FORTY YEARS ACROSS THE RUBICON

Channing J. Curtis[*]

&

Christopher R. Green[**]

INTRODUCTION 682
I. THE MISSISSIPPI CONSTITUTION OF 1890.................. 687
 A. The Relevant Provisions 687
 B. Interpreting the Mississippi Constitution...................689
  1. J.Z. George's Explanation of Interpretation in 1880 690
  2. The Self-Presentation of the Mississippi Constitution 693
  3. Meaning and Application in Mississippi..............695
  4. Overruling Precedent in Mississippi 697
  5. Deference to the Mississippi Legislature 698
  6. Do Modifications to Section 146 Matter? 699
II. THE MISSISSIPPI SUPREME COURT'S SEIZURE OF POWER 700

[*] Executive Notes & Comments Editor (Vol. 92), *Mississippi Law Journal*; J.D., 2023, University of Mississippi School of Law; B.A. in Public Policy Leadership, 2020, University of Mississippi. Many thanks to Professor Guff Abbott for spending time discussing the history of this long debate with me, Professor E. Farish Percy for offering comments on an early version of this Article in her complex litigation seminar, Luther Munford for providing thoughtful critiques, and Magistrate Judge Keith Ball for all the research done in his student comment and for discussing this Article with the Authors at length at a student-alumni networking event. The views and opinions expressed herein are the views and opinions of the Authors alone. They should not be construed in any way as being aligned with the views or opinions of the Authors' past, present, or future employers. All errors are our own.

[**] Professor of Law and Jamie L. Whitten Chair in Law and Government, University of Mississippi School of Law. Thanks to the last several years of Federal Jurisdiction students who have been subjected to brief, very early versions of these ideas.

III. THE MEANING OF "LEGISLATIVE POWER" IN THE 1890 CONTEXT OF SECTION 90(S) 709
A. The Origins and Meaning of 90(s) and Parallel Provisions 709
B. The Mississippi Supreme Court and Other Parts of Section 90 714
IV. EXISTING CONTRADICTIONS 715
A. Venue 716
B. Appellate Procedure from County Court 718
1. General Appeals from County Court 718
2. Interlocutory Appeals from County Court 721
C. Mississippi Rules of Criminal Procedure 723
V. SOLUTIONS FOR PROCEDURAL CLARITY 724
A. Reliance on the Mississippi Rule Making Act of 1975 724
B. Return to a System of Shared Responsibility 728
C. Procedural Common Law 729
D. Amending the Constitution 731
CONCLUSION 735

"The judiciary of this state is subservient to the Mississippi Constitution."

– Chevron U.S.A., Inc. v. State, 578 So. 2d 644, 649 (Miss. 1991).

INTRODUCTION

When Julius Caesar crossed the Rubicon, illegally leading an army into Rome to seize power four years before his assassination, he certainly thought his action would lead to a brighter future for Rome; he may well have been right.[1] But his brazen illegality had big costs too. It has been over forty years since the Mississippi Supreme Court crossed its metaphorical Rubicon—a metaphor the

[1] *Encyclopedic Entry: Julius Caesar*, NAT'L GEOGRAPHIC EDUC., https://www.nationalgeographic.org/encyclopedia/julius-caesar/ [https://perma.cc/G2WS-93LJ].

Court has itself embraced[2]—into a world where the Court possesses "inherent" and exclusive power over practice and procedure in state courts.[3] While the Court's promulgation of rules certainly produces some very important benefits, the Court simply lacks proper constitutional authority to adopt rules that trump statutes. The Court and Mississippi Legislature need a strategy to restore lawfulness to our state's rules of procedure.

Since the day the Court crossed, with good intentions but without constitutional support, it has never once looked back. The adoption of the Mississippi Rules of Civil Procedure came first,[4] and the adoption of the Mississippi Rules of Criminal Procedure is the most recent development.[5] But along the way, the Court also adopted the Mississippi Rules of Evidence and the Rules of Appellate Procedure,[6] invalidating legislative dissent against one of the Rules of Evidence.[7] And while proponents of the Court's rules sought clarity and more sound procedural rules than the former statutory rules of practice and procedure,[8] the Court's adoption of these blanket Rules of Court still leave Mississippi wanting for procedural progress.

[2] *See* Hall v. State, 539 So. 2d 1338, 1345 (Miss. 1989) ("On May 26, 1981, we crossed the Rubicon as the Court entered its Order Adopting the Mississippi Rules of Civil Procedure.").

[3] *Id.* (quoting Newell v. State, 308 So. 2d 71, 76 (Miss. 1975)).

[4] *Id. See generally* Order Adopting the Mississippi Rules of Civil Procedure, May 26, 1981 [hereinafter Supreme Court Order of 1981]. It is worth noting that all concurrences, dissents, and objections to the Supreme Court Order of 1981 are unavailable in electronic format on Westlaw and LexisNexis. Instead, one need look in the hard copy of the Mississippi Cases Edition of the Southern Reporter, volumes 395 to 397 of which are in a single volume. This is the only source from which we could find them. The order appears at page 1.

[5] Order Adopting the Mississippi Rules of Criminal Procedure, Dec. 13, 2016 [hereinafter Supreme Court Order of 2016].

[6] Order Adopting the Mississippi Rules of Evidence, May 15, 1985 [hereinafter Supreme Court Order of 1985]; Order Adopting the Mississippi Rules of Appellate Procedure, Dec. 15, 1994 [hereinafter Supreme Court Order of 1994]. There are other sets of uniform, blanket rules in Mississippi, but we only discuss the major rules which have federal counterparts. *See* MISSISSIPPI RULES OF COURT – STATE (2022).

[7] *Hall*, 539 So. 2d at 1346.

[8] Lawrence J. Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L.J. 287, 287-88 (1972).

For example, as of today, Mississippi is still the only state in the United States without a class action suit rule,[9] and while many proponents argue for the adoption of a Rule 23 akin to the federal counterpart,[10] there are complications that could arise from doing so. First and foremost, should the Court adopt Rule 23 or other complex litigation methods such as an intra-state multi-district litigation without legislative approval, it could rekindle a decades old battle over rulemaking authority in Mississippi.[11] This could

---

[9] *See* Robert H. Klonoff, *The Adoption of a Class Action Rule: Some Issues for Mississippi to Consider*, 24 MISS. C. L. REV. 261, 261 (2005). At various times, we refer to class actions as an example. This does not necessarily embody our view on Mississippi's adoption of a class action rule, but the class action reference merely serves as a clean example for the purposes of discussion.

[10] *Id.* Volume 24 of the Mississippi College Law Review hosted a symposium on the future of Class Actions in Mississippi in 2005. *See also* Letter from Richard T. Phillips, Founding Partner, Smith, Phillips, Mitchell, Scott & Nowak, LLP, to Mississippi Supreme Court et al. (Dec. 30, 2015) (on file with the Office of the Clerk, Mississippi Supreme Court), https://courts.ms.gov/research/rules/rulesofcivilprocedure/12.30.15%20Richard%20Phillips.pdf [https://perma.cc/P6PU-WG6H].

[11] *See, e.g.*, Franck, *supra* note 8; F. Keith Ball, Comment, *The Limits of the Mississippi Supreme Court's Rule-Making Authority*, 60 MISS. L.J. 359 (1990); Ronald C. Morton, Note, *Rules, Rulemaking, and the Ruled: The Mississippi Supreme Court as Self-Proclaimed Ruler* – Duncan v. St. Romain*, 569 So. 2d 687 (Miss. 1990)*, 12 MISS. C. L. REV. 293 (1991). These academic pieces seem to represent the beginning and end of the discussion surrounding Mississippi's rulemaking authority. Since that time, Judge Leslie H. Southwick has provided a brief history of the fight over rulemaking authority and proclaimed that "[i]t is accepted in Mississippi that the Supreme Court has the authority to promulgate rules of practice and procedure." Leslie Southwick, *Recent Trends in Mississippi Judicial Rule Making: Court Power, Judicial Recusals, and Expert Testimony*, 23 MISS. C. L. REV. 1, 2-7 (2003). A rekindling of this issue seems more likely now than at any time since 1989. The state's high court, legislature, governor, and voters have been at odds over foundational constitutional issues in the past few years. *See* Reeves v. Gunn, 307 So. 3d 436 (Miss. 2020) (challenging the governor's line-item veto power and challenging legislators' standing to sue the governor); Butler v. Watson, 338 So. 3d 599 (Miss. 2021) (striking down the process for constitutional amendment by initiative); Geoff Pender & Bobby Harrison, *Mississippi Supreme Court Overturns Medical Marijuana Initiative 65*, MISS. TODAY (May 14, 2021), https://mississippitoday.org/2021/05/14/mississippi-supreme-court-overturns-medical-marijuana-initiative-65/ [https://perma.cc/K7PP-EKNP]; Bobby Harrison, *Supreme Court Chief Quietly Gave Pay Raise to Himself and Other Judges Without Legislative Approval*, MISS. TODAY (June 9, 2021), https://mississippitoday.org/2021/06/09/mississippi-supreme-court-pay-raise/ [https://perma.cc/C3F9-BYL2].

occur with the advancement of complex litigation, but the debate could rekindle over any progressive procedural move by the Court.[12]

But since the Court's holding in *Newell v. State*[13] and subsequent adoption of the Mississippi Rules of Civil Procedure, it has been unclear whether the Court has legitimate authority to adopt rules of procedure on its own, for the Mississippi Constitution does not vest it with that exclusive power.[14] Indeed, the Constitution plainly presupposes (and we will in this Article make even more plain) that the legislature has at least some power over judicial practice: "The Legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.: . . . [r]egulating the practice in courts of justice."[15] And while the legislature conceded rulemaking power to the Court in 1996,[16] the legislature lacks power to divest itself of its own power to pass statutes over judicial procedure. As a matter of the meaning expressed by the Mississippi Constitution in its original context—a meaning that binds those exercising power under it—the legislature retains the power to promulgate rules of procedure in Mississippi. Both the Court and the legislature should make this clear.

The conflicts that exist under the mystery of Mississippi rulemaking authority further complicate the adoption of progressive rules, such as a class action, because there still exists contradictory statutory rules and court rules, some more important to successful class actions than others. For example, venue is one of

[12] Procedural remedies, other than complex litigation, that are available to federal litigants, yet unavailable to state court litigants in Mississippi, include default judgment against the government and required disclosures in pre-trial discovery. *Compare* Porras v. State, No. 2021-CP-00052-COA, 2022 WL 1152158 (Miss. Ct. App. 2022) (McCarty, J., concurring), *with* FED. R. CIV. P. 55(d).

[13] 308 So. 2d 71, 78 (Miss. 1975).

[14] *See* MISS. CONST. art. VI, § 144. Indeed, from *Newell* forward, the Court was split. *See* Hall v. State, 539 So. 2d 1338, 1358 (Miss. 1989) (Hawkins, J., dissenting) (describing the vote count in 1981 as "sharply divided"); Supreme Court Order of 1981, *supra* note 4, at 2 (Broom, J., responding to court's adoption of new rules of civil procedure); *Id.* at 4 (Lee, J., dissenting from order adopting new rules of civil procedure); *Id.* at 5 (Bowling, J., objecting to adoption of rules).

[15] MISS. CONST. art. IV, § 90(s); *see also Hall*, 539 So. 2d at 1353 (Hawkins, J., dissenting) ("Our Constitution plainly and specifically grants unto the Legislature the power by general law to enact laws on procedure.").

[16] MISS. CODE ANN. § 9-3-61 (1996).

the most blatant contradictions between the Rules of Court and the Mississippi Code,[17] and it is of great importance to litigation in general, and therefore, class action suits.[18]

By using the potential adoption of Rule 23 as a vehicle, this Article argues that before such a rule should be adopted in Mississippi, the state should clarify exactly which branch of government has rulemaking authority over Rules of Court. In doing so, it discusses the background of rulemaking authority in Mississippi and the current conflicts that exist between the Rules of Court and statutory rules of procedure as they pertain to any eventual adoption of more progressive rules, like a class action, in the state.

In short, this Article argues that the Mississippi Rules of Court were all adopted unconstitutionally. Their adoption, without the constitutional authority to do so and against the constitutional prohibition of exercising the powers of another branch, has muddied the procedural process in Mississippi.

While we agree that the Court should ultimately have the rulemaking authority, this Article will take the position that the ends do not justify the means. Still, there are possible remedies for this unconstitutional usurpation of power in favor of the Mississippi Rules of Court that can help prevent any future fight over rulemaking authority in Mississippi, such as a fight over the adoption of Rule 23. Part I will discuss the important constitutional provisions and doctrines to take into account when analyzing Mississippi's rulemaking authority, interpreting the Mississippi Constitution as, and based on, the meaning expressed by its text in its original context, and an approach to precedent willing to correct errors about the Constitution if we have sufficient clarity given the reliance interests. Part II discusses the history of section 90(s) and similar language that has appeared in state constitutions and federal law since 1851 and has consistently been understood to confirm legislative power to regulate court procedures. Part III will discuss how the conflict came to be by presenting pertinent Mississippi case law on the subject. Part IV will discuss the existing contradictions between the Mississippi Code and the Rules of Court

[17] *Compare* MISS. CODE ANN. § 11-11-3(2) (2004), *with* MISS. R. CIV. P. 82(c).

[18] *See* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 736 n.31 (2013) (stating that the Fifth Circuit is a "hostile venue" for class actions).

and the importance of their resolution in progressing towards adoption of progressive rules in Mississippi. Finally, Part V will provide potential solutions for moving forward before briefly concluding.

I. THE MISSISSIPPI CONSTITUTION OF 1890

A. The Relevant Provisions

The Mississippi Constitution of 1890 is Mississippi's fourth constitution,[19] and it provides for three separate branches of government: the legislature, the executive, and the judiciary.[20] This is not a new model, but the same one used in the Mississippi Constitutions of 1817, 1832, and 1869.[21] Unlike the United States Constitution,[22] the Mississippi Constitution of 1890 requires all of Mississippi's branches of government to remain separate, explicitly prohibiting members of different branches from exercising the powers of another.[23] In doing so, Section 2 reads,

> **Encroachment of power.** No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.[24]

The constitutional delegates of 1817 likely based section 2 on neighboring states' constitutional provisions,[25] and it has been the source of conflict for different spheres of government and

---

19 Lenore L. Prather, *A Century of Judicial History*, 69 MISS. L.J. 1013, 1013 (2000).

20 MISS. CONST. art. I, § 1 ("The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.").

21 *See* Leslie Southwick, *Separation of Powers at the State Level: Interpretations and Challenges in Mississippi*, 72 MISS. L.J. 927, 938-39 (2003) [hereinafter *Separation of Powers at the State Level*].

22 There is no provision in the United States Constitution that explicitly prohibits one branch from exercising the powers of another branch. *See* U.S. CONST.

