 So.2d 872 (Miss. 1993). The *Van Slyke* court observed that the Mississippi Constitution, unlike the Federal, does not limit judicial review to actual cases and controversies. Adopting an earlier dissent, the court turned the inquiry on its head by posing this rhetorical question: "citizens should have the authority to challenge the constitutionality and/or review of governmental action, and if individuals do not have such authority, how else may constitutional conflicts be raised." *Id.* at 875. Thus the perceived necessity of raising "constitutional conflicts" in the court system justified a new procedural approach that encouraged such "impact litigation."

C. The Quest for "Legislative Intent."

The role of the courts is to interpret or apply statutes, not to actually legislate. There are several major pitfalls which frequently beset judges in statutory construction, including the failure to simply apply the words as written by the legislature, misuse of legislative history, and the misapplication of the doctrine of legislative acquiescence. It is not uncommon to find litigants attempting to gain through the judiciary what they cannot through the legislature. Justice Brandeis was fond of noting with respect to such positions, "To say that [referring to the litigant's imaginative interpretation], would involve not a construction of the amendment, but a rewriting of it." *State Board of Equalization v. Young's Market Co.*, 209 U.S. 59, 62 (1936).

In contrast to Justice Brandeis, the Mississippi Supreme Court of the 1980s and 1990s held the view that statutes were malleable. The court's lodestar of statutory construction in Mississippi supposedly was "legislative intent." "Whether the statute is ambiguous, or not, the ultimate goal of this Court in interpreting a statute is to discern and give effect to the legislative intent." *City of Natchez v. Sullivan,* 612 So.2d 1087, 1089 (Miss. 1992). But because Mississippi does not have recorded "legislative history," *see* L. Southwick, Statutes, Statutory Interpretation, and other Legislative Action, 8 *Encyclopedia of Mississippi Law* § 68:53 at page 103 (West 2001 and Supp. 2003) ("Mississippi legislative debates are not preserved, nor are committee reports and other documents that are often used to explain the intent of Congress to those advocates and judges who believe in that exercise"), the search for "legislative intent" did not always mean the court tried to discover what the actual legislators who voted on the statutes meant to say.

Instead, the court's more activist justices declared that "we seek meaning in the principles and policies embedded in the legislative expression. Given the text, we ask what purpose could best justify the promulgation of *this* act? We seek that statement of purpose which may best justify the statute today, given the world we live in…. Our task in the end requires that we give to the work of the legislature the most coherent and principled reading available." *Stuart's, Inc. v. Brown,* 543 So.2d 649, 651 (Miss. 1989) (emphasis in original).

Coherent and principled, but not necessary literal. "Statutes should be read sensibly, and this is so even if it means correcting the statute's literal language." *Ryals v. Pigott,* 580 So.2d 1140, 1148 n.15 (Miss. 1990). Thus, "the meaning of a statute may be extended beyond the precise words used in the law, and words or phrases may be altered or supplied, where this is necessary to prevent the law from becoming a nullity." *City of Houston v. Tri-Lakes Ltd.,* 681 So.2d 104, 105 (Miss. 1996).[6]

Judge Southwick summed it up well when he wrote: "A search in Mississippi for 'legislative intent' is in reality an effort objectively to evaluate the reasons for a statute's passage. The examination is eclectic." L. Southwick, *supra,* at § 68:54, page 106.

D. Stare Decisis

One of the basic tenets of our judicial system is the recognition of precedent, or the practice of abiding by or adhering to decisions made by earlier courts. This is called the doctrine of *stare decisis.* As Justice Cardozo said long ago, "adherence to precedent must . . . be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts."[7] However, what if the prior court ruling is wrong? A court is not forever bound by the decisions and has a responsibility to "re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question." *Mitchell v. W.T. Grant, Co.,* 416 U.S. 600, 627-28 (1974). The United States Supreme Court has noted that stare decisis is a "principle of policy and not a mechanical formula of adherence to the latest decision," *Helvering v. Hallock,* 309 U.S. 106, 199 (1940), or an "inexorable command." *Payne v. Tennessee,* 501 U.S. 808, 828 (1991). Thus, it is clearly acceptable for a court to overrule precedent in appropriate cases.

Even during the Era of Judicial Supremacy, the Mississippi Supreme Court paid at least lip service to *stare decisis.* "*[S]tare decisis* proceeds from that first principle of justice, that, absent powerful countervailing considerations, like cases ought to be decided alike." *State ex rel. Moore v. Molpus,* 578 So.2d 624, 634 (Miss. 1991). But the court in *Moore* recognized exceptions. First, the court noted that the imperatives of *stare decisis* controlled more strongly in public matters and constitutional interpretation, and less so in private litigation. *Id.* Also, where a precedent "produced great and sustained harm," it can be overruled. Id. at 635. That was certainly the attitude in cases like *Pruett and Presley,* where precedent was deemed to be inapplicable to changing conditions.

