STATE COURT

DOCKET WATCH®

February 2005

The Federalist Society for Law and Public Policy Studies–State Courts Project

Recent State Cases Largely Support Property Rights

The state courts have continued to issue environmental law and property rights cases. Some support private property rights. Others defer to command-and-control regulation. However, the trend seems to favor property rights, with the most dramatic case being the Michigan Supreme Court's repudiation of its *Poletown* Doctrine in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

In what might prove the most important case flowing from state determinations, the U.S. Supreme Court has granted certiorari in *Kelo* v. *City of New London*, *cert. granted*, 125 S.Ct. 27 (Sept. 28, 2004). There, local redevelopment authorities condemned the homes of longtime residents for a private development project. *See*, I.B., *infra*. The Supreme Court will hear oral argument in *Kelo* on February 22, 2005.

I. Battle Over Eminent Domain for Private Redevelopment Intensifies.

Probably the most interesting and important recent state cases concern the battle over the power of state and local governments to take private property for reconveyance to new private owners, ostensibly for "redevelopment" purposes.

Background: The Fifth Amendment says that "… nor shall private property be taken for public use without just compensation." The Supreme Court declared in 1798 that "a law that takes property from *A* and gives it to *B* … cannot be considered a rightful exercise of legislative authority." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (opinion of Chase, J.). In recent times, however, the Court has held that "[o]nce the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine." *Berman v. Parker*, 348 U.S. 26, 33 (1954). Furthermore, the Public Use Clause is "coterminous" with the police power. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984). *Midkiff* involved condemnation of freehold interests for transfer to the respective ground lessees. More generally, *Berman* approved condemnation of even non-blighted parcels in blighted neighborhoods for reconveyance to private redevelopers, so long as private gains were incidental to public purposes.

However, judicial skepticism of condemnation for private redevelopment is increasing. The increasingly aggressive use of eminent domain by localities came to public awareness largely as a result of a 1998 article in the *Wall Street Journal*. "Local and state governments are now using their awesome powers of condemnation, or eminent domain, in a kind of corporate triage: grabbing property from one private business to give to another. A device used for centuries to smooth the way for public works such as roads, and later to ease urban blight, has become a marketing tool for governments seeking to lure bigger business."[1] A more comprehensive report from the Institute for Justice has documented this practice.[2]

Recent cases such as *Manufactured Housing Communities of Washington v. State of Washington*, 13 P.3d 183 (Wash. 2000), *Southwestern Illinois Development*

Continued on pg. 4

Mississippi Supreme Court Limits Permissive Joinder

Mississippi's state court system has served as a magnet for mass tort litigation. Mississippi has never promulgated as part of its Rules of Civil Procedure a rule which, like Federal Rule 23, permits class actions, but its state courts have construed the permissive joinder provisions of Rule 20[1] so expansively as virtually to create a *de facto* mode of class action litigation, but without the safeguards built into the *de jure* mode. It has not been uncommon for scores or even hundreds of plaintiffs to be joined in a forum to which few if any have any nexus, asserting multiple alternative claims against multiple defendants. The results have been some very high verdicts for plaintiffs and a willingness on the part of defendants to settle.

Earlier this year, a newly constituted Mississippi Supreme Court signaled an end to these practices. The Mississippi Supreme Court in *Jannsen Pharmaceutica, Inc. v. Armond*, 866 So. 2d 1092 (Miss. 2004) held that the scope of permissive joinder countenanced by Rule 20 is much narrower than previous Mississippi jurisprudence had appeared to indicate. In *Janssen,* 56 plaintiffs sued a pharmaceutical manufacturer and 42 physicians who had allegedly prescribed Propulsid to one or more of the plaintiffs. Only one of the plaintiffs resided in the county where venue was set. None of the doctors resided there. According to the supreme court's summary of the record, the 56 plaintiffs had different medical histories, alleged different injuries occurring at different times, ingested different amounts of Propulsid over different periods of time, and received different advice from different doctors. The doc-

Continued on pg. 16

Inside...

Mississippi Supreme Court and the "Era of Judicial Supremacy"

As the 1980s began, some critics alleged 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 responded. It began with a series of changes to 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, but with no effect. 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 restrain the legislature. 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 in light of concerns that the statute would be invalidated 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* 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."

In 1983, the court asserted its authority again. A series of statutes had created multiple "commissions" which exercised executive power.[1] 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).

Under the "repealer" in the Mississippi Rules of Evidence, 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.*[2]

The assertion of judicial authority was not limited to procedural rules. In *Pruett v. City of Rosedale*, 421 So. 2d 1026 (Miss. 1982), the supreme court 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 short, perceived legislative inertia led the Mississippi Supreme Court to assert what many criticized as an activist role within the branches of state government. The refrain, that "We can no longer sit idly by," was

Continued on pg. 12

From The Editors...

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents this first 2005 issue of *State Court Docket Watch*. This newsletter is one component of the Society's State Courts Project. *Docket Watch* presents original research on state court jurisprudence, illustrating new trends and ground-breaking decisions in the state courts. The articles and opinions reported here are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in more assiduously tracking state court jurisprudential trends.

The February 2005 issue presents one in-depth case study, an important case regarding class actions in Mississippi. In addition, this issue features a comprehensive analysis of recent cases involving property rights, including eminent domain cases, zoning issues, diminution in value, development moratoria as takings, and wetlands ripeness. The article is a slightly revised version of a piece, "Dramatic State Cases Largely Support Property Rights," authored by George Mason University Professor Steven Eagle, and originally published in the October 2004 issue of *Engage, the Journal of the Federalist Society's Practice Groups*. Finally, this issue features excerpts from two recently published Federalist Society white papers on jurisprudential trends in the Alabama and Mississippi supreme courts. Cumberland School of Law Professor Michael Debow authored the analysis of the Alabama court, and the Mississippi article was written by Michael Wallace and James Craig.

Recent Trends in the Alabama Supreme Court

Tort and Consumer Issues

In the early '90s, tort reform advocates viewed Alabama as a dangerous place to be a defendant, mostly based on a trend of increasingly large punitive damage awards in Alabama courtrooms.

Alabama juries began to award large amounts of money on account of conduct that seemed to critics to fall far short of the kinds of "reprehensible" behavior that had been required for punitive damages in the past. Also criticized was the fact that juries were not awarding punitive damages only in cases involving personal injury or death, but were also awarding them in contract-based cases – often involving insurance companies and other financial institutions – in which the plaintiffs were alleging fraud on the part of the defendants.

The expansion of tort-type doctrines into contract law was aided by one 1991 decision of the Hornsby-era supreme court in particular. *Johnson v. State Farm Ins. Co.*[1] lessened the showing a plaintiff must make to prove fraud. It adopted a standard of "justifiable reliance" to replace the traditional test of "reasonable reliance." By removing some of the burden on the plaintiff to show that he had relied, reasonably, on the alleged misrepresentation of the defendant, the court encouraged filing of claims that might not have survived motions to dismiss in other states' court systems. In many cases, plaintiffs sought punitive as well as compensatory damages.

In an attempt to assert more control over the changes in the state's civil justice system, in 1987 the Alabama legislature passed a number of measures. Most of the new statutes were challenged in court, and the Hornsby court wound up striking down most of the package in a series of opinions in the early 1990s. In particular, in 1993 it struck down a $250,000 cap on punitive damages (in most cases) as violative of the state constitution's guarantee of a right to a jury trial.[2]

Shortly after Chief Justice Hooper's arrived to succeed Chief Justice Hornsby, the U.S. Supreme Court decided the *Gore* case. It reversed the Alabama Supreme Court's decision, holding that the 500-to-1 ratio of punitive to compensatory damages was so "grossly excessive" that it violated the due process rights of BMW, as guaranteed by the Fourteenth Amendment to the U.S. Constitution.[3] The case was remanded to the Alabama state court system, with instructions to consider three factors: "the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases."

