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Rules, Rulemaking, and the Ruled: The Mississippi Supreme Court as Self-Proclaimed Ruler - Duncan v. St. Romain

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RULES, RULEMAKING, AND THE RULED: THE MISSISSIPPI SUPREME COURT AS SELF-PROCLAIMED RULER*

Duncan v. St. Romain,

569 So. 2d 687 (Miss. 1990)

Ronald C. Morton

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I. INTRODUCTION

In 1981 the Mississippi Supreme Court, by its own order, adopted the Mississippi Rules of Civil Procedure.[1] Later, the court promulgated the Mississippi Rules of Evidence[2] and in 1987, the Mississippi Supreme Court Rules.[3] The

1. Order Adopting the Mississippi Rules of Civil Procedure, May 26, 1981 [hereinafter cited as Supreme Court Order of 1981].

2. Order Adopting the Mississippi Rules of Evidence Rules No. 2, Order Sept. 24, 1985 [hereinafter cited as Supreme Court Order of 1985].

3. Order Adopting the Mississippi Supreme Court Rules, Rules No. 3, June 15, 1987.

court's authority to promulgate these rules was based upon a never-before used inherent power to promulgate rules of procedure found in Mississippi's 1890 Constitution.[4] The Mississippi legislature initially rejected this interpretation of these constitutional provisions[5] and continued to pass legislation which included procedural elements.[6] To no real surprise, the court held that its rulemaking power was exclusive and any legislation contrary to the court's rules was invalid.[7] And the court has, for the most part,[8] been consistent in holding that only it may make rules governing procedure. The state's lawmaking branch has now apparently conceded this point in all but a very few areas.[9]

In 1989, the inevitable clash between these two branches of government occurred in a case involving a legislatively created exception to the hearsay prohibition in cases involving child molestation.[10] The latest casualty in this dispute between the court and the legislature occurred in *Duncan v. St. Romain*,[11] wherein a party, relying on the statutory time provisions for appeal, was denied the right to appeal to the Mississippi Supreme Court.[12]

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4. MISS. CONST. art. I, §§ 1-2; art. VI § 144. *See*, Lawrence J. Franck, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L.J. 287 (1972); William H. Page, *Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi*, 3 MISS. C. L. REV. 1 (1982); F. Keith Ball, Comment, *The Limits of the Mississippi Supreme Court's Rule-Making Authority*, 60 MISS. L.J. 359 (1990).

5. MISS. CONST. art. I., §§ 1-2; art. VI, § 144.

6. *See*, e.g., MISS. CODE ANN. § 13-1-403 (Supp. 1991).

7. Hall v. State, 539 So. 2d 1338, 1344-48 (Miss. 1989).

8. *But see* McLendon v. State, 539 So. 2d 1375 (Miss. 1989) (court followed Mississippi Uniform Post Conviction Act); McCarty v. State, 554 So. 2d 909 (Miss. 1989) (court followed MISS. CODE ANN. § 99-7-2 (Supp. 1989), providing for multi-count indictments, despite court's prior prohibitions against such indictments).

9. In 1991, the Mississippi Legislature passed Senate Bill 2792, which repealed most of the statutory provisions in conflict with the court rules. For a list and discussion of statutory provisions remaining see *infra* notes 327-35 and accompanying text.

10. Hall v. State, 539 So. 2d 1338 (Miss. 1989) (court held MISS. CODE ANN. § 13-1-403, creating hearsay exception for out-of-court statements made by children alleging sexual abuse, to be in conflict with Mississippi Rules of Evidence, and therefore invalid). Subsequent to *Hall*, the court has held legislation to be invalid on these same grounds in City of Mound Bayou v. Johnson, 562 So. 2d 1212 (Miss. 1989); Leatherwood v. State, 548 So. 2d 389 (Miss. 1989); Whitehurst v. State, 540 So. 2d 1319 (Miss. 1989); Mitchell v. State, 539 So. 2d 1366 (Miss. 1989).

11. 569 So. 2d 687 (Miss. 1990).

12. *Id.*

This note will briefly review the history of Mississippi rulemaking, and the arguments surrounding the controversy of the court's inherent power to self-rule.[13] It will conclude with an examination of the cases decided after the court's rule promulgation in an attempt to determine the scope of the court's rulemaking power and arrive at some standard that the court uses in concluding whether a state statute is invalidated or supplanted by a court rule, will discuss the effect of Senate Bill 2792 on the conflict, and will indicate some areas in which the rules and the code remain inconsistent.

II. FACTS

Duncan v. St. Romain involved a petition for rehearing brought before the Mississippi Supreme Court in which the petitioner attempted to persuade the justices to reverse their previous denial of appeal.[14] The appellant, Fannie Mae Duncan, represented by Richard L. Weil, an attorney licensed to practice in the state of Louisiana and appearing in this case *pro hoc vice*, had filed a medical malpractice claim against the appellee[15] in the Circuit Court of Jackson County, where final judgment was rendered against her on September 15, 1989.[16] Duncan gave notice of appeal some fifty-three days after final judgment was rendered.[17] She asserted

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13. For articles on inherent powers of courts generally see: John C. Cratsley, *Inherent Powers of the Courts*, The National Judicial Conference (1980); Charles W. Grau, *Judicial Rulemaking: Administration, Access and Accountability*, Research Project of American Judicature Society (1978); Jack B. Weinstein, *Reform of Court Rule-Making Procedure* (1977); Michael B. Browde & M.E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. REV. 407 (1985); Kennith J. Bukowski, *"Inherent Power" of the Court – A New Direction?*, 54 WIS. BAR. BUL. 22 (1981); Neil H. Cogan, *The Inherent Power and Due Process Models in Conflict: Sanctions in the Fifth Circuit*, 42 S.W. L.J. 1011 (1989); John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367 (1986); Bruce L. Dean, Comment, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139 (1988); David A. Rammelt, Note, *"Inherent Power" and Rule 16: How Far Can a Federal Court Push the Litigant Toward Settlement?*, 65 IND. L.J. 965 (1990); Gregory T. Stevens, Note, *The Proper Scope of Nonlawyer Representation in State Administrative Proceedings: A State Specific Balancing Approach*, 43 VAND. L. REV. 245 (1990); Note, *Protective Orders Against the Press and the Inherent Powers of the Courts*, 87 YALE L.J. 342 (1977); Stewart J. Oberman, Annotation, *Propriety of Exclusion of Press or Other Media Representatives from Civil Trial*, 79 A.L.R.3D 401 (1977); Thomas R. Trenkner, Annotation, *Power of Court to Impose Standard of Personal Appearance or Attire*, 73 A.L.R.3D 353 (1976); Annotation, *Right of Attorney Appointed by Court for Indigent Accused to, and Courts Power to Award, Compensation by Public, in Absence of Statute or Court Rule*, 21 A.L.R.3D 819 (1968).

Beyond the scope of this paper is the topic of courts' inherent power to compell funding for judicial functions. For articles on this topic *see*, Ted Z. Robertson & Christa Brown, *The Judiciary's Inherent Power to Compel Funding: A Tale of Heating Stoves and Air Conditioners*, 20 ST. MARY'S L.J. 863 (1989); Andre Douget, Note, McCain v. Grant Parish Police Jury: *Judicial Use of the Inherent Powers Doctrine to Compel Adequate Judicial Funding*, 46 LA. L. REV. 157 (1985); William Scott Ferguson, Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975 (1972); Edward J. Lukey, Comment, *Judges Power to Bind Contractually County Treasury for Courtroom Necessities* – O'Coins, Inc. v. Treasurer of the County of Worcestor, - Mass. - , 7 SUFFOLK U. L. REV. 1136 (1973); Note, *The Courts' Inherent Power to Compel Legislative Funding of Judicial Functions*, 81 MICH. L. REV. 1687 (1983); Gary D. Spivey, Annotation, *Inherent Power of Court to Compel Appropriation or Expenditure of Funds for Judicial Purposes*, 59 A.L.R.3D 569 (1974). *See also*, Hosford v. State, 525 So. 2d 789 (Miss. 1988).

14. 569 So. 2d at 689.

15. *Id.* at 688. The full style of the case reads Fannie Mae Duncan v. Ray A. St. Romain, M.D.; Joseph Bingham Witty, M.D.; M.D. Anesthesia, Ltd; William Preau, M.D.; and Allen Hobbs, CRNA. *Id.* at 687.

16. *Id.* at 688.

17. *Id.*

that the appeal notice was sent via overnight express on October 26, 1989, and should therefore have reached the court clerk the following morning, some forty-two days after judgment.[18] Duncan was relying on Mississippi's 1989 appeal statute, setting the time for appeal to the state supreme court at forty-five days.[19] The court, upon motion of the appellees, dismissed the appeal on grounds that notice of appeal was not timely filed.[20] Under Mississippi Supreme Court Rule (hereinafter "MSCR") 4(a), notice of appeal must be filed with the court within thirty days of judgment entry.[21] Following her dismissal, Duncan filed a petition for rehearing under MSCR 40(a).

The court refused to grant Duncan's petition, holding that even assuming Duncan had filed within the statutory forty-five day period for perfecting an appeal, she would not have met the court's rule requiring filing within thirty days of judgment.[22] Thus, because an attorney chose to rely on a statute, and the state's highest court chose to ignore that statute and substitute its rule, an injured woman may have lost forever her right to appeal a possibly erroneous trial court decision.[23]

III. History of Rulemaking Controversy

Duncan is the latest example of the ongoing controversy between Mississippi's legislative and judicial branches of government over the state's rulemaking authority. Prior to the supreme court's promulgation of rules of civil procedure in 1981,[24] the power of the legislature to make rules of Mississippi court procedure was generally unquestioned.[25] Common law procedure was subject to legislative revision and Circuit and Chancery courts generally were regulated by statute.[26] However, not all practitioners of the Mississippi bar were satisfied with this scheme of existing rules. Indeed, there was movement in Mississippi urging modernization of the

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18. *Id.*

19. Miss. Code Ann. § 11-51-5 (Supp. 1989), repealed by S. 2792, Ch. 573, 1991 Mississippi Session Laws; *See infra*, notes 327-35 and accompanying text.

