

THE HOLY SHIELD: MISSISSIPPI'S SACRED RIGHTS OF SPEECH AND PRESS

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INTRODUCTION

Imbued with a holy protection in the Constitution of 1890, Mississippi's First Amendment clause invests all citizens with the "sacred" rights of freedom of speech and press. Yet these powerful rights are scarcely examined in our jurisprudence, barely reaching the Southern Reporter a half-dozen times in fifty years. Over time, the lofty language of our State's free speech clause has been inexpertly twinned with the federal Constitution's more minimal

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First Amendment guarantees. But like our State's expansive constitutional guarantee to be free from unlawful searches and seizures, our State's freedoms of speech and press are much broader than their federal counterparts.

This important distinction provides a new approach that would give citizens of this State two methods of attack or defense when their rights of speech or press are at issue—both the maximalist state right and the more modest federal right. Instead of seeking relief in federal court based upon federal law, Mississippians could invoke the theoretically broader rights they have under our state constitution. This modern approach would re-prioritize our state courts as a bastion of constitutional interpretation and open a new line of advocacy for those seeking protection of their freedoms.

I. A HOLY POWER

Mississippi adopted its fourth and current constitution on November 1, 1890. In its Bill of Rights, the framers declared, “The freedom of speech and of the press shall be held sacred . . .”¹ The framers repeated the lofty use of the word “sacred” not long after in the freedom of religion clause, writing that “the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred.”²

This distinctive language honoring our citizenry's speech echoed the language of our State's predecessor Constitution of 1868 to the word.³ It is a maximalist depiction of free speech—an affirmative declaration of powers held by the citizenry, not a restriction on interference, such as in the federal Constitution's First Amendment which merely prohibits certain limitations on speech.

The prior versions of Mississippi's free speech clause were less lofty. Under the founding Constitution of 1817 and its successor Constitution of 1832, speech was protected, but the protection was restrictive in nature.⁴ Three separate sections from

¹ MISS. CONST. of 1890, art. III, § 13.

² MISS. CONST. of 1890, art. III, § 18.

³ MISS. CONST. of 1868, art. I, § 4.

⁴ MISS. CONST. of 1832, art. I, §§ 5-7; MISS. CONST. of 1817, art. I, §§ 5-7.

the Mississippi Declaration of Rights in 1832 protected free speech:

Sect. 5. That no person shall be molested for his opinions on any subject whatever, nor suffer any civil or political incapacity, or acquire any civil or political advantage, in consequence of such opinions, except in cases provided for in this Constitution.

Sect. 6. Every citizen may freely speak, write, and publish his sentiments on all subjects; being responsible for the abuse of that liberty.

Sect. 7. No law shall ever be passed to curtail or restrain the liberty of speech, or of the press.⁵

Save for changes in commas or semi-colons, this language was adopted wholesale from the original Constitution of 1817.⁶

When broadening the language in the Constitution of 1868, as carried over in 1890, the drafters explicitly invested Mississippians with the power of free speech—not just the protective guard to be safe from governmental interference with speech. The transformation from the prior language from the Declaration of Rights’ use of “freedom of speech” into the holy realm is remarkable.

The word “sacred,” then as now, means “Holy,” or “pertaining to God or to his worship”—or perhaps most strikingly, “[p]roceeding from God and containing religious precepts.”⁷ This

⁵ MISS. CONST. of 1832, art. I, §§ 5-7.

⁶ MISS. CONST. of 1817, art. I, §§ 5-7.

⁷ The 1828 version of Webster’s Dictionary includes those notable phrases as definitions for “sacred.” See *Sacred*, WEBSTER’S DICTIONARY, <http://webstersdictionary1828.com/Dictionary/sacred> [https://perma.cc/GUZ5-DMFP] (last visited Aug. 25, 2025). Importantly, the modern incarnation of the dictionary still tracks that more ancient definition. See *Sacred*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sacred> [https://perma.cc/YCA3-V8TA] (last visited Aug. 25, 2025) (“worthy of religious veneration”). Similarly, the *Oxford English Dictionary* includes the following definitions: “Consecrated;” “esteemed especially dear or acceptable to a deity;” “Dedicated, set apart, exclusively appropriated to some person or some special purpose;” and “made holy by association with a god or other object of worship.” *Sacred*, OXFORD ENG. DICTIONARY (Dec. 2025), https://www.oed.com/dictionary/sacred_adj?tab=meaning_and_use&hide-all-quotations=true [https://perma.cc/E46A-FWXY].

reading is also confirmed by a larger review of the entire document from 1890. The preamble declares, “We, the people of Mississippi in Convention assembled, grateful to Almighty God, and invoking His blessing on our work, do ordain and establish this Constitution.”⁸ Mississippians are also guaranteed that “the free enjoyment of all religious sentiments and the different modes of worship shall be held sacred.”⁹