This second time around, the Alabama Supreme Court placed greater emphasis on the three *Gore* factors – which the court said were already present in the long list of factors it considered under its own precedents — and reduced the amount of punitive damages to $50,000.[4]

After *Gore*, the Alabama Supreme Court began a more robust – if not altogether transparent – review of punitive awards. In the words of one lawyer who reviewed the court's first ten post-Gore decisions in 1998:

> The only real lesson . . . is that it is better for a civil defendant to appeal an award of punitive damages than to accept it. The odds appear quite high that a large punitive award in a non-wrongful death case will be reduced significantly on appeal, though the reasons for this may not always be clear.[5]

During this same period, the court returned to the traditional requirement of "reasonable reliance" in fraud cases, thus bringing Alabama back into the mainstream nationally on this point.[6] It also bears mention that the Alabama Supreme Court has maintained a consistent position on certification of class actions in state court.[7] It has declined to recognize a "medical monitoring" remedy in toxic tort litigation, thus keeping litigation focused on actual – as opposed to possible future – injury.[8]

In 1999, the Alabama legislature adopted a new set of punitive damages caps[9], which do not apply to cases involving death or intentional infliction of physical injury. In cases involving all other physical injuries, punitive damages cannot exceed three times the compensatory damages, or $1.5 million, whichever is greater. In cases involving "small businesses" (defined as a net worth of $2 million or less), punitive damages cannot exceed $50,000 or 10% of the business' net worth, whichever is greater. In all other civil cases, punitive damages cannot exceed three times the compensatory damages, or $500,000, whichever is greater. To date, there has been no court challenge to this set of caps.

In 2001 the Alabama Supreme Court followed the lead of the U.S. Supreme Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,*[10] and announced that it would conduct *de novo* review of such punitive damage awards.[11] A 2002 analysis of this practice looked at the first five cases the court heard *de novo,* noting that

> ...the court affirmed two awards of $600,000 and $150,000 and it reduced three others with [reductions] of $120,000 (approximately 40% remitted), $2,000,000 (50% remitted), and $450,000 (75% remitted). Again the court inconsistently used the 3:1 ratio as a benchmark, and allowed awards to exceed this ratio if reprehensibility was considered high.[12]

The author tentatively concluded that *de novo* review would enhance "overall predictability" of the process.[13]

That the state supreme court is currently undertaking a serious review of punitive awards finds some support in a task force's report to the state Department of Insurance, which notes that:

> On appeal during 2002, the Alabama Supreme Court reviewed eight cases in which jury awards of punitive damages had resulted in judgments totaling $6 million. The court reversed seven of those eight cases, upholding only one in the amount of $600,000.[14]

A cursory analysis of the court's review of eleven cases involving punitive damages during 2004 showed similar results. In five of them, the court found that the defendants had deserved judgment as a matter of law, thus knocking out the punitive awards. Four cases were reversed and remanded for further proceedings. In only two cases were punitive damages affirmed – one case was decided without opinion; the other involved a $5 million jury award that had been reduced by the trial judge to $1.5 million, and was further reduced to $300,000 by the supreme court.

Alabama punitive damages practice has changed a great deal since the days of *BMW v. Gore.*[15] It should be acknowledged, however, that in some counties, juries still return very large punitive damage awards. For example, in 2002 a jury returned a $122 million verdict against General Motors in a crashworthiness/personal injury case that included a $100 million punitive award. This was reduced by the trial judge to a mere $60 million (three times the compensatory damages of $20 million), and the supreme court granted GM's motion for a new trial, albeit on grounds of irregularities in the selection of the jury.[16] Justices See, Brown and Stuart dissented, arguing that the plaintiff had failed to prove a design defect as required by Alabama law. The ultimate disposition of this case will offer an indication of how the Alabama Supreme Court's orientation toward punitive damages may have changed.

Continued on pg. 14

Authority v. National City Environmental, L.L.C., 768 N.E.2d 1 (Ill. 2002) (*SWIDA*), and *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) mark a revival of meaningful judicial scrutiny of landowners' claims that the exercise of eminent domain, supposedly for public benefit, should be invalidated as primarily for private benefit.

A. The Michigan Supreme Court Overturns Poletown Doctrine in County of Wayne v. Hathcock *684 N.W.2d 765 (Mich. 2004).*

Background: In *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), the Michigan Supreme Court upheld the condemnation of an entire vibrant and close-knit ethnic neighborhood, replete with 1600 homes, shops and churches, so that the land could be transferred to General Motors Corporation for construction of a Cadillac assembly plant. GM had threatened to build the plant outside the city at a time of high unemployment, which the court said made the public the primary beneficiary of the condemnation. *Poletown* has been the emblematic case permitting condemnation of non-blighted areas for private redevelopment.

Probably the most important recent state property rights decision was handed down by the Michigan Supreme Court on July 30, 2004. In *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004), the county sought to condemn land for its planned 1,300-acre "Pinnacle Aeropark Project," to be located south of Detroit Metropolitan Airport. The project had its roots in the expansion of the airport and concerns about aircraft noise. The Federal Aviation Administration contributed some $21 million for the purchase of nearby parcels, with the provision that the land be put to an economically productive use. The county conceived of constructing a "large business and technology park with a conference center, hotel accommodations, and a recreational facility." The county claimed that this "cutting-edge development will attract national and international businesses, leading to accelerated economic growth and revenue enhancement." Its expert testimony "anticipated that the Pinnacle Project will create thirty thousand jobs and add $350 million in tax revenue for the county." *Id*. at 770-71.

The court concluded that the condemnation would be legal under applicable state law, and went on to review its constitutionality.

1. *Poletown* Abrogated as Unconstitutional

The constitutional analysis in *Hathcock* was based on the understanding of "public use" as a legal term of art at the time of ratification of the 1963 Michigan Constitution. From this starting point, the court analyzed in some detail what it deemed the flaws in its earlier *Poletown* opinion. *Poletown* had incorrectly applied a minimal standard of judicial review in eminent domain cases, supported by no authority except a plurality opinion. "Before *Poletown*, we had never held that a private entity's pursuit of profit was a 'public use' for constitutional takings purposes simply because one entity's profit maximization contributed to the health of the general economy." *Id*. at 786. The court quoted the eminent Michigan jurist Thomas M. Cooley, who opined that a statute permitting condemnation for private power mills, with no subsequent constraint on the owner, "will in some manner advance the public interest. But incidentally every lawful business does this." *Id*. (quoting Ryerson v. Brown, 35 Mich. 333, 339 (1877).

> Because *Poletown*'s conception of a public use – that of 'alleviating unemployment and revitalizing the economic base of the community' – has no support in the Court's eminent domain jurisprudence before the Constitution's ratification, its interpretation of "public use" in art. 10, § 2 cannot reflect the common understanding of that phrase among those sophisticated in the law at ratification. Consequently, the Poletown analysis provides no legitimate support for the condemnations proposed in this case and, for the reasons stated above, is overruled. *Id*. at 787 (quoting *Poletown*, 304 N.W.2d at 459).

The Michigan Supreme Court concluded that,

> "because *Poletown* itself was such a radical departure from fundamental constitutional principles and over a century of this Court's eminent domain jurisprudence leading up to the 1963 Constitution, we must overrule Poletown in order to vindicate our Constitution, protect the people's property rights, and preserve the legitimacy of the judicial branch as the expositor—not creator—of fundamental law." *Id*.

Given that *Poletown* was such a "radical departure" from the court's constitutional jurisprudence, it was to apply retroactively to all pending cases in which a challenge to it had been made and preserved. *Id*. at 788.

2. *Hathcock* Established Three Permissible Bases for Exercises of Eminent Domain to be Followed by Reconveyance to Private Parties

The Court reviewed the history of the term "public use" under the Michigan constitutions, and concluded that "the transfer of condemned property is a 'pubic use' when it possesses one of the three characteristics in our pre-1963 case law identified by Justice Ryan" in his *Poletown* dissent:

> First, condemnations in which private land was constitutionally transferred by the condemning authority to a private entity involved "public necessity of the extreme sort otherwise impracticable."
> * * *
> Second, this Court has found that the transfer of condemned property to a private entity is consistent with the constitution's "public use" requirement when the private entity remains accountable to the public in its use of that property.
> * * *
> Finally, condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern. In Justice Ryan's words, the property must be selected on the basis of "facts of independent public significance," meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement. *Id*. at 781-783 (quoting *Poletown*, 304

N.W.2d at 478-480 (Ryan, J. dissenting).

Under the first test, the court found that the nation was "flecked" with "shopping centers, office parks, clusters of hotels, and centers of entertainment and commerce." Therefore, the Pinnacle Project was "not an enterprise 'whose very existence depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving." *Id*. at 783 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J. dissenting).

This analysis seems unquestionably correct. The "need" for the condemned parcels resulted only from the county's extensive purchases and commitments to the redevelopment project, which were spurred on by federal funds. The typical uses that border major airports – small fabricating plants, freight consolidation depots, and the like – are compatible with airport noise. In other words, the Pinnacle Project was a bootstraps operation.

Had the county attempted to acquire only those legal rights that were necessary to proper operation of the expanded airport, such as easements for noise, it is likely that the "public necessity" test of *Hathcock* would have been complied with.