> Appeals to the Supreme Court shall be taken within forty-five (45) days next after the rendition of the judgement or decree complained of, and not after, saving to persons under disability of infancy or unsoundness of mind the like period after the disability shall have been removed . . . .

Id.

20. *Duncan*, 569 So. 2d at 688.

21. Miss. Sup. Ct. R. 4(a).

> In a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to this Court the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgement or order appealed from.

Id.

22. *Duncan*, 569 So. 2d at 688-89. The court went on to say that had Duncan associated local counsel on this matter, as required by Miss. Sup. Ct. R. 46(b)(3), she probably would not have mistakenly relied on the invalid code provision. *Id.*

23. I say "may" here because literally, her notice of appeal was late under the statute also, and the court did not reach the question of whether a tardy appeal notice resulting from error on the part of the overnight carrier would be excused.

24. *See*, Supreme Court Order of 1981; Newell v. State, 308 So. 2d 71 (Miss. 1975).

25. Page, *supra* note 4, at 4 (1982).

26. *Id.*

rules of procedure as early as the 1940's.[27] Early advocates of procedural reform urged change primarily in the areas of pleading,[28] discovery,[29] third party practice,[30] rules of evidence,[31] and forms of process and writs.[32]

In 1972, Lawrence J. Franck wrote an article, not only advocating procedural improvements, but also suggesting that such change should be brought about, not through legislation, but rather through action by the court itself, by means of an inherent power over procedural matters.[33] According to Franck, the power to make rules is one which the supreme court historically always possessed, but which remained dormant simply because the court never chose to use it. He suggested that at the time the United States Constitution was adopted, the power to make rules of procedure in England lied with the court.[34] Since the United States' basic concept of government was derived from England, and since Mississippi's constitutional doctrine of separation of powers was derived from the United States Constitution, then Mississippi should look to England for its notion of how separation of powers is to operate.[35] In England, the courts adopted court procedure at the time of the United States' inception. Historically, then, the courts in Mississippi have always had the power to set procedure.[36]

Franck dismissed the fact that Mississippi procedure was developed legislatively rather than judicially as a matter of historic fact, explaining that the lawyers of the day expected the legislature to control procedure, and so the state was merely following "the philosophy of the day."[37] He suggested that we ignore a heritage of two hundred years of legislative control of judicial procedure and accept the fact that since the courts controlled procedure in England, the courts here have a legitimately based right to control procedure.[38] Until 1981 they simply did not exercise this power.[39]

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27. *Hall*, 539 So. 2d at 1357 (Hawkins, J., dissenting); O.B. Triplett, Jr., *Hocus-Pocus Legal Procedure—A Need For Reform*, 16 MISS. L.J. 9 (1943).

28. L.G. Fant, Jr., *Procedural Reform in Mississippi*, 34 MISS L.J. 40 (1963); Robert Patterson & Jan Patterson, *A Plea for Procedural Reform in Mississippi*, 42 MISS L.J. 293 (1971) (citations originally obtained in Franck, *supra* note 4, at 303 nn.105-09).

29. Franck, *supra* note 4, at 303.

30. *Id.*

31. *Id.*

32. *Id.* (citing *Report of the Mississippi Judiciary Commission* 17 (1970)).

33. Franck, *supra* note 4.

> [P]ractice in Mississippi courts is a constant source of frustration . . . sadly in need of a carefully studied and thorough reworking . . . . The Mississippi Supreme Court, as the state's highest judicial organ and a body constitutionally vested with the "judicial power" of the state, has inherent power to establish by appropriate rules the practice and procedure which shall govern the course of litigation in the courts of Mississippi.

Id. at 287-88.

34. *Id.* at 289.

35. *Id.* at 290.

36. *Id.*

37. *Id.* at 291.

38. *Id.* at 293.

39. Supreme Court Order of 1981.

Franck further supported his contention with an additional constitutional argument. Citing to several cases in other jurisdictions which held that no express constitutional grant of power is needed to promulgate rules,[40] Franck asserted that the separation of powers provision in the Mississippi Constitution[41] inherently places rulemaking authority with the court.[42]

> The rationale of these and similar decisions is clear. When the constitution places the judicial power in the judicial branch of the government, that grant of judicial power carries with it the right to make that power effective, and this includes the adoption of rules of practice and procedure at least for constitutional courts. This is primarily a judicial function.[43]

In 1975, the supreme court embraced the inherent rulemaking power and the premise of Franck's article.[44] *Newell v. State*[45] involved the criminal prosecution of a defendant convicted of assault and battery with intent to kill.[46] The court reversed and remanded the case because the trial court failed to instruct the jury of the elements of the crime under an 1857 statute prohibiting jury instructions on a judge's own motion.[47] Stating as grounds thereof that the statute was obsolete,[48] obstructed justice, and was costly[49] in that it required retrial of cases, the court held the statute invalid.[50] Under this rationale, the court seemed to strike down the statute. As courts are the protectors of due process and the impartial administration of justice, there was nothing unusual in such a finding by the court.[51] However, dictum in the decision referred to an "inherent power" that the court has over procedural matters.[52] The court stated that the constitutional mandate for separation of powers "leaves no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose."[53]

The state legislature took this decision as a warning and attempted to correct the deficiencies in the rulemaking system by passing a version of the federal rules of discovery,[54] the first such reform since 1948,[55] passing a bill creating a rules advi-

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40. *See, e.g.*, Heat Pump Equip. Co. v. Glen Alden Corp., 380 P.2d 1016 (Ariz. 1963); Heiberger v. Clark, 169 A.2d 748 (Conn. 1961); Nasif Realty Corp. v. Nat'l Fire Ins. Co., 220 A.2d 748 (N.H. 1966); Garabedian v. Donald William, Inc., 207 A.2d 425 (N.H. 1965) (cited by Franck, *supra* note 4, at 295-96, nn.63-64, 66).

41. MISS. CONST. art. I, § 1 (1890).

42. *See* Franck, *supra* note 4, at 295-99.

43. Franck, *supra* note 4, at 298.

44. Newell v. State, 308 So. 2d 71 (Miss. 1975).

45. *Id.*

46. *Id.* at 72-73.

47. *Id.* at 76-78.

48. *Id.* at 76.

49. *Id.* at 74.

50. *Id.*

51. Page, *supra* note 4, at 10.

52. *Newell*, 308 So. 2d at 77.

53. *Id.*

54. MISS. CODE ANN. § 13-1-201 (Supp. 1989).

55. Page, *supra* note 4, at 5.

sory committee,[56] and delegating the rulemaking power to the supreme court.[57] Under this framework, the court and advisory committee would submit proposals for rules of procedure to the legislature for legislative approval.[58]

The legislature's advisory committee submitted a draft of its proposed rules in July 1977, and requested feedback from both the bench and bar.[59] Following two months of hearings on the issues, the committee in May 1978, published its final recommendations for rules of procedure.[60] In January 1979, the court, following two days of hearings, gave its approval to the proposed rules and submitted them to the legislature in September 1979.[61]

The House judiciary committee, however, rejected the proposed rules.[62] In October 1980, a revised set of proposed rules was submitted to the Senate judiciary committee, also to no avail.[63] Appropriations for the Advisory Committee were terminated soon thereafter.[64]

On May 26, 1981, the Mississippi Supreme Court upon its own motion, adopted those same rules of civil procedure proposed by the committee in May 1978, citing as authority for their action the "inherent authority" discussed in *Newell*.[65] Those rules were to become effective January 1, 1982.[66] Mississippi was the only court in the nation to ever enact a set of rules upon its own motion, in absence of specific constitutional mandate or legislation so providing.[67]

The legislature responded to the court by passing a joint resolution requesting the court to rescind its action, which the court immediately rejected.[68] The legislature then considered a proposal to impeach the pro-rule justices.[69] They proposed

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56. MISS. CODE ANN. § 9-3-61 (Supp. 1989).

57. Page, *supra* note 4, at 5.

> 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 (Supp. 1990).

"Rules prescribed pursuant to sections 9-3-61 to 9-3-73 shall not abridge, enlarge or modify any substantive right of any litigant and shall preserve the right of trial by jury . . . ." MISS. CODE ANN. § 9-3-63 (Supp. 1990). *See also* MISS. CODE ANN. §§ 9-3-65, -69 (Supp. 1990) (providing for rules advisory committee) and MISS. CODE ANN. § 9-3-71 (Supp. 1990) (providing for submission of proposed rules to legislature for approval; rules not submitted shall be of no effect).

58. Page, *supra* note 4, at 6.

59. *Id.*

60. *Id.*

61. *Id.*

62. Hall v. State, 539 So. 2d 1338, 1358 (Miss. 1989) (Hawkins, J., dissenting); Page, *supra* note 4, at 5.

63. Page, *supra* note 4, at 6.

64. *Id.* at 6 n.39.