23 MISS. CONST. art. I, § 2.

24 *Id.*

25 *Separation of Powers at the State Level*, *supra* note 21, at 939-40 (comparing the state constitutions of Tennessee, Kentucky, and Louisiana).

Mississippi constitutional law.[26] Indeed, it still provides for conflict over Mississippi's rulemaking authority.[27]

While the Mississippi Constitution vests the judicial power of the state in one Supreme Court and other courts provided for by the Constitution,[28] and the legislative power in a legislature,[29] there is no explicit description of what those powers entail. And more relevant for this Article, there is no explicit rulemaking authority entrusted to either branch,[30] nor is it clear that such a power inherently falls under one branch or the other's powers.

Indeed, the clearest statement in the Mississippi Constitution of 1890 regarding the authority to promulgate rules of procedure in state court is found in section 90(s), which states, "The Legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.: . . . [r]egulating the practice in courts of justice."[31] At the very least, it presupposes that the legislature has the power to pass rules of procedure,[32] describing a power to pass "general laws … [r]egulating the practice in courts of justice."[33] Later on, we will make this presupposition even clearer. Alas, the power over judicial procedure vested in the legislature by section 33 and presupposed by section 90(s) was successfully attacked by the Court in their decision in *Newell v. State*, its subsequent adoption of the Mississippi Rules of Civil Procedure without legislative approval, and its categorical rejection of legislative rulemaking power in *Hall v. State*.[34]

But when one branch of government has a stronger claim to a power through the ambiguities in the Constitution and another branch has asserted an "inherent powers" claim over the power to

---

[26] *See, e.g.*, *id.* at 1025-29 (discussing the litigation surrounding the question of whether a member of the state judiciary may also serve in the Mississippi National Guard).

[27] *See infra* Sections IV.A, IV.B.

[28] MISS. CONST. art. VI, § 144 ("The judicial power of the State shall be vested in a Supreme Court and such other courts as are provided for in this Constitution.").

[29] *Id.* art. IV, § 33 ("The legislative power of this state shall be vested in a Legislature which shall consist of a Senate and a House of Representatives.").

[30] *Id.* art. IV; *id.* art. VI.

[31] *Id.* art. IV, § 90(s).

[32] *Id.*; *see also* Ball, *supra* note 11, at 365 n.40.

[33] MISS. CONST. art. IV, § 90(s).

[34] Morton, *supra* note 11, at 300-02.

promulgate rules of procedure, what can the branches of government do to resolve the constitutional question? This question is the source of Mississippi's rulemaking conflict, and the *de facto* answer, at least for the past 40 years, has been that the Court will simply seize the power without regard to the legislature's claim,[35] or for that matter, even addressing the arguments made against the adoption of the Rules of Court under section 90(s).[36]

B. Interpreting the Mississippi Constitution

We will next back up, though, and look at some general principles about the nature of the Mississippi Constitution and how to interpret it. To understand the scope of "legislative power" in section 33, and whether it includes the power to override judicially-adopted rules, we look for the meaning expressed by those words in the context of their adoption in 1890, especially in the context of the simultaneous adoption of the prohibition in section 90(s): "The Legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.: . . . [r]egulating the practice in courts of justice."[37]

---

[35] *See, e.g.*, Newell v. State, 308 So. 2d 71 (Miss. 1975). While Professor Linda S. Mullinex, Professor of Law at the University of Texas School of Law, maintains that most states have a shared system of rulemaking authority because there are legislators present on the state supreme court advisory committee on rules, this is not true in Mississippi. Linda S. Mullinex, The Varieties of State Rulemaking Experience and the Consequences for Substantive and Procedural Fairness (Jan. 1, 2005) (Report of the 2005 Forum for State Appellate Court Judges, Roscoe Pound Institute, Uni. Of Texas Law, Public Research Paper No. 266), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2207381 [https://perma.cc/W8FT-KWPJ]; MISS. CODE ANN. § 9-3-65 (2023). In fact, the Court has been hesitant to even allow legislators standing for constitutional challenges. *See generally* Reeves v. Gunn, 307 So. 3d 436 (Miss. 2020); Channing J. Curtis, *What's It to the Legislator?: Legislator Standing in State Court*, 92 MISS. L.J. 417 (2023).

[36] *Compare* Newell v. State, 308 So. 2d 71 (Miss. 1975), *and* Hall v. State, 539 So. 2d 1338 (Miss. 1989), *and* Supreme Court Order of 1981, *supra* note 4, *with* Supreme Court Order of 1981, *supra* note 4 (Lee, J., dissenting), *and Hall*, 539 So. 2d at 1349-66 (Hawkins, J., dissenting).

[37] MISS. CONST. art. IV, § 90(s).

1. J.Z. George's Explanation of Interpretation in 1880

The principles by which the Mississippi Constitution is to be interpreted were set out at length in 1880 in an opinion by J.Z. George, then Chief Justice, but shortly to become U.S. Senator and chief architect of the Constitution of 1890.[38] George's authority on the nature of the Mississippi Constitution is, to be sure, not based on any general status as a moral exemplar. As chairman of the state Democratic Party in 1875, he negotiated on behalf of those instigating a wave of appalling violence that swept away the regime of Adelbert Ames as soon as Democrats took control of the state legislature in early 1876.[39] George's reputation is thus properly and permanently tied to Fifteenth Amendment nullification, both because of his role in 1875 violence and because of his leadership in the voting-rights restrictions in 1890. But at the same time, his intellectual prowess was undeniable, and his work as Chief Justice makes the Mississippi Constitution's nature exceptionally clear. What *is* the Mississippi Constitution? It is a historically-situated text, expressing meaning according to the linguistic conventions of the time.

Beck v. Allen rejected an argument that Article 12, section 16 of the Mississippi Constitution of 1869 (a provision not repeated in the 1890 constitution) prevented the legislature from limiting local taxation.[40] The details of the case are less important than the Court's general explanation of the nature of constitutional interpretation in Mississippi. This was Chief Justice George's explanation of how constitutional interpretation works:

---

[38] TIMOTHY B. SMITH, JAMES Z. GEORGE: MISSISSIPPI'S GREAT COMMONER 149 (2012) ("George . . . was easily the convention's most prominent member."); *id.* at 151 (contemporary account of George as "the leading spirit in this convention").

[39] NICHOLAS LEMANN, REDEMPTION: THE LAST BATTLE OF THE CIVIL WAR 130 (2006) ("The unstated premise of the [October 13] peace conference was that General George was just as surely in command of the covert white militias as Governor Ames was in command of the Negro ones. How else would it be possible for them to negotiate a truce?").

[40] 58 Miss. 143 (1880).

> It is a cardinal rule of construction of constitutions and statutes to ascertain the intention of the framers of the instrument; and this intention will be that which the natural signification of the words employed, taken in their ordinary sense, indicates, if this sense be plain and involve no absurdity and no contradiction in different parts of the constitution or statute. . . . The rule that requires us to take words used in the Constitution in their ordinary and popular sense, presumes that the framers of the Constitution knew how to express their ideas in appropriate language. . . . To arrive at the construction which we have rejected, we must disregard the plain meaning of the words, taken in their ordinary signification, and we must also suppose that the convention, in this clause alone, rejected the ordinary constitutional language employed by themselves in making grants of power, and resorted to a circumlocution which of itself negatives the idea intended to be conveyed. We are not authorized to indulge in such a supposition. We must follow the language as used, and give it its proper signification. . . . It is also a rule of construction of constitutions and statutes that the instrument should be made, if possible, harmonious and consistent with itself. Its framers are presumed to have a definite and consistent policy, which is a key to all the provisions on the same subject-matter, and that which is clearly within the same mischief must be interpreted as intended to be within the same remedy. It is not to be presumed that provisions were inserted at random, to subserve some detached or isolated purpose. In constitutions, especially, we are to look for a careful and well-digested plan of government, under which there may be a regular, well-ordered, and harmonious administration.[41]

Notice here especially the presumption of harmony and consistency between provisions. A limited reading of "legislative power" in section 33 that makes a hash of one of the limits on such power in section 90(s) is clearly to be rejected if at all possible. Elsewhere, the Court also noted the importance of looking to other states' constructions of similar provisions: "[I]n order to arrive at the construction rejected by us, we must not only disregard the plain meaning of the language employed and the constitutional history of the State, but we must run counter to the general current of

[41] *Id.* at 162, 164, 170.

constitutional provisions on this subject."[42] As we will see below, there have been many comments on similar provisions in other state constitutions that confirm our reading of section 90(s) of the Mississippi Constitution.[43] J.Z. George would have thought this important evidence, and as the principal framer of the Mississippi Constitution of 1890, that means we should too.

Justice Campbell dissented, but he explained the nature of interpretation of the Mississippi Constitution the same way that Chief Justice George did, focusing on the meaning expressed by the text in its original context:

> The question is as to the meaning of the section—not what we might wish it to be, but what it is. The object to be sought is the *intent* of the people in adopting it. That intent is to be found, if possible, in the words used. Those words are to be taken in their ordinary sense and common acceptation, and that meaning is to be given to them which naturally suggests itself upon their perusal. No matter as to the form of expression, whether the most apt or not, if the purpose of the provision is manifest from the language employed, effect must be given to it. Subtility and refinement and astuteness are not admissible to explain away an expression of the sovereign will. A sense suggested by reading a provision of the Constitution which requires ingenious reasoning to explain it away ought not to be thus disposed of, because it cannot be supposed that such reasoning was applied to it by those who adopted it. The framers of the Constitution and the people who adopted it must be understood to have intended the words employed in that sense most likely to arise from them on first reading them.[44]

Campbell, like George, thought other states' constitutions were relevant, appealing to "[t]he fact that the constitutions of other States contain directions to the legislatures to restrict or limit local taxation by municipal organizations, and that with these examples before the framers of our Constitution they inserted the provision under consideration."[45] Finally, like George, he also thought it was important not to render a provision without importance: "If this be

[42] *Id.* at 168-69.
[43] *See infra* notes 127-137 and accompanying text.
[44] *Beck*, 58 Miss. at 177 (Campbell, J., dissenting).
[45] *Id.* at 182 (Campbell, J., dissenting).

not the meaning of the section under review, its insertion was folly and its effect nugatory."[46] The same reasoning should apply, as we will see, to section 90(s).

2. The Self-Presentation of the Mississippi Constitution

Elsewhere, one of us has argued that the federal constitutional text's use of indexical, self-referential language tells us the nature of that Constitution.[47] Language like "the preceding Constitution" in the cover letter approved by the Convention and textual self-references like "foregoing," "herein before," and "hereunto" situate the Federal Constitution in space, as a textual expression of meaning. Terms like "now" and "the time of the adoption of this Constitution" situate the Federal Constitution in time, as an expression of meaning in the precise context of 1787, using the linguistic conventions of the time.[48]

The language of the Mississippi Constitution offers an abundance of evidence along this line—far more, indeed, than in the case of the United States Constitution. It makes the nature of the Mississippi Constitution very clear. It is a textual expression of meaning which speaks in a very precise context: November 1, 1890. Section 32 refers to the "enumeration of rights in *this* constitution,"[49] while section 146 speaks of jurisdiction "specifically provided by *this* Constitution,"[50] and section 244A refers to voter qualifications "set forth in *this* Constitution."[51] The Mississippi

---

[46] *Id.* at 184 (Campbell, J., dissenting).

[47] Christopher R. Green, "This Constitution": Constitutional Indexicals as a Basis for Textualist Semi-Originalism, 84 NOTRE DAME L. REV. 1607, 1666 (2009).

[48] *Id.* at 1666 ("'This Constitution' is, then, located at the time of the Founding. The constituting of the United States happened at the Founding. It did not happen over generations and does not happen anew every day. The constitutional author distinguished itself from succeeding generations, identified its work of establishing the Constitution with the Founding's ratifying conventions, and spoke of the Founding as the time of its adoption. If we ask the Constitution what time it is—that is, what it means by the term 'now'—it answers with the time of the Founding."); Cass R. Sunstein, "This", Harv. J. L. & Pub. Pol'y (forthcoming 2023) (manuscript at 11), https://papers.ssrn.com/paper=4093192 [https://perma.cc/8WLG-AEL2] (quoting this passage and adding: "In an important sense, these claims are correct.").

[49] MISS. CONST. art. III, § 32.

[50] MISS. CONST. art. VI, § 146.

[51] MISS. CONST. art. XII, § 244A.

Constitution has a specifically enumerating, setting-forth, textual nature: it is an expression of meaning.

The fact that the Mississippi Constitution expressed that meaning *in 1890*, and not at other points of time, is extremely clear indeed. The Mississippi Constitution uses the term "now" sixteen times in ways that would make no sense if the Constitution were seen as intergenerationally authored: "such obstructions as now exist" in section 81,[52] "any charter of incorporation now existing and revocable" in section 178,[53] "any corporation now existing" in section 179,[54] "any right or remedy that he [a railroad employee] now has" in section 193,[55] "counties now or hereafter embraced within the limits of said district"[56] and "that part of Humphreys county now embraced within the limits of said district" in section 229,[57] "proceedings as now provided by law" in section 233,[58] "every acre of land now or hereafter embraced within the limits of either or both of said levee districts" in section 236,[59] "the territory now composing them [certain counties]," repeated three times over in former section 256,[60] "now generally known as 'Union Bank' bonds" in section 258,[61] "laws of this State now in force" in section 274,[62] "officers … now in office," "offices now held," and "compensation and fees now fixed" in section 284.[63]

The temporal aspects of the text's references to itself as "this Constitution" are unmistakable as well: it refers to "the laws in force when this Constitution is put in operation" in section 159,[64] to events that have "taken place at the adoption of this Constitution" and "commenced within one year from the adoption of this Constitution" in section 180,[65] to "[e]xemptions from taxation to

[52] MISS. CONST. art. IV, § 81.
[53] MISS. CONST. art. VII, § 178.
[54] MISS. CONST. art. VII, § 179.
[55] MISS. CONST. art. XV, § 285.
[56] MISS. CONST. art. VII, § 193.
[57] MISS. CONST. art. XI, § 229.
[58] MISS. CONST. art. XI, § 233.
[59] MISS. CONST. art. XI, § 236.
[60] MISS. CONST. art. XIII, § 256.
[61] MISS. CONST. art. XIV, § 258.
[62] MISS. CONST. art. XV, § 274.
[63] MISS. CONST. art. XV, § 284.
[64] MISS. CONST. art. VI, § 159.
[65] MISS. CONST. art. VII, § 180.

which corporations are legally entitled at the adoption of this Constitution" in section 181,[66] to "the time of the adoption of this Constitution" in section 183,[67] to "any crime or offense committed before the adoption of this Constitution" in section 279,[68] to "suits, civil and criminal, begun before the adoption of this Constitution" in section 280,[69] to "instruments entered into or executed before the adoption of this Constitution" in section 282,[70] and to "the statute laws in force when this Constitution is adopted" in section 284.[71] Indeed, the Constitution ends by situating itself in time: "This Constitution, adopted by the people of Mississippi in convention assembled, shall be in force and effect from and after this, the first day of November, A.D. 1890."[72]

3. Meaning and Application in Mississippi

The fact that the Constitution defines itself as a textual expression of meaning in a very precise context does not mean that its *applications* are forever fixed.[73] Textual categories are of course sometimes general and fact-dependent. The Court put it this way in 1947 in *Stepp v. State*:

---

[66] MISS. CONST. art. VII, § 181.
[67] MISS. CONST. art. VII, § 183.
[68] MISS. CONST. art. XV, § 279.
[69] MISS. CONST. art. XV, § 280.
[70] MISS. CONST. art. XV, § 282.
[71] MISS. CONST. art. XV, § 284.
[72] MISS. CONST. art. XV, § 285.
[73] For much more on this theme, see Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555 (2006).