The second *Hathcock* test requires that the transferee of the condemned land remain "accountable to the public in its use of that property." In the case itself, there was no mechanism for accountability, since none had been required under *Poletown*.

What if the private redevelopers of the Pinnacle Project had entered into formal and recorded covenants requiring them to "broaden[] the County's tax base [to include] service and technology," or "enhance the image of the County in the development community," or "aid[] in its transformation from a high industrial area, to that of an arena ready to meet the needs of the 21st century," or "attract national and international businesses?" *Id*. at 770-771. Such aspirational and gauzy promises might well be adjudicated as too vague to be enforceable, thus not providing meaningful accountability.

Localities might impose more specific requirements, but that would raise their costs. It seems likely that accountability would be better secured through the project's governance structure than through performance standards. Thus, one might expect post-*Hathcock* redevelopment agreements to stress the collaborative nature of what would be articulated as a public-private partnership. Under such a structure, the redevelopment agency might have an institutionalized voice in, or veto power over, modifications in the original project. Also, the conveyance to the private redeveloper might be for a limited period rather than in fee, in which case the public agency would gain leverage through the possibility of nonrenewal. The agency and the private redeveloper would have to devise language that would pass the judicial "accountability" standard. At the same time, however, the documentation would have to provide the redeveloper with sufficiently certain rights so as not to discourage prospective lenders or tenants.

The final *Hathcock* standard, the establishment that condemnation is appropriate on account of the present state of the parcel, as opposed to its future possibilities, relates to the original goal of urban renewal, slum clearance. It is unlikely that condemnation based on genuine urban blight would be contestable, although the distinction between genuine blight and "pretextual" blight (as noted in *99 Cents Only Stores*, 237 F.Supp.2d at 1129) might not always be easy to draw.

3. Conclusion

County of Wayne v. Hathcock 684 N.W.2d 765 (Mich. 2004), marks what might be an important turning point in American condemnation law. By abrogating the iconic *Poletown* decision, it both abets and calls sharp attention to the trend towards a closer examination of condemnation to further economic development. Also, its delineation of three permissible bases for the use of eminent domain where the parcel is to be reconveyed to another private party seems susceptible of wide adoption.

Hathcock does not require government to curtail urban renewal efforts. Nor, since it is based on the Michigan constitution, does it invoke authority that might be binding on another jurisdiction. However, the case is persuasive authority for the proposition that the diffused benefits thrown off by successful local business should not be sufficient to justify the use of eminent domain.

B. "Economic Development" as "Public Use" Withstands Facial Attack

In a case of first impression, the Supreme Court of Connecticut has held that economic development constitutes a public use for eminent domain purposes under the Federal and state constitution. *Kelo v. City of New London*, 843 A.2d 500 (Conn. 2004). The case involved the condemnation of homes adjacent to the site of a major drug company's new international research facility for compatible corporate use and for residential redevelopment that would link the site to an existing state park. The court described the New London project, for which residential parcels were condemned, as a "significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas." *Id*. at 507.

The Connecticut Supreme Court emphasized legislative findings "*that the economic welfare of the state depends upon the continued growth of industry and business within the state;* that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; *that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes ... are public uses and purposes for which public moneys may be expended*." *Id*. at 520 (emphasis by court).

The court subsequently concluded that the project was primarily for public, as opposed to private, benefit. The U.S. Supreme Court has granted certiorari , 125 S.Ct. 27 (Sept. 28, 2004). The Supreme Court will hear oral argument in *Kelo* on February 22, 2005.

C. Some Courts Distinguish "Public Purpose" from "Public Use" . . .

All legitimate government actions must be designed to accomplish a "public purpose." The criteria for "public purpose" are distinct from those for "public

use" under the Takings Clause. The distinction is important—since a valid exercise of eminent domain must satisfy both requirements.

1. *Town of Beloit v. County of Rock,* 657 N.W.2d 344 (Wis. Mar. 4, 2003)

This is a "public purpose" case, not directly involving "public use" with respect to eminent domain. The town originally had acquired river-front land from farmers and resold it to the Caterpillar Company for industrial development. When that project did not work out, the town reacquired the land and attempted to sell it to other developers. After that proved unsuccessful, the town itself undertook to develop the residential Heron Bay Subdivision. The court found this exercise of municipal industrial policy legitimate, since land development by municipalities did not violate state law and since it was predicated on the creation of jobs and economic development. Quoting earlier holdings, the Wisconsin Supreme Court declared: "Only if it is 'clear and palpable' that there can be no benefit to the public is it possible for a court to conclude that no public purpose exists." *Id*. 351 (citations omitted).

Town of Beloit is significant for our purposes because the court very carefully quotes the landmark Illinois *SWIDA* decision: "While the difference between a public purpose and a public use may appear to be purely semantic, and the line between the two terms has blurred somewhat in recent years, a distinction still exists and is essential to this case.... [The] flexibility [in terminology] does not equate to unfettered ability to exercise takings beyond constitutional boundaries." 657 N.W.2d at 356 (quoting *SWIDA*, 768 N.E.2d at 8). In other words, the Supreme Court of Wisconsin is serving notice that its liberal "public purpose" doctrine regarding the expenditure of public funds does not automatically translate into a liberal "public use" doctrine justifying the exercise of eminent domain.

2. *Friends of Parks v. Chicago Park Dist.*, 786 N.E.2d 161 (Ill. Feb. 21, 2003)

This case draws the same distinction between "public purpose" for spending and "public use" for condemnation as did *Town of Beloit*. Here, the Illinois Supreme Court approved the use of public funds in financing the renovation of Soldier Field, largely for the benefit of the Chicago Bears. The court added that its landmark *SWIDA* decision was "inapposite," since it involved eminent domain, and that its "holding is not a retreat from [its *SWIDA*] analysis." *Id*. at 167.

3. *Georgia D.O.T. v. Jasper County,* 586 S.E.2d 853 (S.C. Sept. 15, 2003)

A county attempted to condemn undeveloped land owned by the Georgia Department of Transportation (GDOT) on the South Carolina side of the Savannah River. Since GDOT had no extraterritorial power of eminent domain, it was treated as a private landowner. The county intended to lease part of the parcel after condemnation to a private company that would develop a large maritime terminal, which would operate in conjunction with a business park the county would itself develop on the rest of the condemned parcel. The trial court found that eminent domain would be for "public use," since the evidence indicated that the majority of the county's population had low-paying jobs in tourism and service industries and that 25% lived below the poverty line. The proposed project would add about 40% of the county's current tax base and would diversify its job base.

The South Carolina Supreme Court reversed, holding that the cases cited below related to "public purpose" under taxation and bond revenue laws. However, "'public purpose' discussed in these cases is not the same as a 'public use,' a term that is narrowly defined in the context of condemnation proceedings." 586 S.E.2d at 638 (citing *Edens v. City of Columbia*, 91 S.E.2d 280, 283 (1956). The marine terminal would be gated, accessible only to those doing business with the lessee, and "public" only to the extent that different steamship lines would use it. The court emphasized that:

> The public use implies possession, occupation, and enjoyment of the land by the public at large or by public agencies; and the due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter will devote it. 586 S.E.2d at 856-857 (quoting *Edens*, 91 S.E.2d at 283).

The court also "emphasize[d]," however, that "it is the lease arrangement in the context of a condemnation that defeats its validity." It did not rule out accomplishment of the project in a different manner. *Id*.

4. *Bailey v. Myers*, 76 P.3d 898 (Ariz. Ct. App. Oct. 1, 2003)

The Bailey family had operated Bailey's Brake Service on the parcel for many years. At the behest of the owner of a nearby Ace Hardware store who desired to relocate to the parcel, it was included within the Mesa Town Center Redevelopment Area. The court ruled that the proposed taking was not for a public use. It noted that "when a proposed taking for a redevelopment project will result in private commercial ownership and operation, the Arizona constitution requires that the anticipated public benefits must substantially outweigh the private character of the end use so that it may truly be said that the taking is for a use that is 'really public.'" *Id*. at 904.

D. . . . But Other Courts Cling to Deference.

1. *City of Las Vegas Downtown Redevel. Agency v. Pappas,* 76 P.3d 1 (Nev. Sept. 8, 2003), *cert. denied*, 124 S.Ct. 1603 (Mar. 8, 2004).