The right adopted in 1890 was much different than the otherwise mundane language used when founding Mississippi in 1817. Mississippi’s Constitution of 1890 actually *consecrates* our freedom of speech.¹⁰

II. FREE SPEECH CASES DECIDED BY THE MISSISSIPPI SUPREME COURT

Despite the holy description of free speech, cases opining on it from state courts have been rare. One case from 1941 took a philosophical view of speech.¹¹ Namely, that it did not itself arise from the Constitution: “In both the State and Federal Constitutions these rights are recognized as *pre-existing* and the provisions therein are against abridgment or restraint, even as

⁸ MISS. CONST. of 1890, pmbi.

⁹ MISS. CONST. of 1890, art. III, § 18.

¹⁰ The holy nature of the word “sacred” is reinforced when viewed in the *Journal of the Proceedings of the Constitutional Convention*, published three years later in 1871. See STATE OF MISS., JOURNAL OF THE PROCEEDINGS IN THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI 1868, at 4 (E. Stafford 1871). One N.J. Chappell was a delegate to the Convention, held in Jackson beginning January 7, 1868. *Id.* at 5, 3. Chappell was a delegate from Noxubee County. *Id.* at 748. Chappell lamented that “[t]he desecration of the Sabbath has become so common since the late war,” which he felt aided in “plunging the country into demoralization deeper than that consequent to the war.” *Id.* at 176. In his view, “the sacred observance of the Sabbath exercises a secret influence over the vital interests of society, more potent than penal codes.” *Id.*

Since he believed that “The God of Heaven in infinite wisdom dedicate the seventh day of the week as a day of rest from all labor,” Chappell argued that the new constitution should have a “general Sunday law.” *Id.* This would involve suspending the railroads, halting “all secular business of any character whatever,” and most importantly to Chappell, “prohibit[ing] the carrying of fire-arms, hunting and shooting, and all other species of Sabbath breaking.” *Id.* But this did not pass; the Noxubee delegate’s resolution “was postponed indefinitely” on the 29th day of the Convention. *Id.* at 180. Despite the failure of Chappell’s effort, his proposal provides a glimpse of how the word “sacred” was used and seen by the delegates in 1868.

¹¹ See generally *Sullens v. State*, 191 Miss. 856, 4 So. 2d 356 (1941).

Magna Charta secured liberty to the people by imposing restraint upon the king.”¹²

In *Sullens*, the Court grappled with what free speech might mean when balanced against a trial court’s broad powers.¹³ The Hinds County Circuit Court held the *Jackson Daily News* in contempt for editorials published in the paper.¹⁴ The editorials hammered “Judge Jephtha Barbour’s widely-publicized moral crusade against liquor selling and gambling” and how madly the trial court had pursued this crusade—such as threatening to hold jurors in contempt for voting for an acquittal in a criminal trial.¹⁵

While noting the Federal right, the Court relied upon the Constitution of 1890 in deciding the case.¹⁶ Peering through that holy glass, the Mississippi Supreme Court refused to allow the press to be restrained by contempt, warning that restraining speech threatened tyranny.¹⁷ Against the backdrop of Nazi Germany’s rise to power, the Court recognized “[t]his freedom is declared to be sacred to the people and being one of the distinguishing features of a democratic state is naturally the first to be destroyed by totalitarian states in their campaign for enslavement through dictatorship.”¹⁸

The speech did not have to be particularly charitable or lofty,¹⁹ for “[f]reedom of speech includes the freedom to speak unwisdom or even heresy.”²⁰ There was no special requirement for speech protections, since “[t]he citizen has the constitutional right to be vulgar.”²¹ In *Sullens*, the Court assured that “[o]thers may despise the speech but they may not despise the freedom,” and “[o]ur devotion to free speech bespeaks a confidence that truth will

¹² *Id.* at 361 (emphasis added).

¹³ *Id.*

¹⁴ *Id.* at 357-58.

¹⁵ *Id.* at 358-60.

¹⁶ *Id.* at 360 (“[W]hen viewed through the lens of Section 13 of our Constitution and in the light of the spirit of [the contempt statute], we can not [sic] discover any germs of legal contempt nor detect any reasonable tendencies to obstruct, embarrass or hinder the court in the proper exercise of its functions.”).

¹⁷ *Id.* at 361.

¹⁸ *Id.*

¹⁹ *Id.* at 362.