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6 Quoting 50 Am. Jur. *Statutes* §357 (1944).

7 Benjamin N. Cardozo, *The Nature of the Judicial Process* 150 (1921).

E. The Road Back to a Balanced Republic

In the last four to six years, the Mississippi Supreme Court has shown a marked return back to judicial restraint and a limited view of its role in the system of government.

On the question of *rulemaking authority;* the court deferred to the Legislature in Claypool v. Mladineo, 724 So.2d 373 (Miss. 1998).[8] Claypool reviewed confidentiality statutes enacted by the Legislature to protect the deliberations of medical peer-review committees. There can be little doubt that in the era of *Hall v. State,* the statute would have been considered "repealed" by the Rules of the Evidence. Instead, the plurality opinion in *Claypool* read the statutes to be "part of the sub*stantive* law of the state for the 'express legislative purpose of promoting quality patient care.'" Claypool, 724 So.2d at 377 (emphasis added), quoting Miss. Code Ann. § 41-63-29 (Supp. 1997). The statute was held to be "an exercise of the legislature's constitutional authority to enact laws to preserve public health and safety" and upheld. *Id.* "We find that the Legislature created a permissible substantive statutory exception to discovery and evidence…" *Id.* at 382.

The court has also pulled back on the issue of *standing.* In *Board of Trustees of State Institutions of Higher Learning v. Ray,* 809 So.2d 627 (Miss. 2002), the State Board of Community and Junior Colleges, and a group of individual citizens, sued the State College Board. The Junior College Board argued that it had public official standing as in *Dye,* and the individual plaintiffs asserted taxpayer standing under *Van Slyke.*

The supreme court disagreed. Miss. Code Ann. §7-5-1 requires one state agency to secure the approval of the Attorney General before filing suit against other agency. Citing *Frazier v. State ex rel. Pittman,* 504 So.2d 675 (Miss. 1987), a case from the era of judicial supremacy where the State Ethics Commission was granted standing to bring suits without the consent of the Attorney General, the Junior College Board argued that §7-5-1 could simply be dispensed with. The court distinguished *Fraizer,* saying that "it was not necessary for the SBCJC to file suit in order to fulfill the duties imposed on it by statute" – a signal declaration of judicial humility. 809 So.2d at 633. Rather, the court held that the Attorney General approval mechanism in the statute promoted resolution of conflicts and would be enforced literally.

The court then made short shrift of the private plaintiffs' claim to standing: "The SBCJC has organized a large group of citizens to file suit in what amounts to a blatant attempt at subterfuge to get around the dictates of § 7-5-1. To allow this case to proceed would be to allow the SBCJC to make an end run around the law, and this we will not allow." *Id.* at 635.

Standing was also denied in *City of Jackson v. Greene,* 869 So.2d 1020 (Miss. 2004). In that case a group of parents contended that two city council members should have recused themselves from voting to confirm the mayor's appointment of two members to the school board. The Mississippi Supreme Court held that in order to assert standing to appeal a municipality's decision, the aggrieved party "has the burden of 'demonstrat[ing] a specific impact or harm felt by him that was not suffered by the general public.'" *Id.* at 1024.[9]

The *Greene* principle, if applied to constitutional standing cases in general, would be a significant limitation on *Van Slyke.* As noted above, standing limitations are important because they discourage "test cases" that become abstract judicial pronouncements and intrusions into the business of the other branches of government. Requiring a showing of more concrete, individualized harm moves the Mississippi Supreme Court away from the business of legislating and towards the business of adjudicating disputes. While this development might be characterized as an abuse of *stare decisis,* in fact it shows a renewed respect for long-instilled principles which preceded *Van Slyke.*

Two recent decisions on *political questions* demonstrate a renewed respect by the Mississippi Supreme Court toward coordinate branches of government. In *Tuck v. Blackmon,* 798 So.2d 402 (Miss. 2001), a state senator sued the Lieutenant Governor for an injunction that bills from conference committees be read in toto on the Senate Floor before a vote – the only "filibuster" available under state legislative rules. Senator Blackmon relied on *Dye.* The court held that the holding in *Dye* was limited to "fundamental" issues that were "basic to the separation of powers" and "manifestly beyond the Senate's constitutional authority." *Id.* at 405-06. Citing pre-*Dye* case law, the *Tuck* court held that "procedural provisions for the operation of the Legislature – whether created by constitution, statute, or rule adopted by the houses – should be left for the Legislature to apply and interpret, without judicial review." *Id.* at 407.