65. Supreme Court Order of 1981, *supra* note 1; *Hall*, 539 So. 2d at 1358.

66. Page, *supra* note 4, at 6; Supreme Court Order of 1981, *supra* note 1.

67. *Hall*, 539 So. 2d at 1358 (Hawkins, J., dissenting) (citing Page, *supra* note 4, at 2); Ball, *supra* note 4, at 363. Courts in other states had exerted some authority over procedural rulemaking prior to the Mississippi court's action. State v. Arnold, 183 P.2d 845, 846 (N.M. 1947) (court held that judiciary "possesses unquestioned power to make rules touching pleading, practice and procedure."); Winberry v. Salibury, 74 A.2d 406 (N.J. 1949) (court interpreted provision limiting court's rulemaking power "subject to the law" as meaning subject to common law only); R.E.W. Constr. Co. v. District Court, 400 P.2d 390 (Idaho 1965).

68. Page, *supra* note 4, at 6-7.

69. *Id.* at 7.

a constitutional amendment to limit the supreme court's rulemaking power,[70] and passed bills requiring legislative approval of procedural rules of court.[71]

The court responded to these laws by rescinding those rules most objectionable to the legislature (i.e., its rule involving third party practice,[72] and its service of process rule[73]) in the spirit of cooperation referred to in *Newell.*[74] However, the court maintained its position that it did have the constitutional rulemaking power, that the rules it promulgated were to remain in force until such time as the court rescinded those rules, and that the legislature, by passing that legislation, was admitting that the power to enact those rules lay with the court.[75] Under the court's interpretation of the constitutional mandate for separation of powers, any legislation on the subject of rules promulgation short of a constitutional amendment is ineffectual.[76]

In time, the Mississippi Supreme Court totally ignored the procedure for rulemaking required by legislative enactment.[77] By court order November 9, 1983, the court called for the creation of the Advisory Committee on Rules, consisting of members of the bench, bar, and academia.[78] In 1985, the court adopted the Mississippi Rules of Evidence.[79] These rules were derived from common law precedent set by the court and were in general accord with those evidentiary statutory provisions which then existed.[80]

The adoption of the Mississippi Rules of Civil Procedure (hereinafter "MRCP") and the Mississippi Rules of Evidence (hereinafter "MRE") were, according to Justice Hawkins, of necessity, and it is generally agreed that they did

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70. *Id.*

71. The Senate version of this bill affected rules "heretofore or hereafter," thus affecting the newly passed rules as well as any future rules. The House version only applied to rules "hereafter" enacted so as not to affect new rules. The Senate version was finally agreed upon by both houses. *Id.;* MISS. CODE ANN. §§ 9-3-61, -73 (Supp. 1991).

72. MISS. R. CIV. PRO. 14.

73. MISS. R. CIV. PRO. 4.

74. [A]s long as rules of judicial procedure enacted by the legislature coincide with fair and efficient administration of justice, the Court will consider them in a cooperative spirit to further the state's best interest, but when, as here, the decades have evidenced a constitutional impingement, impairing justice, it remains our duty to correct it.

308 So. 2d at 78.

75. Page, *supra* note 4, at 8.

76. Alexander v. State, 441 So. 2d 1329 (Miss. 1983); S. Bell Tel. & Tel. Co. v. City of Meridian, 131 So. 2d 666 (Miss. 1961).

77. *See* MISS. CODE ANN. § 9-3-65 (Supp 1989).

78. Hall v. State, 539 So. 2d 1338, 1347 n.22 (Miss. 1989). This group is appointed by the Chief Justice, based upon nominations made by members of the state's bar. The Committee is presently being funded by an IOLTA (Interest on Lawyers Trust Accounts) grant, from the Mississippi State Bar.

79. Supreme Court Order of 1985.

80. *Hall,* 539 So. 2d at 1358-59.

indeed improve court practice and procedure in Mississippi.[81] The court likewise authored uniform rules of practice for circuit and county courts.[82]

In an apparent attempt to regain control over the rulemaking process, the Mississippi legislature amended section 146 of the Mississippi Constitution, limiting the power of the court to only "those matters specifically provided by [the] Constitution or by general law."[83] This constitutional provision, when read in conjunction with section 90, which provides that the legislature may provide the rules "regulating the practice in courts of justice" which "shall be provided for only by general laws,"[84] was thought to preclude the court from further rulemaking and place the power back into its proper legislative domain.

The court, however, took a far different reading of these constitutional provisions and quickly began to chip away at legislative enactments which were inconsistent with the court's own rules, despite changes to the constitution. The court adopted MSCR 15 (then rule 47), authorizing application for a writ of mandamus by any party to an action in *Glen v. Herring*.[85]

In *Jones v. State*,[86] the court held that section 99-17-20 of the Mississippi Code was invalid,[87] as it conflicted with Uniform Criminal Rule of Circuit Court 2.05.[88] The defendant in *Jones* sought to have the indictment against him overturned, because it failed to state the exact code section he allegedly violated, as was required by section 99-17-20.[89] The court, however, relying on its inherent rulemaking au-

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81. 539 So. 2d at 1359; *see also*, Herbert, *infra* note 174; Terryl K. Rushing, Book Review, 8 MISS. C. L. REV. 315 (1988) ("Appellate attorneys in Mississippi now have . . . reason[] to rejoice; the Mississippi Supreme Court has adopted a completely new set of procedural rules . . . .").

82. *See, e.g.*, UNIFORM CHANCERY CT. R., UNIFORM COUNTY CT. R., UNIFORM CRIM. R. OF CIR. CT. PRACTICE, UNIFORM CRIM. R. OF COUNTY CT. PRACTICE.

83. MISS. CONST. art. VI, § 146 (amended 1983).

84. MISS. CONST. art. IV, § 90(s).

85. 415 So. 2d 695, 698 (Miss. 1982). This action supplanted MISS. CODE ANN. § 11-1-17 (Supp. 1972). Justice Bowling opposed the court's adoption of this new rule, stating the existing law "is substantive law. Surely, any statute that deals with jurisdiction of courts is substantive rather than procedural." *Id.* at 701 (Bowling, J., dissenting). Justice Dan Lee likewise dissented, questioning the courts authority to supplant a statute in this manner. "I do not believe that it was the intent of the *Newell Court* to allow the striking of such statutes in the manner proposed here." *Id.* at 702 (Lee, J., dissenting).

86. 461 So. 2d 686 (Miss. 1984).

87. MISS. CODE ANN. § 99-17-20 (Supp. 1989).

> No person shall be tried for capital murder, or any other crime punishable by death as provided by law, unless such offense was specifically cited in the indictment returned against the accused by setting forth the section and sub-section number of the Code defining the offense alleged to have been committed by the accused . . . . Any conviction of the accused for an offense punishable by death shall not be valid unless the offense for which the accused is convicted shall have been set forth in the indictment by section and sub-section number of the Code which defined the offense allegedly committed by the accused.

Id.

88. UNIFORM CRIM. R. CIR. CT. 2.05.

> The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall fully notify the defendant of the nature and cause of the accusation against him. Formal or technical words are not necessary in an indictment, if the offense can be substantially described without them.

Id.

89. Jones v. State, 461 So. 2d at 692-94.

thority, held that only the requirements of rule 2.05 must be met in an indictment, regardless of the type criminal case being considered.[90]

This conflict between Mississippi legislation and the supreme court's rules reached a pivotal climax in *Hall v. State*[91] where Justice Robertson for the majority wrote, "[w]e have today the question of who sets the criteria by which we assign credibility to evidence so that it ought to be considered by a court charged to decide life or liberty."[92]

The *Hall* case dealt factually with the alleged sexual abuse of a minor child by his father.[93] The child, Chad Hall, was born June 2, 1979, and lived with his father in Vicksburg and with his mother in Jackson at various times in the years that followed.[94] In 1983, and again in 1985, the Hinds County Department of Public Welfare received complaints that Chad was being sexually abused.[95] Shortly after the 1985 complaint, Chad, and his older brother Keith, were removed from the custody of Michael Hall.[96] After interviews and physical examinations, youth authorities suggested that Chad had been sexually abused.[97] Michael Hall was charged and indicted with sexual battery of his son.[98]

The prosecution wished to use statements that Chad made to various individuals of the sexual incidents in court under the recently passed Evidence of Child Sexual Abuse Act.[99] They likewise sought to excuse Chad from testimony on the basis that he would likely be traumatized or suffer severe emotional distress if required to testify.[100] The state won its motion and Chad was declared unavailable to testify by the trial court in accordance with the Child Sexual Abuse Act,[101] and the out-of-court statements that Chad made to others were held to be admissible hearsay.[102]

On July 21, 1986, the case was tried and the jury returned a verdict of guilty.[103] Hall was sentenced to twenty-five years imprisonment.[104] Hall, shortly thereafter, perfected an appeal to the Mississippi Supreme Court where the case was reversed

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90. *Id.* at 694.

91. 539 So. 2d 1338 (Miss. 1989).

92. *Id.* at 1346.

93. *Id.* at 1340. The father is Michael A. Hall and the acts of abuse allegedly occurred in September 1983. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.; see* MISS. CODE ANN. §§ 13-1-401, -403 (Supp. 1989).

100. *Hall*, 539 So. 2d at 1340.

101. Miss. Code Ann. § 13-1-403(1)(c)(ii) (Supp. 1989).

102. 539 So. 2d at 1340-41.