²⁰ *Id.*

²¹ *Id.*

prevail over error and that it can take care of itself in any crowd of baser thoughts.”²²

The Court, through Justice Julian P. Alexander, also recognized that the right to speech was incredibly wide-ranging: “The exercise of this right may embarrass the particular functionary; it may depreciate the effectiveness of our legal procedure, yet so long as it pulls up short of the obstruction or impedance of the machinery of the court then in motion, it is free from interference by the courts.”²³

Chief Justice Sydney M. Smith specially concurred—joining with the entirety of the Court’s ruling, but emphasizing that the newspaper editor owed a duty to society to publish the editorial.²⁴ “Since the adoption of our constitutional guaranties of freedom of speech and of the press, American newspapers in response to public demand therefor have assumed the duty of giving the people full information of the conduct of public officials, including the judges of all courts.”²⁵

This was not only a duty in our society, but a vital one, as “[s]uch information is necessary in a Democracy in order to insure the observance of its processes.”²⁶ The vital role of the editor was heightened, as “[t]he discharge of this duty was here particularly incumbent upon the appellant, because of the threat made by the judge to jurors who had voted for an acquittal in a criminal case to cite them for contempt of court.”²⁷

Yet our consecration of free speech has been recognized by our Supreme Court, at least in passing. In 1976, the company that owned the Saenger Theatre in Hattiesburg appealed an obscenity conviction after screening the movie *The Exorcist*.²⁸ The Court reversed the conviction, since the obscenity statute was “an unconstitutional trespass upon the First Amendment to the United States Constitution.”²⁹ The State argued that perhaps the

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 363 (Smith, C.J., specially concurring).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *ABC Interstate Theatres, Inc. v. State*, 325 So. 2d 123, 124 (Miss. 1976).

²⁹ *Id.* at 126.

statute could be salvaged, but the Court rejected this invitation to redraft the language of the lawmaking branch.³⁰

In so ruling, the Court noted “that the legislature might want to give consideration to Article 3, Section 13, of the Mississippi Constitution (1890) relating to the freedom of speech in this state,” and provided:³¹ “We are of the opinion, without deciding, that Article 3, Section 13, . . . by modern-day standards, *appears to be more protective of the individual’s right to freedom of speech* than does the First Amendment *since our constitution makes it worthy of religious veneration*.”³²

The venerated language of Section 13 soars far above the earth-bound protection of the Federal Constitution’s First Amendment, which rather plainly states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”³³ There is a striking difference in tone: Mississippi’s cornerstone invokes the angelic realms, while the Federal Constitution only speaks to the realm of humans and their legislatures.

There is also a formal distinction in approach: the Federal amendment is a limitation on Congressional power by preventing Congress from restraining speech, but it does not actually address the freedom of speech itself. In contrast, Mississippi places the speech of the citizenry first and invests it with unlimited power: “The freedom of speech and of the press shall be held sacred.”³⁴ The inability of a legislature or any other actor to restrain the speech is implied; the only thing that might subvert the holy exercise of freedom of speech would arise from an adversary.

In one key treatise, former Justice James Robertson has specifically considered the use of the word “sacred” in our Bill of Rights.³⁵ “This expression of ‘religious veneration’ has suggested

³⁰ *Id.*

³¹ *Id.* at 126-27.

³² *Id.* at 126 (emphasis added); see also *Gulf Pub. Co. v. Lee*, 434 So. 2d 687, 696 (Miss. 1983) (recognizing the holy nature of the Constitutional protection).

³³ U.S. CONST. amend. I.

³⁴ MISS. CONST. of 1890, art. III, § 13.

³⁵ JAMES L. ROBERTSON, 3 ENCYC. OF MISS. LAW § 19:57 (3d ed. 2025).

the view that Mississippi's right of free speech is 'more protective of the individual's right to freedom of speech than [is] the First Amendment.'"³⁶ Nonetheless, former Justice Robertson noted that such an approach has not always been honored in our courts in modern days.³⁷

In contemporary times, just as keeping the Sabbath has faded in some corners, the Court has been less observant about honoring the holy nature of Section 13. It began to merely march in lockstep with the federal Constitution. Considered in dicta, if at all, the sacred right has been minimized to be interpreted as a parallel to the Federal Constitution's guarantee.^{38, 39}

³⁶ *Id.* (quoting *Gulf Pub. Co.*, 434 So. 2d at 696 (quoting *ABC Interstate Theatres*, 325 So. 2d at 127)).

³⁷ *Id.* Whole books could be written about the now-departed Justice Robertson's contribution to the fields of law and literature and his incredible ability to mix the two. For instance, in the famed "case about a fishin' hole," the good Justice opined that "[t]his is also a case about a people, the waters they fish, and a unique culture and lore. These form an ambiguous but real part of our life whose pulse is preserved in the product of our poets from the famous to the obscure." See *Dycus v. Sillers*, 557 So. 2d 486, 487 (Miss. 1990). Indeed, this Law Journal recently devoted an entire issue to celebrating Justice Robertson. See *Tribute, Justice James Robertson*, 94 MISS. L.J. 681 (2025).

