CABA
Capital Area Bar Association

AUGUST 2012

President's Column

David Maron

It has been an eventful summer. With the U.S. Supreme Court Affordable Care Act and immigration opinions, the London Olympics, and the national election cycle ramping up, a lot is going on. CABA has been busy as well. With its continued emphasis on communication among membership, civility and professionalism, and promoting public service, there are several exciting developments and opportunities.

First, thanks to CABA board member Scott Jones and Communications Committee co-chairs, Meta Copeland and Melissa Baltz, CABA has launched its new website: www.caba.ms. The new website provides a more flexible and user-friendly platform to get information to and from you, our members. In fact, many of you may have already downloaded this article from our new website or even on your smart phone.

We've also launched a CABA Facebook Page and a CABA Twitter Account to allow even greater access to information. Those are new. Please take a moment to "like" us on Facebook and follow us on Twitter for information, articles, and announcements for socials, meetings and other CABA activities.

CABA members will also continue to receive announcements and information by email. But now, similar to the weekly ***News from the Mississippi Bar*** email, CABA's email will be sent from info@caba.ms. So, to make sure you stay up to date, please check to make sure your email filter settings recognize and allow these emails.

Second, CABA is continuing its emphasis to promote civility and professionalism within the practice of law. Strengthening relationships (and building new ones) is often best accomplished out of the office, so mark your calendars and plan to participate in CABA's Tennis Tournament (proceeds from which benefit MVLP) and attend the Fall Social, both of which will be held at River Hills Club on October 4. For more information contact Tennis Chair Stephanie Jones and Social Chair Joanna Kuhn.

Mentoring also remains a core element of CABA's support of professionalism. Thanks to each CABA member who took part in the recent Mississippi Bar James O. Dukes Professionalism programs at Ole Miss and MC

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Inside

Upcoming Events

August 21, 2012

CABA Membership Meeting • 11:30 AM at the Capital Club • 19th floor of Capital Towers Building

Member Lunch $15, Free CLE
Non-Member Lunch $18, $25 CLE

August Membership Meeting & Ethics CLE

Aug 21, 2012 @ 11:30 AM

Capital Club • 19th Floor of Capital Towers Building

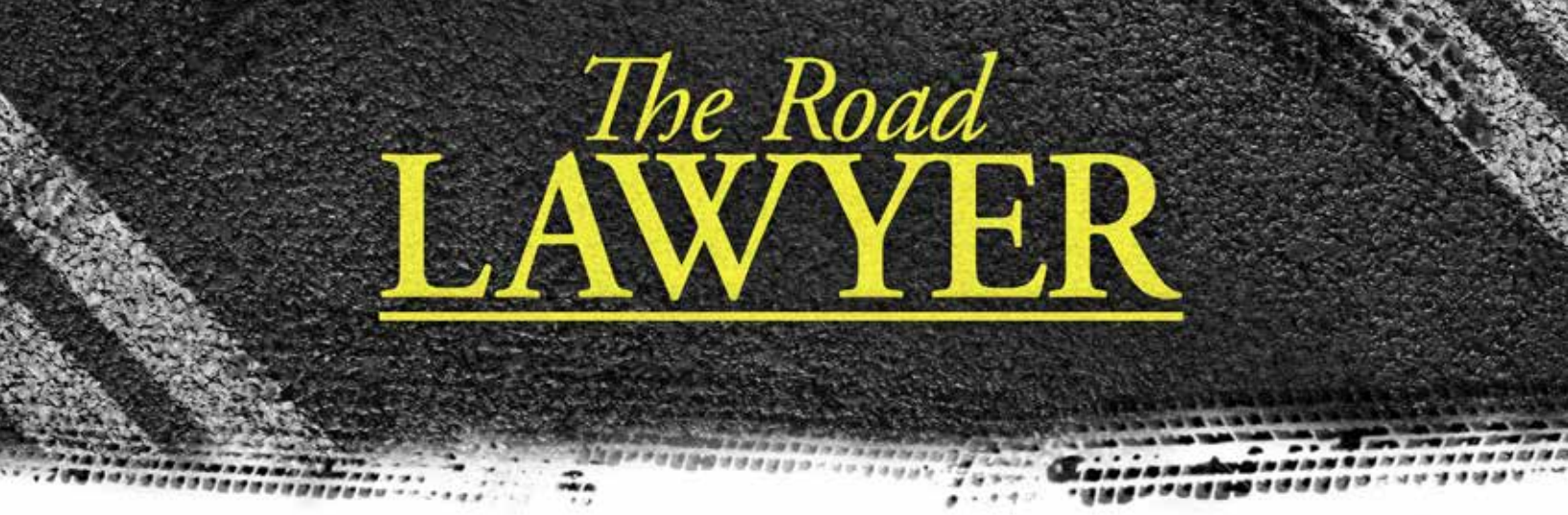
Topic: "Your Brother's Keeper"

$15 Lunch

Member Lunch $15, Free CLE
Non-Member Lunch $18, $25 CLE

Guest Speakers

Chip Glaze: Director of Lawyers and Judges Assistance Program • ***Adam Kilgore:*** General Counsel of the Mississippi Bar



OF FORESTS & TREES

Musings on the Commerce Clause, the Affordable Care Act, & Baseball by the Bay

Many say it's our most beautiful city, that the Golden Gate Bridge tops even the Brooklyn Bridge as a work of engineering, architecture and art, that one experiences more wonders in Golden Gate Park than in Central Park.

Mark Twain may or may not have said, "The coldest I ever been was the Summer I spent in San Francisco." No place tops The Bay Area for eerie and oppressive fogs and squirrely weather in general. Ah! Those serene sunsets.

New Orleans may be another city with cable cars that run, but SFCA is the only one that deems 30 degree incline angle streets and trolley lines traversable. Memorable movie chase scenes are filmed here.

Back in February, the city honored crooner Tony Bennett for leaving his heart there fifty years ago, making all more beloved. A half century ago, Scott McKenzie sang to a new generation of what to do, "If you come to San Francisco."

"The two most respected citizens of this wonderful, crazy city are Nancy Pelosi and Patrick Willis," an ex-pat local friend told The Road Lawyer ["TRL"], as we arrived a few days early for little legal business the first week in July. "It was Jerry Rice back in the 1990s, but it's Patrick's time now."

"And don't be surprised Sunday if you see almost as many No. 22 Giant jerseys as No. 24s. This city hasn't forgotten Will's sweet swing."

Of Will Clark's time here, no city has combined a tragic earthquake with an equivalent baseball disaster the way San Francisco did in the 1989 World Series. The blue collar rabble from Oakland crushed in the Giants in four straight, as the quaking earth reduced the Embarcadero Expressway to concrete lasagna.

TRL landed at SFO in the wake of a national legal earthquake that last Thursday in June — with thoughts of Obamacare, the Commerce Clause, and baseball.

What Pages Of History?

"A page of history is worth a volume of logic."[1] But what page? 1994's? When Big Baseball emerged from the 1994 strike season with a commercial vengeance? Or was it 1992 and the opening of Oriole Park at Camden Yards, now called The Ballpark That Forever Changed Baseball.[2]

Baseball still enjoys its antitrust exemption, on paper at least.[3] The proper page of history may be one when it all began, the one Holmes penned May 29, 1922, seeing professional baseball foremost as a local "exhibition."[4] "[T]he fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business."[5]

"[T]he transport is a mere incident, not the essential thing. That to which it is incident, the exhibition, although made for money would not be called trade or commerce in the commonly accepted use of those words."[6] In 1922, what was once known as baseball's reserve clause, was "not an interference with commerce among the States."[7]

Justice Alito's Take On *Federal Baseball Club*

Three years ago Justice Samuel A. Alito, Jr., told the story of *Federal Baseball Club* in a sympathetic lecture, concluding:

> "In law, the view of baseball as a local affair prevailed. The argument that baseball was big interstate business lost. But the real losers in the case were local people [, t]he . . . some 600 citizens of Baltimore"[8] who owned the upstart Federal Baseball League team that Big Baseball ran out of business. "For the people of Baltimore who backed the team, baseball, like politics, was local."[9]

Justice Alito saw that the local people lost and that the "big interstate business" of baseball was the culprit. One would have thought he'd also have seen the makeup of the "big interstate business" professional baseball exhibition market, *viz.*, the players, the competing leagues and teams (including the Federal Baseball Club of Baltimore, Inc.), the fans, the multiple local venues in multiple states, advertisers on outfield walls, radio and in print media, the vendors in the stands, and no doubt more.[10] And that as such the Congress could regulate the whole of this aggregated market under the Commerce Clause, and that the Sherman Act was just such a constitutionally authorized regulatory effort.

And that he would have seen the implications of that view for the meaning and application of the Commerce Clause in future cases involving markets so big that — as in 1922 — some might be tempted to focus arbitrarily on certain trees, and miss the forest.

The Commerce Clause As Text

In relevant part, the Commerce Clause provides that "[t]he Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, ..." U. S. Const., Art. 1, § 8, cl. 3. It so read on June 28, 2012, and it so read on May 29, 1922. No mention of the "mere incident" or the "essential thing." No hint that "Commerce" should be seen as anything other than the economic enterprise that it is. Remember, Adam Smith's The Wealth Of Nations was published in 1776.

Nothing in the text of the Commerce Clause tells Congress it must focus on persons, nor does it limit the regulatory authority of Congress to particular classes of persons or other market participants. Nothing in the text limits that authority to discrete activities, nor does the text exclude inactivity or omissions affecting commerce where made by persons or classes of persons or entities. Nothing in the text excludes regulation of the merely reasonably foreseeable aspects of the commercial engine that is inherently an ongoing enterprise.[11] Commerce is not something that is but rather is always a continuous process of becoming.