In order to alleviate what it determined to be the blight of the core of downtown Las Vegas, the redevelopment agency planned a massive project:

> Several components comprised the Fremont Street Experience, including a sculpted steel mesh canopy stretching across Fremont Street from Main to Fourth Streets. The canopy would allow light and air flow during daylight hours but would provide shade for tourists. At night, however, the Fremont Street Experience would present a sound and light show. In addition, the Fremont Street Experience would create a pedestrian plaza by closing Fremont Street to vehicular traffic from Main Street to Las Vegas Boulevard. Finally, because of a lack of adequate public parking, plans for the Fremont Street Experience included a five-story public parking structure with some retail and office space.

> Because the Agency lacked the financial resources to construct the project alone, it entered into an agreement with a consortium of downtown casinos. The consortium would finance and cover any operating losses of the feature attraction as well as the construction of the parking garage. The City would authorize the creation of the pedestrian mall, and the Agency would provide funds to acquire the land needed to construct the garage. In return for the risk taken by the consortium in absorbing all of the construction costs, start- up losses, and possible operating losses, the consortium would control the operation and revenues of the garage as well as the operation of the feature attraction. *Id.* at 7.

The Nevada Supreme Court upheld the project against a "public use" challenge, essentially deeming it a straight application of *Berman v. Parker*, 348 U.S. 26, 33 (1954). Of particular interest, the court attempted to differentiate the case from *99 Cents Only Stores* and *SWIDA*:

> In those cases, the courts found that eminent domain proceedings were not instituted to accomplish a public purpose, such as the elimination of blight. Rather, the courts indicated that the sole purpose for acquiring the property through condemnation proceedings was to benefit another private entity. Although, in these cases, the property to be condemned in each case was located in an area designated for redevelopment, the individual projects did not further redevelopment goals. Instead, the projects were simply expansions of existing business concerns. … There was no evidence that the areas in question suffered from high crime, unemployment, vacant business or other components of blight that would be addressed by the proposed projects. In contrast, when a project is intended to attack blight, such as creating a significant increase in jobs in an area suffering from high unemployment, even the relocation of one business through condemnation to make way for a new business is still considered a public purpose. *Id*. at 12 (citations omitted).

2. *Town of Corte Madera v. Yasin,* 2002 WL 1723997 (Cal. App. 2002)

Although *Yasin* is a 2002 case, and neither officially published nor citeable in California courts, it nicely illustrates that state's approach to property rights. The Yasins operated a delicatessen/liquor store near a tired shopping center that the town desired to spruce up. It condemned the Yasin parcel for shopping center parking. The court distinguished *SWIDA* on the grounds that the Illinois Supreme Court applied the narrower "more than a mere benefit to the public must flow from the contemplated improvement" standard. 2002 WL 1723997 at 5 (quoting *SWIDA*, 768 N.W.2d at 10). "In California, a mere benefit is enough. The use need only promote the general interest in relation to any legitimate object of government. *Id*. (citing *City of Oakland v. Oakland Raiders*, 646 P.2d 835 (Cal. 1982)).

II. Zoning

A. Open Space Preservation by "Inverse Spot Zoning"

Background: In the children's game of "musical chairs," the last child to scamper for a chair when the music stops has no place to sit. The same principle seems to animate state court holdings that the last property owner in an area to seek to develop land won't be permitted to do so, for that would use up what is termed the community's green space. The leading example is *Bonnie Briar Syndicate v. Town of Mamaroneck*, 721 N.E.2d 971 (N.Y. 1999). The New York Court of Appeals upheld the rezoning of a country club parcel from residential to solely for recreational use. The surrounding area had been built up and the community needed green space. The rezoning was held to substantially advanced legitimate state interests in furthering open space, recreational opportunities, and flood control, and thus did not result in a regulatory taking requiring just compensation.

1. *In re Realen Valley Forge Greens Associates*, 838 A.2d 718 (Pa. Dec. 18, 2003)

The Pennsylvania Supreme Court's *Realen Valley Forge* decision was a particularly notable case.

As was the case in *Bonnie Briar*, the parcel in *Realen* was a private golf course, "located in the heart of one of the most highly developed areas in the region, entirely surrounded by an urban landscape, and immediately adjacent to what is currently the world's largest shopping complex at one discrete location... We hold that this agricultural zoning, designed to prevent development of the subject property and to 'freeze' its substantially undeveloped state for over four decades in order to serve the public interest as 'green space', constitutes unlawful 'reverse spot zoning' beyond the municipality's proper powers." *Id*. at 721. "While the size of the zoned tract is a relevant factor in a spot zoning challenge, the most important factor in an analysis of a spot zoning question is whether the rezoned land is being treated unjustifiably different from similar surrounding land." *Id.* at 729.

2. *Smith v. Town of Mendon*, 771 N.Y.S.2d 781 (App. Div. Feb. 11, 2004)

Bonnie Briar remains alive and well. In *Smith*, the New York intermediate appellate court cited it in ruling that conditioning site plan approval on the placement of a conservation restriction on the parcel did not constitute a taking.

III. Penn Central - Diminution in Value

Background: Prior to *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), many lower courts erroneously assumed that regulations resulting in less than complete deprivations of value could not be considered compensable takings. In *Palazzolo* and *Tahoe-Sierra*, the Supreme Court reiterated that partial regulatory takings may be compensable under the multifactor test outlined in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

A. Friedenburg v. New York Dept. of Environmental Conservation, 767 N.Y.S.2d 451 (A.D. Nov. 24, 2003).

In *Friedenburg*, the Appellate Division affirmed a trial court ruling that the Department of Environmental Conservation's denial of a wetlands permit to construct a single-family residence on a 2.5 acre property, almost all of which

consisted of tidal wetlands, effected a taking. The court found no *per se* taking under *Lucas*. In proceeding with a *Penn Central* analysis, it held that a 95% reduction in value (the state asserted 92.5%) worked a taking. The court emphasized that the plaintiff acquired the parcel prior to the enactment of the Tidal Wetlands Act of 1973. Had the plaintiff purchased subsequent to the imposition of strict wetlands controls, he would have been subject to the rule in *Gazza v. New York State Dept. of Environmental Conservation*, 679 N.E.2d 1035 (N.Y. 1997) "[T]he denial of the application of the property owner in *Gazza* for setback variances was not tantamount to a taking, because that property owner did not lose a development right; it had already been restricted prior to his purchase of the land." 767 N.Y.S.2d at 460.

Significantly, the court cited *Chase Manhattan Bank, N.A. v. State*, 479 N.Y.S.2d 983, 991-992 (App. Div. 1984) for the proposition that the owner deprived of 86 per cent of value would have a "reasonable probability of success in court" on a takings claim. 767 N.Y.S.2d at 460. The court did not address the state's parcel-as-a-whole and public trust doctrine arguments.

B. Sheffield Development Co., Inc. v. City of Glenn Heights, 140 S.W.3d. 660 *(Tex. Mar. 5, 2004).*

Sheffield, an experienced developer, purchased the nascent "Stone Creek" subdivision at an attractive price from an anxious seller. Before closing on the deal, he had extensive talks with various officials of Glenn Heights, a small, but rapidly growing, suburb of Dallas. Sheffield said that he planned to continue development in accordance with the existing zoning, which permitted a density of 5.5 dwell units per acre. He specifically asked about possible zoning changes. After hearing no objections or reservations, Sheffield went through with the purchase. Under what was then Texas law, he could have immediately filed a plat which would have vested the plaintiff's development rights. According to the Texas Supreme Court, the defendant's ensuing 15-month moratorium and subsequent downzoning "blindsided Sheffield, just as the City intended." 140 S.W.3d. at 678. The plaintiff filed suit, alleging that both the moratorium and downzoning constituted takings of its property.

The court discussed *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), under which Sheffield could establish a compensable regulatory taking if the moratorium or downzoning (1) did not substantially advance the City's legitimate interests, (2) deprived Sheffield of all economically viable use of its property or (3) unreasonably interfered with Sheffield's use of the property as measured by the severity of the economic impact on Sheffield and the extent to which its investment-backed expectations had been defeated. Since Sheffield conceded that the land still was worth $600 per acre, the second claim was precluded.

The court then analyzed first the rezoning and subsequently the moratorium.

With respect to the rezoning, the court found substantial advancement of the legitimate governmental purpose of preserving the city's "smaller community environment." Turning to whether the city went too far in restricting Sheffield's land use, the court began with the three *Penn Central* factors. It noted that "the rezoning clearly had a severe economic impact," accepting the 50% diminution in value determined by the jury.