I first "met" Justice Robertson and his expansive view of our state Constitutional rights as a rising 2L in 2002. I was tasked by my great professor and mentor, the late Jeffrey Jackson, with editing the footnotes to the above-cited treatise. He might as well have tied a bowling ball to my left leg and pushed me in the Pearl River. I was doomed, but thrilled; overwhelmed, but determined to get my head around it. Justice Robertson was always as gracious as can be to me and I am thankful that he lives on via his massive treatises (one could say tributes) to the law. See generally JAMES L. ROBERTS, HEROES, RASCALS, AND THE LAW: CONSTITUTIONAL ENCOUNTERS IN MISSISSIPPI HISTORY (2019).

³⁸ See *Jeffries v. State*, 724 So. 2d 897, 900 (Miss. 1998) ("The Mississippi Constitution of 1890 provides safeguards similar to those provided by the federal constitution[.]"); *Miss. Comm'n on Jud. Performance v. Wilkerson*, 876 So. 2d 1006, 1009 n.1 (Miss. 2004) ("[S]ince the constitutional analysis of the Mississippi provision would be no different from an analysis of the provision found in the United States Constitution, we restrict our analysis in this case to applicable law interpreting the United States Constitution."); cf. *Miss. Empl. Sec. Comm'n v. McGlothlin*, 556 So. 2d 324, 328 (Miss. 1990) (ruling that a teacher who wore a headwrap for religious and cultural reasons could not be denied benefits because the First Amendment and our Section 13 "clothe teachers such as McGlothlin in all protected forms of expression, religious as well as cultural").

³⁹ Compared to say, slip and falls at the local grocery store, free speech cases are exceedingly rare. The Court has had little need to issue an opinion on one in many years. One of the more recent examples involved the speech rights of Justice Court Judge Gay Polk-Payton. However, it ended without an opinion.

III. DEMOTION TO SECOND PLACE

While our state rights have atrophied over time, this does not have to be the norm. This approach certainly does not have to define the future. The law is not static; it moves and changes, including ebbing and flowing between federal and state government and legislative and judicial imperative, and has done so in dramatic fashion during my time on the Bench and half century on this planet.

As Sixth Circuit Court of Appeals Chief Judge Jeff Sutton points out in his crucial treatise on state constitutions, what we think of today as “con law” would have been shockingly unusual to the Framers of the federal Constitution.⁴⁰

“Odd though it may sound to modern ears, most of the constitutional-rights litigation of the first 150 years after 1776 took place *in the States*.”⁴¹ It was only because many of the States failed to honor the rights of their citizenry that we saw the federal courts intervene in what Judge Sutton calls “the federal rights revolution” due to “the States’ relative underprotection of individual rights.”⁴² “Who could blame lawyers and their clients

The Commission on Judicial Performance had gone after the judge, in part, because she had published a book collecting a series of stories and maxims she had written over the years. The Commission on Judicial Performance’s complaint was centered on her book, her commercial efforts to sell the book, and her usage of the handle “@JudgeCutie” on social media.

Along with former Presiding Justice Oliver Diaz, I served as counsel for Judge Polk-Payton. We argued any attempt to restrain her speech was shielded by our State’s sacred rights. Her position was supported by two amicus curiae. UCLA School of Law First Amendment Professor Eugene Volokh and Lincoln County, Mississippi, native Graham P. Carner submitted the first brief. The American Civil Liberties Union, represented by Joshua Tom, filed the second.

Forty-eight hours after oral argument, which included both amici, an En Banc Order from the Mississippi Supreme Court found “that no violation of the Mississippi Code of Judicial Conduct . . . has been proven by clear and convincing evidence,” and dismissed all charges “with prejudice.” Miss. Comm’n on Jud. Performance v. Judge Gay Polk-Payton, No. 2016-JP-01685-SCT (June 15, 2017).

I keep the copy of the Mississippi Constitution that Justice Diaz and I had with us at counsel table on my desk at the Court of Appeals, including a note written during oral argument.

⁴⁰ JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 13 (2018).

⁴¹ *Id.* (emphasis added).