Every proffered reasoned elaboration of the Commerce Clause, by James Madison or John Marshall or John Roberts or Sam Alito, must withstand scrutiny under the text.[12]

Every judicial generalization or policy preference regarding the Commerce Clause **must in addition** (a) withstand scrutiny under Holmes' wise insight that "[g]eneral propositions do not decide concrete cases," [13] **and** (b) answer the charge that it is but the expounding Justice's overt or *sub silentio* value judgment or personal political preference that cannot be justified by a fair reading of the text.

Back To Justice Alito and *Federal Baseball Club*

"In 1922, the Court saw the Commerce Clause as a limited power that did not extend to all 'economic . . . activities that have a substantial effect on interstate commerce.' This approach forced the court to draw fine — some would say arbitrary — lines." [14]

Assume arguendo that there is sense in the notion of the Commerce Clause "as a limited power" that should be again reigned in. Given what Justice Alito said about *Federal Baseball Club* in 2009, there would seem no way he (or any other Justice) could miss the practical reality that a case centered on congressional regulation of a "big interstate business" was **not** the occasion for a defensible reigning in. Nor any way such a view might pass muster under any of the three scrutinies just stated.

Justice Alito's words and sympathies bore bitter fruit 90 years after *Federal Baseball Club*. Without Holmes' excuse for not knowing the relevant legislative facts (after all, Holmes never went to a baseball game), The Five,[15] including Chief Justice John G. Roberts, Jr., saw but a lone class of trees, and missed a forest far bigger than a mere "big interstate business," and with infinitely more genre and species of trees.

On June 28, 2012, The Five isolated — arbitrarily, formalistically, and so charactaristically — the act from the omission, "activity" from "inactivity," [17] the completed effect from the merely reasonably foreseeable. This view cannot stand under any of the three scrutinies. Yet, Chief Justice Roberts persists, though he concedes a fourth level deficiency in his argument, *viz.*, "[t]o the economist . . . there is no difference between activity and inactivity; both have economic effects on commerce." [18]

How could The Five not know (1) that in but a moment any lawyer can conjure dozens of contexts in which acts **and** omissions are equally actionable when one or the other causes damaging effects, and (2) that good economists [19] are every bit as practical as good lawyers, if not more so.

There Are None So Blind As Those Who Will Not See

How could The Five not see that those who may be "taxed" [20] via the individual mandate are but one of many species of "trees" whose acts **and omissions** make up "the forest" and drive the commercial engine within the legally relevant market?

Or, fail to see that the relevant legislative facts include that which no one denies, *viz.*, that "[c]ollectively, Americans spent $2.5 trillion on health care in 2009, accounting for 17.6% of our Nation's economy"? [21] And that the economic emergence and effects (identifiable and foreseeable) of this massive commercial market are the relevant "page[s] of history"?

Or, fail to see that health care consumers are but **one of many** categories of trees (subsuming all potential individual mandatees) whose acts **and omissions** make up the forest and the economic engine that drives the legally relevant market? Or, that the operative words of Art. 1, § 8, cl. 3, are "regulate Commerce" with no hint those words should be grudgingly construed and limited to persons or entities or sub-categories of commerce?

Or, fail to see that this aggregated forest with all of its genre and species of trees — with a magnitude of $2.5 trillion a year, "accounting for 17.6% of our Nation's economy" — is within the phrase "Commerce . . . among the several States," and are thus **the** relevant market to which **the text** of the Commerce Clause, augmented by the Necessary and Proper Clause, must be applied?

Paraphrasing and plagiarizing what former Giants manager Leo Durocher once said of umpires, our problem is not with the integrity of The Five, but with their eyesight.

Baseball By The Bay

A local exhibition of baseball took place at AT&T Park f/k/a Pac Bell Park in San Francisco on Sunday afternoon, July 1, 2012, that may be worthy of note and reflection.

The accidental tourist happening by would have thought it business as usual in the reefer capitol of the country. Happy people everywhere high with anticipation. Colorful dress. A happening was about to happen.

Understand that all whose acts and omissions have an economic effect on the professional baseball exhibition market dream of playing in October. The dream is seen a bit more possible in San Francisco since the Giants won the World Series in 2010. That early July Sunday afternoon saw a reunion of the 2002 Giants who came up a game short in an all California World Series with the American League's Angels.

Bright pumpkin orange and dark satanic black were everywhere within blocks of the corner of King and Second Streets that Sunday afternoon. Those not knowing the dress Giants market participants wear would have thought of October all right. Such colors are normally reserved for Halloween.

Any doubts about the nature of the scent of magic and witchcraft that filled the air were laid to rest in the bottom of the ninth when the San Francisco swirls caught Angel Pagan's high fly ball to right and eased it behind poor Jay Bruce's outstretched glove. Giants 4, Reds 3! The party was on.

AT&T Park

The Polo Grounds once graced the corner of West 155th Street and Eighth Avenue in Upper Manhattan. Giants labored there from 1883 to 1957. Commerce called. The Giants and their inter-borough rival Dodgers crossed many state lines, found gold in California and invited others to join them.

Forty years in cold churly, multi-sport Candlestick Park (Patrick Willis and the '49ers still play there) were punctuated by the last two 1989 World Series games played there after the Loma Prieta earthquake of October 17, as the players were about to take the field for Game Three.

AT&T Park lies in the industrial waterfront area known as China Basin in the up and coming neighborhoods of South Beach and Mission Bay. Reports are that it cost $357 million to build n/k/a $482 million in today's dollars.

Engineered so that wind levels are about half those in "The Stick" (tell that to Jay Bruce), regulars report cold summer fog and winter jackets are still seen at Giants games in July, despite the higher average

temperatures. TRL appreciated the nice 65° game time thermometer reading, knowing it was almost certainly above 95° at Trustmark Park back home.

AT&T Park seats about 42,000 with SRO room for another 1500. It opened for local exhibitions of baseball for the Millenium Season. 68 luxury suites. 5200 club seats on the club level, with 1500 more at field level behind home plate. Big bucks are spent here. TRL's field box seat far beyond the foul pole down the third base line cost $ 66. Two beers and a dog added another $25.

Most prominent at AT&T is the right field wall, 24 feet high in honor of Willie Mays who played here long after his Say Hey days, but still wore No. 24. Behind Levi's Landing in right field is China Basin aka McCovey Cove and in which over 90 "splash" HRs have landed, 35 hit by bulked up Barry Bonds. Texas Rangers' first baseman Mitch Moreland of Amory via State and Starkville is one of two AL players to hit a "splash" HR; the other David (Big Papi) Ortiz.

A dozen or more kayaks and inflated rafts dotted McCovey Cove with fish nets ready, hoping for "splash" HRs that have been a lot less plentiful since the Giants declined to resign Bonds for the 2008 season. To the north was a marina, home to hundreds of moored sailing craft, with the obligatory blue and white colors.

Fans get to Giant games via the usual public and private means of transportation, but one AT&T means of arrival is unique. Ferries tie up at a pier out behind center field. Golden Gate Ferry navigates past Alcatraz from and to Sausalito and Larkspur on game days, and embark for return voyages 30 minutes after the last out. Those on the Marin County side of The Bay (less and except those who are guests of the state at bayside San Quentin) have a scenic ride to the ball park. TRL's son and family were ferried to and fro that Sunday afternoon.

The Muni delivers fans to the T intersection of Second and King aka Willie Mays Plaza, even closer to the front door than at Safeco Field in Seattle, and much closer than any of the other ballparks TRL has found in his road lawyering over the years.

A Game Played By Southern Boys

Everyone knows Willie Mays is from Fairfield, Alabama in the Birmingham area, while Willie McCovey is from down near the Coast in Mobile. Not one of the nine Giants who took the field for a local exhibition of baseball that Sunday afternoon came from north of the Mason – Dixon Line.[22]

NL All Star Catcher Buster Posey is from just outside Albany, Georgia, and still looks like a teenager. 1B Brandon Belt aka "Baby Giraffe" is from Texas, with two "splash" HRs to his credit. 2B Ryan Theriot is from LSU. SS Brandon Crawford played for UCLA.

Starting pitcher Ryan Vogelsong hales from Charlotte, NC. Others in the Giants' starting rotation are Matt Cain of Dothan, Alabama, who threw a perfect game on June 13, Madison Bumgarner from Hickory, NC, and Barry Zito from Las Vegas. The odd duck is Tim Lincecum from Belleview, WA.

Then there was the ever-increasing demographic phenomenon (on all MLB teams, including those without so many players from the Old South) of the boys from further south and whose first language is not English. The Giants tradition includes Orlando Cepeda from Puerto Rico and Juan Marichal from the Dominican Republic.

Starting on that first Sunday in July were 3B Pablo ("Kung Fu Panda") Sandoval and RF Gregor Blanco, both born and raised in Venezuela. Outfielders Melkey Cabrera and Joaquim Arias, and relief pitcher Santiago Casilla grew up in the Dominican Republic. CF Angel Pagan and reliever Javier Lopez are from Puerto Rico.

In fairness, two of The Five had the insight and eyesight to see — and the courage to say — that "[t]he history of the United States is in part made of the stories, talents and lasting contributions of those who crossed oceans and deserts to come here."[23] And to add that "the sound exercise of national power of immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse."[24]

The visiting Cincinnati Reds were not that different. Zach Cozart from Memphis and Ole Miss was one of many Southern boys on the field at AT&T Park on July 1. SS Miguel Cairo is from Venezuela. Two relievers who appeared hale from the Dominican Republic. The only yankee was 3B Todd Frazier (whose two run HR had Cincinnati ahead for a while) from New Jersey. Star first baseman Joe Votto (who had a sore left knee did not play) is from Toronto.