In *Mauldin v. Branch,* 866 So.2d 429 (Miss. 2003), the court held that the state courts have no power to impose Congressional redistricting. The Legislature

8 By the time of *Claypool* the Legislature had extended the olive branch to the supreme court by amending Miss. Code Ann. §9-3-61 in 1996 to expressly give rulemaking authority to the court.

9 Quoting *Burgess v. City of Gulfport,* 814 So.2d 149, 153 (Miss. 2002).

had failed to draw congressional districts after the 2000 census. Plaintiffs filed suit in Hinds County Chancery Court, which issued an order adopting a redistricting plan. The Mississippi Supreme Court held squarely that "no state court has jurisdiction to draw plans for congressional redistricting." *Id.* at 434 (emphasis in original).

Instead, the court pointed out that a "default" statute provided for at-large congressional elections if the Legislature failed to act. Acknowledging that "an at-large election is an unpopular option, it is the law of this State." *Id.*

Of particular interest was the Mauldin court's decision of statutory interpretation: "The duty of this Court is to interpret the statutes as written. It is not the duty of this Court to add language where we see fit." *Id.* at 435.[10]

The court in *Mauldin* made two significant statements about its role vis-a-vis the coordinate branches of government. In refusing to take on the legislative duty of redistricting, the court said: "The Court cannot ignore the will of the people of this State as written in [the statute for at-large elections, rather than judicial interaction]. To do so would undermine all enforcement of State law." *Id.*

Second, the court made clear that it did not approve of the Legislature's inaction. But it assumed that judicial restraint would force the Legislature to do its duty: "The slate is clean now, and the way is clear for our Legislature to reassert its authority to represent the people of this State in the adoption of the congressional districts to be used in the next election…" *Id.* at 436. That is, instead of rushing forward to fix the problem, the court insisted that the Legislature do so.

This attitude towards the Legislature is also manifested in the court's more recent opinions where the constitutionality of statutes is questioned. In *City of Belmont v. Mississippi State Tax Commission,* 860 So.2d 289 (Miss. 2003), the court held that the Legislature could pass a statute approving of the method the Tax Commission used to calculate sales tax repayments to municipalities. The court declared that "it is not for the courts to decide whether a law is needed and advisable in the general government of the people. That is solely a matter for the wisdom of the legislature. But, it is our duty to construe the law and apply it to the case presented, and determine whether the Constitution of this State authorizes the legislation." *Id.* at 307.[11]

In particular, the court pointed out that "the control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people." *Id.* at 306-07.[12]

10 Quoting *Stockstill, supra,* 854 So.2d at 1022-23 (Carlson, J.).
11 Quoting *Moore, supra,* 39 So.2d at 509.
12 Quoting *Culbert v. State,* 86 Miss. 769, 39 So. 65, 66 (1905).

In PHE, *Inc. v. State,* 877 So.2d 1244 (Miss. 2004), the court upheld the statute prohibiting the sale of sexual devices. Plaintiffs challenged the statute under the free speech and right to privacy provisions of the State Constitution. While expressly respecting *stare decisis* by acknowledging that the court had previously recognized a right to privacy, the *PHE* court declined to extend that precedent so as to invalidate the anti-sexual devices law. This result was dictated by the court's deference to the Legislature, which required that "'[a]ll doubts must be resolved in favor of the validity of a statute,' and any challenge will fail if the statute 'does not clearly and apparently conflict with organic law after first resolving all doubts in favor of validity.'" *Id.* at 1247.[13]

Not that the Mississippi Supreme Court refuses ever to declare statutes unconstitutional. In *Public Employees' Retirement System v. Porter,* 763 So.2d 845 (Miss. 2000), the court struck down a statute as applied to the election of pre-retirement death benefits. The statute, according to the court, impaired the rights of the employees to name their own beneficiaries. And in *IHL v Ray, supra,* the court struck down a statute which limited the College Board's control over degree and curriculum programs. In each case, however, the court acted to protect the decision-making authority of other participants in our democratic system, not to expand its own powers.

F. Conclusion

The current Mississippi Supreme Court is returning to a balance – showing a heightened awareness of its role in adjudicating disputes, and interpreting the Constitution, statutes, and common law – instead of substituting its judgment for that of other elected officials. The court's defenders over the last two decades argued that the court had no choice but to cure the defects of Mississippi democracy, much like Julius Caesar, who claimed to be saving the Republic from itself. The real problem is, what comes next? After all, it was not Julius Caesar, but his nephew Augustus, who abolished the Republic and established the Empire. By the way, he killed Cicero too. Hopefully Mississippi's lawyers will be luckier than Cicero was.

13 Quoting *Cities of Oxford, Carthage, Starkville & Tupelo v. Northeast Miss. Elec. Power Ass'n,* 704 So.2d 59, 65 (Miss. 1997).