103. *Id.* at 1341. The prosecution presented testimony of Chad's brother, Keith Hall, who testified that Chad was sexually abused by Michael Hall. Debbie Graham, a social worker, testified of conversations she had with Chad in which Chad described the sexual acts that Michael Hall had performed on him; and Brenda Chance, a social worker specializing in children's therapy, likewise offered testimony of Chad's description of the transpired sexual acts which his father had performed. *Id.*

104. *Id.*

and remanded for a new trial.[105] The decision of the supreme court turned upon the single issue of whether the hearsay exception passed by the Mississippi legislature was a valid exception to the general prohibition against hearsay.[106] The court examined the statements of the social workers testifying on Chad's behalf under the excited utterance exception,[107] the existing condition exception,[108] and the medical diagnosis or treatment rule,[109] and found none of these exceptions to be "remotely applicable."[110] Examining the statements under the catchall rule,[111] the court held:

> The record before us fails to reflect any "trustworthiness" finding by the Circuit Court, nor are we prepared to imply one. Moreover, neither we nor the Circuit Court have been presented argument that the statements Chad made to Graham and Chance are "more probative . . . than any other evidence which the proponent can procure through reasonable efforts."[112]

The court did not preclude this rule from ever being used to admit hearsay testimony in child abuse cases, but merely pointed out "that the proponent must satisfy the trial court that each of the requisites of the rule is met . . . . As we must review such matters, the trial court should preserve for the record its findings on each point suggested by the rule."[113]

The court also considered MRE 804 which provides a further exception to the hearsay rule whenever the declarant is unavailable as a witness.[114] The court reasoned that since Chad was physically present within the jurisdiction he was not legally "unavailable" within the meaning of the rule.[115]

The state argued "that the Mississippi Rules of Evidence are not the only form of law which may supply the rule it seeks" pointing to the Evidence of Child Sexual Abuse Act.[116] Under this statute, the term "unavailable" means that there has been a finding that the "child's participation in the trial would result in a substantial likelihood of traumatic emotional or mental distress."[117]

The court refused to read the statute into the MRE, however, reasoning that, "[w]hen Rule 802 declares that hearsay is not admissible 'except as provided by *law*' [it means] 'except as provided by *valid law.*' Law is only valid when it emanates from a source having authority to make it."[118] Thus, the sole question before

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105. *Id.* at 1338.
106. *Id.; see* MISS. CODE ANN. §§ 13-1-401, -403 (Supp. 1989); MISS. R. EVID. 802.
107. MISS. R. EVID. 803(2).
108. MISS. R. EVID. 803(3).
109. MISS. R. EVID. 803(4).
110. 539 So. 2d at 1342.
111. MISS. R. EVID. 803(24).
112. 539 So. 2d at 1342-43. *See, e.g.*, MISS. R. EVID. 803(24)(B).
113. 539 So. 2d at 1343.
114. *Id.*
115. *Id.*
116. *Id.* at 1343-44.
117. *Id.* at 1344; *see* MISS. CODE ANN. § 13-1-403(1)(c)(ii).
118. 539 So. 2d at 1344 (citing Jones v. Harris, 460 So. 2d 120, 124 (Miss. 1984) and MISS. R. EVID. 802).

the court was whether the Mississippi State Legislature has the power to make valid law dealing with court procedure.[119]

The court's analysis began with a discussion of the historical grounds for the Mississippi judiciary's exclusive power to make hearsay exceptions.[120] The basis for the court's rulemaking power is that it is a function of the Mississippi Constitution in its command for three separate branches of government,[121] as these provisions have since 1975 been interpreted by the court.[122]

Under the doctrine of separation of powers "no officer of one department of government may exercise a power at the core of the power constitutionally committed to one of the other departments."[123] The legislature then, had no authority whatsoever to enact a law dealing with judicial administration, as this is wholly a function of the judiciary.

> 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. 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. As that act enjoys no legal validity, it may not be regarded as "law" within Rule 802, Miss.R.Evid.[124]

The court commended the hard work and effort of the Advisory Committee on Rules[125] and charged them with investigating whether or not a special exception for sexually abused children ought to be adopted by the court.[126] As for this case, however, the court had no choice in its view, but to hold the trial court in error, as that court was following invalid law.[127] In summation, "problems of hearsay evidence belong to the judiciary historically, functionally, and practicably . . . ."[128]

The *Hall* decision shows rulemaking belongs to the judiciary exclusively as well.

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119. *Id.*

120. *Id.* at 1346-47.

121. *See* MISS. CONST. art. I, §§ 1-2.

122. *Id.* at 1346.

123. *Id.* at 1345.

124. *Id.* at 1346.

125. The committee that the court appointed, not the committee set up under MISS. CODE ANN. § 9-3-65 (Supp. 1989).

126. 539 So. 2d at 1347-48. Indeed, the advisory committee has drafted a rule proposing just such an exception. 570 So. 2d CI-CVIII (Miss. 1990) (Southern Reporter Advanced Sheets). The court's proposed rules are almost identical to the hearsay exception passed by the legislature in 1984.

127. 539 So. 2d at 1348. This was not the sort of action anticipated by Franck in his article as he advocated that the court use its "inherent" authority to make rules, but that the legislative rules of procedure should be followed by the court to the extent that they provide a system of judicial administration sufficient for the needs of the Mississippi judiciary.

> It is not necessary that our present procedural statutes be repealed or declared invalid by the court. All that is necessary is that the court assert its inherent power to prescribe rules of pleading, practice, and procedure and prepare and promulgate such rules, following such statutes where they may still be useful but departing from them when "the administration of justice is impaired" by the statutory procedure.

Franck, *supra* note 4, at 309.

128. 539 So. 2d at 1346-47.

The court in *Hall* basically ignored the constitutional changes to section 146,[129] stating that its power to promulgate rules emanates solely from the separation of powers mandate[130] and the requirement that "[t]he judicial power of the state shall be vested in a Supreme Court."[131] Presumably, the court read the "general law" amendment to the constitution as meaning "subject to valid law," the same as it treated the "except as provided by law" clause in its evidentiary rule 802.[132]

Decisions following *Hall* were decided in a similar fashion. Only nine days after *Hall* was decided, a case with similar facts came before the court.[133] *Mitchell v. State*[134] involved a defendant accused of placing his penis on his neighbor's five-year-old daughter. Upon conviction of fondling the girl, Mitchell appealed the decision of the trial judge to allow hearsay evidence in under the common law "tender years" exception found in *Williams v. State*.[135] The court ruled that this exception no longer existed, since the Mississippi Rules of Evidence exclude any hearsay not listed in Rule 803.[136] Although the "tender years" exception adopted in *Williams* was not inconsistent with the Rule 803 exceptions, but was merely in addition to these twenty-three specific exceptions, the court held that under MRE 1103, former exceptions recognized by the court, but not placed into rule 803, were repealed.[137] In holding the exception no longer viable, the court warned trial judges against reliance on anything other than the current court rules in deciding procedural issues in cases.[138] The court gave its appreciation to the "[l]egislature's attention to the special evidentiary problems surrounding child victims," but reiterated its exclusive rulemaking authority stating: "Such action is at the core of the judicial function, and as such is separate and different from the legislative function. Furthermore, our inherent rulemaking authority to regulate practice and procedure within the Judicial Branch has long been recognized."[139]

In *City of Mound Bayou v. Johnson*,[140] the court was faced with a far different conflict. In this case, the plaintiff brought a civil rights action against the city of

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129. *See infra* notes 195-206 and accompanying text.

130. *Hall*, 539 So. 2d at 1345; *see* MISS. CONST art. I, §§ 1-2.

131. *Id.* at 1345; MISS. CONST. art. VI, § 144.

132. MISS. R. EVID. 802.

133. Mitchell v. State, 539 So. 2d 1366 (Miss. 1989).

134. *Id.*

135. 427 So. 2d 100, 102 (Miss. 1983).

136. *Mitchell*, 539 So. 2d at 1369.

137. *Id.* MISS. R. EVID. 1103. "All evidentiary rules, whether provided by statute, court decision or court rule, which are inconsistent with the Mississippi Rules of Evidence are hereby repealed." *Id.*

138. *Mitchell*, 539 So. 2d at 1371.

139. *Id.* Another child sexual molestation case came before the court in July 1989. Leatherwood v. State, 548 So. 2d 389 (Miss. 1989). *Leatherwood* involved the alleged rape of an eleven-year-old girl by a twenty-two-year-old male, Alfred Dale Leatherwood. In this case, as in *Hall*, the prosecution sought to, and succeeded in, admitting into evidence hearsay statements made by the victim to a child behavioral expert, as well as a note the victim wrote to her teacher stating that she had been raped. The court examined the hearsay under MRE 803(4) and MRE 803(24), and held that neither was proper evidence to be admitted under the present Mississippi Rules of Evidence, as trial began twenty-six days after the rules of evidence were promulgated. *Id.* MISS. CODE ANN. § 13-1-403 was not yet in effect at time of trial and thus was not at issue here.

140. 562 So. 2d 1212 (Miss. 1990).

Mound Bayou and police officer Alfred Thompson.[141] The circuit court judge held that the action was time barred, but certified the question for hearing by the Mississippi Supreme Court via interlocutory appeal.[142] Without even discussing whether the court had jurisdiction to hear the case, the court heard and ruled on whether the statute of limitations had run on the plaintiff's claim.[143] The only code provision permitting a party to appeal an interlocutory order from circuit court was Mississippi Code Annotated section 11-7-213, providing for appeals on orders for new trials based on inappropriate damage awards.[144] Despite the constitutional restrictions which limited the court's jurisdiction to only those areas permitted by statute,[145] the supreme court declared and affirmed its own power to create its own jurisdiction.[146]

In sum, the Mississippi Supreme Court has declared that it, and it alone, has the power to make rules of procedure; any other rules[147] formerly recognized at common law, or legislative acts contrary to these court rules,[148] are invalid. Despite action taken by the legislature to circumvent this court-rulemaking, the court has maintained its constitutional interpretation granting itself power to promulgate rules.