If the face of baseball has changed

Membership Meeting
June 2012

Pictured are Meade Mitchell, CABA Program Chairman; Lem Adams, The Mississippi Bar President and Speaker at the June Membership Meeting; and David Maron, CABA President

demographically from what it once was, it has changed even more commercially. The new ball parks starting with Baltimore's Camden Yards and high priced sky boxes are but one of many new clumps of trees that have emerged within Big Baseball and the massive market of commerce among the several States that we now know so well.

AT&T's Culinary Offerings

For a decade TRL has reviewed the beer and dogs, peanuts and crackerjacks at ballparks across the Country. As with so much else, the Internet has made things easier and more readily accessible. To learn more than you could possibly want to know of the culinary offerings at AT&T Park, click here.

Still TRL dutifully walked the Promenade Level concourse and the View Level aka upper deck. A few observations are appropriate.

Beer (bottled and draft) flows as freely as at any park where baseball is played, but it's not so furiously marketed at AT&T. A couple of modest Coors Light facade billboards visible from most everywhere, and a few Budweiser stands within the concourse are about all.

There were long lines at most concession stands, particularly in the early innings. Here's another sense in which AT&T is fan friendly. You may have to wait most of an inning to feed your face, but there are TV monitors everywhere. The only time you have to miss a pitch is when you place your order and pay for it. There's even audio play by play in the restrooms!

Not surprising in this jumping off point to Napa and Sonoma Valleys, wine is readily available. Three California Wine Bars, one on the concourse behind third base, the other behind deep right field. Not bad offerings. *Coppolla*, *Clos du Bos*, *Kenwood*, *Ravenswood*, and a few more. TRL noticed not a single patron at any, on 3rd and 6th inning inspections, nor were sitings made in the stands. A local exhibition of baseball was being presented that Sunday afternoon, not a wine tasting.

One hard liquor stand on the concourse far behind the home plate area was almost as lonely.

No set of dining options in SFCA would be complete without Chinese food. But Edsel Ford Fong's!?

Go to the Internet and check the link above.

Lots Of Americans At AT&T That Afternoon

Like so many of the "new" ballparks, AT&T is kid friendly. "My First Game" T-shirts seemed a hot seller. A veritable children's playground and recreation park lies on the concourse deep behind the outfield. Trusting parents can turn their children loose with little risk the kids will know there's a ball game on.

One moment sticks in TRL's mind and memory from that Sunday afternoon above all. The 42,000 at AT&T Park began the Seventh Inning Stretch with a "God Bless America" sung with a gusto matching the fervent renderings TRL has experienced in Rick Perry country — Minute Maid Park in Houston and Rangers Ballpark in Arlington — to Safeco Park in left leaning Seattle, and to those venues more directly touched by the malicious attacks of 9/11, the old Shea Stadium in Flushing, KeySpan Park on Coney Island

ESSAY CONTEST

Topic: Hands Free in Mississippi - What is Fair Law of Cell Phone Use by Drivers?

1 **Essay Contest Winner Jack Collins**

2 **Essay Contest 2nd Place Carter Bearman**

3 **Essay Contest 3rd Place Daniela Tellkamp**

Also pictured are: Scott Welch, LaVerne Edney, Committee Members; Jessica Morris, Law Related Education Committee Chairman; and David Maron, CABA President.

and Nationals Park at the Navy Yard in D. C.

We were all Americans in that moment that was followed by a joyous "Take Me Out To The Ball Game."

An Event Plucked Out Of The Future

The pumpkin orange and satanic black clad home crowd was really into the game. Dads and kids alike wore jerseys featuring their favorites, including a few for "Fear the Beard!" Brian Wilson, out for the season with his second "Tommy John surgery."

Several Mays' No. 24s, a McCovey No. 44, an Orlando Cepeda No. 30, and, yes, two with the back of the jersey reading "CLARK" above a **big bold orange 22**.

The Giants took an early lead one run lead. Then Frazier's two run HR put the Reds up. The Giants pulled back ahead 3-2 in the bottom of the 7th, but relievers Javier Lopez and Santiago Casilla couldn't hold it in the top of the 9th. The score was tied 3-3 when the Giants came bat. Two quick outs.

Buster Posey swung late at a two strike pitch and served a double inside the right field foul line. Kung Fu Panda was intentionally walked.

Angel Pagan battled Reds' reliever Jose Arrendondo until . . . .

A half century ago, John Updike had the sight to see that "there will always lurk, around the corner in a pocket of our knowledge of the odds, an indefensible hope, and this was one of the times, which you now and then find in sports, when a density of expectation hangs in the air and plucks an event out of the future." [25]

TRL has reported above that the San Francisco swirls caught Angel Pagan's high fly ball to right and eased it behind poor Jay Bruce's outstretched glove. Giants 4, Reds 3! Giants win! Giants win!

It wasn't pretty. Nine times out of 10 Bruce would have caught the ball, even with Bay Area winds to contend with. It wasn't historic, as was Ted Williams' last at bat, that Updike so poetically memorialized. It didn't cinch a pennant; the 2012 Season was barely half over. The Giants have much work to do, to play baseball in October.

Rather, it was a lot like what happened at the Supreme Court on Thursday morning, June 28, 2012. The Five were rock solid in their refusal to see beyond the trees they had so arbitrarily identified and so indefensibly isolated from the relevant market of "Commerce . . . among the several States," leaving many with only an "indefensible hope" as the clock struck 10 A.M.

Yet in the courthouse as at the ballpark, there are those times, "when a density of expectation hangs in the air and plucks an event out of the future."

1. *N. Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).
2. Fittingly, Camden Yards was the first of almost a dozen of the "new" traditional looking ball parks that TRL visited and reviewed in this Newsletter.
3. *See Flood v. Kuhn*, 407 U.S. 258 (1972).
4. *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200, 208, 209 (1922).
5. *Id*., at 209.
6. *Id*.
7. *Id*.
8. Alito, "The Origin of the Baseball Antitrust Exemption: *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*," 34 Journal of Supreme Court History 183, 193 (2009).
9. *Id*.
10. Television is certainly a player today in the "big interstate business" professional baseball exhibition market, but are Stub Hub and Ticketmaster?
11. The Federal Employers Liability Act, 45 U.S.C. §§ 51, *et seq*., would have been no less constitutional if it had been enacted before the first railroad worker was mangled by two colliding freight cars, or even before the first railroad was built in this Country.
12. Prof. Ronald Dworkin takes the idea of a chain novel and provides an insightful metaphor. Dworkin, Law's Empire (1986). The legal text — the Commerce Clause — is the title. Each case decided under the Commerce Clause is seen as successive chapters in the chain novel. Each new case must strive for principled consistency with prior cases (*qua stare decisis*) but should independently be scrutinized for consistency with the text of the Commerce Clause. Reliance interests complicate the metaphor in the instance of Big Baseball's antitrust exemption, given the line of cases from *Federal Baseball Club to Flood v. Kuhn*. The text — the title of the chain novel — should trump where there are no such conflicting interests present.
13. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). A practical understanding of the law application phase of judging, *e.g., Boardman v. USAA*, 470 So.2d 1024, 1029-30 (Miss. 1985); *cf.* Fed. R. Ev. 702(d), makes clear the impossibility of a credible adjudication where all that is brought to bear on the facts are polemics stated at the 30,000 foot level of generalization.
14. Alito, *supra*, 34 Journal of Supreme Court History at 193.
15. The Five include Justices Antonin G. Scalia, Anthony M. Kennedy and Clarence Thomas, in addition to the Chief Justice and Justice Alito.
16. *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (June 28, 2012)
17. *National Federation*, 132 S.Ct. at 2587 (per Chief Justice Roberts).
18. *Id*. at 2589.
19. With respect, it is bizarre that Chief Justice Roberts would call economists "metaphysical philosophers" and "visionaries," dichotomizing them from the Framers of the Constitution he labels "practical statesmen" and "practical men." *Id*. Most thoughtful persons would find all four labels fit for both the Framers, good economists, **and** good lawyers as well.
20. *National Federation*, 132 S.Ct. at 2593-2600 (per Chief Justice Roberts); *id*. at 2642 (per Justice Ginsburg, concurring).
21. *National Federation*, 132 S.Ct. at 2627 (per Justice Ginsburg, concurring).
22. Holmes had an up close, personal and thrice near fatal knowledge of those from below the Mason – Dixon Line. *See, e.g.*, his justly famous address on Memorial Day, 1884, of which Shelby Foote remarked, re the standard of "the 'few appropriate remarks' Lincoln had uttered at Gettysburg . . . , [that] one at least came close at Keene, New Hampshire, in 1884, ..." 3 Foote, The Civil War, A *Narrative* 1046 (1974). One can only wonder how Holmes' 1922 page of history might have been written had he known a bit more about the commercial enterprise of baseball. *Compare, e.g., Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (Holmes, J., dissenting); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (Holmes, J., dissenting); *see also, Plant v. Wood*, 176 Mass. 492, 57 N.E. 1011 (1900) (Holmes, J., dissenting); and *Vegelahn v. Gunter*, 167 Mass. 92, 44 N.E. 1077 (1896) (Holmes, J., dissenting). In *Federal Baseball Club*, arguably Holmes was respecting the *stare decisis* effects of *U. S. v. E. C. Knight Co*., 156 U.S. 1 , 17-18 (1895) and *Hooper v. California*, 155 U. S. 648 (1895); *see also*, Holmes' own dissenting opinion in *National Securities Co. v. U. S.*, 193 U.S. 197 (1904).
23. *Arizona v. United States*, 2012 WL 2368661, *18 (June 25, 2012) (Kennedy, J., joined by Chief Justice Roberts and three others). Baseball fans and other sociologists wonder how some future David Halberstam will write "of the stories, talents and lasting contributions" and friendships on today's Major League Baseball teams. *See* Halberstam, The Teammates: A Portrait of a Friendship (2003). And as a footnote to a footnote, AT&T's bullpens are down the base lines adjacent to right and left field foul lines, so that the relievers sit in the dugouts and enjoy the regular camaraderie with rest of the guys.
24. *Id*. It is a sad irony that the three dissenters in Arizona are surely aware that, at some level of the ancestry of each, prejudice and discrimination was experienced not unlike that encountered by today's Spanish speaking illegal immigrants whose only sin in the sight of God is their naive faith that this Nation still means it when it says to the world "Give me your tired, your poor, your huddled masses yearning to breathe free," as per Emma Lazarus' famous poem, "The New Colossus," graven within the pedestal on which the Statue of Liberty stands.
25. Updike, "Hub Fans Bid Kid Adieu," The New Yorker (October 20, 1960).