> But diminution in value is not the only, or in this case even the principal, element to be considered. It is more important that, according to the jury verdict, the property was still worth four times what it cost, despite the rezoning, because this makes the impact of the rezoning very unlike a taking. Sheffield argues that its business acumen or good fortune in acquiring the property cannot be considered in assessing the economic impact of rezoning, but we think that investment profits, like lost development profits, must be included in the analysis. *Id*. at 677.

With respect to investment-backed expectations, the court took the "blindsiding" by the city as proof that Sheffield's expectations were reasonable.

> Although no City employee ever promised Sheffield that there would be no change in zoning (nor would any such promise have bound the City), it is fair to say that the moratorium and rezoning blindsided Sheffield, just as the City intended. Evidence of Sheffield's dealings with the City is not, as the City argues, an improper basis to estop the City, but proof of the reasonableness of Sheffield's expectations. However, it must also be said that the investment backing Sheffield's expectations at the time of rezoning—the $600/acre purchase price and the expenses of exploring development with the City—was minimal, a small fraction of the investment that would be required for full development. And as with most development property, Sheffield's investment was also speculative, as evidenced by the fact that the property Sheffield acquired had not been developed in the ten years since it was first zoned PD 10. *Id* at 678.

The third *Penn Central* factor, the character of the regulation, was held to be that of a general rezoning not exclusively directed at Sheffield.

The court continued:

> Beyond the three *Penn Central* factors, we are concerned, as we have already indicated, about the City's conduct. The evidence is quite strong that the City attempted to take unfair advantage of Sheffield, and quite lacking in any indication of unfair action on Sheffield's part. The City, fearful that we might consider the improvident statements of individual officials and employees, argues that the actions and motives of those individuals are not those of the City itself. Of course, we agree. But it is exactly the City's conduct, not that of its officials and employees, that is so troubling. The City did not rezone or impose a moratorium on development, or indicate that it had the remotest intention of doing so, until Sheffield closed on the purchase of the property. The moratorium it imposed was for the purpose of "study," which was unquestionably completed within a month. Yet for a year the City Council delayed action on the Planning and Zoning Commission's decision that PD 10 not be rezoned. Accord-

ing to the City's own records, a reason for the delay was to muster the votes to reject the Commission's decision. On the other hand, the City Council continued to consider the zoning of many other PDs during the same time period, suggesting that the delay was lethargic rather than ill-motivated. And while the City's conduct is troubling, it must also be said that the benefits the City legitimately sought to achieve from rezoning were not thereby diminished.

Taking all of these factors into account, the trial court concluded that the rezoning was not unreasonable, and a divided court of appeals disagreed. We agree with the court of appeals that the downzoning in this case is much different from the refusal to upzone in *Mayhew,* thereby maintaining the *status quo* and preventing the landowner from proceeding with an enormous development on land that had long been used solely for agricultural purposes in a small, uniquely rural environment. Nevertheless, we do not agree that the rezoning in this case went too far, approaching a taking. Rather, we think that the City's zoning decisions, apart from the faulty way they were reached, were not materially different from zoning decisions made by cities every day. On balance, we conclude that the rezoning was not a taking. *Id*. at 678-79.

Turning to the 15-month moratorium, the court noted that the landowner did not object to the first month, during which a study was undertaken. Also, the city argued, "candidly but remarkably, that using delay to extract concessions from landowners is a legitimate government function. We disagree, and were we convinced that this was the sole reason for the City's delay, we would be required to consider whether the moratorium constituted a compensable taking." *Id*. at 680.

The court went on to find that the city's resolution of other rezoning problems during the moratorium period evinced an orderly process. "One can wish that the process had hurried along, but we cannot say that the moratorium did not substantially advance a legitimate governmental purpose." *Id*. The court also determined that Sheffield showed no evidence of economic impact resulting from the moratorium, as distinguished from the rezoning, nor why the moratorium should not be within the ambit of reasonable investment-backed expectations. "We can easily imagine circumstances in which delay was aimed more at one person, or was more protracted with less justification, and more indicative of a taking. But the evidence in this case does not approach that situation." *Id*.

One issue that was not decided by the courts below was Sheffield's contention that the plat that it attempted during a short gap in the legislative moratorium (more accurately, moratoria) gave it vested rights. The city "rejected the plat on the asserted ground that the City Manager had continued the moratorium in effect without Council action." *Id*. at 655. The court ruled remanded the claim for a declaration that its rights were vested by the plat submission. *Id*. at 681.

C. Diamond B-Y Ranches v. Tooele County, 91 P.3d 841 (Utah App. Apr. 29, 2004), *cert. denied*, 98 P.3d 1177 (Utah, Aug. 2, 2004)(table).

The Utah appellate court, reversing a trial court ruling in the county's favor, held that whether the landowner had a property interest in the granting of a conditional use permit for sand and gravel extraction was not dispositive. Rather, the trial court would have to examine whether denial of the permit so reduced the economic uses to which the land could be put as to constitute a taking.

IV. Penn Central - Investment-Backed Expectations

A. Avenal v. State*,* 886 So.2d 1095 (La. Oct. 15, 2003)

The Louisiana Supreme Court reversed an appellate court determination, 858 So.2d 697 (La. App. Oct. 15, 2003), that had upheld a trial court award of extensive damages based on changes in water salinity levels resulting from joint federal-state coastal restoration. The appellate court had found that the changes made the plaintiffs' underwater lease area unsuitable for oyster propagation and thus required compensation under the state takings clause. The state supreme court, in reversing, held that the damages were barred by hold-harmless clauses in the plaintiffs' leases, or, in a few cases, by statute. 886 So.2d at 1095-1100. In a well-known earlier decision involving the same situation and some of the same plaintiffs, Judge Jay Plager of the U.S. Court of Appeals for the Federal Circuit had ruled against the lessees, who he deemed were well aware that government activities were modifying salinity levels. "It is hard for them to claim surprise … that the pre-existing salinity conditions, created at least in part by earlier government activity, were not left alone, but were again tampered with to their (this time) disadvantage." *Avenal v. United States*, 100 F.3d 933, 937 (Fed. Cir. 1996).

V. Penn Central - Development Moratoria as Takings.

Background: In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the Supreme Court held that whether development freezes imposed by planning moratoria constituted compensable takings would have to be determined by applying the *Penn Central* multi-factor criteria.

A. Leon County v. Gluesenkamp*, 873 So.2d 460 (Fl. App. May 10, 2004)*

In a decision reversing the trial court's determination, the Florida Court of Appeals held that a development moratorium extending for almost two years did not constitute a taking under *Penn Central*. It stressed that the land subsequently was sold for a profit and that the planning efforts that gave rise to the moratorium had been in place when the landowner purchased.

VI. Penn Central – Relevant Parcel

A. Zanghi v. Board of Appeals of Bedford, *807 N.E.2d 221 (Mass. App. May 3, 2004).*

The intermediate Massachusetts court rejected a taking claim based on a zoning order requiring that buildable lots be one-half acre minimum in size, with no portion located within a flood plain or a designated wetland. The court asserted that the owner's lots could be combined for cluster housing and that there also were viable agricultural uses of the land.

B. Milton v. Williamsburg Township. Bd.

of Zoning Appeals, *2004 WL 549583 (Ohio App., Mar. 22, 2004) (not reported in N.E.2d)*

The Ohio appellate court held that zoning amendments that increased the minimum lot-size requirement for residential development from approximately one-half acre to 1.5 acres did not constitute a taking. Since the plaintiffs could combine and build a house upon three non-conforming lots, they had not been deprived of economically beneficial use of their property.

VII. Compelled Speech Trumps Shopping Center Owner's Right to Exclude

Background: In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Supreme Court ruled that members of the public had no First Amendment right to expressive conduct within privately owned shopping centers. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), however, the Court subsequently held that shopping center owners had no Fifth Amendment right to *prevent* such expressive activity if it were protected by state law. Since then, several states have decided *PruneYard* cases, with split results.

A. Wood v. State, *2003 WL 1955433 (Fla. Cir. Ct. Feb. 26, 2003) (not reported in So.2d.)*

In *Wood*, a Florida appellate court has adopted the *PruneYard* approach as a matter of first impression in that state. In overturning a trespass conviction, it declared that the state constitution "prohibits a private owner of a 'quasi-public' place from using state trespass laws to exclude peaceful political activity." With no analysis of cases involving remotely similar facts, it concluded: "This state has long recognized that the exercise of the right to petition is a form of democratic expression at its purest. . . . Citizens of this state should be entitled to no less protection than citizens of other states." 2003 WL 1955433 at 2. Apparently, "citizens," in this context, do not include property owners.