⁴² *Id.* at 14.

for being reluctant to develop a strategy built in part on state constitutional rights,” when such was not being enforced?⁴³

Writing in 2018, Judge Sutton presciently observed that if we treat only the “Big 9” in the United States Supreme Court as if they have the power of ascertaining truth, we set it up to fail: “[W]hy should we assume that the U.S. Supreme Court is somehow an Oracle of Truth?”⁴⁴ This then “impose[s] on the members of that Court the remarkable (and what must be exhausting) burden of treating it as the only supreme court in the country capable of offering an insightful solution to [the] difficult problem[s]” of constitutional rights.⁴⁵ “That’s a recipe for decreasing, not increasing, respect for the U.S. Supreme Court.”⁴⁶

In Judge Sutton’s view, we should return to healthy litigation over what our individual rights are as citizens of the fifty States.⁴⁷ Not only does this restore state constitutions to their proper place as equal, or even superior, to the federal document, but it also gives a lawyer another shot to zealously represent her client.⁴⁸ For lawyers and litigants “should prefer two arrows in their quiver—two chances, not one, to invalidate a state or local law.”⁴⁹

IV. A SIMILAR PATH CARVED BY SEARCH AND SEIZURE

Our state courts already recognize an expansive freedom granted to Mississippians: the freedom from unlawful search and seizure. One recent case from the Court of Appeals of the State of Mississippi provides the perfect roadmap.⁵⁰ One “Walter Okhuysen owns a vacant house and property on Garrard Road in Starkville.”⁵¹ The city board of alderman determined the lot—overgrown and chock full of “an abandoned truck and various other debris, junk, scrap materials, and construction materials”—was a public menace.⁵² But the way they documented Okhuysen’s

⁴³ *Id.*

⁴⁴ *Id.* at 18.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 20.

⁴⁸ *Id.*

⁴⁹ *Id.* at 176.

⁵⁰ *Okhuysen v. City of Starkville*, 333 So. 3d 573 (Miss. Ct. App. 2022).

⁵¹ *Id.* at 576, ¶1.

⁵² *Id.* at 576, ¶2.

property was that “a code enforcement officer for the City of Starkville, went onto Okhuysen’s vacant property . . . without Okhuysen’s permission and without a warrant.”⁵³ The code enforcement officer took photographs, which the city ultimately used to determine the property was a public menace.⁵⁴

All of this is pretty par for the course, as was Okhuysen’s attorney’s attack on whether the city had been specific enough with its complaint.⁵⁵ But counsel for the property owner did something else: He “argued that . . . the code enforcement officer, had violated Article 3, Section 23 of the Mississippi Constitution by trespassing and inspecting the property without a warrant.”⁵⁶

That right guarantees that “[t]he people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.”⁵⁷ Okhuysen’s lawyer, Gary Goodwin, then told the board of alderman “the Mississippi Supreme Court has always said Section 23 protects all of your property, not just your house and not just your curtilage of your house either.”⁵⁸

Quick sidebar: he was dead right. Over a century ago, the Mississippi Supreme Court took the no-nonsense stance that the words meant what they said.⁵⁹ “The security of the [Constitutional] section is of the persons, houses, and possessions,” the Court reasoned.⁶⁰ “If the section meant only to protect the persons and houses the words ‘and possessions’ would be superfluous and meaningless.”⁶¹

But “[t]he rule is clear that [] construing [the] Constitutions every word is to be given some meaning.”⁶² “The words ‘and

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 578.

⁵⁶ *Id.*

⁵⁷ MISS. CONST. of 1890, art. III, § 23.

⁵⁸ *Okhuysen*, 333 So. 3d at 578.

⁵⁹ *See generally* *Falkner v. State*, 98 So. 691 (Miss. 1924).

⁶⁰ *Id.* at 692.

⁶¹ *Id.*

⁶² *Id.*; *see also* *Green v. Weller*, 32 Miss. 650, 679 (1856) (noting the “familiar rules of construction apply with at least as much force to the construction of written

possessions' indicate clearly something other than houses and persons," and since it "is a very comprehensive term, [it] includes *practically everything which may be owned*, and over which a person may exercise control."⁶³

In *Falkner*, the Court was looking at whether the felony convictions of two men for the "attempt to manufacture intoxicating liquor" was void because "the sheriff and constable" found "a still and mash" upon the property of one of the men—but did not have a search warrant to be there.⁶⁴ The still was "about 300 yards" from where one of the men lived.⁶⁵

After explaining how expansive the word "and possessions" might be, the Court also acknowledged, "[t]he rule is well settled that constitutional provisions designed for the protection of persons are to be liberally construed."⁶⁶ "A Constitution should be construed so as to effectuate, not defeat, the policy indicated by its framers."⁶⁷

Once having covered this ground, the 1924 Court declared that "[t]he language of our Constitution is somewhat broader than the words 'papers or effects,'" found in the Federal Constitution "and, applying the principle of liberal construction which governs in cases affecting the liberty and property of the citizen, we think the term embraces all of the property of the citizen."⁶⁸ "We are therefore convinced that the search made in this case was unlawful as to Tom Falkner, and that the evidence obtained thereby was an invasion of his rights, and could not be used in a criminal prosecution against him."⁶⁹

So, in the ensuing century, the line was drawn quite further out than many of us learn in law school. And while you and I now know this constitutional background, and the lawyer for

constitutions, as to statutes; the former being presumed to be framed with much greater care and consideration than the latter").