POINT • COUNTERPOINT

Topic: MS Workers Compensation Law Changes

Used with permission from the Summer 2012 issues of "Our Work and Our Clients", a publication of the Mississippi Bar Workers Compensation Section.

A View from Claimant's Counsel

By Jason Pollan, Pollan Dobbs, PLLC.

2012 Legislative Changes to MS Workers' Compensation Law

The law affecting nearly every single worker in the state was changed this year after a long, desperate fight in the legislature. The changes were pushed through on razor thin margins after ignoring all requests for more considered deliberation. A premium was placed on rushing the job without input from the legal community in an effort to preserve a constantly shifting voting majority. The work was sloppy, sadly ignorant of the actual problems (for both sides) in the Workers' Compensation system, and has simplified the process of diminishing the rights of the Mississippi worker. I cannot address all portions of the legislation here, but let's review a few glaring portions of the new law:

Drug/Alcohol presumption: For years Mississippi has denied workers' compensation to workers whose injuries were directly related to the use of drugs/alcohol. The law drew a simple line to deny injuries incurred because of intoxication or incapacitation. Now, if a worker is found to have drugs or alcohol in their system, this is deemed to be automatic proof that the drugs/alcohol in the system was the proximate cause of the injury and no coverage need be given. This ignores the basic science of drug testing. It assumes that drugs—which can remain in the system for days and weeks—are now somehow magically known to have caused any subsequent, particular injury in question. The vague construction of the law appears to apply the new rules even when the drug/alcohol testing comes days or weeks post injury. The rule

takes a Kafka-esque turn by forcing a claimant to rebut these assumptions only if they can prove the found substances were not the cause of the injury—effectively forcing one to prove a negative. There is no interest in denying coverage due to reckless behavior in this new language. It simply supplies another means for the employer/carrier to deny proper claims. Previously they were required to show factual causation and now evidence is contrived by the legislature. And what of a carrier who wantonly denies coverage due to a sham positive test? What of an employer who purposefully slanders a worker with false drug claims in order to wrongfully deny protections under state law? This legislation protects those willful acts by denying a cause of action for defamation, libel, slander or damage to reputation. Despite claimed attempts to make the changes to the act appear fair and impartial, we have nothing of the sort. The paltry increases to the disfigurement, death, and vocational assistance benefits, while allowing the specific exclusion of claims for defamation is quite telling, as to the true motivations.

Apportionment for pre-existing conditions when they are not occupationally disabling: This is a clear attempt to negate case law and limit carrier responsibility under the act. There is a justified argument for apportionment for pre-existing injuries under the act. Unfortunately, this doesn't ask for simple apportionment to apply. It demands apportionment discounts for employer/carriers when pre-existing ailments or injuries (work related or not) have been shown to have no role in making a worker occupationally disabled. This is an attempt to openly credit one side for previous injuries that are admitted as having no effect on occupational disability. It is a one-way discount system created to ignore fact and a worker's ability to continue a productive life in order to distribute otherwise unjustifiable discounts in claim valuation.

Medical proof/causation required before filing a Petition to Controvert: This is perhaps the most cynical of the new rules, if not the most troublesome. A worker would be denied access to the Mississippi Workers' Compensation Commission without medical documentation showing his/her injury is work related. Such a petition is the only means to bring a controversy before the courts. When an employer/carrier refuses to pay for the most basic medical attention in a proper claim, it has a new protection for this sort of action. The worker is barred from the courthouse door without records from the very care being denied contrary to the law. We see medical providers having to shift expenses for the care of those who cannot pay.

Time and again, the theme is the same here. Employer/carriers are given an easier path when denying proper claims and no such interest is paid in the protection of workers. The law has created needless new requirements for litigation and places health care providers, as well as Medicaid/Medicare, in the position of treating more uninsured patients.

I contend that these laws do not actually solve the problems they purport to address. That does not mean we have no problems or that we need not find compromises. I admit the assertions above and the notion of fair and impartial construction of the act are debatable. During the fight over this

bill, there was near universal support for full legislative review and hearings concerning the workers' compensation law in Mississippi in lieu of a flawed, rushed bill. Despite my own repeated requests, not a single member of the MS Bar's Workers' Comp section told me they preferred the less measured approach. During the numerous discussions with all parties interested in the comp system, the direction became clear. Even management with carriers in our state openly asserted this law will simplify the denial of proper claims.

Our system already offers the least in worker compensation compared to the other 49 states as well as Puerto Rico & Washington D.C. However, no substantial benefits increase was detailed in any version of the bill in this past legislative session. We needed a legitimate, rational look at our Workers' Compensation laws and we have instead created more cracks in our system. The workers of Mississippi deserve better.

About the Author: Jason Pollan is a partner in the firm Pollan Dobbs, PLLC. The firm handles claims for injured workers via offices in Jackson, New Orleans, & Memphis. He is licensed in Mississippi.

A View from the Employer/Carrier's Counsel

By James M. Anderson, Anderson, Crawley & Burke, PLLC

A Perspective on the 2012 Workers' Compensation Amendments

Governor Bryant has signed into law revisions to the Mississippi Workers' Compensation law from the 2012 legislative session. Spokespersons for the business community tout those changes as being for the betterment of the workers' compensation system, but many workers' compensation professionals have expressed concerns with that conclusion.

Some practitioners have urged that the bill "goes too far" in favor of the Employer/Carrier, but I suggest that the legislation was, for the most part, focused on the wrong things. My prediction is that most of the changes will prove to be insignificant while others will lead to additional litigation to find out if they will survive constitutional scrutiny. Still others could prove to have unintended consequences that, in my opinion, are not in the best interests of a viable workers' compensation system.

Space will not permit an analysis of every change in the bill, so this presentation is only going to focus on a few of the concepts covered by the bill and offer other issues to be considered. The cornerstone amendment of the new law attempts to eliminate liberal construction of the workers' compensation law in favor of the claimant and the abrogation of all case law requiring fulfillment of the beneficent purposes of the Act. In so doing, Mississippi joins a handful of states who have redefined their workers' compensation laws

in an effort to create a level playing field. By my count, about ten states so far have passed legislation taking their systems in this direction.

Workers' compensation was a compromise: in exchange for employers not being sued for every workplace injury, employees injured in work-related accidents were given a right to recover limited income protection benefits and medical services to aid their recovery. Interpretations regarding the workers' compensation systems across the country are replete with mandates concluding that the humanitarian objectives of workers' compensation laws are not to be defeated on technicalities or by putting form over substance.

Every defense attorney can provide anecdotal evidence illustrating decisions where employers and carriers have suffered gravely at the hands of a "liberal interpretation gone amok". Clearly, the liberality of the system has been abused by some jurists in permitting awards where "liberal construction" is the only basis for the decision in favor of the employee. This change, however, attacks every claim existing within the workers' compensation system, and not just those examples of overreaching.

Some counter that argument with "so what", and this is the root of my concern: we have begun to see increasing examples where the "exclusive remedy" provision of the workers' compensation law designed to protect employers is being abrogated on new and novel theories. The exclusive remedy protection of an employer under a workers' compensation system is its most valuable asset in the system. Will this change be interpreted in such a way as to foster increasing attacks on exclusive remedy which will in turn hasten the demise of a viable workers' compensation system? I do not know, but I would not have made this change in the law without also considering the unintended possibility that it will cause more efforts to erode exclusive remedy, and I would have encouraged including provisions to strengthen exclusive remedy.

The changes involving the intoxication defense are an attempt to give a legitimate life to the statutory defense. Over the years, judicial decisions have gone overboard in trying to find ways to defeat the defense. Philosophically, irresponsible claimants who get injured because of alcohol, illegal drugs, or improper use of prescription drugs should not get paid. Whether this approach to dealing with those cases is the right direction remains to be seen, and I foresee significant litigation dealing with the application of the new law and have some concerns that it will survive a constitutional challenge.

Benefit changes in the law were appropriate and appreciated. They were argued by proponents as the trade-off for the more dramatic changes urged by the legislation. Those changes were long overdue, but the number of cases affected by the changes is probably less than 1% of all the claims filed.

The legislation did not focus on the big cost drivers in the system. The biggest single threat to the viability of the Mississippi Workers' Compensation system is the judicially created cause of action for "bad

faith" claims handling. Parties can and do disagree as to appropriate benefits to be paid in given circumstances, but bad faith threats often strip the employer/carrier of an opportunity to pursue defenses, the result of which is a chilling effect on the entire claims process. The legislation does not attempt to address that problem at all. Admittedly there are problems with claims handling by some companies that should be addressed. Some claims professionals do not understand the concept of being a competent, rational, objective professional, and mistakes made by those require a course correction. We can and should address and fix this problem for the benefit of the system as a whole.

The largest expense seen in claims today concerns pain medication and procedures and no effort was made to tackle that problem. That oversight leaves everyone wallowing in misery, and a genuine effort to address those problems is long overdue.

A healthy workers' compensation system is in the best interests of everyone in the State. Employers need to know that the system is stable and that they can realistically evaluate and manage the cost of the system. Injured workers are entitled to reasonable compensation for legitimate injuries. With informed dialogue and appropriate consideration of the issues, the workers' compensation system can continue to improve for the benefit of everyone. I think that the trigger was pulled before the aiming was completed in this legislation, and I hope that further opportunities for dialogue and healthy debate will foster additional opportunities to improve the system.