> It is a mistake to suppose that a constitution is to be interpreted only in the light of things as they existed at the time of its adoption. On the contrary, a constitution is intended to endure for a long time, and is interpreted in the light of developments which have appeared at the time of the interpretation, and may therefore include things and conditions which not only did not exist but were not contemplated when it was drafted, so long as the new developments are in their nature within the scope of the purposes and powers for the furtherance of which the constitution was established.[74]

The U.S. Supreme Court similarly distinguished meaning from application in 1926 in *Village of Euclid v. Ambler Realty Co.*:

> Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise. But although a degree of elasticity is thus imparted, not to the *meaning*, but to the *application* of constitutional principles, statutes and ordinances which, after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall.[75]

As a general matter, then, it is possible for factual changes to cause applications to pass into or out of a fixed constitutional category. But no such factual changes are relevant here. Nothing has happened to take power over judicial practice and procedure outside the extent of "legislative power."

---

[74] 32 So. 2d 447, 447 (Miss. 1947).

[75] 272 U.S. 365, 387 (1926).

4. Overruling Precedent in Mississippi

The 1880 case in which J.Z. George explained interpretation, *Beck*, also explains when the Court should reverse itself. Reliance placed on a precedent certainly raises the amount of *evidence* required about constitutional meaning. But the Court must prefer the Constitution itself to its earlier decisions if the error of a precedent is sufficiently clear:

> We depart from these decisions with reluctance, both on account of the weight due to the opinions of the learned judges who concurred in them, and also on account of the appearance of vacillation in the opinions of the court. . . . We are fully impressed with the force of the doctrine *stare decisis* in all cases in which it is proper to apply it. But we do not think we ought to surrender our convictions — fortified, as they are, by the repeated and deliberate enactments of the political department of the government — to the authority of these cases, since no property rights, but only the proper administration of the government, are involved.[76]

Beck quoted a case from the year before holding that the court should be especially energetic in correcting a mistaken precedent that "sanctioned an alienation of legislative power conferred for the public good."[77] This is a category that encompasses both the limitation of legislative power over local taxation and legislative power over the practice of courts. *Newell* and *Hall* are worth consideration, of course, but they should not stand in the way of properly interpreting the Mississippi Constitution itself.[78]

---

[76] 58 Miss. 143, 172-73 (1880).

[77] *Id.* at 173 (citing Lombard v. Lombard, 57 Miss. 171, 177 (1879)).

[78] For expressions outside Mississippi of the same idea—using reliance interests to gauge the importance and weight of an issue, then overruling only if an error is sufficiently clear, given those stakes—see, for example, Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedent*, 87 VA. L. REV. 1 (2001); *id.* at 19 n.59 (quoting Gwin v. McCarroll, 9 Miss. (1 S. & M.) 351, 371 (1843) as exemplifying a typical rationale for overruling precedent); *id.* at 68 n.224 (quoting Garland v. Rowan, 10 Miss. (2 S. & M.) 617, 630 (1844) on the danger for public perceptions "[i]f solemn judgments, once made, are lightly departed from"); Gamble v. United States, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring) ("Federal courts may . . . adhere to an incorrect decision as precedent, but only when . . . the earlier decision adopted a textually permissible interpretation of the law. . . . When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it."); *id.* at 1982-84 (following Nelson, *supra* note 54);

How big are the reliance interests behind *Newell* and *Hall*? For *past* invalidations of legislatively-adopted judicial procedures, there may be a reliance interest. Overruling *Hall* by using the rule of evidence preferred by the statute held unconstitutional in *Hall* itself, might be destabilizing. But where the legislature has adopted new rules, and it is uncertain whether they are substantive or procedural, it seems unlikely to us that anyone would have invested significant resources in the assumption that the Court would strike them down under *Newell* and *Hall* as improperly procedural. Further, if we regard the 1996 liberalization of the Mississippi Rules Act in Mississippi Code section 9-3-61 as implicitly repealing all *earlier* procedural statutes, the reliance cost could be reduced nearly to the vanishing point. In light of the small reliance interest at stake, it would thus require relatively little clarity about legislative power over judicial procedure to overrule *Newell* and *Hall* and to enforce statutes adopted since then. As we will see below, the case for such power in light of the history of the language of section 90(s) is quite clear indeed.

5. Deference to the Mississippi Legislature

A final element of constitutional theory, explained at length in *Beck*, and which makes overruling *Newell* and *Hall* even easier, is the presumption of constitutionality. In close cases, courts should understand the legislature to have acted constitutionally:

McDonald v. City of Chicago, 561 U.S. 742, 859-60 (2010) (Stevens, J., dissenting) ("[T]he original meaning of the [Privileges or Immunities] Clause is . . . not nearly as clear as it would need to be to dislodge 137 years of precedent."); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1722 (2013) ("The need to take account of reliance interests forces a justice to think carefully about whether she is sure enough about her rationale for overruling to pay the cost of upsetting institutional investment in the prior approach. If she is not sure enough, the preference for continuity trumps." (footnote omitted)); Transcript of Oral Argument at 70, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392) (question of Breyer, J.) (in case with large reliance interests, "you better be damn sure that the normal . . . considerations . . . are really there in spades."); Transcript of Oral Argument at 174-75, Students for Fair Admissions v. Univ. of N.C. (2022) (No. 21-707) (question of Jackson, J.) ("[I]f there's evidence on the other side, don't we need to have a clear picture of this in order to overcome stare decisis? . . . [O]vercoming stare decisis requires something more than ambiguous historical evidence.").

> It is well settled that courts ought not, except in cases admitting of no reasonable doubt, to take upon themselves to say that the Legislature has exceeded its powers and violated the Constitution, especially where the legislative construction has been given to the Constitution by those who framed its provisions, and contemporaneous with its adoption. … Th[e] uniform construction put on this section by the Legislature ought not, under well-settled rules, to be disregarded by the courts, except in a very clear case.[79]

The interaction of the presumption of correctness of legislative judgment with the presumption of correctness of earlier contrary judicial judgment—at stake in both *Beck* and in a decision today about whether to overrule *Newell* and *Hall*—means that we have to ask a several-layered question. To uphold a statute regulating judicial procedure, the Court would have to be convinced that is it clear enough, in the face of contrary judicial precedents in *Newell*, *Hall*, and their progeny, that legislative control over judicial procedure is *not* clearly *un*constitutional. If the issue were clearly unclear, that would be enough. As set out below, however, there is plenty of evidence, enough to satisfy even a much higher standard of proof.

6. Do Modifications to Section 146 Matter?

Recently, the Fifth Circuit has upheld felon-disfranchisement sections of the Mississippi Constitution against federal constitutional attack on the basis that they have been amended since 1890.[80] Some of the provisions related to judicial power have been modified or re-enacted since 1890. Does that mean we should ask what "legislative power" or "judicial power" meant at those later times, rather than 1890? We do not think so. The separation of judicial from legislative power is the product of three provisions in the Mississippi Constitution that have remained unaltered since 1890: section 33, granting "legislative power" to the legislature,[81]

---

[79] *Beck*, 58 Miss. at 171-72.

[80] Harness v. Watson, 47 F.4th 296, 307 (5th Cir. 2022) ("[T]he critical issue here is not the intent behind Mississippi's 1890 Constitution, but whether the reenactment of Section 241 in 1968 was free of intentional racial discrimination.").

[81] MISS. CONST. art. IV, § 33.

section 144, granting "judicial power" to courts,[82] and section 2, preventing the exercise by those in one branch of powers belonging to others.[83] These basic walls of separation, established according to the linguistic conventions of 1890, have not been changed by any modifications made at other times to other provisions. The 1983 amendment to section 146, for instance, on the distribution of power between the Mississippi Supreme Court and other courts, expressed its meaning in virtue of the linguistic conventions of 1983. But rearranging furniture that may have been placed behind particular walls does not move the walls themselves. Changing the jurisdiction of the Court does not change the nature of "legislative power" or "judicial power," which remain as they were.

II. THE MISSISSIPPI SUPREME COURT'S SEIZURE OF POWER

In 1975, the Court began eroding the legislature's authority to promulgate rules of procedure in Mississippi courts.[84] It all began, according to now-Federal Magistrate Judge, F. Keith Ball, when Lawrence J. Franck "published an article arguing that the Mississippi Supreme Court should undertake to reform the state's procedural rules on the basis of the court's own rule-promulgating authority inherent in the Mississippi Constitution."[85] And it seems the Court took Franck's article seriously, for in 1975, the Court held that due to its inherent authority over procedure, vested by the Constitution, it could disregard statutory rules of procedure where they are "determined to be an impediment to justice or an impingement upon the constitution."[86]

Newell v. State is now the landmark case, along with *Hall v. State*, upon which the Court bases its authority to promulgate rules of procedure.[87] In *Newell*, a Mississippi statute precluded judges from instructing juries on their own, and the Court dealt with the practical issue that such a statute presents by writing the now famous words,

---

[82] MISS. CONST. art. VI, § 144.

[83] MISS. CONST. art. I, § 2.

[84] *See* Morton, *supra* note 11, at 301.

[85] Ball, *supra* note 11, at 360.

[86] Newell v. State, 308 So. 2d 71, 76 (Miss. 1975).

[87] Supreme Court Order of 1981, *supra* note 4.

> We are keenly aware of, and measure with great respect, legislative suggestions concerning procedural rules and they will be followed unless determined to be an impediment to justice or an impingement upon the constitution. The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts.[88]

Along with the Court's declaration of the power to disregard statutory rules of procedure in *Newell*, the legislature passed the Rule Making Act of 1975 which has changed over time.[89] Originally, in 1975, the legislature gave the Court power "to prescribe from time to time by general rules, the forms of process, writs, pleadings, motions, rules of evidence and the practice and procedure of the circuit, chancery and county courts of this state in civil actions."[90] But this power was contingent upon submission of rules by the Advisory Committee on the Rules of Civil Procedure[91] to the legislature for approval.[92]

The Advisory Committee was led by Arlen Coyle from the University of Mississippi School of Law, and that committee spent

[88] *Newell*, 308 So. 2d at 76 (first citing Matthews v. State, 288 So. 2d 714 (Miss. 1974); then citing Gulf Coast Drilling & Expl. Co. v. Permenter, 214 So. 2d 601 (Miss. 1968); and then citing S. Pac. Lumber Co. v. Reynolds, 206 So. 2d 334 (Miss. 1968)).

[89] Mary Libby Payne, *The Mississippi Judiciary Commission Revisited: Judicial Administration: An Idea Whose Time Has Come?*, 14 MISS. C. L. REV. 413, 451 (1994). In 1975, the same year *Newell v. State* was decided, the legislature passed Mississippi Code sections 9-3-61 to 73. MISS. CODE ANN. §§ 9-3-61 to 73 (1975). Amendments followed in 1982, 1993, and 1996. MISS. CODE ANN. § 9-3-61 (1982) ("The supreme court shall have the power subject to the provisions set forth in § 9-3-71 to prescribe from time to time by general rules, the forms of process, writs, pleadings, motions, rules of evidence and the practice and procedure of the circuit, chancery and county courts of this state in civil actions."); MISS. CODE ANN. § 9-3-61 (1993) (adding the Court of Appeals to the list of courts for which the supreme court could propose rules); MISS. CODE ANN. § 9-3-61 (1996) ("As a part of the judicial power granted in Article 6, Section 144, of the Mississippi Constitution of 1890, the Supreme Court has the power to prescribe from time to time by general rules the forms of process, writs, pleadings, motions, rules of evidence and the practice and procedure for trials and appeals in the Court of Appeals and in the circuit, chancery and county courts of this state and for appeals to the Supreme Court from interlocutory or final orders of trial courts and administrative boards and agencies, and certiorari from the Court of Appeals.") (repealing MISS. CODE ANN. §§ 9-3-71 to 73 (1975)).

[90] MISS. CODE ANN. § 9-3-61 (1975).

[91] The composition of the Advisory Committee is codified at MISS. CODE ANN. § 9-3-65 (2023).

[92] MISS. CODE ANN. § 9-3-61 (1975); *id.* at § 9-3-71.

several years forming proposed rules based on the recommendations of a broad group of attorneys and judges, according to long-time University of Mississippi School of Law Professor Guff Abbott.[93] It seems that these years were filled with compromise between the plaintiffs' bar, defense bar, and other groups, but ultimately sparsely attended hearings were held in 1977.

Subsequently, the Court's Advisory Committee submitted a draft of the rules to the Judiciary Committees of both the House and Senate, who both rejected the proposed rules, prior to the 1980 legislative session.[94] Compromise ensued, and the rules were submitted to the legislature again prior to the 1981 legislative session, where the House Judiciary Committee rejected the rules by a vote of fifteen to one.[95]

Despite the legislative rejection of the proposed rules, a sharply divided Court finally crossed the Rubicon in 1981,[96] adopting the Mississippi Rules of Civil Procedure based upon the power described in *Newell v. State*.[97] And for the first time, a "Court in the United States . . . adopted a blanket set of rules in the absence of explicit statutory or constitutional authority therefor."[98] But it

---

[93] Email from Guthrie T. Abbott, Professor Emeritus, Univ. of Miss. Sch. of L., to Channing J. Curtis, Student at the Univ. of Miss. Sch. of L. (Dec. 8, 2022, 11:51 CST) (on file with Authors).

[94] Payne, *supra* note 62, at 453; Supreme Court Order of 1981, *supra* note 4, at 4 (Lee, J., dissenting from order adopting new rules of civil procedure). Personal communication with Professor Abbott reflects that the rules were opposed by a vote of twenty-six to eight in the House Judiciary Committee. Email from Guthrie T. Abbott, *supra* note 66.

[95] E-mail from Guthrie T. Abbott, *supra* note 66.