Thus far, the Mississippi Supreme Court has made the following rulings concerning conflicts between the Mississippi Code and the Mississippi Rules of Procedure:

1. The legislature has no authority of adjudge the credibility of hearsay.[149]
2. The court has appellate jurisdiction to hear interlocutory appeals from any trial court.[150]
3. Actions for garnishment, replevin, and attachment are governed by the Code, and the rules apply only where they are not inconsistent with the Code.[151]
4. The privilige of a party to exclude blood test results taken pursuant to the implied consent law as evidence of intoxication has been abrogated by the Rules of Evidence.[152]
5. The Code requirements for court-appointed experts in eminent domain cases are to remain in full force and effect.[153]

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141. *Id.* at 1212-13.

142. *Id.*

143. *Id.* at 1215.

144. *Id.* at 1223 (Hawkins, J., dissenting).

145. *Id.* at 1225.

146. 562 So. 2d 1212.

147. *See* text accompanying notes 85-146.

148. *See* text accompanying notes 250-320.

149. Hall v. State, 539 So. 2d 1338 (Miss. 1989).

150. City of Mound Bayou v. Johnson, 562 So. 2d 1212 (Miss. 1990).

151. First Miss. Nat. Bank v. KLH Indus., 457 So. 2d 1333 (Miss. 1984) (garnishment); Leader Nat'l Ins. Co. v. Lindsey, 477 So. 2d 1323 (Miss. 1985) (garnishment); Universal Computer Servs. v. Lyall, 464 So. 2d 69 (Miss. 1985) (attachment); Hall v. Corbin, 478 So. 2d 253 (Miss. 1985) (replevin).

152. Whitehurst v. State, 540 So. 2d 1319 (Miss. 1989).

153. Hudspeth v. State Highway Comm'n, 534 So. 2d 210 (Miss. 1988).

6. The Mississippi Post-Conviction Collateral Relief Act supplants prior rule and statutory versions of habeas corpus writs.[154]
7. A criminal defendant's right to a speedy trial as provided by statute will be recognized and followed by the court.[155]
8. The Rules of Evidence, and not the Code, control what documents are to be afforded evidentiary weight in sentencing a defendant as a habitual offender.[156]
9. The Uniform Criminal Rules, and not the Code, govern the sufficiency of indictments.[157]
10. The notice of appeal requirements in the Code are supplanted by the provisions of the Supreme Court Rules.[158]
11. Forms of action such as "quo warranto" have been supplanted by the rules' single form of "civil action."[159]
12. Technical forms of pleading required by the Code are abolished in favor of MRCP 8(e)(1) providing that "no technical forms of pleadins or motions are required."[160]
13. The post judgment examination statute has been enlarged by the rules to permit examiniation of a judgment debtor "or any other person . . . upon any matter not privileged relating to the debtor's property."[161]

IV. INSTANT CASE

A. Majority Opinion

The most recent example of the court's self-governance is *Duncan v. St. Romain*,[162] in which the court refused to recognize a Mississippi code provision allowing a party forty-five days in which to perfect an appeal to the supreme court.[163] The majority opinion simply states that under rule 4(a), notice must be filed within thirty days of judgment.[164] The court goes on to say that if the Louisiana attorney bringing the appeal had followed rule 46(b)(3) and associated local counsel, this probably would not have occurred.[165]

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154. State v. Read, 544 So. 2d 810 (Miss. 1989); McLendon v. State, 539 So. 2d 1375 (Miss. 1989) (act enjoys enforceability, not because of any legal validity conferred upon it, but because court has adopted it in prior proceedings); Grubb v. State, 584 So. 2d 786 (Miss. 1991).

155. Flores v. State, 586 So. 2d 811 (Miss. 1991). *But see, id.* (McRae, J., dissenting) (270-day speedy trial rule is procedural, making Code provision unconstitutional, in violation of separation of powers; court should adopt speedy trial approach of its own).

156. Cox v. State, 586 So. 2d 761 (Miss. 1991).

157. Jones v. State, 461 So. 2d 686 (Miss. 1984).

158. Duncan v. St. Romain, 569 So. 2d 687 (Miss. 1990).

159. Dye v. State, 507 So. 2d 332 (Miss. 1987).

160. Penton v. Penton, 539 So. 2d 1036 (Miss. 1989); Key Constructors v. H & M Gas Co., 537 So. 2d 1318 (Miss. 1989); Carpenter v. Haggard, 538 So. 2d 776 (Miss. 1989).

161. *Ex parte* Burchinal, 571 So. 2d 281 (Miss. 1990).

162. 569 So. 2d 687 (Miss. 1990).

163. *Id.*

164. *Id.* at 689-90.

165. *Id.* at 688.

B. Dissenting Opinions

As in most of the rules decisions discussed in this note heretofore, Justice Hawkins penned a critical dissenting opinion, again conveying his view that the court does not possess authority to promulgate procedural rules, such power belonging exclusively within the legislative realm of power.[166] Justice Dan Lee likewise dissented, suggesting that the court be less rigid in the enforcement of its rules.[167] Lee's position was that the facts of the case, where a Louisiana attorney relied upon a state statute, apparently without knowledge of the court's rules, created a "confusing situation" which the court should remedy by suspending MSCR 4.[168]

Justice Pittman also dissented, expressing frustration at the court for having rules which fail to conform to existing statutes.[169] Pittman did not go so far as to suggest that the court lacked legitimate rulemaking authority. Instead he stated, "[t]o adopt an attitude of conformity is not to surrender our rule-making authority or power, but it is to recognize that however desirable unified rules might be, it is more desirable to have unified rules unified with the statute."[170]

V. ANALYSIS

A. In Support of Court Rulemaking

Despite the disapproval and condemnation the court has received from both the bench and bar[171] for its self-appointment as rule-writer, there are several propitious aspects to the court's authorship of procedural rules.

One such advantage is the judiciary's immunity from the pressure of the political arena.[172] Proponents argue that legislators may be driven by motives other than the concern for efficient administration of justice and as such are not in the best position to make objective decisions concerning procedural change.

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166. *Id.* at 689 (Hawkins, J., dissenting).

> In enacting a rule governing the method of appeal to this Court, we have asserted an authority the Legislature could not give us even if it wanted to. Such authority under our Constitution is vested exclusively in the Legislature.

Id.

167. *Id.* at 690 (Lee, J., dissenting).

168. *Id.* Justice Lee recognized that under MISS. SUP. CT. R. 2(c), the rules could not be suspended to permit an extension of time for taking appeal, but Justice Lee argued that this was an "exceptional case in which strict compliance with our Rule 4, in light of the confusion created by the statute, would result in manifest injustice." *Id.*

169. *Id.* (Pittman, J., dissenting).

170. *Id.*

171. Hall v. State, 539 So. 2d 1338, 1349-66 (Miss. 1989) (Hawkins, J., dissenting); Mitchell v. State, 539 So. 2d 1366, 1374-75 (Miss. 1989) (Hawkins, J., dissenting); Leatherwood v. State, 548 So. 2d 389, 406-12 (Miss. 1989) (Hawkins, J., dissenting); Page, *supra* note 4.

172. Jack Pope & Steve McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 7-8 (1978); Roscoe Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 44-45 (1952); Bruce L. Dean, Comment, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139 (1988).

Likewise, the legislature is generally slow to act, and will likely delay enactment of needed procedural reforms.[173] Court-rule advocates also assert a "judicial competence and superiority" argument, submitting that the court, not the legislature, is in the better position to know what changes are needed in the judiciary because of the court's daily contact with, and expertise in, the legal discipline.[174] Other reasons given are: the public's expectation of the judiciary's responsibility for the administration of justice;[175] the willingness of the judiciary to vigilantly review procedural postures;[176] the court's ability to make necessary, minor changes to rules without lengthy debate and the possibility of full judicial reform;[177] an easier, less cumbersome enactment process;[178] elimination of litigation resulting from ambiguities in statutory language which must later be interpreted by the court;[179] and consistency in procedural rule interpretation resulting from rule authorship and interpretation from the same entity.[180]

The court was notably applauded for its rulemaking decision by Professor Paul B. Herbert.[181] Herbert discounted critics denouncements that court rulemaking was historically a function of the legislature[182] and thus could not be justified with historic arguments, noting that the *Newell* court did not attempt to justify its action with historical arguments.[183] But if history is to be considered, he argued, it is recent history which ought to be considered. The legislature for many years failed to improve the efficiency of the procedural rules. "This legislative *inaction* necessitated and hence justified judicial *action*."[184]

Herbert also noted that Mississippi has the oldest heritage of a fully elected judicial branch in the nation, dating back to 1832.[185] As such, Herbert suggested that

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173. Dean, *supra* note 172, at 150. It goes without saying that the Mississippi legislature is slow to act in this regard. Prior to 1984, no significant change had been made to Mississippi procedure in over 50 years. *See supra* note 4 and accompanying text.

174. Newell v. State, 308 So. 2d 71, 76 (Miss. 1975); Paul B. Herbert, *Process, Procedure, and Constitutionalism: A Response to Professor Page*, 3 MISS. C. L. REV. 45, 45-49 (1982).

Professor Page counters this "Judicial Expertise" reasoning by pointing out that it is the function of the legislature to make laws in many areas which its members lack daily familiarity or expertise, such as "occupational health, energy policy, or the myriad [of] other complex substantive areas in which they must legislate." Page, *supra* note 4, at 34.

175. Dean, *supra* note 172, at 150.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at 150-51.

181. Herbert, *supra* note 174.

182. After a thorough historical analysis of the power to make rules throughout history, Professor Page concluded:

> History teaches that the courts have had control over procedure, but that this control was always subject to final legislative authority. What these courts claim is not any dormant historical power, but a transference of the traditional legislative authority over procedure that other courts have obtained, if at all, by a specific legislative or constitutional delegation.

Page, *supra* note 4, at 26.

183. *Id.* at 52.

184. *Id.* at 53.