About the Author: Jim Anderson is the Managing Member of Anderson Crawley & Burke, PLLC, a firm representing businesses, the insurance community, and governmental entities throughout Mississippi. He has been Chairman of the Mississippi Workers' Compensation Educational Association's Annual Conference since 2008 and has participated throughout his career as an educator and reform advocate for workers' compensation. He was honored earlier this year by being named the *2012 Lawyer of the Year* by The Best Lawyers in America in the field of Workers' Compensation—Employers, in the Jackson, Mississippi area.

President's Column (continued from Page 1)

law schools. It is a critical investment in the future of our profession and, most importantly, in the lives of new law students who will be a part of that future. Beginning a mentoring dialogue early helps build a solid foundation for high standards of professional service and conduct toward clients and fellow lawyers.

In order to foster a continuous and formal dialogue with law students, CABA has created a non-voting Law Student Representative on the CABA board. The position will create opportunities for direct communication between a law student representative and CABA leadership. CABA's first Law Student Representative for 2012-13 is Wesley Webb, a 3L at Mississippi College School of Law. We look forward to increased communication that will allow CABA to expand its mentoring and working relationships with law students. If you have ideas and an interest in participating in this initiative please let us know.

Finally, please mark your calendar and plan to attend a one-hour ethics CLE starting at 11:30 at the Capital Club on August 21st. The CLE is offered free to CABA members and is entitled ***Your Brother's Keeper***. Our speakers, Chip Glaze and Adam Kilgore (respectively, the Director of Lawyers and Judge Assistance Program and General Counsel of the Mississippi Bar) will address professional responsibility and personal impairment issues. Awareness and intervention both help to avoid or mitigate the effects of malpractice claims, suspension of a law partner, or the loss of a friend or colleague. Warning signs tragically are more frequently noticed after the fact. But if we're alert and know what to look for, we might not only avoid loss of productivity or preserve a reputation, but we may also save a life.

Third, as always there are many opportunities to stay involved. Whether you're interested in public service, pro bono or in other CABA committees, take a look at the list of CABA committees to the right or review CABA's interactive Committee Page. On this new committee page, each committee is listed along with a description of its mission. CABA committee leaders have been making plans for the 2012-13 year. If you're not already a committee member (or aren't sure) let me encourage you to email a committee chair and start today. Photos and contact information for each committee leader are also provided on the committee page to help members keep in touch with committee leaders.

In closing, this fall will mark the 50th anniversary of the historic admission of James Meredith to the University of Mississippi. It was and remains a pivotal event in history. We're grateful that two CABA members have shared personal reflections in this issue of the Newsletter. The articles by John Corlew (p 17) and former Mississippi Supreme Court Justice James Robertson (p 19) offer two unique and valuable perspectives on the events surrounding those years.

James Meredith's admission to school is a history of courage—his as well as judges,[1] lawyers and others involved. Another well-documented account of this history is contained in *Unlikely Heroes* by Jack Bass.

As we mark this anniversary, it is a history to reflect on. In his foreword to Erle Johnson's *Mississippi's Defiant Years*, Governor William Winter summarized it well: This history "is a sometimes depressing often disturbing, but factual account of an era that thankfully has been laid to rest, but should not be forgotten. For it is only by remembering what has gone before that we are able to understand and appreciate where and who we are."

1. *See e.g., James H. Meredith v. Charles Dickson Fair, President of the Board of Trustees*, 298 F. 2d 696 (5th Cir. 1962).

2012 Committee List

- Bench Bar Relations
- Diversity in the Profession
- Annual Judge's Banquet
- Golf Tournament
- Tennis Tournament
- Law Related Education
- Membership
- Newsletter/Editorial Board
- Library
- Community Outreach
- Communications
- Programming
- Social
- Womens Initiatives
- Pro Bono
- Solo and Small Firm

What Every Lawyer Should Know About the Affordable Care Act

By R. Pepper Crutcher, Jr.

It's November 2013 and you have several domestic relations clients. Back in 2011, a court ordered your client's former husband to elect family coverage under his employer's insurance plan and to pay the required premiums. Due to cost increases attributed to the Affordable Care Act, his employer has terminated its plan, electing instead to pay the cheaper, "shared responsibility cost" when its full-time employees seek federally-subsidized coverage through the state's exchange. However, the state has abandoned its efforts to create that exchange. And, despite having had a bad year, the former spouse can't enroll in Medicaid because the state has not elected to expand Medicaid coverage to those who earn less than 133% of the federal poverty level. Your client expects you to fix this.

Do you still consider the Affordable Care Act to be a ball of confusion that's (thankfully) not your problem? The ACA is a metastatic law. It will insinuate itself into many practice areas and cause substantial difficulties for those who are unprepared. Absent a historic political upheaval in November, it's not going away any time soon. Each of us must study the ACA and anticipate the issues for our clients or we must expect some day to be embarrassed by our failure to do so.

Here is a list of suggested study topics for Mississippi lawyers who do not primarily represent the ACA's primary targets – health care providers, health insurers, drug and medical device manufacturers and employer health insurance sponsors.

- What should a domestic relations lawyer do to require, to the extent possible, a client's former spouse to obtain federally-subsidized family coverage through a state-run exchange?
- How will the ACA affect personal injury settlements and the taxation of settlement payments? The web sites of the Academy of Special Needs Planners (http://www.specialneedsplanners.com) (membership required) and the National Academy of Elder Law Attorneys (www.naela.org) (membership required to access resources) have been covering this issue.
- What role will the ACA's Elder Justice Act (§ 6703) play in tort suits brought against nursing homes?
- Is the ACA's increased child adoption tax credit (§ 10909) a material incentive for your client?
- How will the ACA affect wealth management, estate plans and estate planning?
- How will the ACA affect business sales, corporate merger and acquisition agreements and related due diligence investigations?
- What will be the bankruptcy priority of the individual mandate enforcement "penalty" and the employer "shared responsibility cost"?
- Will the new financial burdens imposed on borrowers, coupled with the bankruptcy priority of those debts, affect lending decisions?
- Can separately owned and incorporated small businesses – for example, fast food restaurants – continue to share common back office support functions without being treated as a single "large employer" obligated to offer affordable, qualifying coverage? See ACA § 1513.

When Colonel Sanders was asked – so goes the joke – why the chicken crossed the road, he answered, "I missed one?" You'll think of that joke as you search the U.S. Code for scattered parts of the ACA's complete, labyrinthine text, found in Public Laws 111-148 and 111-152. Have your cross-reference table close at hand, because the Public Law sections are spread across Titles 16, 17, 18, 19, 20, 21, 25, 26, 28, 29, 31, 35, 36, 42 (especially), and 47. The substance of most eventual regulations will be announced first on the web site of the IRS (www.irs.gov/newsroom) ("Affordable Care Act Tax Provisions") or the HHS (www.hhs.gov/regulations), before being published in the Federal Register (www.federalregister.gov) in official form (www.gpoaccess.gov/fr).

Health Care Politics

By Jere Nash

Some weeks after we've all had a chance to reflect on the U.S. Supreme Court's decision to uphold President Obama's healthcare reform, the Affordable Care Act ("ACA"), I've concluded that our side is barely hanging on. From a public policy perspective, the Supreme Court reaffirmed the authority of Congress, albeit tenuous, to tackle complex problems of a national scope. While that's a good thing for 21st century America, having to depend on John Roberts for the fifth vote doesn't exactly leave me feeling sanguine about our future.

From a political perspective, the Supreme Court kicked the ball back to the politicians, creating opportunities and pitfalls for Barack Obama and Mitt Romney as well as most of the down ballot incumbents and challengers this election cycle. And that doesn't give me warm and fuzzy feelings either, seeing how Democrats have failed miserably at defending the ACA and promoting the good that the legislation will engender. They've ceded the issue to the Republicans for far too long, so perhaps John Roberts has, inadvertently, given them a reason to take the offensive.

For Mississippians, the decision of the Supreme Court means we will continue benefiting from the general provisions of the health care reform legislation – allowing young adults to remain on their parents' health care plans, prohibiting denial of coverage for pre-existing conditions, removing lifetime limits from insurance plans, stopping insurance companies from rescinding coverage, and many others.

That being said, and leaving aside a discussion of whether the Obama or Romney campaigns will effectively respond to the political implications of the decision, the big news in our state is the Supreme Court has effectively drawn one of those proverbial lines-in-the-sand of Mississippi politics, akin to the vote in 1982 on education reform or in 1987 on the four-lane highway program or in 1997 on the Adequate Education Program. The issue: whether to dramatically expand Mississippi's Medicaid insurance program, as authorized by the new law. By barring the federal government from withholding all of a state's Medicaid funding if that state opts not to participate fully in the Medicaid expansion requirements, the Court left intact the carrot of full funding for the first few years of the law's implementation, but removed the stick should a state rebel. For the hundreds of thousands of Mississippians who are now without health insurance, but who would be covered by full implementation of the ACA, the decision on their futures now rests with the Mississippi Legislature when it convenes in January. It is a vote that will have repercussions for many, many years to come.

The irony? Virtually all of the public officials who will be choosing which side of the line-in-the-sand to cast their vote enjoy comprehensive health insurance courtesy of the taxpayers of Mississippi.