VIII. Dolan - *Individual Determination and Proportional Impact*

Background: In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court held that, in order to condition issuance of a development permit on the exaction of a property interest, the city had to show that its administrative determination was based on an individualized determination and roughly proportional to the burden created by the proposed development. Several recent cases help elucidate the requirements of *Dolan*.

A. City of Olympia v. Drebick, *83 P.3d 443 (Wash. App., Jan. 22, 2004)*

Invoking the *Dolan* decision, the Washington Court of Appeals ruled that a state statute should be interpreted as providing that a municipality could not impose a traffic impact fee based on city-wide average figures. Instead, it had to base the assessment on a property-specific calculation.

B. Town of Flower Mound v. Stafford Estates Limited Partnership, 135 S.W.3d 620 (*Tex., May 7, 2004*)

The Texas Supreme Court held that the town failed to carry its burden of demonstrating that the conditioning of development approval for a 247-unit residential project upon the owner rebuild a public roadway abutting the development was roughly proportional to the impact of the development. It therefore found the requirement a taking under the state constitution. The court also rejected the argument that exactions covered by the *Dolan* test are limited to those requiring an actual transfer of real property to the locality, i.e., "dedicatory" exactions."

C. Hallmark Inns & Resorts, Inc. v. City of Lake Oswego, *88 P.3d 284 (Ore. App. Apr. 14, 2004)*

The Oregon Court of Appeals affirmed the decision of the state Land Use Board of Appeals that the city could require the developer of a major commercial development to provide a pedestrian pathway across the property, connecting a residential area on one side to a shopping center on the other. The court held that, for purposes of *Dolan*, the city's attempts to quantify the impact of the development on the city's traffic circulation pattern correctly took into account not only the immediately projected uses of the property, but also potential uses in the future that were permitted under the city's property development authorization.

IX. State "Ripeness" Requirements

A. Miller v. Town of Westport, *842 A.2d 558 (Conn. Mar. 16, 2004)*

The state trial court had ruled that the former owner of a parcel could not prevail on a temporary takings claim, because the validity of the zoning board of appeal's denial of a variance never had been decided due to the withdrawal of the administrative appeal. The state supreme court reversed. It ruled that "the denial of a variance by a zoning board of appeals is considered a final decision by an initial decision maker, which is all that is required to establish finality in order to bring a takings claim, and that once the zoning board of appeals makes its decision, the regulatory activity is final for purposes of an inverse condemnation claim," and that an administrative appeal is not necessary in order to bring an inverse condemnation action. *Id*. at 563-564 (citing *Cumberland Farms, Inc. v. Town of Groton*, 719 A.2d 465 (1998)). Moreover, the doctrine of collateral estoppel did not preclude the landowner from litigating all relevant factual issues in an inverse condemnation claim, regardless of whether those issues had been decided by a zoning board of appeals in ruling on the plaintiff's variance applications. *Cumberland Farms, Inc. v. Town of Groton*, 808 A.2d 1107 (2002). "Simply put, our decisions in *Cumberland Farms I* and *Cumberland Farms II* clearly recognize that a plaintiff is not required to appeal a decision of the zoning board of appeals denying a variance in order to bring an inverse condemnation claim, and also that the plaintiff is entitled to *de novo* review of the factual issues underlying its inverse condemnation claim regardless of the prior determinations of those issues by the zoning board of appeals." *Miller* at 564.

X. Calling "Zoning" and "Easements" by Their Proper Names

Background: Confucius taught that if we don't call things by their proper names we can't understand them and, hence, cannot deal with them correctly.

A. Greater Atlanta Homebuilders Association v. DeKalb County, *588 S.E.2d 694 (Ga. Nov. 10, 2003)*

A county ordinance conditioned the issuance of all new building or land development permits in the county upon the submission of a tree survey and tree protection plan by the applicant and its approval by the County Arborist. The Homebuilders Association challenged the validity of the law, asserting that it was not enacted in accordance with the state Zoning Procedures Act, which provided

minimum due process standards. The court noted that a zoning ordinance "is one that establishes 'procedures and zones or districts ... which regulate the uses and development standards of property within such zones or districts.'" *Id*. at 696 (citation omitted). The court upheld the ordinance, asserting that "[t]he Tree Ordinance applies to every building and development permit that allows land disturbance, regardless of the zoning district. The Tree Ordinance contains only three references to zones or districts." *Id*.

The ordinance contained extensive specifications of the size, type, and number of trees required. The dissent emphasized that "the primary substantive provisions of the ordinance, which specify where trees are to be saved and what densities are required upon completion of a project, depend on several different combinations of existing zoning classifications." *Id*. at 700.

B. Dudek v. Umatilla County*, 69 P.3d 751 (Or.App. May 15, 2003)*

Neighbors challenged a county decision to permit the partitioning of land without requiring a recorded road easement meeting county standards. The court found that the county's decision apparently was made in part to avoid violating the requirements of *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Oregon appellate court held that, despite the general nature of the county ordinance, the decision as to whether to require an easement in a given case involved considerable administrative discretion, thus triggering *Dolan*'s requirement of "rough proportionality" between burdens placed on the community and corresponding governmental exactions. The neighbors claimed that the requirement here was not an exaction of "property," but rather an exaction of money, since the partitioning landowner could be forced to purchase land for reconveyance to the county. The Oregon courts have interpreted *Dolan* as not applicable to the payment of a "fee."

The court rejected this analysis. "An applicant who is required to purchase and then dedicate property is in a very similar position to an applicant who is required to dedicate a possessory interest in property that is owned at the time of the application. That condition effectively is a requirement to dedicate a property interest … and is therefore subject to heightened scrutiny under *Dolan*. *Id*. at 758.

C. Insist on a Factual Record (But Don't Shout)

Background: "Whether a taking compensable under the Fifth Amendment has occurred is a question of law based on factual underpinnings." *Bass Enterprises Products Co. v. United States*, 133 F.3d 893, 895 (Fed. Cir. 1998) (citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

1. *B.A.M. v. Salt Lake County*, 87 P.3d 710 (Utah App. Feb 20, 2004).

The county Planning and Zoning Commission had given preliminary approval for a proposed subdivision, conditioned upon the developer dedicating a wider strip of land than it had agreed, based on the anticipated future road widening. The developer said this would require reconfiguration of building lots and would result in substantial loss. Without holding a hearing, the Commission then denied the development application. The developer appealed to the county Board of Commissioners, which upheld the PZC without conducting a hearing. The developer brought suit in district court. Under state law, the district court "shall 'presume that land use decisions and regulations are valid; and ... *determine only whether or not the decision is arbitrary, capricious, or illegal*'" *Id*. at 712 (emphasis supplied by appellate court). The trial court undertook its own factual determination and concluded that there had been an unconstitutional taking. The appellate court reversed on the grounds that state law did not permit the trial court to develop its own record, but, rather, that the trial court should have found the lack of an evidentiary record to indicate that the county's initial determination was arbitrary and capricious. The appellate court then remanded for a rehearing by the PZC. The dissent admonished the prevailing attorney:

> To the extent BAM has successfully persuaded me of the fundamental soundness of its position, that success should not be attributed, in any degree, to its counsel's unrestrained and unnecessary use of the bold, underline, and "all caps" functions of word processing or his repeated use of exclamation marks to emphasize points in his briefs. Nor are the briefs he filed in this case unique. Rather, BAM's counsel has regularly employed these devices in prior appeals to this court. While I appreciate a zealous advocate as much as anyone, such techniques, which really amount to a written form of shouting, are simply inappropriate in an appellate brief. It is counterproductive for counsel to litter his brief with burdensome material such as "WRONG! WRONG ANALYSIS! WRONG RESULT! WRONG! WRONG! WRONG!" It is also at odds with [the state] Rules of Appellate Procedure." *Id*. at 734 n.30 (Orme, J., dissenting).

XI. Other Issues

A. Schoene *Rides Again*

Background: In *Miller v. Schoene*, 276 U.S. 272 (1928), the Supreme Court upheld the uncompensated destruction by Virginia of cedar trees that might harbor the communicable plant disease "cedar rust." While not harmful to the cedars, the rust was destructive to apple trees, which were much more commercially important in the state.

1. *In re Property Located at 14255 53rd Avenue*, 86 P.3d 222 (Wash.App. Mar. 22, 2004)

The Washington Court of Appeals held that the state Department of Agriculture's destruction of healthy trees on private land within a one-eighth mile radius of the site of the escape of citrus long-horned beetles did not effect a taking. It noted that the insect was a "dangerous pest."