185. *Id.* at 53-54.

the power the supreme court possesses should be substantially larger and different than the powers possessed by the appointed federal courts.[186]

In response to arguments that a court's actions are legitimate only in the "case or controversey" context, Herbert responded that a state court does not have to adhere to this requirement, noting that this standard applies only to Article III federal courts.[187] And in reply to suggestions that courts may not necessarily possess superior knowledge and expertise in how courts should operate, Herbert dismissed as self-evident that courts indeed are superior in this field.[188]

Herbert suggested that Mississippi become a laboratory, rather than following the model set by the United States Supreme Court in their handling of rulemaking, by experimenting with a new form of rulemaking.[189]

In summary, the arguments made in support of court rulemaking are as follows:

1. Inherent power of court is historically based.
2. Court has institutional competence to make rules.
3. Power is based on need to improve judicial efficiency in a period where increased qualitative and quantitative demands are being made on courts.
4. Courts are extra-political.

As a whole, the state bar has embraced the new court-adopted rules as an immense improvement over court practice of the past.[190] Those criticizing the court do not question the wisdom or competence of the rules themselves, but simply challenge the court's authority to tread on this terrain.[191]

B. Criticism of Court Rulemaking

1. Constitutional Mandate of Legislative Rulemaking

Criticisms of the court's actions are numerous. Justice Hawkins, in his *Hall* dissent, argued that section 146 of the Mississippi Constitution provides: "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,"[192] and this grants to the court jurisdiction

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186. *Id.* at 54.

187. *Id.* at 47.

188. *Id.* at 46.

189. *Id.* at 56. Herbert refers here to Justice Brandeis' famous suggestion: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

190. *See* Page, *supra* note 4, at 3. Even Justice Hawkins admits that the court's new rules are an improvement over old procedure. *See* Hall v. State, 539 So. 2d 1338, 1359 (Miss. 1989) (Hawkins, J., dissenting).

191. *Hall*, 539 So. 2d at 1359-61 (Hawkins, J., dissenting); Page, *supra* note 4.

192. MISS. CONST. art. VI, § 146.

only in those areas *specifically* provided for by law or in the constitution itself; whereas the legislature has "the legislative power of this state."[193]

A similar argument was presented by Professor William H. Page in his early criticism of the court:

> The state constitution specifically places the power of establishing rules for the conduct of the legislature in the legislature itself; there is no similar delegation to the courts with respect to judicial procedure. In fact, where the state constitution does refer to questions of judicial procedure, it places the responsibility in the hands of the legislature.[194]

Justice Hawkins likewise recognized this, noting that the majority ignored those constitutional provisions which specifically grant the legislature power over court procedure.[195]

Article IV, section 90 of the Mississippi Constitution provides: "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 . . . regulating the practice in courts of justice."[196] Justice Hawkins cited early Mississippi court precedent standing for the proposition that specific constitutional provisions (e.g., § 90), are controlling over the general provisions (e.g., § 1).[197] Under this precedent, the court must bow to the constitution and allow the legislature at least some control over procedure, as *specific* provisions require such. "Thus," concluded Justice Hawkins, "the Legislative branch, and not this Court, has a specific Constitutional mandate to pass laws 'regulating the practice in courts of justice.' "[198]

The argument has also been advanced that before a law is held unconstitutional, it must violate organic law beyond a reasonable doubt, which Hawkins asserts the court has failed to do.[199]

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193. Hall v. State, 539 So. 2d 1338, 1351 (Miss. 1989); MISS. CONST. art. IV, § 33. According to Justice Hawkins, the legislature holds all power which is not specifically prohibited by the constitution. *Hall*, 539 So. 2d at 1351 (Hawkins, J., dissenting). The court, however, was not able to cite to any specific provision of the constitution which prohibited enactment of procedural statutes by the legislature. *Id.* Therefore, under this analysis, the legislature had the power to enact MISS. CODE ANN. § 13-1-403, which makes it valid law under the court's analysis, and therefore law which can be read into the MISS. R. EVID.

194. Page, *supra* note 4, at 38. *E.g.*, MISS. CONST. art. IV, § 90(s) (legislature shall provide by general law for "Regulating the practice in courts of justice"); MISS. CONST. art. III, § 31 (legislature may provide for non-unanimous juries in circuit and chancery court) (*Compare* MISS. R. CIV. P. 48(A)); MISS. CONST. art. VI, § 163 (legislation shall provide procedures for transfer of actions between circuit and chancery court). *Id.* at 38 n.228.

195. 539 So. 2d at 1353 (Hawkins, J., dissenting) (citing MISS. CONST. art. IV, § 90).

196. MISS. CONST. art. IV, § 90(s).

197. 539 So. 2d at 1345 (Hawkins, J., dissenting)

> First constitutional provisions should be read so that each is given maximum effect and a meaning in harmony with that of each other . . . . To the extent that conflict may appear, specific provisions such as Sections 55 and 129 control over general provisions such as those of Sections 1 and 2.

Dye v. State *Ex rel.* Hale, 507 So. 2d 332, 342 (Miss. 1987).

198. 539 So. 2d at 1353 (Hawkins, J., dissenting).

199. *Id.* at 1354 (Hawkins, J., dissenting) (citing State v. Edwards, 46 So. 964, 966 (1908)).

Under article six, section 146 of Mississippi's Constitution, a prerequisite of *specific authority* exists.[200] To claim inherent authority then, is to concede that the court has no specific authority to act, and without specific authority the court cannot act within the constitutional framework.[201]

One final contention, advanced in *Leatherwood,* is the danger the court's rulings present to our system of checks and balances.[202] Justice Hawkins reviewed our system of checks and balances and reminded the majority that both the legislative and executive branches of government have two checks on their power to carry out their respective duties, but the judiciary, by claiming the power to legislate rules of procedure, has no check on this power.[203]

> [T]his court is taking power from the Legislature and Governor, and placing it solely in the members of this Court. The members of this Court have a direct interest in this result. We are the self-declared recipients of power, the other two branches the losers of any such power. And we and we alone are the ones who decide whether we shall grant such power unto ourselves. How can these be perceived as impartial? Especially since we declared ourselves the winner.[204]

"This is frightening."[205]

Under this same line of reasoning the majority has chosen, all branches of government have the power inherently to rule themselves. Under the majority's rationale, the Governor could claim violation of separation of powers if the legislature specified the procedure by which he is to carry out his duties.[206]

2. Expertise vs. Legitimacy

In response to the argument of superior competency of the judiciary in making rules, Professor Page questioned the reasoning of the *Newell* holding, saying that the court "confuses expertise with legitimacy."[207] That is to say that just because the court is in a better position than the legislature to set court procedure since they deal with it daily, does not legitimate the power to make the rules.[208] "Rulemaking, although related to the court system, is lawmaking; and lawmaking is primarily a legislative function."[209] It is not at all clear, according to Professor Page, that the court has superior proficiency in making rules of procedure.[210] While it is true that supreme court justices deal with the judicial procedure daily, so do those practicing lawyers who serve on the legislative judiciary committees and in the

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200. *Id.*
201. *Id.* at 1359 (Hawkins, J., dissenting).
202. 548 So. 2d 389, 411 (Miss. 1989) (Hawkins, J., dissenting).
203. *Id.* (Hawkins, J., dissenting).
204. *Id.* at 408.
205. *Id.* at 411 (Hawkins, J., dissenting).
206. *Id.*
207. Page, *supra* note 4, at 28.
208. *Id.* at 28-29.
209. *Id.* at 29.
210. *Id.* at 34.

legislature at large.[211] These practicing attorneys, it is suggested, are just as cognizant, if not more so since they practice primarily at the trial level as opposed to the appellate level, of the need for changes as the supreme court justices.[212] This proposition that our legislators are equally – or perhaps more – competent to set procedural guidelines for Mississippi courts than the high court itself is suspect at best. It is doubtful that members of the bar which have so much free time that they are able to run or serve in the legislature, have law practices which actually take them in court enough to know the needs of judicial procedural reform. For the court to say that it is better suited to make rules may be merely conclusory,[213] but so also is the suggestion that the legislature is the superior source.

Justice Hawkins made an appraisal similar to Professor Page's in *Leatherwood*, noting:

> The majority has held such a law beyond Legislative "competence." This ignores the fact that the Child Abuse Evidence Act was prepared by the chief law enforcement office of this State. I doubt seriously that this Court will receive any better evidentiary "advice" in such cases than the Legislature received from the office of the Attorney General.[214]

Indeed, the child-shield statute proposed by the court in their 1990 Proposed Rules of Evidence are, for the most part, identical to the Mississippi Child Abuse Act.[215] The court's version, however, was offered some four years after the legislature's version was passed, drawing into consideration the validity of the argument that the court is a more efficient "rule-maker."

It has been suggested that the court cannot act with legitimacy outside the adversarial system. According to Professor Page, the court's legitimacy rests in its ability to impartially decide cases, "according to the law" based upon information presented to it by the prospective advocates.[216] "Once courts are cut free of the case or controversy element of their law making function, as they are when they issue advisory opinions or when they make rules of procedure, they no longer have this legitimacy."[217] In their rulemaking capacity, the court acts as a political body, but in this role, they make their decision without the benefit of the adversarial system.

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211. *Id.*

212. Professor Page also points out that the nature of law-making requires legislators to consider topics about which they know little or nothing such as health or energy. *Id.* Such areas are generally studied and reviewed by committees with knowledge in the area who make recommendations to the legislators. *Id.* Being an expert in a certain area is not a prerequisite to legislating that field. *Id.*

213. *Id.* at 35.