THE DIRTY LITTLE SECRETS OF "AMERICAN EXCEPTIONALISM"

Well, here we are just a scant few months away from yet another federal election. The electorate, which is comprised of an embarrassing minority of Americans who even bother to vote, will choose the President of the United States, all members of the House of Representatives and a third of the U.S. Senate. The biggest winners of all will be media outlets who will be selling unprecedented billions of dollars of political ads. Talk about job creation! For this we can thank a bare majority of the Supreme Court for the *Citizens United* opinion, which legalized political propaganda campaigns on an unprecedented scale by faceless elites to promote their self-serving agendas. Those agendas will be molded into federal law by battalions of bought-and-paid-for politicians posing as our *leaders* who will be *elected or reelected* to office, most of whom will be incumbents. This is the case despite an all time low public approval rate of Congress which stands at 17%. The other primary beneficiaries will be well heeled special interests who will unleash their armies of lobbyists on our *political leaders*. Think the Koch Brothers, casino mogul Sheldon Adelson and other billionaires seeking special favors. Oh, and the losers…the working poor, the ever shrinking middle class of America and those under 30 who are poised to reap the catastrophic consequences of credit card government that lie just ahead.

Too harsh? If you haven't done so already, take a look at the *60 Minutes* Jack Abramoff interview that originally aired on CBS in 2011 and was rebroadcast in July of 2012. Jack, fresh from three plus years in federal prison on corruption charges and now protected by double jeopardy, freely told the program that he controlled some 100 Congressional Offices and their staffs with favors such as a million dollars a year in sporting event and concert tickets and the standing lure of a career in his firm as a six figure plus lobbyist for congressional staffers that played ball for his clients. One of these congressional offices was that of powerful Ohio Republican Congressman Jack Ney, who was one of the very few office holders prosecuted and sent to prison for corruption. And since political corruption is an equal opportunity vice, just about every former Democratic Illinois Governor in memory seems to wind up behind bars for selling out their office. That said, I wonder who else on Abramoff's Top 100 was able to escape prosecution to continue the lucrative practice of doing the bidding of their corporate sponsors. And so you ask, what is your point? Just that this is one of the hundreds or even thousands of dirty little secrets of so-called American Exceptionalism that the

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2012 HOLIDAY HOURS

September (1st Monday)	Labor Day
November 12	Armistice / Veteran's Day
November	Thanksgiving Day
December 25	Christmas Day

* The date of Thanksgiving is fixed by proclamation by the Governor and shall be fixed to correspond to the date proclaimed by the President of the United States. The Governor, at his discretion, designates any additional day(s) for further observance of the Thanksgiving Season by the same proclamation.

** In addition to Christmas Day, any day(s) designated, at the Governor's discretion, for the observance of the Christmas Season are fixed by proclamation by the Governor.

shills of the power elites trumpet repeatedly from every forum, from cable news shows to the internet, while conveniently ignoring reality. And if you dare to differ with them, you are labeled unpatriotic, un-American… Un, you name it. Well, if that be the case, please add Captain Equity's name to the Un list. (Most who chronically disagree with me already have).

> *"Where to start? How about a 15 trillion dollar debt that will never be paid off?"*

With that preamble out of the way, I hasten to add that there is indeed much substance to the concept of American Exceptionalism. Compared with much of the rest of the world, we have indeed achieved a great deal of which to be proud since our founding in the late Eighteenth Century. However, the moral authority, ingenuity and collective sacrifice that made the United States a unique entity for good in the history of the world is increasingly being put at risk by a new "business as usual" model of greed, corruption, arrogance and callousness that in past decades has been reserved for the Soviet Union, Maoist China and the Axis powers of World War Two. Today, it is the power elites in Syria, Egypt, Iran, North Korea and yes, parts of post-Maoist China and post-Stalinist Russia that exercises power over the many for the narrow interests of the few.

Just A Few Dirty Little Secrets

Where to start? How about a 15 trillion dollar debt that will never be paid off? All it will take is a dramatic increase in interest rates, a bout of hyperinflation circa the late 1970s or both to trigger default. So what do our leaders do? More tax cuts, more spending programs and more denial.

Another dirty little secret pits basic morality and protection of the defenseless against power, money and position. The latest incarnation features those in power at Penn State University who looked the other way while Jerry Sandusky molested troubled boys at will at the Penn State football complex for at least 14 years. And while this story has captured the headlines this past summer, the ongoing saga of the Catholic Church's hierarchy to protect pedophile priests is exponentially more stunning. For many Catholics and many more non-Catholics, the Church has irrevocably squandered its moral authority. I really don't need to hear about the infinite ways my soul will be consigned to hell from these folks. To make matters worse, it has been going on since I was old enough to know how to spell Pope. The only saving grace for American Exceptionalism is that this seems to be a world-wide phenomenon, but that doesn't excuse the American Catholic hierarchy from purposefully looking the other way.

Then there is the voter suppression movement, which is defined as the solution to a problem that simply does not exist. This may come as a shock, but there are poor and elderly citizens throughout America that do not possess a government issued photo ID card. The right wing architects of voter suppression know this. They also know that there is no evidence of any widespread or even random voter fraud, but they don't care as long as the outcome of close elections can be controlled by selective disenfranchisement. Think poll taxes, unevenly applied literacy tests, etc. In a word, it is a shameless tactic of the political right that originally prompted Civil Rights era measures such as the Voting Rights Act. Do we really need to go back to the bad old days of the 50's and 60's? Some of yesterday's Dixiecrats now posing as flag waving Republicans apparently think so.

The next dirty little secret involves the Founding Fathers of America and it is not because ownership of other human beings was a basic non-issue back in the late Eighteenth Century. We all know that the wisdom of the Founding Fathers is an enduring tenet of American Exceptionalism. I acknowledge that their admiration is generally well placed. Nonetheless, it is uncontroverted that the architects of America adopted the fundamental precept of separation of church and state to avoid replication of centuries of the abuse of power experienced in Europe. Notwithstanding every public display of emotion by our U.S. flag lapel pin wearing elected officials, the dirty little secret is that exactly the opposite is playing out here in Mississippi and across America regarding the issue of abortion on which reasonable persons can and do disagree. Our very own Governor and his nearly all male Republican fellow zealots (and I do use "fellow" in the most male sense of the term) have spent an inordinate amount of taxpayer compensated time to craft an intricate and technical state statute to end abortion in Mississippi. Never mind the settled constitutional right of privacy guaranteed by *Roe v. Wade*. The predicate for the law specifically designed to shutter Mississippi's only remaining abortion clinic is the divinely inspired fact that only the governor and his self appointed male Illuminate know just what is best for women despite never having faced the very personal, heart rending, life altering dilemma of how to proceed with an unwanted pregnancy. To them, every fetus is precious and sacred, until of course it is born. At that point mother and child are totally on their own thanks to the GOP caucus's opposition to Medicaid, et al. The good news is that as long as you acknowledge that the governor and friends are truly superior beings tasked by God to micromanage every aspect of a woman's personal life, our liberty is guaranteed and American Exceptionalism is enhanced. Gosh, I never thought I would miss Haley this much.

But the dirty little secrets of 21st Century America are indeed equal opportunity in nature. Take college students for instance. In the old days, students graduated from college in four years. Today, for those who graduate at all it now takes five, six or even seven years to do it all financed by student loans that not only pay for tuition, but for

an off campus apartment with a pool, and $5 cups of Starbucks coffee as well. Fortunately, mediocre students with affluent parents can always move back in with them to delay real life for an indeterminate period of time. Those not so fortunate may or may not even graduate high school. For them the prospects are even dimmer. In an affluent country of 300 million plus people, it is a disgrace that 46.4 million are SNAP (Supplemental Nutritional Aid Program aka Food Stamp) recipients. Many of these people are the working poor. Many others don't own an alarm clock and prefer the alternative of drinking beer mid-morning to getting a job. Even as the young and irresponsible mature, they discover that their lack of education and skills and poor decision making has consigned them to a life of poverty and dependence as life's doors close on them. This is in large part due to the fact that single mothers, many of them teens, are giving birth to an increasing number of out of wedlock children. Here are some troubling statistics that go a long way to helping understanding the reality of poverty in America. In the United States 41% of all births today are to single mothers. This number rises to 71% for African Americans. Mississippi leads the U.S. in births to single mothers at 59%. Teenagers from even the best two parent families (think Barack and Michelle Obama) can be a handful thanks to hormones, peer pressure and immaturity. What are the chances for those born into a world of perpetual irresponsibility? It eventually manifests into alcoholism, drugs, violence, crime, underemployment, unemployment and even homelessness. There is nothing exceptional about this.

Now for the ultimate dirty little secret, "I have only scratched the surface."

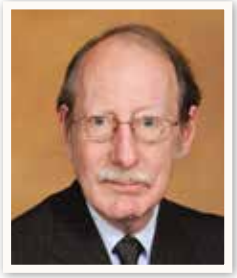
So, how can we restore and ensure the continuity of true American Exceptionalism? It is simple to state and much more difficult to realize. In essence, we all need to strive continually to overcome the downside of human nature and to build character and integrity in our institutions and ourselves. Simple terms like honesty, truth, sacrifice, concern for others and tolerance come to mind. We all must battle the very real temptations of selfishness, hatred, arrogance and hypocrisy. My favorite aphorism on this subject goes back to my Torts Professor at Ole Miss Law School, Robert Khayat, who told me long ago. "True Ethical Conduct Is Defined As What You Do When Nobody Is Looking." Do that and American Exceptionalism will take care of itself.

JOEL HOWELL

On Computing

Focused on the Contemporary Lawyer

Demystifying the "Cloud"



Lots of folks ask about "The Cloud." This is a short attempt to demystify a relatively new dimension of computing that's here to stay.

Wikipedia says "[t]he name comes from the use of clouds as an abstraction for the complex infrastructure it contains in system diagrams." (Huh?) You don't need a "system diagram" to know that what the "cloud" means is, with internet access from a very basic computer, or even terminal, you can do anything the baddest computer you know of can, anywhere, and share it with others. Consider this an analogy to the internet used as a telephone and computer network.

An understanding of service models helps to explain this. From basic to the most complex, these are IaaS (Infrastructure as a Service), PaaS (Platform as a Service), and SaaS (Software as a Service), all of which interact with Cloud Clients.