The court rejected the contention that entering upon private land and destroying valuable trees constituted a per se taking under *Loretto v. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Rather, the court invoked the "line of cases applying what is known as the law of necessity or the conflagration doctrine." *Id*. at 225. "When immediate action is necessary in order to avert a great public calamity, private property may be controlled, damaged or even destroyed without compensation. . . . If the individual who thus enters and destroys private property happens to be a public officer whose duty it is to avert the impending calamity, the rights of the owner of the property to compensation are no

greater." *Id*. at 226 (quoting 1 *Nichols on Eminent Domain*, 2d Ed. 263 Sec. 96, quoted in *Short v. Pierce Co.*, 78 P.2d 610, 615 (Wash. 1938).)

B. Mineral Rights "Cover-Up" is a Taking

1. *Alabama Department of Transportation v. Land Energy Limited,* 886 So.2d 787 (Ala. Feb. 6, 2004)

The Alabama Department of Transportation (ADOT) purchased the surface rights over some 34 acres of a 120-acre parcel for use as a highway right of way. ADOT then denied Land Energy, which owned sub-surface mineral rights in coal, the right to access them. The court found that there was sufficient bases for the jury to determine that there had been a regulatory taking and to award $650,000 in compensation.

XII. Wetlands Ripeness

A. Commonwealth v. Blair*, 805 N.E.2d 1011 (Mass. App., Apr. 2, 2004)*

The Massachusetts Appeals Court upheld a trial court determination that the owners of waterfront property had violated the state Watershed Protection Act by altering their beach and lawn without first obtaining a state permit. The court rejected the landowner's federal and state takings challenges to this enforcement action on ripeness grounds, since the owners had not sought a variance, as provided by the Act.

XIII. Condemnation Blight

A. Merkur Steel Supply, Inc. v. City of Detroit*, 680 N.W.2d 485 (Mich. App. Mar. 9, 2004)*

The Michigan Court of Appeals affirmed a trial court's award of some $ 7 million based on a jury determination of "condemnation blight." The court declared:

> [T]he city appears to minimize and mischaracterize plaintiff's claims …. This is not simply a case where a company's attempt to expand its business interferes with the city's management of its airport. Instead, this is essentially a case of blight by planning. In this case, the city of Detroit wanted to expand Detroit City Airport and it needed to condemn the properties around the airport. However, the city's plans were not concrete and, for over a decade, the city has failed to actually expand the airport. While the city has condemned some of the surrounding area and has viewed it as practically uninhabited or vacant, the city has failed to formally condemn plaintiff's property. However, although the city has never formally condemned plaintiff's property, it has made it virtually impossible for plaintiff to expand its own business. Essentially, the city, in over ten years, has thrown "roadblock" after barrier to discourage the expansion of plaintiff's business. *Id.* at 492.

Footnotes

[1] Dean Starkman, *Condemnation Is Used to Hand One Business Property of Another*, Wall St. J., Dec. 2, 1998, at A1.

[2] Dana Berliner, *Public Power, Private Gain* (Washington D.C.: Institute for Justice, 2003). The text may be downloaded from http://ij.org/publications/castle/.

Mississippi Supreme Court (continued from pg. 2)

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.* Inaction on the part of the legislature was seen as sufficient constitutional grounds for judicial action.

The Rules of Standing

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 ruled that 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 posed 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.

The Quest for "Legislative Intent."

The Mississippi Supreme Court of the 1980s and 1990s seemed to many to hold the view that statutes were malleable. The court's lodestar of statutory construction in Mississippi 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 was able to discover what the actual legislators who voted on the statutes meant to say.

Instead, some 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).

"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).[3]

Judge Southwick summarized this jurisprudential theory: "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.

Stare Decisis

Even during the period in which the Mississippi Supreme Court was criticized for judicial activism, the court articulated a commitment 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.

The Future

Some judicial observers have discerned that in the last four to six years, the Mississippi Supreme Court has shown an increased level of 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).[4] *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 *substantive* 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 reversed 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 another 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 rejected 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.[5]

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 valued 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 draws a more concrete line between the business of legislating and the business of adjudicating disputes. While some may criticize this development as an abuse of *stare decisis*, others have argued that in fact it shows a renewed respect for long-instilled principles which preceded *Van Slyke.*

Two recent decisions on political questions demonstrate a change in the relationship of the Mississippi Supreme Court with 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 had not

drawn 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 even though "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.[6]

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.

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.[7]

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.[8]

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 indicated the court's deference to the Legislature, and 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.[9]

This perceived shift away from its alleged past judicial activism does not mean 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 the system, and its ruling was not interpreted as an expansion of its own authority.

Footnotes

[1]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).

[2]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).

[3]Quoting 50 Am. Jur. Statutes *§357 (1944).*

[4]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.

[5]Quoting Burgess v. City of Gulfport, 814 So.2d 149, 153 (Miss. 2002).

[6]Quoting *Stockstill, supra,* 854 So.2d at 1022-23 (Carlson, J.).

[7]Quoting *Moore, supra,* 39 So.2d at 509.

[8]Quoting Culbert v. State, 86 Miss. 769, 39 So. 65, 66 (1905).

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

Alabama Supreme Court (continued from pg. 3)

Another emerging issue in the Alabama courts is the treatment of "mental anguish" damages. A recent Alabama Supreme Court decision underscores the complexity of addressing such damages.[17] Plaintiffs sued an insurance company for "fraud, breach of contract, and negligent or wanton failure to procure life insurance." Plaintiffs claimed that the company's agent had represented that the insurance policies they were buying would be "paid up" in 15 years. This was not the case, and the written policies themselves contradicted this claim. Plaintiff Magnolia Jackson testified that upon learning that the policies were not paid up, she felt "like a big bomb had just exploded" and that the situation made her "worry." The plaintiffs' out-of-pocket loss was $2,340. In addition to this, the jury gave them $497,660 in mental anguish damages, and $5 million in punitive damages. The trial judge reduced the punitive award to $1.5 million (three times the "compensatory" damages, including mental anguish).

A five-member majority of the state supreme court ordered the mental anguish damages reduced to $97,660, and the punitive damages reduced to $300,000 (or, in the alternative, a new trial for the defendant). Three justices – See, Brown, and Stuart – dissented. They argued that the majority had departed from clear precedent as to the kind of evidence needed to sustain a claim of mental anguish. Because the evidence produced by the plaintiffs was sparse, the dissenters would reduce that amount to $10,000, and the punitive amount to $30,000.

Whether the court's position on mental anguish will remain consistent is unclear.

The Courts and the Alabama Constitution

Perhaps the most dramatic evidence of the court's emphasis on separation of powers came in 2002, when the court dismissed a lawsuit challenging the way the state funds K-12 education. The suit had been in the Alabama court system since 1990. It was based on the 1901 state constitution's provision that "The legislature shall establish, organize, and maintain a *liberal* system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years" (emphasis added). The plaintiffs' basic theory was that the word "liberal" required the state to make per pupil expenditures more nearly equal across local school districts, necessitating some amount of redistribution of public funds from wealthier to poorer school districts.

The plaintiffs convinced the Montgomery County trial judge to whom the case was initially assigned to issue an "order" that declared that "equitable and adequate educational opportunities shall be provided to all schoolchildren regardless of the wealth of the communities in which the schoolchildren reside."[18] The order defined "adequate educational opportunities" with respect to nine categories, such as – "sufficient oral and written communication skills to function in Alabama, and at the national and international levels, in the coming years." The order concluded: "the state officers charged by law with responsibility for the Alabama public school system, are hereby enjoined to establish, organize and maintain a system of public schools, that provides equitable and adequate educational opportunities to all school-age children . . . ."

Convinced that the trial judge's order rested on an unprecedented reading of the state constitution and a disregard for the separation of powers,[19] the legislature asked the supreme court for a ruling on whether they had to follow the trial judge's order. The 1993 court said that the legislature was bound to follow it, "unless changed by a competent court having the power to overturn it. . . ."[20]

The matter came before the supreme court again in 1997. Stripped of procedural complexity, the court's decision basically held that the action was justiciable, and that the doctrine of separation of powers did not prohibit "judicial review" of the constitutionality of the public school system.[21] The decision moved the state further down the road toward a judicially-prescribed restructuring of its K-12 finances. Justices Maddox, Houston, and Chief Justice Hooper all dissented (in relevant part).

By 2002, the case was once again in a procedural posture such that the supreme court could rule on it. On this occasion, by an 8-1 vote, the court dismissed the action.[22] The majority opinion held:

> (1)that this Court's review of the merits of the still pending cases commonly and collectively known in this State, and hereinafter referred to, as the "Equity Funding Case," has reached its end, and (2) that, because the duty to fund Alabama's public schools is a duty that—for over 125 years—the people of this State have rested squarely upon the shoulders of the Legislature, it is the Legislature, not the courts, from which any further redress should be sought.