214. Leatherwood v. State, 548 So. 2d 389, 410 (Miss. 1989) (Hawkins, J., dissenting).

215. Proposed Rules, 570 So. 2d CI-CVIII (Miss. 1990) (Southern Reporter Advance Sheets); "Rules 803(25), 804(a)(6) attempt to say essentially the same thing, but more unartfully [sic] and less effectively than MISS. CODE ANN. § 13-1-403." *Id.* at CVI (Hawkins, J., dissenting). "Rule 617, which it did not occur to the Advisory Committee to propose, and which has been gratuitously added in the past few days by a member of this court, plagiarizes MISS. CODE ANN. § 13-1-405." *Id.* at CVII.

216. Page, *supra* note 4, at 30.

217. *Id.*

Professor Page's argument that courts only have legitimacy in the "case or controversy" context is also conclusory. The suggestion is that courts' only legitimate purposes are to decide cases, but this also suggests that the legislature's only legitimate purpose is to pass laws. Under this reasoning any extra-lawmaking function that the legislature may perform to insure its efficient operation, such as instituting procedures for hearings before committees, is invalid as beyond the legitimate scope of the legislature's authority. All branches of government must enact policies and procedures in order to effectually accomplish their function. For the court to require that briefs be limited to fifty pages[218] and filed on paper not larger than 8 1/2 x 14, in type not smaller than pica[219] are requirements which ultimately go to the court's ability to effectively determine "case and controversy" but which are themselves outside that medium. The suggestion is that we are to deny the court the power to set limitations on litigants, or hire a court administrator, or to permit service by fax, merely because these are done outside of a particular lawsuit, thereby making the action "illegitimate."

Professor Page argued that when a court makes rules, it is taking on a political function, and when it decides cases, performs a non-political role. This distinction, even if correct, is not helpful. The court has defined its boundary of authority using a "substantive/procedural" characterization.[220] Professor Page's point merely converts the conflict into a "political/non-political" dichotomy. Both forms of nomenclature are merely labeling, and are not distinctions which provide a new solution to this controversy.

Of the judicial independence the court exerted in *Newell,* Professor Page concluded that it was a very dangerous thing, stating that the likelihood of legislative abuse is far less than abuse in the judiciary, "as legislators are more directly accountable to the [public]."[221] He concluded, "[t]he legislature may enact procedural statutes; but the court may overturn them not only if they are found to be unfair or inefficient, but merely if it disagrees with them. And once it has done so, its action cannot be altered except by constitutional amendment."[222]

3. Substantive/Procedural Distinction

One of the most problematic aspects of the court's decision to promulgate rules of procedure is the difficult, often incorrigible distinction between "procedure" and "substance."[223] The Mississippi court has long recognized the quandary associated with labeling or characterizing a rule in either category.[224] "The blunt substantive-procedural distinction has proved unsatisfactory in all except the simplest

218. MISS. SUP. CT. R. 28(g).
219. MISS. SUP. CT. R. 32(a).
220. *See infra* notes 223-33, 238-49 and accompanying text.
221. Page, *supra* note 4, at 32.
222. *Id.* at 36.
223. *Id.* at 40-43.
224. Walters v. Inexco Oil Co., 440 So. 2d 268 (Miss. 1983). "Experience suggests that 'generality' and 'substance,' like beauty, are in the eye of the beholder. *Id.* at 272.

of cases."[225] Yet, under the court's mandate that rules of "procedure" belong exclusively to the Mississippi Supreme Court,[226] it is a distinction which must obviously be made.

"Procedure" has been defined as those rules "which concern methods of presenting to a court the operative facts upon which legal relations depend."[227] Whereas "substantive law" is "that which creates duties, rights and obligations."[228] While there are clear-cut examples which fit nicely into one category or the other, there is a "grey area" or "twilight zone"[229] between the categories, whereby a rule may be characterized as either. One could hardly argue, in good faith, for example, that the requisite length of paper for filed court pleadings, or the number of appellate brief copies to be filed with the court are anything other than procedural. Likewise, laws governing conduct such as "driving under the influence" statutes and laws governing liabilities such as a comparative negligence statute, are clearly substantive. Rules and statutes affecting one's behavior with the court, and outside the court, such as statute of limitations,[230] burden of proof at trial,[231] venue and certiorari rules,[232] have, however, been a great deal more problematic. Courts and scholars continue to wrestle with the proper distinction between substance and procedure.[233] Yet, in the context of court rulemaking, if the legislature is to know its proper function in government, it is a distinction which must be made.

To summarize, the primary criticisms of court's rulemaking power are:

1. Historically there is no constitutional basis for the court's power.
2. Institutitional competence does not give the court legitimate authority.
3. The court lacks accountability.
4. The process for rules promulgation has access problems.
5. No clearly definable boundaries exist between the court's exclusive zone of authority and that of the legislature.

C. The Reality of Court Authority

Whether the court has legitimate constitutional authority to promulgate rules of judicial procedure is, from a practical standpoint, a moot question. Assuming the

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225. *Id.* at 273.

226. *Hall*, 539 So. 2d 1338 (Miss. 1989).

227. Dinetia M. Newman, Comment, *Mississippi's Statutes of Limitations and Choice of Law Analysis: A Borrowed Conflict*, 57 MISS. L.J. 739, 747 (1987).

228. Michael B. Browde & M.E. Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M. L. REV. 407, 444 n.227 (1985).

229. Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940), *cert. denied*, 310 U.S. 650 (1940).

230. Newman, *supra* note 227, at 745-51; Gregory Gelfand & Howard B. Abrams, *Putting Erie on the Right Track*, 49 U. PITT. L. REV. 937, 958 (1988); Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 295-97.

231. Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940).

232. Browde & Occhialino, *supra* note 228, at 444-47.

233. *Id.* at 210; Gelfand & Abrams, *supra* note 230; Mary K. Kane, *The Golden Wedding Year:* Erie Railroad Company v. Tompkins *and the Federal Rules*, 63 NOTRE DAME L. REV. 671 (1988); Carrington, *supra* note 230; John H. Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974).

court does not abandon its position,[234] and the rulemaking power is not taken from the court by the federal judiciary, possibly on due process grounds,[235] the debate over who has the legitimate rulemaking power is academic. While Mississippi can expect one or two Justices to continue their criticism of court-made rules,[236] the matter is generally settled by *Hall* and its progeny that the court does indeed have power to promulgate the rules of procedural practice for the state. These court-authored rules are not subject to alteration or addition by the state's legislative branch of government.[237] The remainder of this note will attempt to determine what standards the court uses in deciding whether a statute violates the territory of authority which the court has proclaimed to be exclusively its own.

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234. Chief Justice Roy Noble Lee and Justice James L. Robertson will not be sitting on the court effective January 1993. At the time this note went to press, Chief Justice Lee's successor had not been determined. Justice Robertson will be succeeded by James L. Roberts.

235. A basic principle of modern constitutional law is the Fourteenth Amendment requirement that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV. It could be argued that the Mississippi Supreme Court, by passing rules of court without proper constitutional authority or legislative delegation, is violating this provision. Generally, the legislative process provides the avenue of due process, but in the case of court-made rules, this process is sidestepped. *See* ROTUNDA, NOWAK & YOUNG, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE [hereinafter Rotunda] § 17.8. An argument could thus be made that a party adversely affected by the court's rules was denied due process of law, as the wrong branch of government wrote the law, or the appropriate legislative-rule was not applied. There are presently no federal decisions in this regard. The Supreme Court has ruled on the due process implications of rulemaking powers delegated to agencies by Congress. Vermont Yankee Nuclear Power v. Natural Resources Defense Counsel, 435 U.S. 519 (1978). The Court held that minimum procedural safeguards provided for by enabling legislation were sufficient, and that rulemaking powers can otherwise be delegated by Congress. *Id.* at 1202-03. Beyond this, the Court has not gone any further in requiring any procedural safeguards in rulemaking processes by a non-legislative body. ROTUNDA § 17.8.

The Court has addressed rulemaking by state judiciaries regarding bar regulations. District of Columbia Ct. of App. v. Feldman, 460 U.S. 462 (1983). The Court has recognized "that state supreme courts may act in a nonjudicial capacity in promulgating rules regulating the bar." *Id.* at 486 (citations omitted). Additionally, the court has held that constitutional challenges to such rules can be brought at the federal district court level, if the court is asked to assess the validity of the rule. *Id.* In such an instance, the district court would not be reviewing the state court's judicial proceeding; 28 U.S.C. § 1257 would not act as a bar to nonjudicial proceedings. *Id.*

> [The] United States district courts, therefore, have subject matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings . . . . They do not have jurisdiction, however, over challenges to state-court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. Review of those decisions may be had only in [the United States Supreme Court].

Id. at 486. Court-made rules of procedure seem to be analogous to court-made bar regulations, both being promulgated by the court in a nonadjudicatory capacity. Thus, it would seem that a U.S. constitutional challenge to the validity of the rules could be brought in United States district court.

236. Justice Hawkins has written a dissenting opinion criticizing the court for writing its own rules in the following decisions: Baily v. Woodcock, 1990 W.L. 257460 (Miss. 1990); City of Mound Bayou v. Johnson, 562 So. 2d 1212 (Miss. 1990); Duncan v. St. Romain, 569 So. 2d 687 (Miss. 1990); Goodson v. State, 566 So. 2d 1142 (Miss. 1990); Lambert v. State, 1990 W.L. 257410 (Miss. 1990); Whitehurst v. State, 540 So. 2d 1319 (Miss. 1989); Hall v. State, 539 So. 2d 1338 (Miss. 1989); Leatherwood v. State, 548 So. 2d 389 (Miss. 1989); Mitchell v. State, 539 So. 2d 1366 (Miss. 1989); *In re* C.B., 1990 W.L. 257460 (Miss 1990); *In re* the Adoption of the MISS. R. OF EVID., 570 So. 2d CI (Miss. 1990) (Southern Reporter Advance Sheets).