A Cloud Client can be as simple as a web browser or as complex as a mainframe. The important concept is that it is the AClient@ who accesses the desired service model.

IaaS allows a Client, which can be anything from an individual to all users in an organization, to access a system on a pay as you go basis. PaaS allows a Client to access a full computing platform without a costly investment in hardware and software. SaaS allows a Client to access application software from a cloud provider, eliminating the need for system administration over all users in the Client organization. Thus, "Cloud" means access to computing capability and storage which are not on the "Client."

All this is easier to understand in practice. You very likely use cloud based services already, for example, email (Gmail, Google, you name it). Google not only provides email, but it offers free online storage. Google Drive (drive.google.com) offers 5GB of free storage, which works in conjunction with Google Docs -- more on that in a bit.

There are many variations on this theme. Google Drive allocates a space on Google's servers personal to you, which you can share with others or access from your computer, smartphone, or tablet. Google Docs, a free competitor with Microsoft Office, will let you create and edit documents or any other program generated output online. On your computer, for example, you can install Google Drive (PC or Mac version), which creates a folder that syncs with Google Drive in the cloud, allowing you and all authorized users to access the most current version of whatever you're working on.

An additional example is DropBox (dropbox.com). DropBox

Continued on Page 18 …

MISSISSIPPI COLLEGE LAW LIBRARY HOURS

FALL 2012: AUGUST 15 – DECEMBER 19

Monday – Thursday	7:30 a.m. – midnight
Friday	7:30 a.m. – 9:00 p.m.
Saturday	9:00 a.m. – 9:00 p.m.
Sunday	Noon – midnight

EXCEPTIONS

LABOR DAY HOLIDAY: AUGUST 31 – SEPTEMBER 3

Friday (Aug. 31st)	7:30 a.m. – 5:00 p.m.
Saturday & Sunday (Sep. 1st and 2nd)	CLOSED
Monday (Sep. 3rd)	9:00 a.m. – 5:00 p.m.

THANKSGIVING HOLIDAY: NOVEMBER 16 – NOVEMBER 25

Friday (Nov. 16th)	7:30 a.m. – 5:00 p.m.
Saturday & Sunday (Nov. 17th & 18th)	CLOSED
Monday – Wednesday (Nov. 19th – 21st)	7:30 a.m. – 5:00 p.m.
Thursday – Sunday (Nov. 22nd – 25th)	CLOSED

EXAM SCHEDULE: DECEMBER 2 – DECEMBER 12

Monday – Friday	7:30 a.m. – midnight
Saturday	9:00 a.m. – midnight
Sunday	noon – midnight

DECEMBER 13 – DECEMBER 19

Thursday – Friday (Dec. 13th – 14th)	7:30 a.m. – 5:00 p.m.
Saturday & Sunday (Dec. 15th – 16th)	CLOSED
Monday – Wednesday (Dec. 17th – 19th)	7:30 a.m. – 5:00 p.m.

Hours subject to change without notice.
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Reflections on my Interview with James Meredith

By John Corlew

In the June 2012 issue of the Capital Area Bar Association newsletter, John Hengan reviewed a book written by Charles W. Eagles, The Price of Defiance-James Meredith and the Integration of Ole Miss. Professor Eagles made reference to an interview I did of Meredith when we were both students at Ole Miss.

Henegan wanted me to write an article for the CABA newsletter about that interview. I searched and found it – it was not a great interview. In fact, Meredith commented that "this is kind of a strange interview." It appeared in the Ole Miss student newspaper, *The Daily Mississippian*, on May 10, 1963, close to the end of Meredith's second semester at Ole Miss. I was a naive 19-year old journalism student. Meredith was an Air Force veteran in his mid to late 20's who had survived a year of hell as the first African-American to attend the University of Mississippi.

Meredith's enrollment and attendance at Ole Miss had set off a riot that left two persons dead and resulted in a military occupation of the campus. The enrollment came only after protracted federal court proceedings and a Fifth Circuit Court of Appeals order directing Meredith's admission that found "from the moment the defendants discovered that Meredith was a Negro, they engaged in a carefully calculated campaign of delay, harassment and inactivity."[1] The defendants included university administrators, state officials, and the Board of Trustees of the State Institutions of Higher Learning, better known as the college board.

The pre-enrollment harassment by state and university officials was continued by students after Meredith arrived on campus. Among other incidents, cherry bombs were sling-shotted at his dormitory room and students formed a line at the dormitory water cooler to keep him from getting a drink. The emotional toll of that treatment

had to be enormous. Although Meredith was accompanied on campus and protected by federal marshals, given the riot and the hatred with which his enrollment was met, he had to be apprehensive about his safety.

But none of that was displayed in the 1962 interview. The first paragraph related:

> *A sometimes serious, sometimes nonchalant —but always quietly confident James Meredith answered questions and offered comments in his dormitory room Wednesday afternoon.*

Meredith was unflappable. Before I could get going with questions, he said "I didn't think the campus senate would allow you to do this." He referred to the censure by the campus senate of then *Daily Mississippian* Editor Sidna Brower for an editorial she wrote and published October 1, 1962 headlined "Violence Will Not Help." It urged students to "preserve peace and harmony" and avoid violence and bloodshed. Sidna was nominated for a Pulitzer Prize for her courage, but the censure by the campus senate criticized her for "failing in a time of grave crisis to respect and uphold the rights of fellow students." In 2002 – 40 years later – the campus senate rescinded the censure.

A couple of questions I asked Meredith were who he was supporting for governor ("let them fight it out") and did he have aspirations to run for governor ("Who do you think would vote for me?")

Meredith volunteered to a question I didn't ask:

> *"The real question is seldom, if ever crossed in this whole business," he said. "There's a lot of talk about soldiers and marshals being on campus – a lot of complaining. It's seldom discussed why they're here, and that is the real heart: why they're here."*
>
> *"And I think I should answer that question. The actual question, the issue faced here is basic to citizenship and that is whether or not citizens will be the recipients of the rights, privileges, and benefits of a citizen or will it continue to be a double standard —and that's what we have"*

James Meredith knocked down the double standard at Ole Miss – and at all institutions of higher learning in Mississippi. A monument was dedicated to him on the Ole Miss campus in 2006, presented by the president of the college board.

A sidepiece to the Meredith interview was an observation about the decor of Meredith's dormitory room. It was older men's dormitory issue except the chair I sat in for the interview. Meredith got it, as he said, at "Shine's." Shine Morgan owned a furniture store on the square in downtown Oxford and was a Ross Barnett-appointee to the state college board that resisted Meredith's entrance at Ole Miss.

A couple of postscripts to this

Sidna Brower was not the first editor of the *Daily Mississippian* to attract the ire of the campus senate over James Meredith and integration at Ole Miss. CABA member and former Supreme Court Justice Jimmy Robertson preceded Sidna as editor and wrote a front page story in 1962, "Meredith – the Man." He quoted persons who knew Meredith as "a quiet student with few outside interests" and his family as "good, solid, substantial citizens" of Attala County. A campus senate resolution sought to reprimand Robertson for his article (and other editorial misdeeds), but succeeded only in passing a measure that

stated it was "not in complete agreement" with his policies. Earlier – in 1950 – Mississippian editor Albin Krebs, uncle of Pascagoula Circuit Judge Robert P. Krebs, – editorized in favor of entry of African-Americans into the Ole Miss Law School and other professional schools. A recall petition was presented to the campus senate, but student leaders, including student body president Maurice Dantin of Columbia, defeated the attempt to adopt a recall petition.

The Fifth Circuit decision put the handwriting on the wall for Mississippi Governor Ross Barnett and the college board. But Barnett wanted to continue to maintain a public persona of "standing in the schoolhouse door" to block Meredith's entry at Ole Miss. This led to a series of secret negotiations between Barnett and United States Attorney General Robert Kennedy about how Meredith would be escorted onto campus. Barnett wanted a "show of force" by federal marshals, at times insisting to Kennedy that the marshals draw their guns. These shenanigans were generally unknown to the public. But in 1966, CABA member and United States Bankruptcy Judge Edward Ellington – then chairman of the Ole Miss Law School Speakers' Bureau – invited Attorney General Kennedy to speak on campus. University officials opposed the invitation and tried to have it retracted. Ellington ignored them and Kennedy spoke to a packed audience on the Ole Miss campus in March 1966. He described in detail the hypocritical positions of Mississippi public officials during the Meredith matter. It was the most electrifying public presentation I have ever witnessed. Most memorable was how Kennedy opened his talk and broke the ice with an audience sitting on egg shells. He said that most of you have heard about the fox getting into the chicken house – "I feel like the chicken in the fox house."

1. *James H. Meredith v. Charles Dickson Fair, President of the Board of Trustees*, 305 F.2d 343, 344 (5th Cir. 1962).

On Computing (continued from Page 16)

eliminates the need for an organization sharing documents by repetitive emails with redundant attachments. This makes it much easier for multiple people to access the most recent versions of large documents.

FileBoard (fileboard.com) integrates DropBox and Gmail accounts, so you can write emails in Gmail and attach documents stored in a DropBox folder.

Box (box.com) lets you share files, track versions, and comment on documents.

Sugar Sync (sugarsync.com) is compatible with numerous mobile operating systems (iOS, Android, Symbian, Windows Mobile, BlackBerry, Kindle) and lets you store, share, sync, and back up folders from the Cloud to your PC or device.

Find this (somewhat) demystifying? Cloud usage will become increasingly prevalent, especially with the proliferation of smart phones and tablets. Questions or comments? Drop me an email: jwh3@mindspring.com.

Of September 30, 1962 & 2012

By James L. Robertson[1]

On anniversaries we reflect, about meanings and mistakes, hopes and hurts.