Another way that the supreme court emphasizes the separation of powers is in its case law construing statutes. The Alabama case law on this point indicates a tendency toward a textualist approach, that is, reading statutory law as it is written by the legislature.[23] The court's opinion in the Hooper-Hornsby absentee ballot case, noted earlier, was anomalous in this regard. In a recent decision, the court summarized the basic concepts:

> The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature as manifested in the language of the statute. . . . Absent a clearly expressed legislative intent to the contrary, the language of the statute is conclusive. Words must be given their natural, ordinary, commonly understood meaning, and where plain language is used, the court is bound to interpret that language to mean exactly what it says. . .Where the language of a statute is clear and "there remains no room for judicial construction[,] ... the clearly expressed intent of the legislature must be given effect.". . .When construing a statute, this Court "has a duty to ascertain and effectuate legislative intent expressed in the statute, which may be gleaned from the language used, the reason and necessity for the act, and the purpose sought to be obtained.[24]

Footnotes

[1] 587 So.2d 974 (Ala. 1991).

[2] Henderson v. Alabama Power Co., 627 So.2d 878 (Ala. 1993).

[3] BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

[4] BMW of North America, Inc. v. Gore, 701 So.2d 507 (Ala. 1997).

[5] E. Berton Spence, *Punitive Damages in Alabama After* BMW v. Gore: *Are Outcomes Any More Predictable?*, 59 ALA. LAWYER 314, 320 (1998).

[6] Foremost Ins. Co. v. Parham, 693 So.2d 409 (Ala. 1997).

[7] See, for example, Regions Bank v. Lee, 2004 WL 1859678 (Ala. 2004) (denying class certification).

[8] Hinton v. Monsanto Co., 813 So.2d 827 (Ala. 2001).

[9] Ala. Code § 6-11-21.

[10] 532 U.S. 424 (2001).

[11] The new procedure was first announced in Acceptance Ins. Co. v. Brown, 832 So.2d 1 (Ala. 2001), and fleshed out in Horton Homes, Inc. v. Brooks, 832 So.2d 44 (Ala. 2001), *cert. denied sub nom.* Southern Manufactured Homes, Inc. v. Brooks, 535 U.S. 1054 (2002).

[12] David E. Hogg, Comment, *Alabama Adopts De Novo Review for Punitive Damage Appeals: Another Landmark Decision or Much Ado About Nothing?*, 54 ALA. L. REV. 223, 234 (2002).

[13] Id. at 240.

[14] Report of the Legal Environment Committee, Alabama Department of Insurance, Health Issues Task Force, Nov. 5, 2003 (copy on file with author).

[15] One practicing lawyer opined that the implications of the U.S. Supreme Court's most recent decision concerning punitive damages, State Farm Ins. Co. v. Campbell, 538 U.S. 408 (2003), have not yet been incorporated into Alabama caselaw.

[16] General Motors Corp. v. Jernigan, 2003 WL 22929111 (Ala. 2003).

[17] Alfa Life Ins. Co. v. Jackson, 2004 WL 1009367 (Ala. 2004).

[18] Reprinted in Opinion of the Justices, 624 So.2d 107, 166 (Ala. 1993).

[19] For a further discussion of this point, see Susan Thompson Spence, Comment, *The Usurpation of Legislative Power by the Alabama Judiciary: From Legislative Apportionment to School Reform*, 50 ALA. L. REV. 929, (1999). It is interesting to note that the trial judge was unsuccessful in his 1994 run for a supreme court judgeship.

[20] 624 So.2d at 110.

[21] Ex parte James, 713 So.2d 869 (Ala. 1997).

[22] Ex parte James, 836 So.2d 813 (Ala. 2002).

[23] For a short summary of the major cases, see J. Gorman Houston, Jr., *Judicial Restraint and the Doctrine of Separation of Powers*, 59 ALA. LAW. 166, 169-70 (1998) (suggesting, somewhat obliquely, that *Roe* was wrongly decided).

[24] Ex parte University of South Alabama, 761 So.2d 240, 243 (Ala. 1999) (citations omitted).

Permissive Joinder in Mississippi (continued from pg. 1)

tors in turn received different information regarding the drug embodied in six different warning labels utilized over the course of the time relevant to the claims in the case. *Id*. at 1096. Confronted with the substantial disparities among the factual grounds for the plaintiffs' various claims, the Mississippi Supreme Court held that the plaintiffs' claims did not arise out of the same transaction or occurrence and that, accordingly, the requirements for permissive joinder under Rule 20 had not been satisfied. The supreme court thus reversed the trial court and remanded the case with instructions to sever and transfer to appropriate jurisdictions those plaintiffs who had been improperly joined. *Id.* at 1101-02.

In August 2004, the Mississippi Supreme Court delivered a second blow to joinder. In *Harold's Auto Parts, Inc. v. Magialardi* (2004 Miss. Lexis 1099), the court ruled that Rule 20's requirements for permissive joinder must be satisfied by the averments in the complaint.

Harold's Auto involved various claims by 264 plaintiffs against 137 defendants who had in turn identified approximately 600 different employers on whose worksites one or more plaintiffs may have been exposed to asbestos-containing products manufactured by one or more of the defendants. Approximately 220 of the plaintiffs were unable to identify any employment within the State of Mississippi. *Id.* at 2. The court observed, "The complaint provides virtually no helpful information with respect to the claims asserted by the individual plaintiffs." *Id.* In summarizing the relevant averments of the complaint, the court noted, "In essence we are told that 264 plaintiffs were exposed over a 75-year period of time to asbestos products associated with 137 manufacturers and approximately 600 workplaces. We are not told which plaintiff was exposed to which product manufactured by which defendant in which workplace at any particular time." *Id.* Rejecting the notion that the requirements of Rule 20 or, significantly, of Rule 11, can be deferred until discovery permits the trial court to winnow out the properly joined plaintiffs from those who have been improperly joined, the court held that this "core information" must be known to plaintiffs' counsel "prior to filing the complaint, not information to be developed in discovery or disclosure. *The information should have been included in the complaint*." *Id.* at 35 (emphasis added) Specifically addressing the issue of permissive joinder under Rule 20, the court held that such joinder is permissible "only where the plaintiffs make certain assertions which demonstrate the matters set out in the rule." *Id.* at 4. For plaintiffs to proceed on the assumption that they will demonstrate the propriety of joinder on the basis of information to be developed *after* the filing of the complaint was characterized by the Mississippi Supreme Court as "a perversion of the judicial system . . . " *Id.* Finding that the plaintiffs had "wholly failed in their obligation to assert sufficient information to justify joinder", the supreme court remanded the case with instructions to sever and transfer each plaintiff to a court of appropriate venue and jurisdiction "where known". *Id.* at 5. The trial court was further directed to dismiss, albeit without prejudice, the claims of each plaintiff who failed to provide sufficient information to permit such a determination. *Id.*

It may, to persons unfamiliar with the history of joinder in Mississippi, seem unremarkable that a state supreme court should hold that a complaint which seeks permissive joinder pursuant to Rule 20 must allege sufficient information to permit the trial court to make at least some preliminary determination as to whether permissive joinder is proper. For state court practitioners in the State of Mississippi, however, the holding in *Harold's Auto* constitutes a dramatic change. Instead of requiring defendants to undergo a number of procedures including open-ended discovery, the legal sufficiency of joinder may now be meaningfully tested at the pleading stage. Where, as appears to have been the case in *Harold's Auto*, the prerequisite grounds for joinder are not sufficiently plead in the complaint, improperly joined plaintiffs can be summarily dismissed or severed and transferred to appropriate jurisdictions. Moreover, Rule 11 sanctions may be available where plaintiff's counsel is found to have had no good faith basis for joinder.

Plaintiffs' counsel will continue to have the right to seek leave to amend the complaint in the face of a challenge based on the holding in *Harold's Auto.* Yet as the *Harold's Auto* opinion makes clear, there are limits even to the liberal amendment policy of Rule 15(a). The reduced litigation costs from early resolution of joinder issues may be substantial and there is the strong possibility of a consequent dimminution of settlements.

[1] The language of Mississippi Rule of Civil Procedure 20 is substantially identical to the corresponding federal rule.

J. MADISON

The Federalist Society for Law and Public Policy Studies
1015 18th Street, N.W., Suite 425
Washington, D.C. 20036