⁶³ *Falkner*, 98 So. at 692 (emphasis added).

⁶⁴ *Id.* at 691.

⁶⁵ *Id.*

⁶⁶ *Id.* at 692.

⁶⁷ *Id.*; see also *Brien v. Williamson*, 8 Miss. (7 Howard) 14, 20 (1843) ("Words are the signs of our ideas, and when we wish to know legislative intention, we look at the language employed.").

⁶⁸ *Falkner*, 98 So. at 693.

⁶⁹ *Id.*

Okhuysen knew it at the time, the city attorney did not, telling the board of aldermen “that in his opinion, [the code enforcement officer] had authority to go onto Okhuysen’s property under . . . the City Code.”⁷⁰

This argument won the day, and the aldermen “voted six-to-one to declare the property a menace to the public health, safety, and welfare of the community.”⁷¹ An appeal to circuit court proved fruitless, as the trial court “held that the City complied with the statutory notice requirements and gave Okhuysen sufficient notice of the conditions that made his property a public menace,” and that the code enforcement officer “did not trespass on Okhuysen’s property because the City Code authorized him to go onto the property for purposes of inspection and enforcement.”⁷²

Presiding Judge Jack L. Wilson, writing for the majority, first noted in the headline to the discussion that “Article 3, Section 23 of the Mississippi Constitution protects all land owned by the person searched.”⁷³ The Constitution of 1890 established that:

The people shall be secure in their persons, houses, and possessions, from unreasonable seizure or search; and no warrant shall be issued without probable cause, supported by oath or affirmation, specially designating the place to be searched and the person or thing to be seized.⁷⁴

Quoting and interposing *Falkner*, Judge Wilson reasoned, “Our Supreme Court has held that the protection afforded by Section 23 ‘is somewhat broader than’ the Fourth Amendment to the United States Constitution because Section 23 protects all of the people’s ‘possessions,’ not just their ‘papers’ and ‘effects.’”⁷⁵

The Court then reviewed other cases from the past sixty years before concluding that the code inspector “committed a trespass when he went onto Okhuysen’s land.”⁷⁶ Since the city employee “trespassed on Okhuysen’s land,” this meant “his

⁷⁰ *Okhuysen*, 333 So. 3d at 578.

⁷¹ *Id.* at 578.

⁷² *Id.* at 578-79.

⁷³ *Id.* at 579.

⁷⁴ MISS. CONST. of 1890, art. III, § 23.

⁷⁵ *Okhuysen*, 333 So. 3d at 579.

⁷⁶ *Id.* at 581.

inspection violated Section 23 of the Constitution[,] because he did not have a warrant or Okhuysen's permission to enter."⁷⁷

Nor could the City Code salvage the trespass, because the trespass violated the Constitution of 1890.⁷⁸

If the City "could define its own powers by altering the . . . meaning" of the Mississippi Constitution, then "no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" The validity of a search must be determined based on Section 23 of the Constitution and Mississippi Supreme Court decisions interpreting it, not by reference to municipal ordinances.⁷⁹

Once this was established, the Court then concluded that "Article 3, Section 3 of the Mississippi Constitution prohibits warrantless administrative searches."⁸⁰ It also did not matter if the charge was civil or criminal; "the warrantless search of Okhuysen's property violated Section 23 of the Constitution regardless of what later proceedings grew out of the search, what evidence was obtained during the search, or what subsequent use was made of that evidence."⁸¹

The near-unanimous Court (one judge dissented, and one more did not participate) ended its review of the law with a clear decision in favor of a faithful view of the expansive right granted to people under our State's Constitution.⁸² "Article 3, Section 23 of the Mississippi Constitution protects the entirety of [a person's] property, not just the house and curtilage."⁸³ The majority quietly acknowledged that it was *only* Okhuysen's state right which provided him this protection.⁸⁴ In a footnote, Presiding Judge Wilson pointed out that "[i]f this case were governed solely by the Fourth Amendment, Okhuysen likely would not prevail because it

⁷⁷ *Id.* at 582.

⁷⁸ *Id.* at 582.

⁷⁹ *Id.* (alteration in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

⁸⁰ *Id.* at 583.

⁸¹ *Id.* at 584.

⁸² *Id.* at 590-91.