[96] *See* Hall v. State, 539 So. 2d 1338, 1358 (Miss. 1989) (Hawkins, J., dissenting) (describing the vote count in 1981 as "sharply divided").

[97] Supreme Court Order of 1981, *supra* note 4.

[98] *Hall*, 539 So. 2d at 1358 (Hawkins, J., dissenting). For a brief history of the quarrel between the Legislature and Supreme Court, see Ball, *supra* note 11, at 363-64. Commentators even discuss the separation of powers disputes in federal rulemaking. *See* Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976); Michael Blasie, Note, *A Separation of Powers Defense of Federal Rulemaking Power*, 66 N.Y.U. ANN. SURV. AM. L. 593 (2011). But it is worth noting that while Mississippi was the first state, it was not the last to fight the fight over whether rulemaking authority is an inherent power of the judicial branch or if it is a legislative prerogative. *See, e.g.*, Kala Rogers Holt, *The Balance of Power:* Wiedrick v. Arnold *and the Conflict Over Legislative and Judicial Rulemaking Authority in Arkansas*, 46 ARK. L. REV. 627 (1993); Bruce L. Dean, Comment, *Rule-Making in Texas: Clarifying the*

did not do so without dissent.[99] Indeed, Justices Broom, Roy Noble Lee, and Bowling wrote and joined two dissenting opinions,[100] and Justice Bowling filed an objection to the adoption of the rules.[101]

A year later, in the 1982 legislative session, the legislature amended the Rulemaking Act, allowing more input from the legislature and requiring that the rules be submitted to the legislature thirty days prior to the legislature's adjournment sine die.[102] The Court complied with the thirty day requirement to the day, and the legislature responded, rejecting Rules 3, 12, 13, 41, 47, 49, 55, 56, and 83 by concurrent resolution.[103] According to Professor Guff Abbott, this created much confusion among the Bench and Bar as to which rules were actually in effect.[104] In response, Chief Justice Neville Patterson authored a letter to the trial judges on April 6, 1982, giving the history of the rulemaking process and the attempted cooperation of the Court which was not reciprocated by the legislature.[105] Concluding his letter, Chief Justice Patterson stated, "The Mississippi Rules of Civil Procedure,

---

Judiciary's Power to Promulgate Rules of Civil Procedure, 20 ST. MARY'S L.J. 139 (1988); Amanda G. Ray, Recent Development, *The Supreme Court of North Carolina's Rulemaking Authority and the Struggle for Power:* State v. Tutt, 84 N.C. L. REV. 2100 (2006). Indeed, Connecticut is similarly situated. The Connecticut Constitution states, "[t]he judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law." CONN. CONST. art. 5 § 1(1). *But see* State v. Rollison, 526 A.2d 1283, 1288-89 (Conn. 1987); Thomas A. Bishop, *Evidence Rulemaking: Balancing the Separation of Powers*, 43 CONN. L. REV. 265 (2010). However, many states have now constitutionalized rulemaking authority. *See infra* note 223.

[99] Supreme Court Order of 1981, *supra* note 4, at 2 (Broom, J., responding to court's adoption of new rules of civil procedure); *id.* at 4 (Lee, J., dissenting from order adopting new rules of civil procedure); *id.* at 5 (Bowling, J., objecting to adoption of rules).

[100] Supreme Court Order of 1981, *supra* note 4, at 2 (Broom, J., responding to court's adoption of new rules of civil procedure); *id.* at 4 (Lee, J., dissenting from order adopting new rules of civil procedure).

[101] *Id.* at 5 (Bowling, J., objecting to adoption of rules).

[102] E-mail from Guthrie T. Abbott, *supra* note 66.

[103] *Id.*

[104] Interview with Guff Abbott, Professor Emeritus, Univ. of Miss. Sch. of L. (Feb. 11, 2022).

[105] Neville Patterson, *Re: Rules of Civil Procedure*, MISS. LAWYER, Mar.-Apr. 1982, at 8.

as amended, shall remain in full force and effect until further order of this Court."[106]

Chief Justice Patterson's letter seemed to have spurred the legislature into action, as a small bump in the road in the slow erosion of the legislature's claim to rulemaking power appeared in 1983, when the legislature amended section 146 of the Constitution, seeming to give section 90(s) more weight.[107] The previous version of section 146 simply read, "The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals . . . ."[108] Section 146 now reads in relevant part, "The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals *and shall exercise no jurisdiction on matters other than those specifically provided by this Constitution* ***or by general law***."[109] Section 146's amendment now seems to make section 90(s) a jurisdictional issue for the Court, not merely a separation of powers concern.[110] Nonetheless, the Court maintains its hold over the power to promulgate Rules of Court, despite the existence of section 90(s) and the amended section 146.[111]

Despite the legislature's efforts, the Court adopted the Mississippi Rules of Evidence in 1985.[112] In doing so, it adopted a blanket set of rules for the second time, not only without constitutional or statutory approval, as was the case of the Rules of Civil Procedure,[113] but the Rules of Evidence were adopted after the

---

[106] *Id.*; *see also* William H. Page, *Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi*, 3 MISS. C. L. REV. 1, 8 (1982). The defense of the Judiciary's rulemaking authority has been touted as one of Chief Justice Patterson's greatest achievements. *See* James L. Robertson, In Memoriam, *Neville Patterson*, 57 MISS. L.J. 417, 419-420 (1987); William L. Waller, Jr. & Gabe Goza, *The Office of Chief Justice of the Supreme Court of Mississippi*, 29 MISS. C. L. REV. 469, 484 (2010) ("Patterson orchestrated the adoption of the Mississippi Rules of Civil Procedure . . . .").

[107] Ball, *supra* note 11, at 364 n.28.

[108] Newell v. State, 308 So. 2d 71, 77 (Miss. 1975).

[109] MISS. CONST. art. VI, § 146 (emphasis added).

[110] Ball, *supra* note 11, at 364-65.

[111] *See, e.g.*, Donaldson v. Cotton, 336 So. 3d 1099, 1102 (Miss. 2022). This case is the most recent proclamation of the Court's inherent authority over procedure.

[112] Supreme Court Order of 1985, *supra* note 6.

[113] The Mississippi Rules of Civil Procedure were adopted in 1981 and the Mississippi Rules of Evidence were adopted in 1985. *See* Hall v. State, 539 So. 2d 1338, 1358 (Miss. 1989) (Hawkins, J., dissenting).

amendment of section 146 of the Constitution, which arguably weakened the Court's power to do so.[114]

Four years later, in *Hall v. State*, the Court doubled down, reaffirming its power to promulgate rules of procedure, "completely ignoring" the counterarguments that the power actually resides with the legislature.[115] Indeed, the presupposition of section 90(s) is still something that the full Court has never addressed.[116] *Hall v. State* was the last time it has been argued by a Mississippi Supreme Court Justice,[117] though several jurists have renewed their objection to *Hall* or alluded to the possibility that it was incorrectly decided.[118]

The Court in *Hall* relied centrally on its watershed enforcement of the separation of powers six years earlier in *Alexander*, in which the Court had struck down Mississippi's longstanding practice of legislators serving in executive offices and exercising appointment powers, because legislators may not exercise powers lying "at the core of the executive power."[119] The Court in *Hall* then applied *Alexander*'s no-sharing-of-core-functions principle to rulemaking on the ground that rulemaking was not only within the judicial power, but at its core: "As trials are the core activity of the judiciary, so the promulgation of rules for the regulation of trials lie at the core of the judicial power."[120]

Alexander's willingness to challenge even long-standing practices of the legislature, if those practices' unconstitutionality is

---

[114] Ball, *supra* note 11, at 363-64. *Compare* MISS. CONST. art. VI, § 146, *with* Supreme Court Order of 1985, *supra* note 6.

[115] *Hall*, 539 So. 2d at 1353 (Hawkins, J., dissenting).

[116] This presupposition has only been addressed by academics, Justice Hawkins's dissenting opinion in *Hall*, *id.* at 1349-66 (Hawkins, J., dissenting), and Justice Broom in his dissent to the Order Adopting the Mississippi Rules of Civil Procedure. Supreme Court Order of 1981, *supra* note 4, at 2 (Broom, J., dissenting).

[117] We are unaware of any other opinions in which this argument has been made.

[118] *See* Lambert v. State, 574 So. 2d 573, 579 (Miss. 1990) (Hawkins, J., specially concurring) ("I am compelled to write, however, because the majority takes pains to cite *Hall v. State*, . . . an egregious oscillation to unbalanced judgment, and which I can never accept as a valid decision. This Court in *Hall* usurped it [sic] Constitutional authority, seized a power it does not have, and struck down a valid Legislative enactment as beyond the Legislative Branch of this Government's power to enact."); *see also* Pitts v. State, No. 2021-KA-00740-COA, 2023 WL 1425289, at *26 n.22 (Miss. Ct. App. Jan. 31, 2023) (Wilson, J., dissenting) (citing a previous draft of this Article).

[119] Alexander v. State *ex rel.* Allain, 441 So. 2d 1329, 1337 (Miss. 1983).

[120] *Hall*, 539 So. 2d at 1346.

sufficiently clear, fits well with the approach to precedent, outlined above, that the Court adopted in *Beck* and other early cases. But *Hall*'s ipse dixit that judicial procedure is at the core of judicial power is unsupported. Indeed, the separation-of-powers analysis in *Hall* (and suggested in *Newell*) is undermined by the counterexample of common-law rules. The common law can be made and changed by courts, but subject to override by the legislature if it disagrees. *Hall* reasoned, however, that because "judicial power" included the power to adopt rules, "legislative power" could not:

> [T]he promulgation of rules for the regulation of trials lie at the core of the judicial power. That being so, it only follows that the officers of neither the legislative nor executive departments of government, acting jointly or severally, had authority to confer legal validity upon the Evidence of Child Sexual Abuse Act.[121]

The existence of interstitial, gap-filling common law—law that courts can make in the absence of a statute, but which is nonetheless legislatively defeasible—reveals the flaw in *Hall*'s reasoning. *Inherent* powers need not be legislatively *indefeasible*. We might see the same point in terms of the distinction between categories two and three of Justice Jackson's concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*.[122] Category two, the "zone of twilight," consists of what the President can do if Congress has not spoken either way, while category three, the "lowest ebb," consists of what the President can do even if Congress forbids it.[123] There are some things that Presidents may do in the absence of legislation, but which they may not if Congress tells them not to. Similarly for courts: vindicating the power of courts to adopt rules

---

[121] *Id. Cf.* Newell v. State, 308 So. 2d 71, 76 (Miss. 1975) ("We are keenly aware of, and measure with great respect, legislative suggestions concerning procedural rules and they will be followed unless determined to be an impediment to justice or an impingement upon the constitution. The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts." (first citing Matthews v. State, 288 So. 2d 714 (Miss. 1974); then citing Gulf Coast Drilling & Expl. Co. v. Permenter, 214 So. 2d 601 (Miss. 1968); and then citing S. Pac. Lumber Co. v. Reynolds, 206 So. 2d 334 (Miss. 1968)).

[122] 343 U.S. 579 (1952).

[123] *Id.* at 637-38 (Jackson, J., concurring).

when the legislature has not spoken need not prevent the legislature from overriding them later.

Indeed, the U.S. Supreme Court characterized the power over judicial procedure exactly this way in *Wayman v. Southard* in 1825, approving the delegation of rulemaking power over the effect of judgments to federal courts. For certain less important "details," Congress could either act itself or leave them to other branches:

> It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. Without going farther for examples, we will take that, the legality of which the counsel for the defendants admit. The 17th section of the Judiciary Act, and the 7th section of the additional act, empower the Courts respectively to regulate their practice. It certainly will not be contended, that this might not be done by Congress. The Courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended, that these things might not be done by the legislature, without the intervention of the Courts; yet it is not alleged that the power may not be conferred on the judicial department. The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.[124]

Note the key point in then Chief Justice Marshall's analysis: Congress has the power to adopt rules of practice for courts itself, but also has the power to allow courts to adopt them. And if Congress had the power to adopt procedural rules rather than delegating power to courts, nothing prevents it from exercising it later, overriding judicial rulemaking.[125] The mere existence of judicial power over procedure does not mean that such power is legislatively indefeasible, beyond Congress's ability to change.

---

[124] Wayman v. Southard, 23 U.S. (10 Wheat) 1, 42-43 (1825).

[125] For more elaboration on the fact that legislatures cannot permanently divest themselves of power, see *infra* notes 102-04 and accompanying text.

Returning to our later-twentieth-century story, we find that soon after *Hall*, the fight over rulemaking authority was seemingly abandoned by the legislature.[126] In 1996, the Mississippi Code was revised to no longer require the Court to submit proposed rules to the legislature.[127] Thus, the legislature conceded that the power to promulgate rules of procedure in Mississippi belonged to the Court:

> As a part of the judicial power granted in Article 6, Section 144, of the Mississippi Constitution of 1890, the Supreme Court has the power to prescribe from time to time by general rules the forms of process, writs, pleadings, motions, rules of evidence and the practice and procedure for trials and appeals in the Court of Appeals and in the circuit, chancery and county courts of this state and for appeals to the Supreme Court from interlocutory or final orders of trial courts and administrative boards and agencies, and certiorari from the Court of Appeals.[128]

Has the legislature thus abandoned its rulemaking power? Recall that *Beck* mentioned in 1880, in justifying the reversal of earlier precedent, that the legislature had not acquiesced in the cases it overruled. In 1996, however, the legislature authorized the Court to adopt rules. Did the legislature thereby ratify the Court's invalidation of legislative power over judicial procedure in *Hall*? Even on its face, the mere legislative authorization of judicial rulemaking in the first instance does not abandon the authority to override those judicially-adopted rules in the future. A power to adopt rules need not be legislatively indefeasible. But even if the legislature were to attempt to give the Court the power to override procedural statutes, that statute would itself be unconstitutional. A legislature at time one cannot entrench its statutes against repeal by the Legislature at time two. As Justice Coleman explained in his concurrence in the MAEP case, "the Legislature certainly has the authority to amend existing statutes. Whether the language of the general law is mandatory or not, when the Legislature passes a one-year appropriations law that differs from the general law it does nothing more than temporarily amend or

[126] Payne, *supra* note 62, at 454.
[127] *See supra* note 62.
[128] *See* MISS. CODE ANN. § 9-3-61 (2023).

suspend the general law."[129] Hostility to a legislative power of entrenchment is well-recognized elsewhere as well. Chief Justice Marshall explained, "[O]ne legislature is competent to repeal any act which a former legislature was competent to pass . . . [O]ne legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted."[130] William Blackstone noted famously that binding a future parliament was the *only* thing parliament could not do. "Acts of parliament derogatory from the power of subsequent parliaments bind not."[131] Accordingly, the power presupposed by section 90(s), if it existed in 1890 and has not been eroded by subsequent material factual developments, remains with the legislature.