My reflections on James Meredith's enrollment at Ole Miss began a year early. On its 49th anniversary, I went back to Ole Miss to commemorate with friends the life of the late Prof. James W. Silver, whose stubborn courage was so central to the birth pangs of that terrible time half a century ago. I sought signs of hope.

Then, as now, I wondered of the words of wiser men. A century ago, Yeats ominously observed,

> *Things fall apart, the centre cannot hold;*
> *…, and everywhere*
> *The ceremony of innocence is drowned;*
> *The best lack all conviction, while the worst*
> *Are full of passionate intensity.*[2]

And that,

> *They must to keep their certainty accuse*
> *All that are different of a base intent.*[3]

Holmes is my muse. About the time of Yeats, Holmes saw inside the minds of men.

> *If you have no doubt of your premises or your power and want a certain result with all your heart, you naturally express your wishes in a law, and sweep away all opposition. To allow opposition… seems to indicate that…you do not care wholeheartedly for the result, or that you doubt either your power or your premises.*[4]

These thoughts capture the core thinking of so many in my home state as I knew it in 1962. That much is clear. But are Yeats and Holmes hitting home of today's Mississippi?

Historical Perspective according to Faulkner And O'Neill

A year ago, I (re)read the first chapter of Jim Silver's Mississippi: The Closed Society (1964). Professional historian that he was, Silver paralleled the late 1950s leading to the integration of Ole Miss in September 1962 with the late 1850s leading to The War.

Circa 1961, many that I had grown up with and/or had come to know at Ole Miss, and who seemed otherwise sensible persons, thought the proper way to commemorate the Lost Cause was to secede again.

Faulkner died on July 6, 1962. Our reflections on the thought of our most literate Mississippian remain fresh.

On March 18, 2008, then candidate Barack Obama confronted history from a Faulknerian perspective, and reminded us of country lawyer philosopher Gavin Stevens' insight, **"The past is never dead. It's not even past."**[5]

I was in awe of Faulkner's 1949 Nobel Prize for Literature when I arrived at Ole Miss in the Fall of 1958, though at the time I had read only a few of his short stories. I learned that Faulkner was the second such American Nobel laureate, and I became curious about the first, Eugene O'Neill, particularly as I learned that many think O'Neill's best work was done after receiving his Nobel Prize in 1937.

In the Millennium Year 2000, I first saw O'Neill's last play staged and was struck by the words: **"There is no present or future, only the past, happening over and over again, now."**[6] This line that sounded so Faulknerian came from Jim Tyrone, the semi-autobiographical protagonist in O'Neill's last work, posthumously published.[7]

Where are we Fifty Years after September 30, 1962?

The lesson of 2011's state elections is that our politics is headed for re-segregation. Politically moderate Mississippians are as disenfranchised *de facto* as 50 years ago African Americans were disenfranchised *de jure*. A 40 year old William Winter (if we were lucky enough to have one) is utterly unelectable in Mississippi today and for the foreseeable future.

The State's political leaders are not going to implement the Affordable Care Act, and the Supreme Court's upholding it be damned. No matter that all the Act does is shift to all of our backs burdens and costs that have heretofore been borne exclusively by those least able to bear them — the poor and the uninsureds including a disproportionate number of minorities — to whom we so comfortably close our eyes.

Our leaders supported establishing a health care exchange as good public policy until the Tea Party crowd got the idea that this somehow signaled support for Obamacare. Do you "not care wholeheartedly for the result, or . . . [do] you doubt either your power or your premises"?

"They must to keep their certainty accuse all that are different of a base intent."

Our legislature has enacted that before a physician may perform an abortion, he or she must have staff privileges at a state accredited hospital. "Mississippi must be abortion free," though the State's lawyers go to court and say we're only trying to protect the health of pregnant women who have made the gut wrenching choice that they should exercise their rights under *Roe v. Wade*.

Sort of like 50 years ago's "Segregation now! Segregation forever!" with our Attorney General arguing that persons, going to court to secure their civil rights, for their own good should be required to have a lawyer licensed in Mississippi.

More and more public schools, once racially segregated by state law, are becoming all but re-segregated, and we are told *de facto* re-segregation is not only okay; it is a part of the natural order of society. No matter that it produces a racial isolation far more insidious and intractable than the *de jure* segregation

a half century ago.

For those of us who are now past 70, there is no escaping that the vitriol white Mississippi levels at Barack Obama is of the same genre — of the same passionate intensity — as that leveled against John Kennedy 50 years ago. I could go on.

Make no mistake about it. Any lawyer worth shooting can make the case that **"There is no present or future, only the past, happening over and over again, now." "The past is never dead. It's not even past."** And that, as Abraham Lincoln said simply, a month before issuing the Emancipation Proclamation, "Fellow Citizens, we cannot escape history." [8]

Words of Hope

But surely there is a way out. We must have hope, and, maybe more important, words.

"I decline to accept the end of man. . . . I believe that man will not merely endure; he will prevail. He is immortal, not because he alone among creatures has an inexhaustible voice, but because he has a soul, a spirit capable of compassion and sacrifice and endurance." [9]

Faulkner's poetry appeals. I accept it, not because I believe man is immortal and has a soul, but for the far more powerful reason that I have seen fellow flawed Mississippians act out compassion and sacrifice and endurance, again and again.

Still, this is not enough. We must have — and use — minds capable of thinking and a voice capable of talking and articulating reason. Enough of us enough of the time see that organized democratic society is not just about equal liberty and equality of opportunity, but of efficient distributive justice with a social safety net, though I cannot as I would wish say our quibbles are at the margins.

We can and at times do infuse this pragmatic elaboration of Faulkner's poetry with Learned Hand's words from the darkest of times.

> *The spirit of liberty is **the spirit which is not too sure that it is right**; the spirit of liberty is the spirit which seeks to understand the minds of…men and women;…which weighs their interest alongside its own without bias;…that remembers that not even a sparrow falls to earth unheeded.*[10]

Signs of Hope

I have long thought our history a lot of two steps forward, one step backwards. Of late, the pessimist within me fears it's been more like **five steps forward** and **four backwards**.

Still, on this sesquicentennial of the Civil War, no one is talking about seceding again — outside of Texas, that is. And maybe Alaska.

We all know many who are full of passionate intensity and determined to turn the clock back. But not completely.

The Governor of Mississippi opening the Mansion and hosting the Freedom Riders of 50 years ago really does **symbolize** substantive change for the better.

The Presidential Debate in the Fall of 2008 really does tell us we'll never again have speakers banned from our college campuses, the way the IHL Board of almost fifty years ago did so determinedly.

The greatest change is in the moments we see each day, where so many of different races and creeds have mundane daily interactions in friendship and mutual respect.

Hope is a Continuous Process of Becoming

Today, as 150 years ago and as fifty years ago, "the occasion is piled high with difficulty." [11] As always, we have no choice but "to wager our salvation upon some prophecy based on imperfect knowledge." [12]

We best honor the hopes and hurts of our September 30, 1962, by sharpening our practice of those Holmesian touchstones for the activity of life. Not only is it "required of a man that he should share the passion and action of his time at peril of being judged not to have lived," [13] but we should "recall what our country has done for each of us, and . . . ask ourselves what we can do for our country in return," [14] never forgetting the practical reality that opportunity is not a frequent visitor.

We have **endured** the Closed Society, and we are in the process of prevailing, five steps forward and **maybe only three steps backwards**. We will continue the process of becoming so long as there are a few much, much younger than me who will not only follow Holmes in "sounding a note of daring, hope and will," [15] but act out that note. And in a **spirit which is not too sure that it is right**.

For who among us knows just "what rough beast, its hour come round at last, slouches towards Bethlehem to be born." [16]

1. I had spent the 1961-62 academic year (my senior year at Ole Miss) as Editor of *The Daily Mississippian*, aware of the gathering storm. From time to time, the DM published stories covering various aspects of James Meredith's application for admission to the University of Mississippi and his suit in the federal courts thereafter. On September 30, 1962, I was 1500 miles away in Cambridge, Massachusetts, beginning my first year in law school. Suffice it to say that a first year law student does not need the sort of distractions I had in the ensuing months of the Fall of 1962.
2. "The Second Coming", W. B. Yeats, Collected Poems 184-85 (1956).
3. "The Leaders Of The Crowd," W. B. Yeats, Collected Poems 182 (1956).
4. *Abrams v. United States*, 250 U.S. 616, 630 (1919).
5. Requiem For A Nun, Act I, Scene iii, at 80.
6. "Moon For The Misbegotten," Act III, page 77. It was probably after the 1986 World Series that I first heard these words, as Bob Costas was offering perspective on the long suffering, pre-2004 Boston Red Sox.
7. I have stopped worrying about Faulkner and O'Neill saying the same thing, but I remain curious who said it first. And did the second to say it know what the first had said? O'Neill wrote "Moon" in the late 1940s, but it did not see the light of day until much later. Faulkner's "RFN" bears an original 1950 copyright.
8. Lincoln, Message to Congress, December 1, 1862.
9. William Faulkner, Nobel Prize acceptance address, December 10, 1950.
10. Learned Hand, "The Spirit Of Liberty Speech," delivered May 21, 1944, reproduced in The Spirit Of Liberty: Papers and Addresses of Learned Hand 144 (Dillard ed. 1959).
11. Lincoln, Message to Congress, December 1, 1862.
12. *Abrams v. United States*, 250 U.S. 616, 630 (1919).
13. Oliver Wendell Holmes, Jr., Address in Keene, N. H., on Memorial Day, 1884.
14. Oliver Wendell Holmes, Jr., Address in Keene, N. H., on Memorial Day, 1884.
15. Oliver Wendell Holmes, Jr., Address in Keene, N. H., on Memorial Day, 1884.
16. "The Second Coming", W. B. Yeats, Collected Poems 185 (1956).

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