⁸³ *Id.*

⁸⁴ *Id.* at 582.

would be difficult for him to show that he had any reasonable expectation of privacy in the wooded areas on this property.”⁸⁵

In 2022, the Court of Appeals resoundingly interpreted the Constitution of 1890 to provide greater protections for Mississippians than what are afforded under the federal constitution.⁸⁶ Since Walter Okhuysen was one of “the people” of the State of Mississippi, he had stronger protections from governmental overreach than other Americans in different states would have.⁸⁷

V. THE DUALITY OF THE CONSTITUTION OF 1890

We cannot pretend our current Constitution is a perfect document; no constitution is, or can be, as it is fashioned by the hands of the people and bound to the time during which it is created. This is one reason that constitutions can be amended or even wholly rewritten.

Our old friend Publius devoted more or less an entire article of *The Federalist Papers* to discussing the difficulties of trying to define a government through a constitution.⁸⁸ “[M]any allowances ought to be made for the difficulties inherent in the very nature of the undertaking referred to the convention.”⁸⁹ In the 18th century, as in the 21st, we simply did our best “to avoid the errors suggested by the past experience of other countries, as well as of

⁸⁵ *Id.* at 582 n.4.

⁸⁶ *Id.* at 580-81.

⁸⁷ While I cast my vote for the majority authored by Presiding Judge Wilson, the workload of the Court is intense and never-ending. There is rarely the time to reflect upon our jurisprudence unless we are applying the case in a subsequent dispute. So I am grateful that the Mississippi Law Journal invited me to be part of its 2025 Mississippi Law Symposium. I was honored to be part of a panel with U.S. District Court Judge Michael P. Mills, privacy law expert Melody I. McAnally, and Mississippi College School of Law Professor Jonathan Will.

My focus was to expound upon the rights held by Mississippians and those who live within our borders. This led me to revisit the *Okhuysen* case and see within it a renewed focus on our Mississippi Constitution. It in turn led me to knitting together several skeins of interest over the years—our State right of free speech, Chief Judge Sutton’s meditation on state constitutional power (part of my training as a “baby judge” in the New Appellate Judges Seminar at New York University School of Law in 2019), and the history of our great State.

⁸⁸ See THE FEDERALIST NO. 37, at 265 (James Madison) (Benjamin F. Wright ed., 1961).

⁸⁹ *Id.* at 267.

our own; and to provide a convenient mode of rectifying their own errors, as future experience may unfold them.”⁹⁰

Despite the glorious language containing our rights of free speech and religion and the expansive language of our right to be free from unjust searches and seizures, one core purpose of the Constitution of 1890 was vile.

It began with beauty, which is often present at the beginning. It was the particular type of late-summer beauty known to all Mississippians as the delegates assembled in the House of Representatives in what we now call the Old Capitol, at noon on August 12, 1890.⁹¹ Bishop Galloway prayed for guidance from God: “We invoke Thy special favor upon this Convention, called together by the voice of the whole people to reconstruct their organic law.”⁹²

Representing Hinds County as a delegate, Circuit Judge S.S. Calhoun, later to serve on the Mississippi Supreme Court, received the most votes, and so was declared President of the Convention.⁹³ He began again with beauty: “Mississippi, our common mother, whom we all love, requires us to do our duty for the people now living and who are yet to live within our borders.”⁹⁴

But Judge Calhoun soon showed his hand. “[T]hat fact remains that there exists here in this State two distinct and opposite types of mankind.”⁹⁵ Since these two “opposite types”—Black and white—were locked in eternal struggle, Judge Calhoun believed the “ballot system must be so arranged as to effect one object.”⁹⁶ In his view, Reconstruction had failed—an experiment

⁹⁰ *Id.*

⁹¹ STATE OF MISS., JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MISSISSIPPI BEGUN AT THE CITY OF JACKSON ON AUGUST 12, 1890 AND CONCLUDED NOVEMBER 1, 1890, at 4 (E.L. Martin 1890).

⁹² *Id.* I must gratefully acknowledge the wonderful assistance of our State Law Librarian, Stephen Parks, in providing me with access to the treasures of our history and law in order to meditate on them in the present. Recognizing the vital need for a central repository of knowledge, our Constitution establishes his office. MISS. CONST. of 1890, art. IV, § 106. As his position was created by the Mississippi Constitution and mine was not, and as he is the keeper of our histories and my Westlaw passwords, I am fond of telling Mr. Parks that he outranks me.

⁹³ STATE OF MISS., *supra* note 91, at 8-9.

⁹⁴ *Id.* at 9.

⁹⁵ *Id.* at 10.