III. THE MEANING OF "LEGISLATIVE POWER" IN THE 1890 CONTEXT OF SECTION 90(S)

It may seem perfectly obvious—beyond the possibility of being rendered more obvious with evidence—that the legislature has the power to adopt general rules of practice in courts of justice, because section 90(s) prohibits *special* laws of this kind.[132] And indeed, this inference has always seemed quite compelling to us. An obvious presupposition, even a very obvious presupposition, is not *quite* the same thing as an explicit grant of power. However, the history of how the language of section 90(s) has been understood as well as the early treatment of other parts of section 90 by the Court make our reading even clearer.

A. *The Origins and Meaning of 90(s) and Parallel Provisions*

Thorpe's 1909 collection of state constitutions contains provisions in 19 other states besides Mississippi with provisions

---

[129] Clarksdale Mun. Sch. Dist. v. State, 233 So. 3d 299, 307 (Miss. 2017) (Coleman, J., concurring in result) (citations omitted).

[130] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810). The Supreme Court held later in the opinion that the attempt to repeal the Yazoo Land Grant ran afoul of the Contracts Clause, but the authorization of judicial rulemaking obviously does not pose any contracts-clause issue.

[131] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *90. For more, see Lockhart v. United States, 546 U.S. 142, 147-48 (2005) (Scalia, J., concurring).

[132] MISS. CONST. art. II, § 90(s).

identical or nearly identical to 90(s): Indiana's Constitution of 1851,[133] Oregon's Constitution of 1857,[134] Nevada's Constitution of 1864,[135] Florida's Constitution of 1868,[136] Illinois's Constitution of 1870,[137] West Virginia's Constitution of 1872,[138] an 1873 amendment to Texas's Constitution,[139] Pennsylvania's Constitution of 1873,[140] Nebraska's Constitution of 1875,[141] Colorado's

[133] IND. CONST. of 1851, art. IV, § 22 ("The General Assembly shall not pass local or special laws, in any of the following enumerated cases, that is to say: . . . Regulating the practice in courts of justice . . . .").

[134] OR. CONST. of 1857, art. IV, § 23 ("The Legislative Assembly shall not pass special or local laws in any of the following enumerated cases; that is to say— . . . Regulating the practice in courts of justice . . . .").

[135] NEV. CONST. of 1864, art. IV, § 20 ("The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: … Regulating the practice of courts of justice . . . .").

[136] FLA. CONST. of 1868, art. IV, § 17 ("The Legislature shall not pass special or local laws in any of the following enumerated cases; that is to say— . . . regulating the practices of courts of justice . . . ."); *see also* FLA. CONST. of 1885, art. III, § 20 ("The Legislature shall not pass special or local laws in any of the following enumerated cases: that is to say, . . …. regulating the practice of courts of justice, except municipal courts . . . .").

[137] ILL. CONST. of 1870, art. IV, § 22 ("The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For— . . . Regulating the practice in courts of justice . . . .").

[138] W. VA. CONST. of 1872, art. VI, § 39 ("The Legislature shall not pass local or special laws, in any of the following enumerated cases; that is to say, for … Regulating the practice in courts of justice . . . .").

[139] TEX. CONST. of 1868, art. XII, § 40 (1873) ("The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say, . . . regulating the practice in courts of justice . . . ."); *see also* TEX. CONST. of 1876, art. III, § 56 ("The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law, authorizing: . . . Regulating the practice or jurisdiction of, or changing the rules of evidence in any judicial proceeding or inquiry before courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate.").

[140] PA. CONST. of 1873, art. III, § 7 ("The General Assembly shall not pass any local or special law . . . regulating the practice or jurisdiction of, or changing the rules of evidence in, any judicial proceeding or inquiry before courts, aldermen, justices of the peace, sheriffs, commissioners, arbitrators, auditors, masters in chancery or other tribunals, or providing or changing methods for the collection of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate.").

[141] NEB. CONST. of 1875, art. III, § 15 ("The legislature shall not pass local or special laws in any of the following cases, that is to say: . . . Regulating the practice of courts of justice.").

Constitution of 1876,[142] California's Constitution of 1879,[143] Louisiana's Constitution of 1879,[144] Idaho's Constitution of 1889,[145] North Dakota's Constitution of 1889,[146] Montana's Constitution of 1889,[147] Wyoming's Constitution of 1889,[148] Utah's Constitution of 1895,[149] Virginia's Constitution of 1902,[150] and Oklahoma's Constitution of 1907.[151] Congress included a similar provision in an

---

[142] COLO. CONST. of 1876, art. V, § 25 ("The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say . . . regulating the practice in courts of justice.").

[143] CAL. CONST. of 1879, art. IV, § 25 ("The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say . . . Regulating the practice of Courts of justice.").

[144] LA. CONST. of 1879, art. 46 ("The General Assembly shall not pass any local or special law on the following specified objects: . . . Regulating the practice or jurisdiction of any court or changing the rules of evidence in any judicial proceeding or inquiry before courts, or providing or changing methods for the collection of debts or the enforcement of judgments, or prescribing the effects of judicial sales.").

[145] IDAHO CONST. of 1889, art. III, § 19 ("The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . Regulating the practice of the courts of justice.").

[146] N.D. CONST. of 1889, art. II, § 69 ("The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . Regulating the practice of courts of justice.").

[147] MONT. CONST. of 1889, art. V, § 26 ("The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . regulating the practice in courts of justice.").

[148] WYO. CONST. of 1889, art. III, § 27 ("The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . regulating the practice in courts of justice[.]").

[149] UTAH CONST. of 1895, art. VI, § 26 ("The Legislature is prohibited from enacting any private or special laws in the following cases: . . . Regulating the practice of courts of justice.").

[150] VA. CONST. of 1902, art. IV, § 63 ("The General Assembly shall not enact local, special, or private law in the following cases . . . Regulating the practice in, or the jurisdiction of, or changing the rules of evidence in any judicial proceedings or inquiry before,the courts or other tribunals, or providing or changing the methods of collecting debts or enforcing judgments, or prescribing the effect of judicial sales of real estate.").

[151] OKLA. CONST. of 1907, art. V, § 46 ("The Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law . . . Regulating the practice or jurisdiction of, or changing the rules of evidence in judicial proceedings or inquiry before the courts, justices of the peace, sheriffs, commissioners, arbitrators, or other tribunals, or providing or changing the methods for the collection of debts, or the enforcement of judgments or prescribing the effect of judicial sales of real estate[.]").

1871 act for the District of Columbia[152] and in an 1886 limit on territorial legislatures.[153]

From the very first time these proposals were adopted, they were understood to confirm the power of legislatures to adopt general laws in these areas. It would make no sense to ban *special* laws in these areas if there were no legislative power to adopt general ones. In 1851, while Indiana was considering the first of these provisions, the Plymouth Pilot summarized it as providing that "[u]niform laws must also be enacted" in these fields.[154] The Indiana Supreme Court noted the next year that the provision "thus contemplate[s] the existence of positive laws in these very cases."[155] A commentator on an 1862 proposal in Illinois—not ratified at the time by voters but later included in the state's 1870 constitution—noted, "There is no good reason that can be given why all the objects here enumerated can not be attained under general laws."[156] A newspaper commented on the 1872 West Virginia provision, "[b]ut the Legislature may, so far as practicable, and as may be deemed proper and useful, enact laws of a general nature providing for such cases."[157] A newspaper in Pennsylvania commended the Illinois provision as a useful model for its own state (advice that was followed), noting, "All these subjects have to be provided for by general laws extending over the whole State."[158] Another Pennsylvania newspaper explained the no-special-legislation provisions: "The Legislature is restrained from passing local or special laws upon a number of specified subjects which it was thought could be much more appropriately embraced within

[152] District of Columbia Organic Act of 1871, ch. 62, § 17, 16 Stat. 419 (1871) ("[T]he legislative assembly shall not pass special laws in any of the following cases, that is to say: . . . regulating the practice in courts of justice[.]").

[153] Act of July 30, 1886, ch. 818, § 1, 24 Stat. 170 (1886) ("[T]he legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . Regulating the practice in courts of justice.").

[154] *The Next Legislature*, PLYMOUTH PILOT, Apr. 23, 1851, at 2 (quoting Indiana Statesman).

[155] State v. Barbee, 3 Ind. 258, 260 (1852).

[156] *Special Legislation Abolished by the New Constitution*, EVENING ARGUS, May 7, 1862, at 2.

[157] *Legislative Department*, SPIRIT JEFFERSON, Mar. 19, 1872, at 1.

[158] *Revising the Constitution*, THE COLUMBIAN, Nov. 22, 1872, at 2.

general laws of uniform operation."[159] In 1886, a newspaper commented that the federal limit on territorial legislatures "still leaves it within the power of the legislature to pass a general act" on those subjects.[160]

Former Attorney General and Solicitor General William DeWitt Mitchell explained the 1871 provision for the District of Columbia in congressional testimony in 1947:

> The scope of the legislative authority intended to be granted is emphasized by section 17, which forbade the legislative assembly from passing special laws in certain cases, to wit, granting divorces, regulating the practice in the courts, changes of venue, remission of fines, sale of real estate of minors, changing of the law of descent, and various other subjects, the denial of power to grant special laws, of course, *carrying with it the necessary inference that the District Assembly might pass general laws on those subjects*.[161]

In 1864, the Maryland Constitutional Convention considered an identically-worded proposal,[162] clearly understood to presuppose legislative power to impose general procedural rules on courts. The convention defeated the proposal after criticism of exactly this presupposition. Delegate Oliver Miller, later a judge on the state's highest court for many years, objected:

---

[159] *New Constitution*, JUNIATA SENTINEL & REPUBLICAN, Nov. 26, 1873, at 2.

[160] *An Important Bill*, EMMONS CNTY. REC., Aug. 14, 1886, at 1.

[161] *Home Rule and Reorganization for the District of Columbia: Joint Hearings Before the Subcommittees on Home Rule and Reorganization of the Senate and House Committees on the District of Columbia*, 80th Cong. 503 (1948) (emphasis added).

[162] 1 W.M. BLAIR LORD, THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND 877 (1864) (proposal by delegate Henry Stockbridge).

> "Regulating the practice of courts of justice." How is that to be done by a general law? You give now, under the general law, the power to each court in the counties of the State, to pass rules in reference to the practice in these respective courts. The rules passed by the respective courts will be local. I have never heard of any attempt made on the part of the Legislature to provide any general law which would give the courts of the State the power to pass rules. *It is a necessary inherent part of their jurisdiction as courts of justice.* These rules may be as diverse and different as the several judges of the several courts in the counties of the State. Why put that provision in, and regulate that by a general law?[163]

The proposal was then narrowly defeated.[164]

B. *The Mississippi Supreme Court and Other Parts of Section 90*

The Mississippi Supreme Court's treatment of section 90 makes clear that its subject matters are all within the legislative power. In 1911, the Court noted that section 90(d) reflects the importance of usury laws: "That usury laws are of general public interest and concern is shown by section 90 of the Constitution of 1890, under which local laws regulating the rate of interest on money cannot be passed."[165]

The Mississippi Supreme Court has also several times assumed that parts of section 90 are not superfluous. In 1893, the Mississippi Supreme Court applied the anti-superfluity canon to the parenthetical in section 90(k), reasoning that it must apply retroactively as well as prospectively. Of the prospective-only reading, the Court said, "This construction, if adopted, would

---

[163] *Id.* at 879 (delegate Oliver Miller).

[164] *Id.* at 887 (32-27 defeat). Today, Maryland gives its court of appeals (its highest court) very explicit constitutional authority to adopt procedural rules. MD. CONST. art. IV, § 18(a) ("The Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations adopted by the Court of Appeals or otherwise by law.").

[165] Miss. Bldg. & Loan Ass'n v. McElveen, 56 So. 187, 189 (Miss. 1911).

render the clause superfluous, and without any force whatever."[166] In 1923, the Court held that evasion of 90(p) through a curative statute would render section 90 a nullity: "To hold otherwise would to a large extent nullify the constitutional inhibitions against local, special, or private legislation contained in section 90 of our Constitution."[167] The Court in 1925 similarly insisted that section 90(o) was not superfluous: "Manifestly this section of the Constitution was inserted for a purpose."[168] Finally, in 1955 the Court rejected a reading of 90(l) under which "it is inconceivable how Section 90, par. (l) . . . could ever be violated by a local or special law."[169]

If these are adequate reasons to construe sections 90(k), 90(l), 90(o), or 90(p), or their parts, not to be superfluous, there is even clearer reason to see 90(s) as itself not entirely superfluous. But that is what the *Newell-Hall* reading does.

IV. EXISTING CONTRADICTIONS

Having described the origins of conflict over rulemaking authority in Mississippi and its conflict with the original meaning of our 1890 Constitution, this Part will discuss the existing contradictions in the Rules of Court which complicate procedure and confuse practitioners.[170] Three contradictions are discussed, although they very well may not be the only three procedural contradictions present in the Mississippi Code and Mississippi Rules of Court.[171] But they are mentioned, absent conducting an exhaustive list of contradictions, as brief examples of the lack of clarity across the Rules of Court, which make the rulemaking

---

[166] Chidsey v. Town of Scranton, 12 So. 545, 545 (Miss. 1893).

[167] Hamilton v. Bd. of Supervisors of Lafayette Cnty., 96 So. 465, 466 (Miss. 1923).

[168] Toombs v. Sharkey, 106 So. 273, 275 (Miss. 1925).

[169] Walker v. Bd. of Supervisors of Monroe Cnty., 81 So. 2d 225, 230 (Miss. 1955).

[170] *See* Morton, *supra* note 11.

[171] Indeed, as this Article was being edited for publication, the Court decided *Howell v. State*, which directly implicated the holding in *Newell v. State*. Howell v. State, No. 2020-CA-00868-SCT, 2023 WL 412469 (Miss. Jan. 26, 2023). And the Mississippi Court of Appeals decided an evidentiary issue in a child sexual abuse case where statutory and court rule procedures were in direct conflict. *See* Pitts v. State, No. 2021-KA-00740-COA, 2023 WL 1425289, at *26 n.22 (Miss. Ct. App. Jan. 31, 2023) (Wilson, J., dissenting) (citing a previous draft of this Article). Both of these cases provide evidence that the separation of powers questions involved in *Newell v. State* and *Hall v. State* are very much still alive today.

authority in Mississippi an issue. This Article first examines the venue statute and Court rule before examining the appellate procedure from county court and the initial disputes within the newly-formed Mississippi Rules of Criminal Procedure.

A. Venue

Perhaps the most glaring contradiction between the Mississippi Rules of Court and the Mississippi Code concerns venue,[172] a central issue to any litigation but more often a hurdle for complex litigation and class actions.[173] Because venue is critical for policy goals of fairness, the clarity of rules governing venue are important, but in Mississippi, venue rules are far from clear.

Section 11-11-3(2) of the Mississippi Code provides that "[i]n any civil action where more than one (1) plaintiff is joined, each plaintiff shall independently establish proper venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action."[174] But Mississippi Rule of Civil Procedure 82(c) provides otherwise, stating,

> Where several claims or parties have been properly joined, the suit may be brought in any county in which any one of the claims could properly have been brought. Whenever an action has been commenced in a proper county, additional claims and parties may be joined, pursuant to Rules 13, 14, 22, and 24, as ancillary thereto, without regard to whether that county would be a proper venue for an independent action on such claims or against such parties.[175]

These contradictions play a large role in what venues may be accessible to parties. If the statutory rule in section 11-11-3(2)

---

[172] *Compare* MISS. CODE ANN. § 11-11-3(2) (2023), *with* MISS. R. CIV. P. 82(c).

[173] *See Venue in Class Actions* – Gresser v Wells Fargo Bank NA, MCGUIREWOODS BLOG (Apr. 3, 2012), https://www.classactioncountermeasures.com/2012/04/articles/motions-practice/venue-in-class-actions-gresser-v-wells-fargo-bank-na/ [https://perma.cc/C7YT-B7XQ].

[174] § 11-11-3(2). This statute was passed in conjunction with tort reform measures in 2004. Geoff Pender, *Mississippi Tort Reform at 10 Years*, CLARION-LEDGER (May 5, 2014, 10:10 PM), https://www.clarionledger.com/story/news/2014/05/05/mississippi-tort-reform-years/8750203/ [https://perma.cc/8FJ4-YV4S]. The legislature's tort reform measures made it more difficult to establish venue and provided more protections for defendants. *Id.*

[175] MISS. R. CIV. P. 82(c).

governs, a class action may never be possible outside of a single county where the alleged conduct occurred or where *all* of the plaintiffs reside if the statutory rule is strictly construed.

On the other hand, Mississippi Rule of Civil Procedure 82(c) may be a viable option to class action advocates. If the Court does indeed have an inherent authority vested by the Constitution to promulgate rules of procedure,[176] and Rule 82(c) is the one true rule of venue, then class actions could work in Mississippi by requiring only that venue be established by one plaintiff.[177] But clarity is needed to know for sure, and the current Mississippi venue rules, both Court rules and statutory rules, are unclear and confusing.[178]

Other states having statewide class actions provide for interesting venue rule comparisons. Alabama, for example, requires that a named party to the class reside in the venue where the action is brought.[179] It is not enough for a putative member of the class to be a resident within the venue.[180] However, if we took a similar fact pattern to *Ex parte 3M* and applied Mississippi Rule of Civil Procedure 82(c), it would seem such a class would be able to establish venue in any county where a single plaintiff, named or unnamed, could establish venue.[181] Thus, a class could be properly venued in any county where any putative class member could be properly venued.[182] This application of Rule 82(c) would be similar to the holding of the New York Supreme Court in New York County, where the court found it "self-evident" under a New York statute that "a class action is properly venued if at least one member of the class resides in the county where the action was brought."[183]

---

[176] Supreme Court Order of 1981, *supra* note 4 (citing Newell v. State, 308 So. 2d 71 (Miss. 1975)).

[177] MISS. R. CIV. P. 82(c).

[178] With tort reform, the promulgation of Rules of Court, statutory rules, and differing circumstances, venue is a complicated issue in Mississippi. Additionally, there are overarching concerns over whether a defendant is a resident or nonresident. *See* Cap. City Ins. Co. v. G.B. "Boots" Smith Corp., 889 So. 2d 505, 514 (Miss. 2004). All of these differing considerations make the path to a clear procedural framework in which to build a successful Rule 23.

[179] *Ex parte* 3M Co., 42 So. 3d 1228, 1233 (Ala. 2010).

[180] *Id.* Federal courts also require venue to be based on a named party.

[181] *Compare Ex parte* 3M Co., 42 So. 3d 1228, *with* MISS. R. CIV. P. 82(c).

[182] *Cf.* MISS. R. CIV. P. 82(c); *Ex parte* 3M Co., 42 So. 3d 1228.

[183] Mazzocki v. State Farm Fire & Cas. Co., 649 N.Y.S.2d 656, 658 (1996) (finding improper venue because the class had yet to be certified).

But even if Mississippi adopted a class action rule, it would not resolve this conflict, as Mississippi Rule of Civil Procedure 82(c) and Mississippi Code section 11-11-3(2) do not provide for exceptions or difference in treatment of "named" or "unnamed" plaintiffs.[184] Instead, they simply and generally refer to "parties" and "plaintiff[s]." Because of this generality, even if Mississippi adopted a class action venue rule by statute or rule, there would still exist a contradiction. And adding a separate class action rule, which would likely include a venue rule of its own, would further complicate the procedure with a total of three different venue rules.

B. Appellate Procedure from County Court

Appeals from County Court provide for another contradiction between Court rules and statutes, but they are an oddity in the Mississippi court system. While most courts in Mississippi are constitutionally created courts, county court and the Mississippi Court of Appeals were both created by statute.[185] Along with the creation of those courts, the legislature passed laws governing the appellate process over each.[186] The statutory provision concerning appeals from county court have long been a point of conflict, contradiction, and confusion.[187] Nevertheless, we argue that the legislature, not the Court, has the power to determine the appellate process from county court. But it is important to distinguish general appeals, interlocutory appeals, and contradictions of each.

1. General Appeals from County Court

Under Miss. Code Ann. section 11-51-79, appeals may be taken from county court to circuit court if the appeal concerns a question in law or to chancery court if a question of equity.[188] The original provision of the statute gave litigants 10 days to file their notice of appeal with either the circuit or chancery court,[189] but when the

---

[184] MISS. R. CIV. P. 82(c); MISS. CODE ANN. § 11-11-3(2) (2023).

[185] MISS. CODE ANN. § 9-9-1 (2023) (establishing county courts); *id.* § 9-4-1 (establishing the "Court of Appeals of the State of Mississippi").

[186] *Id.* § 9-4-3; *id.* § 11-51-79.

[187] *See* Justin L. Matheny, *Inherent Judicial Rule Making Authority and the Right to Appeal: Time for Clarification*, 22 MISS. C. L. REV. 63-67 (2002) (discussing cases).

[188] MISS. CODE ANN. § 11-51-79 (2023).

[189] *Id.*

Court adopted the Uniform Civil Rules of Circuit and County Court Practice, they gave litigants a more lenient thirty days to file their notice of appeal.[190] These two requirements stood together for a period of about six years,[191] confusing litigants about when their notice of appeal was due and confusing judges and chancellors about when a case ought to be dismissed as procedurally barred.[192]

Adopted May 1, 1995, Rule 5.04 stood in unresolved contradiction with Miss. Code Ann. section 11-51-79 for six years until the Court in *Davis v. Nationwide Recovery Serv., Inc.* stated that under *Newell v. State* and *Hall v. State*, its "rules regarding appeals from court to court . . . supercede statutes which are in conflict with the rules."[193] In that case, the Court did not need to actually address the issue because the legislature changed the statute to comply with the Court rules prior to the Court issuing their decision,[194] but this new-founded trumping of statues regarding appellate procedure is one that defied the Court's previous holdings post-*Newell*.[195]

Indeed, in 1990, the Court explicitly held,

---

[190] Wolfe v. City of D'Iberville, 799 So. 2d 142, 146 (Miss. Ct. App. 2001) (quoting Davis v. Nationwide Recovery Serv., Inc., 797 So. 2d 929 (Miss. 2001)) ("[T]he Legislature amended § 11-51-79 to replace the ten-day appeal period with the thirty-day appeal period, effective July 1, 2001.").

[191] *Compare id.*, *with* UNIF. CIV. RULES OF CIR. & CNTY. CT. PRAC. (effective May 1, 1995).

[192] *See, e.g.*, *Wolfe*, 799 So. 2d at 142; *Davis*, 797 So. 2d at 929.

[193] *Wolfe*, 799 So. 2d at 148 (Southwick, J., concurring); *Davis*, 797 So. 2d at 930.

[194] *Wolfe*, 799 So. 2d at 148 (Southwick, J., concurring).

[195] *Id.* at 148-49. However, the idea that appeals are in the legislative prerogative and governed by statutes is not at all new. Indeed, in 1938, seventy-eight years before the Court's invalidation of section 11-51-79 but only forty-eight years from the adoption of the constitution, the Court stated,

> The power of superintendence by a superior court of original jurisdiction over an inferior court exercising similar jurisdiction arises out of the common law, independent of statute, and continues to exist unless and until expressly withdrawn by statute; while on the other hand, the appellate jurisdiction is solely a creature of statute and exists in no case unless conferred by statute, and then only in the manner and to the extent so conferred . . . . The subject of appeals belongs exclusively to the adjective or procedural side of the law and is a subject upon which the legislature has plenary power, there being no section of the Constitution which expressly limits the legislative power in that respect save only that it is provided that appeals must be followed from justices' courts."

Drummond v. State, 185 So. 207, 208-09 (Miss. 1938).

> Statutes limiting the time within which appeals shall be taken are both mandatory and jurisdictional, and must be strictly complied with. The court is without power to ingraft any exception on the statute. When the statute is not complied with, the Supreme Court is without jurisdiction of the cause, which will be dismissed, either on motion of appellee or by this court of its own motion. This court is without power to make any other order.[196]

While the Uniform Civil Rules of Circuit and County Court Practice were not in place at the time *Moore* was decided, it no less persuades that the Legislature, not the Court, has the authority over time for appeals.[197] If a statute, by nature, is jurisdictional, the Supreme Court lacks the authority to bring such a question within their purview.[198]

But why does this matter if the Legislature conceded, in a "cooperative spirit," the authority to decide how long litigants have to perfect an appeal?[199] Then-Presiding Judge Southwick gives the answer.[200] He writes that "conduct occurring within a court, from the time the matter was properly commenced in that court until it is disposed of by the court, it is likely to be a matter of practice and procedure," which " . . . are core functions in the day-to-day operations of courts and properly within [the Courts'] control under *Newell*."[201] He continues by adding that "whether the matter [has been] timely commenced . . . is something that can be, and indeed always has been, controlled by the legislature through statutes of limitations."[202]

Not only does the legislature have the power over how much time litigants have to file their appeal, the legislature has the power to determine whether litigants may have an appeal *at all*.[203] Indeed,

---

[196] Moore v. Sanders, 569 So. 2d 1148, 1150 (Miss. 1990) (quoting Turner v. Simmons, 54 So. 658, 658 (Miss. 1911)).

[197] *See Wolfe*, 799 So. 2d at 148 (Southwick, J., concurring).

[198] *See* Moore v. Sanders, 569 So. 2d 1148, 1150 (Miss. 1990).

[199] *Wolfe*, 799 So. 2d at 149 (Southwick, J., concurring) (quoting Newell v. State, 308 So. 2d 71, 78 (Miss. 1975)).

[200] *See Wolfe*, 799 So. 2d at 149 (Southwick, J., concurring).

[201] *Id.* at 150 (Southwick, J., concurring).

[202] *Id.* (Southwick, J., concurring).

[203] *Id.* at 149 (Southwick, J., concurring). *See* Gill v. Miss. Dep't of Wildlife Conservation, 574 So. 2d 586, 590 (Miss. 1990) (citing Fleming v. State, 553 So. 2d 505, 506 (Miss. 1989) ("This Court has repeatedly held that a party has no right to appeal,

the Mississippi legislature created such right by codifying Miss. Code Ann. section 11-51-3.[204] "That statute is indispensable since the *right* to appeal is solely a matter of statute. For now."[205]

2. Interlocutory Appeals from County Court

Despite the legislature conceding to the Court Rules regarding time for appeals from county court, conflict over Miss. Code Ann. section 11-51-79 persisted regarding interlocutory appeals. By statute, "[n]o appeals or certiorari shall be taken from any interlocutory order of the county court . . . ."[206] However, "if any matter or cause be unreasonably delayed of final judgment therein, it shall be good cause for an order of transfer to the circuit or chancery court upon application therefor to the circuit judge or chancellor."[207] This is directly contrary to the Uniform Civil Rules of Circuit and County Court Practice.[208] Rule 4.05 states very plainly, "[a]n appeal from an interlocutory order in county court may be sought in the Supreme Court as provided in Rule 5 of the Mississippi Rules of Appellate Procedure."[209]

In 2016, the Supreme Court held that because Miss. Code Ann. section 11-51-79 conflicted with Rule 4.05, a rule promulgated by the Court, the statute was void.[210] But while the Mississippi

except insofar as it has been given by law."); State *ex rel.* Patterson v. Autry, 110 So. 2d 377, 378 (Miss. 1959)).

[204] MISS. CODE ANN. § 11-51-3 (2023).

[205] *Wolfe*, 799 So. 2d at 149 (Southwick, J., concurring). Judge Southwick's last two words are telling in that the Mississippi Supreme Court consistently furthered its authority by citing *Newell* or otherwise claiming that their authority outweighs that of the Legislature on grounds which are shaky at best.

[206] MISS. CODE ANN. § 11-51-79 (2023).

[207] *Id.*

[208] *Compare id.*, *with* UNIF. CIV. RULES OF CIRC. & CNTY. CT. PRAC. 4.05.

[209] UNIF. CIV. RULES OF CIRC. & CNTY. CT. PRAC. 4.05.

[210] Brown v. Collections, Inc., 188 So. 3d 1171, 1177 (Miss. 2016) ("So there is obviously a conflict between the statute and the rule-based interlocutory appeal procedure. When such a conflict exists, our court's rules trump statutory law." (citing Stevens v. Lake, 615 So. 2d 1177, 1183 (Miss. 1993)). It is worth noting that while the Court held this statute invalid in 2016, in 2019 the Court cited this statute for other purposes, putting the statute in a grey area regarding just how much of the statute remains intact. *See* Malouf v. Evans, 267 So. 3d 272, 278, 274 n.2 (Miss. 2019). But at the same time, the Supreme Court maintains that statutory requirements for appeal found within that same statute are jurisdictional. *See* T. Jackson Lyons & Assocs., P.A. v. Precious T. Martin, Sr. & Assocs., PLLC, 87 So. 3d 444, 451 (Miss. 2012). So, one could

Supreme Court has made possible and taken control of the procedures surrounding interlocutory appeals from County Court directly to the Supreme Court, it is unclear that they actually have that power.[211] If, as discussed above, the right to appeal is a statutorily created right,[212] and if "a party has no right to appeal, except insofar as it has been given by law,"[213] it is difficult to justify the Supreme Court having the authority to grant parties an appeal where statute explicitly prohibits it.[214]

Outside of the reasons already stated explaining why the Court's contradictions are troublesome, practical reasons exist for why the Legislature, and not the Court, should govern interlocutory appeals from County Court.