⁹⁶ *Id.*

which was “twenty-five long years endeavoring to have strictly homologous political relations between those races.”⁹⁷ For Calhoun, only white people should have the right to govern.⁹⁸

Should there be any mistaking his point, while closing the Convention and ratifying the document before them, Judge Calhoun pontificated that Black people were “unfit to rule,” as when they ruled, it meant “the brutalization of man, animal savagery, universal ruin.”⁹⁹ With the Constitution of 1890 ratified, the President of the Convention was proud that the white “race alone can now safely exercise the function of ruling with moderation and justice and accomplish the great purpose for which governments are established.”¹⁰⁰

As former Mississippi Secretary of State Eric Clark revealed in his thesis on the Constitution Convention, “[i]t was said in 1890, and has been generally stated since, that the paramount purpose for framing a new constitution was legally to secure white Democratic control of the state government.”¹⁰¹ After the issues of geographical representation and who would be extended the franchise was settled, Clark reasoned that “the great issue of the convention was decided. It was hoped that white supremacy had been made secure.”¹⁰² The sum total of this effort? “Only those who had paid their poll tax and met the other stipulations of the 1890 [C]onstitution could run for office or vote in primaries,” and so “the number of voters dropped to half the number who were eligible before 1890.”¹⁰³

How then can we celebrate such a document and such a moment in history? I think often about a song flowing from my native state of Alabama. A call to be “[p]roud of the glory,” but “stare down the shame.”¹⁰⁴ As songwriter Patterson Hood phrased

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 702.

¹⁰⁰ *Id.* at 703.

¹⁰¹ Eric Charles Clark, *The Mississippi Constitutional Convention of 1890: A Political Analysis* (May 1975) (B.A. thesis, University of Mississippi) (on file with the Mississippi State Law Library) (manuscript at 2).

¹⁰² *Id.* at 130.

¹⁰³ DENNIS J. MITCHELL, *A NEW HISTORY OF MISSISSIPPI* 259 (2014).

¹⁰⁴ DRIVE-BY TRUCKERS, *The Southern Thing* (CD, Lost Highway Recs. Sep. 25, 2001).

it, this is the “[d]uality of the Southern thing.”¹⁰⁵ The Constitution of 1890 was set up to repress whole swaths of our population based on hatred. At the same time, it enshrined protections for each person within our borders behind shining shields of rights. Over time, a series of landmark decisions from the U.S. Supreme Court erased much (if not all) of the stain from our cornerstone document. Yet time has only burnished the rights contained within, even as they are oft forgotten.

We are not bound by the horrors of the past. We must see them, learn from them. But as lawyers, as judges, as students, and as citizens, we must remain committed to the unending power of *change* in our State and our Country. The preamble to our federal Constitution does not declare that we have made it—we are done—shut it down.¹⁰⁶ Instead, it says, “We the People of the United States, in Order to form *a more perfect* Union.”¹⁰⁷ We know the American experiment is still in its early stages. As members of the legal profession, we also have a unique power to advocate for change. As Justice Robertson once wrote, “[t]he courthouse is a place where the promises and the powers of the constitution become real in the lives of flawed and fearful and yet hopeful human beings.”¹⁰⁸

The former President of the 1890 Convention sleeps outside my window. My view from the third floor of the Gartin Justice Building looks down over Greenwood Cemetery. I walked over at lunch today to visit his resting place. It looks like a great altar, and carved in all-caps are the words “WRITE ME AS ONE WHO LOVES HIS FELLOW MAN.”

Justice Calhoon is long gone, as is the Mississippi in which he lived. We are still here, and it is our decision where Mississippi goes next.

CONCLUSION

In wrapping up his treatise on state constitutions, Chief Judge Sutton points out, “Lawyers can’t make arguments they

¹⁰⁵ *Id.*

¹⁰⁶ U.S. CONST. pmb.

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ ROBERTS, *supra* note 39, at 4.

don't know anything about.”¹⁰⁹ “American law faces a woeful education deficit when it comes to knowledge about our state constitutions.”¹¹⁰ I find it ironic that every lawyer swears an oath of admission “that I will support the Constitution of the State of Mississippi and the Constitution of the United States,” yet we are often radically uninformed about what the former means at all, let alone what the latter can mean.¹¹¹

It will be a challenge to transform this current state of dormancy in analysis of our Constitution. It begins with reading it, wondering about it, and thinking about how the words written in 1890 still inform us—even control us—but most certainly *can protect us*, as we move towards a certainly unknown but hopefully prosperous future in Mississippi.

“The freedom of speech and of the press shall be held sacred,” our predecessors wrote, 135 years ago.¹¹² They fashioned these shields for us, their children. They remain—sacred, solid, adamant, noble—awaiting the day they are raised to defend the people.

¹⁰⁹ SUTTON, *supra* note 42, at 194.

¹¹⁰ *Id.*

¹¹¹ MISS. CODE ANN. § 73-3-35 (2011).

¹¹² MISS. CONST. of 1890, art. III, § 13.