In Mississippi, County Court is a statutorily created court,[215] rather than a constitutional court,[216] and because County Court is a statutorily created court, it would seem that statutes might regulate that court, perhaps even more so than other constitutional courts. While the Supreme Court's hold over practice and procedure in Circuit and Chancery Court are questionable, they are somewhat less questionable than a command of County Court procedures because Circuit and Chancery Court are, like the Supreme Court, constitutional courts. It seems convincing, at least to us, that where a court is subject to creation by the Legislature or dissolution by the Legislature, that court would be subject to legislative mandates over jurisdictional or procedural matters more so that the Supreme Court.

That is not to say that it is impossible for a question of law to proceed from county court to the Court on appeal, but it must proceed through the proper means. While the current statute prohibits interlocutory appeals from county court, the statute provides that in such a circumstance where an interlocutory appeal would be beneficial, the county court may transfer the matter to

logically conclude that statutes may provide for jurisdictional requirements for the Court, such as whether or not the Court may hear certain appeals from county court.

[211] *See* Drummond v. State, 185 So. 207 (Miss. 1938).

[212] *See supra* note 178 and accompanying text.

[213] Gill v. Miss. Dep't of Wildlife Conservation, 574 So. 2d 586, 590 (Miss. 1990).

[214] *See id.*; *see also* MISS. CODE ANN. § 11-51-79 (2023).

[215] MISS. CODE ANN. § 9-9-1 (2023).

[216] Constitutional courts in Mississippi include, the Supreme Court, Chancery Court, Circuit Court, and Justice Court. MISS. CONST. art. VI, §§ 144, 152, 171.

circuit or chancery court.[217] From there, it seems, the circuit or chancery court will be the trial court from which any interlocutory appeals may be taken. But it is also important to note, to the extent there are any concerns over litigants' trouble to appeal from county court, that nearly every action filed in county court has concurrent jurisdiction with either circuit, chancery, or justice court. Thus, the appellate process from county court to the Court is not one of impossibility, but one of following steps and jurisdictional statutory rules in order to bring a case to the Court.

C. Mississippi Rules of Criminal Procedure

The inconsistencies and litigation surrounding the confusion between statutory and Court rules is not over. Indeed, newer rules, which have been promulgated by the Court, have recently been the subject of litigation. In *Wilbourn v. Wilbourn*,[218] the Court was faced with the question of "how a criminal proceeding is commenced for purposes of a malicious prosecution claim."[219] In answering the question, the majority looked to definitions found in Miss. Code Ann. section 99-1-7 (Rev. 2020), the case of *City of Mound Bayou v. Johnson*, 562 So. 2d 1212, 1219 (Miss. 1990), and Miss. R. Crim. P. 2.1(a).[220] Despite the majority's discussion of the statutory, common law, and court rule definitions of commencement of a criminal proceeding,[221] Presiding Justice Kitchens specially concurred to clarify that this issue would be resolved under *Newell v. State*.[222]

The Court has dealt with numerous issues revolving around criminal justice and its decision in *Newell v. State*.[223] But none of these decisions find a basis in the Constitution, and the constant battle between statute and court rules complicates litigation for criminal defendants and the state alike.

---

[217] MISS. CODE ANN. § 11-51-79 (2023).
[218] 314 So. 3d 104 (Miss. 2021).
[219] *Id.* at 108 (Kitchens, J., specially concurring).
[220] *Id.* at 106-08 (Kitchens, J., specially concurring).
[221] *Id.* at 106-07.
[222] *Id.* at 108 (Kitchens, J., specially concurring) (citing Ashwell v. State, 226 So. 3d 69, 71 (Miss. 2017)) ("It is well established that, because the Mississippi Constitution vests this Court with the inherent power to promulgate rules of judicial procedure, the Bench and Bar of this State should consult the applicable rules of court to answer questions of procedure such as the one at issue.").
[223] *See, e.g.*, *Ashwell*, 226 So. 3d at 71.

***

Venue, the appellate procedure from county courts, and the newly-minted Rules of Criminal Procedure are just three areas in which the Mississippi Code, the Mississippi Rules of Procedure, and the Court's interpretations and explanations of each muddy the water. But it does not have to be this way. Part V provides for solutions to help Mississippi along the road to procedural clarity. While in the short-term, Mississippi law might not be as clear until precedent emerges, these solutions may set the state's Bar up for long-term clarity and efficiency.

V. SOLUTIONS FOR PROCEDURAL CLARITY

Pointing to a problem is virtually useless without pointing to a solution. Therefore, in this Part, we propose four possible solutions which would allow courts, legislators, and litigants to move forward with a clear procedural understanding of the law in Mississippi. Ultimately, a constitutional amendment is needed to put this debate to rest;[224] however, to provide more politically feasible solutions, we provide subsection A and B despite there being open questions as to those solutions' constitutionality.[225] Subsection C presents a solution which we believe would best suit the state, absent constitutional amendment, which would most squarely fall within the requirements and limitations of Mississippi's Constitution.[226]

A. Reliance on the Mississippi Rule Making Act of 1975

One potential solution to rulemaking authority disputes is for the legislature to delegate such authority to the Court. Indeed, this is how the U.S. Supreme Court has the power to promulgate the Federal Rules of Procedure.[227] But the Mississippi legislature has also delegated authority to the Court by statute.[228] So the first proposed solution is for the Court to rely upon this already existing

---

[224] *See supra* Section IV.D.
[225] *See supra* Sections IV.A., IV.B.
[226] *See supra* Section IV.C.
[227] 28 U.S.C. § 2072.
[228] MISS. CODE ANN. § 9-3-61 (2023).

statute instead of its "inherent authority" declared in *Newell v. State* and *Hall v. State*.[229]

The Federal Judiciary is permitted by statute to promulgate rules of procedure in the Courts of the United States by the Rules Enabling Act of 1934.[230] This concession by the legislature to give rulemaking authority to the Courts has given the Federal Rules of Civil Procedure and Evidence real legitimacy to the point of unquestioning authority.[231] Other states lacking constitutional guidance have also delegated authority over rulemaking to their own high court.[232] And the Mississippi legislature has similarly conceded power to the Court over the promulgation of procedural rules.[233]

Because the Mississippi Rules of Court have become so entrenched over the years and some say almost uniformly accepted,[234] it makes sense for the legislature to relinquish control. Before *Newell v. State*, procedural statutes were not easily navigated by litigants.[235] Indeed, Lawrence Franck wrote a law

---

[229] Newell v. State, 308 So. 2d 71, 76 (Miss. 1975); Hall v. State, 539 So. 2d 1338, 1345 (Miss. 1989).

[230] 28 U.S.C. § 2072.

[231] There are still those who question this authority. *See* Ethan J. Leib, *Are the Federal Rules of Evidence Unconstitutional?*, 71 AM. U. L. REV. 911 (2022); Cheryl L. Haas, Note, *Judicial Rulemaking: Criticisms and Cures for a System in Crisis*, 70 N.Y.U. L. REV. 135, 135 (1995) (describing Justice White's questioning of the U.S. Supreme Court's authority to promulgate rules).

[232] IDAHO CODE § 1-212 (2023); IND. CODE § 33-24-3-1 (2023); ME. STAT. tit. 4, § 1-8 (2023); MD. CODE ANN., CTS. & JUD. PROC. § 1-201 (West 2023); MASS. GEN. LAWS ch. 218, § 43 (2023); MINN. STAT. §§ 480.05-480.051 (2023); MONT. CODE ANN. § 3-2-701 (2023) (held unconstitutional in *In re* Formation of E. Bench Irr. Dist., 186 P.3d 1266, 1268 (Mont. 2008) (holding that Appellate Rule of Procedure timeframe superseded statutory timeframe)); NEV. REV. STAT. § 2.120 (2023); N.H. REV. STAT. ANN. § 491:10 (West 2023); OR. REV. STAT. § 1.006 (2023); 8 R.I. GEN. LAWS § 8-6-2 (2023); TENN. CODE ANN. §§ 16-3-401 to 407 (2023); TEX. GOV'T CODE ANN. § 22.004 (West 2023); WIS. STAT. § 751.12 (2023); WYO. STAT. ANN. §§ 5-2-113 to 117 (2023). But at least one state court has held, absent constitutional provision or statute, that it is not in the judiciary's power to promulgate rules. *See* Siesseger v. Puth, 234 N.W. 540 (Iowa 1931) (holding that the legislature has power over rules of appellate procedure and that the state supreme court has the power to fill any void in that procedure).

[233] MISS. CODE ANN. § 9-3-61 (Rev. 1996). This provision has been amended over time, showing the struggle for rule-making power. *See, e.g.*, Supreme Court Order of 1981, *supra* note 4.

[234] Southwick, *supra* note 11, at 2 ("It is accepted in Mississippi that the Supreme court has the authority to promulgate rules of practice and procedure.").

[235] Franck, *supra* note 8, at 287.

review article urging the Court to take the power of promulgating rules of procedure into its own hands,[236] which likely persuaded the Court.[237] But aside from preferences of members of the bar, the rules of procedure in Mississippi courts seem to be best when promulgated by the Court. Indeed, the Court provided good reasons for declaring their inherent authority to do so, stating,

> The procedural changes needed to meet the needs of a particular era and to maintain the judiciary's constitutional purpose would be better served, we believe, if promulgated by those conversant with the law through the years of legal study, observation and actual trials in accord with their oaths rather than by well-intentioned, but over-burdened, legislators of other pursuits and professions.[238]

The Court's reasoning for giving themselves the power to promulgate rules of procedure are compelling;[239] however, its usurpation of that power was not constitutionally proper.[240] A Mississippi version of the Rules Enabling Act seems, at least to us, the easiest way to amicably delegate the rulemaking power to the Court. This would in effect render all procedural statutes void and give the Court the ability and power to say definitively what the rules for procedure in Mississippi courts are.[241]

But there are three issues with this already-existing statutory solution.

First, the Court rarely cites the existing statutory provision giving them the power to promulgate rules.[242] While the Court has

---

[236] *Id.* at 287-89.

[237] Newell v. State, 308 So.2d 71, 76 (Miss. 1975).

[238] *Id.*

[239] *Id.* at 76-77.

[240] *Compare Newell*, 308 So.2d 71, *and* Hall v. State, 539 So. 2d 1338 (Miss. 1989), *with* MISS. CONST. art. IV, § 90(s), *and id.* art VI, § 146, *and Hall*, 539 So. 2d at 1349-66 (Hawkins, J., dissenting), *and* Supreme Court Order of 1981, *supra* note 4, at 2 (Broom, J., responding to court's adoption of new rules of civil procedure), *and id.* at 4 (Lee, J., dissenting from order adopting new rules of civil procedure), *and id.* at 5 (Bowling, J., objecting to adoption of rules).

[241] *See* MISS. CODE ANN. § 9-3-61 (2023).

[242] The Mississippi Supreme Court and Court of Appeals have cited this provision in majority opinions only seven times. *See* Roley v. Roley, 329 So. 3d 473, 507 (Miss. Ct. App. 2021); Jones v. City of Ridgeland, 48 So. 3d 530, 537 (Miss. 2010); Cunningham Enters., Inc. v. Vowell, 937 So. 2d 32, 34 (Miss. Ct. App. 2006) (Southwick, J., concurring); Wolfe v. City of D'Iberville, 799 So. 2d 142, 149 (Miss. Ct. App. 2001)

this statute available, it has only cited this provision once in majority opinions since section 9-3-61's major revision in 1996.[243] Because the Court rarely cites the provision in the Constitution for the purpose of justifying its exercise of rulemaking authority, this is an initial proposed solution that would clear up a small amount of confusion over the issue by putting attorneys on notice of the Rule Making Act of 1975.

Second, not only were they adopted without reliance on the Mississippi Rules Making Act, the Rules of Court explicitly claim that they can trump statutes. The comment to Rule 1 of the Mississippi Rules of Criminal Procedure quotes the Court's statement in 2011: "[W]hen a statute conflicts with this Court's rules regarding matters of judicial procedure, our rules control."[244] The order adopting the Mississippi Rules of Civil Procedure, which still appears as the cover page of the Rules, states that they apply "any and all statutes and court rules previously adopted to the contrary notwithstanding."[245] Mississippi Rule of Appellate Procedure 3(a) provides, "All statutes, other sets of rules, decisions or orders in conflict with these rules shall be of no further force or effect."[246] If the very basis of judicial rulemaking were a statute, rather than the Court's own constitutional powers, the Court could of course not use that power to trump other statutes; the stream of rulemaking power could not rise higher than its source.

Third, it is possible, in the language of *Wayman v. Southard*, that rulemaking may be too "important" for the legislature to delegate.[247] Something as consequential as class actions, for instance, might not be deemed a mere "detail." However, the U.S. Supreme Court has not interpreted *Wayman* to pose any barrier to the adoption of any of the federal rules, even very important ones.

(Southwick, J., concurring); Trull v. State, 811 So. 2d 243, 247 (Miss. Ct. App. 2000); Winder v. State, 640 So. 2d 893, 900 n.4 (Miss. 1994) (Hawkins, C.J., concurring); *Hall*, 539 So. 2d at 1345 n.8.

[243] *Jones*, 48 So. 3d at 537. This is according to Westlaw's citing references function.

[244] MISS. R. CRIM. P. 1.1, cmt.

[245] *See* Supreme Court Order of 1981, *supra* note 4.

[246] MISS. R. APP. P. 3(a).

[247] *See supra* note 86 and accompanying text.

B. Return to a System of Shared Responsibility

The State of Texas has put forward a solution which might be appropriate to put in place in Mississippi.[248] Bruce L. Dean, provides a succinct account of this system that maximizes the function of both the judiciary and the legislature without propounding constitutional conflict.[249] The "system of shared responsibility . . . maximizes the talents of both the legislature and judiciary," by allowing the judiciary to begin the process of implementing a new rule, allowing it to "quickly adapt to the changing needs of the courts and bar."[250] But the legislature is not left powerless in the process.[251] Instead, the legislature may monitor the Court's rulemaking activities and disapprove of any rules which encroach upon their legislative authority.[252] Indeed, this system of shared responsibility has been attempted in Mississippi before.[253]

It would be possible to again allow the Court to promulgate rules of procedure, just as the Supreme Court of Texas does, and with no objection from the legislature, the rules will be adopted. But giving the legislature the opportunity to disapprove of the Court's rules through legislative action is an important condition, especially in light of section 2 of the Mississippi Constitution.[254]

This solution might prove fruitful absent the history of the Rule Making Act of 1975. In its initial enactment, the legislature included a shared responsibility framework in which the Court could propose rules of procedure and those rules would be given full effect provided that the legislature (1) was given notice of the rules at least thirty days prior to adjournment sine die and (2) did not pass a resolution disapproving of such rules.[255] While this seems like an amicable solution to share powers between the two branches, the Court adopted the Rules of Civil Procedure without first obtaining the final consent of the legislature.[256]

---

[248] *See* TEX. GOV'T CODE ANN. § 22.004 (2023).
[249] Dean, *supra* note 71, at 179-86.
[250] *Id.*
[251] *Id.*
[252] *Id.*
[253] MISS. CODE ANN. §§ 9-3-61 to 73 (Rev. 1975).
[254] *See* MISS. CONST. art. I, § 2.
[255] MISS. CODE ANN. §§ 9-3-61, 9-3-71 (Rev. 1975).
[256] *See supra* Sections I.B.3, I.B.4.

While section 2, along with sections 90(s) and 146, would likely prohibit such a system in that the branches would be sharing power,[257] this is an open question that the Court would have to decide, provided that there are any eventual challenges. Although, in all likelihood, the Court would decide such an issue in favor of power being squarely in its hands, this is a potential solution to circumvent many of the contradictions between statutory and court rules.

C. Procedural Common Law

Then-Professor, now-Justice Amy Coney Barrett provides another solution to Mississippi's rulemaking authority issue: procedural common law.[258] Her article, *Procedural Common Law*, takes the position that federal common law has three characteristics: it is controlling law, it is specialized, and it can always be abrogated by Congress.[259] However, there is another body of law—procedural common law—which "is concerned primarily with the regulation of internal court processes rather than substantive rights and obligations."[260] But this procedural law is not promulgated by the U.S. Supreme Court.[261] Instead, because each federal court is, under Article III, vested with the judicial power of the United States, each Article III court has authority in its own right to create this "procedural common law."[262] And the rules developed under procedural common law may be abrogated, or overridden, by legislation.[263] "This argument treats judicial

---

[257] MISS. CONST. art. I, § 2; *id.* art IV, § 90(s); *id.* art VI, § 146.

[258] Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008) [hereinafter Barrett, *Procedural Common Law*].

[259] *Id.* at 814.

[260] *Id.* at 814-15.

[261] *Id.* at 817 ("In other words, Article III empowers a court to regulate its own proceedings, but it does not empower a reviewing court to supervise the proceedings of a lower court by prescribing procedures that the lower court must follow.").

[262] *Id.* ("That is so because Article III vests 'the judicial Power' in *each* Article III court. To the extent that 'the judicial Power' carries with it the power to regulate procedure in the course of adjudicating cases, each court possesses that power in its own right.").

[263] *Id.* at 815 ("If Congress fails to exercise its authority over procedure, the federal courts can regulate procedure in common law fashion. They can only do so, however, until Congress steps in.").

authority over procedure, like judicial authority over substance, as entirely subservient to that of Congress."[264]

If we apply Justice Barrett's theory of federal procedural common law to Mississippi courts and the rulemaking debate, we come to a solution. Where the Mississippi legislature has not codified a procedural rule, the courts may "fill the void."[265] Like the Federal Article III courts, the judicial power of Mississippi is vested in one "Supreme Court and such other courts as are provided for in this Constitution,"[266] so each individual court provided for by the Constitution has the power to regulate procedure in that court so long as the legislature has not passed a law to the contrary.[267] But the legislature may, at any time, pass a law which abrogates some rule developed under this procedural common law.[268]

Take, for example, rules regarding service of process. While state statutes provide certain service of process details in specific actions,[269] there is no general statute which states how service of process is to be made. Therefore, it would be a strong argument to say that rules like Rule 4(c) or Rule 81(a) fill a void which the legislature left.[270] The same can be said for complex litigation in Mississippi because the legislature has not enacted any law prohibiting or encouraging the existence of a class action. Therefore, a void exists on the subject which could be filled by procedural common law.

Under Justice Barrett's theory of procedural common law, which we apply to state courts, Mississippi courts could, for instance, certify a class action, so long as they do not affect substantive rights of the parties.[271] The judiciary has the power to do this, in part, because of the administrative benefits that class actions might bring to the court itself, but the lack of a class action rule is a procedural void that constitutional courts have the power to fill absent legislative action through procedural common law.[272]

---

[264] *Id.* at 879.
[265] *Id.*
[266] MISS. CONST. art. VI, § 144.
[267] *See* Barrett, *Procedural Common Law*, *supra* note 230.
[268] *See id.*
[269] *See* MISS. R. CIV. P. 81(a).
[270] *Id.*; *see also* MISS. R. CIV. P. 4(c).
[271] *See* Barrett, *Procedural Common Law*, *supra* note 230.
[272] *See id.*

This solution most likely comports with the Constitution. While the legislature seemingly has the power over procedure under section 90(s),[273] where the legislature fails to enact a law addressing specific issues of procedure, courts could hardly be expected to operate without procedures of their own. As such, all constitutional courts in Mississippi, like all Article III federal courts, would be able to create procedural common law to fill procedural voids left by the legislature.[274]

D. Amending the Constitution

While avenues exist, at least in practice, to get around this solution, none of the above solutions address the issue head-on, meaning that there can and will always be debate over the issue. The only solution which provides for a future of absolute clarity in regards to which branch of government has the rulemaking authority in Mississippi is to amend the Mississippi Constitution.[275] Indeed, thirty-two other states have constitutional provisions regarding the authority to promulgate rules.[276] This could be done in Mississippi to accommodate some of the previous solutions mentioned, and there are varying degrees of power which the Court could be vested with in a constitutional amendment. This subsection will provide sample amendments in varying degrees,

---

[273] *See supra* Parts I, II.

[274] *See supra* notes 228-29 and accompanying text.

[275] The processes for amending the Mississippi Constitution of 1890 are laid out in Article 15, Section 273 of that document. MISS. CONST. art. XV, § 273. Either the Mississippi legislature, by a two-thirds vote of each house, may put a constitutional amendment on the ballot for statewide approval by voters, or the People may, through initiative, put a constitutional amendment on the ballot, subverting the legislature altogether. *Id.* However, the process for constitutional amendment by initiative is currently "unworkable and inoperable." Butler v. Watson, 338 So. 3d 599, 607 (Miss. 2021).

[276] ALA. CONST. art. VI, § 150; ALASKA CONST. art. IV, § 15; ARIZ. CONST. art. VI, § 5; ARK. CONST. amend. LXXX, § 3; CAL. CONST. art. VI, § 6; COLO. CONST. art. VI, § 21; DEL. CONST. art. IV, § 13(1); FLA. CONST. art. V, § 2; GA. CONST. art. VI, § 9, ¶ 1; HAW. CONST. art. VI, § 7; ILL. CONST. art. VI, § 16; KAN. CONST. art. III, § 1; KY. CONST. § 116; LA. CONST. art. V, § 5(A); MICH. CONST. art. VI, § 5; MO. CONST. art. V, § 5; NEB. CONST. art. V, § 1; N.J. CONST. art. VI, § 2, ¶ 3; N.M. CONST. art. VI, § 3; N.Y. CONST. art. VI, § 30; N.C. CONST. art. IV, § 13(2); N.D. CONST. art. VI, § 3; OHIO CONST. art. IV, § 5; OKLA. CONST. art. VII-A, § 3(c); PA. CONST. art. V § 10(c); S.C. CONST. art. V, § 4; S.D. CONST. art. V, § 12; UTAH CONST. art. VIII, § 4; VT. CONST. ch. II, § 37; VA. CONST. art. VI, § 5; WASH. CONST. art. IV, § 24; W. VA. CONST. art. VIII, § 3.

from one that yields the most power to the Court to one that invokes the most cooperative solution.

The constitutional amendment which would give the Court the most discretion would be an amendment that tracks the language of the 1996 amendment to Mississippi Code section 9-3-61:

> As a part of the judicial power granted in Article 6, Section 144, of the Mississippi Constitution of 1890, the Supreme Court has the power to prescribe from time to time by general rules the forms of process, writs, pleadings, motions, rules of evidence and the practice and procedure for trials and appeals in the Court of Appeals and in the circuit, chancery and county courts of this state and for appeals to the Supreme Court from interlocutory or final orders of trial courts and administrative boards and agencies, and certiorari from the Court of Appeals.[277]

This amendment would not be unprecedented, at least in terms of other states. Sixteen states have included in their constitutions provisions giving their state supreme court the sole authority over rules of practice and procedure.[278]

As explained above, it is not clear that giving courts an initial power over procedure means that the Legislature could not overturn such a power. *Inherent* power to act in the absence of a statute is not the same as *indefeasible* power to act notwithstanding a contrary statute. Accordingly, if the Legislature and the People of Mississippi really wanted to codify *Newell* and *Hall*, they should insert the word "sole" into this provision, so that it would be clear that the power was exclusive. If that were the aim of the amendment, it would presumably repeal section 90(s) by implication, or at least make it superfluous. Because repeals by implication are disfavored, removal of section 90(s) from the Constitution would be a good idea.

---

[277] MISS. CODE ANN. § 9-3-61 (2023).

[278] ARIZ. CONST. art. VI, § 5; ARK. CONST. amend. LXXX, § 3; COLO. CONST. art. VI, § 21; DEL. CONST. art. IV, § 13(1); GA. CONST. art. VI, § 9, para. 1; HAW. CONST. art. VI, § 7; ILL. CONST. art. VI, § 16; KAN. CONST. art. III, § 1; KY. CONST. § 116; MICH. CONST. art. VI, § 5; N.J. CONST. art. VI, § 2, ¶ 3; N.M. CONST. art. VI, § 3; OKLA. CONST. art. VII-A, § 3(c); PA. CONST. art. V, § 10(c); WASH. CONST. art. IV, § 24; W. VA. CONST. art. VIII, § 3.

If the legislature were disinclined to do so, the state might consider, instead, an amendment providing for a system of shared responsibility in rulemaking. This might track the language of the original Rule Making Act of 1975,[279] and an amendment of this type could read:

> The supreme court shall have the power to prescribe from time to time by general rules, the forms of process, writs, pleadings, motions, rules of evidence and the practice and procedure of the circuit, chancery, county courts, and the Court of Appeals of this state in civil actions, but this power is contingent upon the supreme court's submission of proposed rules to both the Senate and House of Representative prior to thirty (30) days until adjournment *sine die*. Should the Legislature disapprove of any rule submitted by the supreme court by concurrent resolution, such rule will be invalidated. Should the Legislature take no action, such rule or rules shall become valid on January 1 of the following year. Any rule hereafter proposed or promulgated by the supreme court which has not been submitted to the legislature and become effective in this manner shall be of no force and effect.[280]

Constitutional amendments in six other states provide for some sort of collaborative solution,[281] although not identical to this proposal.

The most extreme amendment in favor of the legislature would be to amend the Constitution vesting the legislature with the rulemaking authority, leaving the Court the option of adopting procedural common law, as discussed by now-Justice Amy Coney Barrett, to "fill the void" left by the state legislature.[282] This, of course, would leave room for the Court to address procedural rules where the legislature has not passed a law concerning that specific procedure.[283] Six states allow their high court by constitutional amendment to promulgate rules only insomuch as they do not in

---

[279] MISS. CODE ANN. §§ 9-3-61 to 73 (Rev. 1975). This proposed amendment both pulls from and uses direct language found in the statutes cited. We have omitted all quotation marks from the proposed amendment presented above for presentation purposes.

[280] *See* MISS. CODE ANN. §§ 9-3-61 and 9-3-71 (Rev. 1975).

[281] N.Y. CONST. art. VI, § 30; N.C. CONST. art. IV, § 13(2); OHIO CONST. art. IV, § 5; S.C. CONST. art. V, § 4; UTAH CONST. art. VIII,8 § 4; VT. CONST. ch. II, § 37.

[282] Barrett, *Procedural Common Law*, *supra* note 230, at 815.

[283] *Id.* at 879.

conflict with statutory law.[284] An amendment of this sort would read,

> The Legislature shall have the power to prescribe from time to time by general rules the forms of process, writs, pleadings, motions, rules of evidence and the practice and procedure for trials and appeals in the Court of Appeals and in the circuit, chancery and county courts of this state. Where the Legislature has failed to codify rules of procedure on specific issues, the Supreme Court shall have the power, by procedural common law, to fill any gaps in statutory procedures, unless and until the Legislature codifies a rule on the subject.[285]

Or more simply, Mississippi could adopt the language from the Virginia Constitution, which reads,

> The Supreme Court shall have the authority to make rules governing the course of appeals and the practice and procedures to be used in the courts of the [State], but such rules shall not be in conflict with the general law as the same shall, from time to time, be established by the [Legislature].[286]

While there are varying degrees of constitutional amendments which would serve the purpose of remedying the issue once and for all, the remedy for the constitutional wrongs perpetuated by the Court lies in some form of the amendment as proposed here.

In so amending the Constitution, the People of Mississippi might provide themselves with a more efficient and clear procedure by choosing one branch of government to vest with the exclusive authority to promulgate rules. Should the People wish to vindicate section 90(s) of the Mississippi Constitution of 1890, perhaps an amendment would be more clear and explicit, instead of presupposing legislative power over procedure. Should they wish to vest the power exclusively in the Court, section 90(s) should be

---

[284] CAL. CONST. art. VI, § 6; LA. CONST. art. V, § 5(A); NEB. CONST. art. V, § 1; N.J. CONST. art. VI, § 2, ¶ 3; N.D. CONST. art. VI, § 3; VA. CONST. art. VI, § 5.

[285] We draw upon the language present in MISS. CODE ANN. §§ 9-3-61 to 73 (Rev. 1975) and the ideas put forward by now-Justice Amy Coney Barrett in her article, Barrett, *Procedural Common Law*, *supra* note 230, for this proposal. Quotation marks have been omitted for presentation purposes.

[286] VA. CONST. art. VI, § 5.

repealed. Regardless, an amendment is needed in some form or fashion to clarify the rulemaking authority in Mississippi.

CONCLUSION

While we propose four solutions, only the latter two provide unquestionable solutions, at least in the constitutional sense. Because of this, we favor either the Court's reliance solely on the procedural common law theory put forward by now-Justice Amy Coney Barrett or a constitutional amendment clearly designating which branch of government is responsible for promulgating rules of procedure. To do either would allow litigators and litigants in Mississippi to move forward under procedurally clear law and make procedural progress, such as the adoption of any form of complex litigation, more probable. And finally, Mississippi might leave the constitutional questions surrounding rulemaking authority in the past.

Condemning actions of the Court as unconstitutional might seem blasphemous. However, to preserve the good ends to which the Court's unconstitutional acts have led, we seek to remedy the means to the ends. Mississippi needs to clarify the Court's role in promulgating rules of procedure at a foundational level, not only to put an end to any question over the rulemaking authority in Mississippi, but to preserve the constitutional integrity of the court system.