Justice Dan Lee joined Justice Hawkins' dissent in *Goodson* and *City of Mound Bayou*, and wrote a separate dissenting opinion in *Duncan*. Justice Pitmann joined the Hawkins dissent in *Bailey*.

237. Unless of course, the court chooses to adopt the legislative rule as its own. *See* McCarty v. State, 554 So. 2d 909 (Miss. 1989) (court follows legislative provision regarding multi-count indictments "not because of any legal validity conferred upon them by the legislature, but because we have adopted them"). *Id.* at 914.

1. Procedural Defined

In *Newell*, the court declared that it had exclusive power over matters of judicial *procedure*.[238] The court, however, failed to go so far as to define "procedure" for purposes of division of responsibility between the court and legislature.[239] It was readily presumed that under this power announced in *Newell*, the court would possess power over matters of "procedure" – those matters which involve effective administration of justice – only, and "substantive" matters – those matters which involve public policy considerations – would remain under the dominion of the legislature.[240] Although critics warned that the characterizations of "procedure" and "substance" were not mutually exclusive and were necessarily interdependent on one another,[241] these warnings were rebuffed by court supporters, who argued that although procedure can and does *affect* substantive rights, that "is not to say, however, that procedure *constitutes* substantive law."[242]

The court has not, as of yet, defined precisely what it means by "procedure." In *Hall*, the court did state that it had authority over "rules and standards by which evidence is adjudged competent for use in a trial . . ."[243] but it did not say whether this was the limit of the court's rulemaking power. The problem with defining the scope of the court's rulemaking authority was addressed by Lawrence Franck in his article calling for court rulemaking.[244] He suggested that the division between judicially controlled procedure and legislatively controlled substance should be based upon whether the rule relates to effective and orderly management of justice.[245] If so, the rule should be properly classified as procedural and be under the control of the judiciary.[246] But if not within this category, the rule should be governed by the legislative branch of government.[247] This procedural/substantive dis-

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238. Hall v. State, 539 So. 2d 1338, 1345 (Miss. 1989).

239. There is a great deal of Mississippi case law defining the term in the context of conflict of laws and the *Erie* doctrine. However, it is readily recognized that what is "procedural" in the context of an *Erie* question may not be "procedural" in the context of a conflict-of-laws case. *See, e.g.*, Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940), *cert. denied*, 310 U.S. 650 (1940).

240. Franck, *supra* note 4, at 302-07.

> The division is dependent upon whether the matters involve primarily questions of important public policy, in which case they are properly of legislative concern, or whether they relate primarily to the effective and orderly administration of justice – the dispatch of the business of the courts – in which case they are properly the subject of the judicial rule-making power. Questions relating to the creation of courts, their organization, the salaries of their officials, and the subjects over which they can exercise jurisdiction are all matters involving important policy considerations and should be under the control of the legislative branch. Similarly, the length of the period of limitations in various cases primarily involves policy considerations, rather than the orderly dispatch of the judicial business, and is therefore subject to legislative action.

Id. at 303-04.

241. Page, *supra* note 4, at 40-43.

242. Herbert, *supra* note 174, at 52. "The difference, if not always crystal clear, is real, workable and salient." *Id.*

243. *Hall*, 539 So. 2d at 1344.

244. *See* Franck, *supra* note 4, at 302.

245. *Id.* at 303-04.

246. *Id.*

247. *Id.*

tinction, as discussed previously,[248] is a satisfactory distinction in easy cases, such as paper size and cover colors, but by the court's own admission, in hard cases, is unworkable.[249] Not only is there a great deal of difficulty in the determination of what constitutes procedure, and what constitutes substance in close cases, but the two are not necessarily mutually exclusive. Thus, a substantive/procedural distinction offers little help in determining prospectively in what category a particular statute will be categorized. What remains is a legislature which must pass laws with little guidance from the court as to whether the statutes are truly valid.

2. Public Policy Distinction Rejected

Another possibility, also suggested by Franck, of how to distinguish the power of these branches is public policy.[250] That is to say that those matters which affect public policy considerations should properly be in the control of the legislature. The problem with this suggestion is that it assumes the court will recognize that the legislature is a better policy-maker than the court. The court, however, does indeed take public policy considerations into account when ruling on issues.[251] Such is part of its role in the prudent dispatch of justice. It is unlikely that the court would now refrain from making such determinations, or that the court would perceive itself ill-equipped to set public policy.[252]

The court's early holdings in the area of conflicting statutes seemed to indicate that the court would do some type of substantive/procedural analysis, and supplant only those statutes concerning wholly procedural matters. In *Jones v. State*,[253] the court held invalid a statute requiring indictments charging a person with capital murder to specifically inform the defendant of the precise code section against which he is being charged.[254] The court based its holding on the fact that the statute in question was "purely procedural" and therefore the court's "prerogative and responsibility to adopt rules regulating the same."[255] Thus, the court held that Criminal Rule of Circuit Court Practice 2.05 controlled the indictment in question.[256]

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248. *See supra* text accompanying notes 223-33.

249. Walters v. Inexco Oil Co., 440 So. 2d 268, 273 (Miss. 1983).

250. Franck, *supra* note 4, at 303-04.

251. *See e.g.*, Jones v. Chandler, 592 So. 2d 966 (Miss. 1991); Chenier v. Chenier, 573 So. 2d 699 (Miss. 1990); Wing v. Wing, 549 So. 2d 944 (Miss. 1989).

252. The legislature bases its decision to make or alter any statute on the influence of various lobby groups, committee studies and reports, and ultimately upon the will of the electorate. If the judiciary choses to supplant a statute through its rulemaking power, upon what basis would it make its determination? Would its members allow special interest groups to woo them; or would they consider the desires of voters? If past behavior of the court is any indication as to how the court would make such a decision, they would seek the advice of the Advisory Committee on Rules, a learned group of attorneys and law faculty from around the state, and based on the recommendation of that group, would act. Thus the will of the electorate and the many policy considerations involved are not to be consulted in such circumstances.

253. 461 So. 2d 686 (Miss. 1984).

254. *Id.* at 693; *see* MISS. CODE ANN. § 99-17-20 (Supp. 1989).

255. 461 So. 2d at 694.

256. *Id.*

Public policy considerations seemed to be the test used by the court in *City of Mound Bayou v. Roy Collins Constr. Co.*[257] In that case, the court held that before a statute was to be stricken by the court due to the statute's conflict with a court-made procedural rule, there must be a finding that the statute to be stricken does not implicate any important public policy considerations.[258] Thus, in these early rule decisions the court seemed to rely on some sort of substantive/procedural analysis, leaving for the legislature areas of public policy.

In *Hall v. State,* the court laid to rest the notion espoused by Franck that the court's power ended where matters of public policy began. In 1986, the Mississippi legislature, responding to public pressure in the area of child abuse and in an attempt to protect the child victims from exacting in-court examination while still punishing the child's offender, passed a comprehensive child shield statute.[259] This statute was similar to statutes passed in other states in response to an increased awareness of child abuse.

Social recognition of sexual child abuse is a relatively new phenomena.[260] In the late nineteenth century, Sigmund Freud discounted the many sexual abuse complaints that he heard from his patients as fantasies.[261] Throughout the early part of the twentieth century, it was generally believed by the mental health profession,

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257. 457 So. 2d 337 (Miss. 1984).

258. *Id.* at 340.

259. MISS. CODE ANN. §§ 13-1-401, -409.

> (1) An out-of-court statement made by a child under the age of twelve (12) describing any act of child abuse, sexual abuse or any other offense involving an unlawful sexual act, contact, intrusion or penetration performed in the presence of, with, by or on the declarant child, not otherwise admissible, is admissible in evidence to prove the contents thereof, if:
>
> (a) Such statement is made for the purpose of receiving assistance or advice in order to prevent or mitigate the recurrence of the offenses, or in order to obtain advice about the psychological, social or familial consequences associated with the offenses; and
>
> (b) Such statement is made to a person on whom the child should reasonably be able to rely for assistance, counseling, or advise; and
>
> (c) The child either:
>
> (i) Is available to testify; or
>
> (ii) Is unavailable as a witness, provided that there is other corroborative evidence of the abuse or offense. A finding of unavailability, except in those situations specified by Rule 804 of the Mississippi Rules of Evidence, shall require a finding by the court, based on the specific behavioral indicators described in § 13-1-411, that the child's participation in the trial would result in a substantial likelihood of traumatic emotional or mental distress; and
>
> (d) The court finds in a hearing conducted outside the presence of the jury that the time, content and circumstances of the statement provide sufficient guarantees of trustworthiness . . . .
>
> (2) The defendant shall be notified no later than ten (10) days before trial that an out-of-court statement as described in this section shall be offered in evidence at trial. The notice shall include a written statement of the content of the child's statement, the time the statement was made, the circumstances surrounding the statement which indicate its reliability and such other particulars as necessary to provide full disclosure of the statement.
>
> (3) The court shall make specific findings of fact, on the record, as to the basis for its ruling under this section.

MISS. CODE ANN. § 13-1-403 (Supp. 1989).

260. David McCord, *Expert Psychological Testimony About Child Complaints in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence,* 77 J. CRIM. L. & CRIMINOLOGY 1, 2-5 (1986).

261. *Id.* at 2. "[T]here was the astonishing thing that in every case blame was laid on perverse acts by the father, and realization of the unexpected frequency of hysteria, in every case of which the same thing applied, though it was hardly credible that perverse acts against children were so general." (quoting from S. FREUD, THE ORIGINS OF PSYCHOANALYSIS: LETTERS TO WILHELM FLIESS, DRAFTS AND NOTES: 1887-1902, 215 (1954)).

social workers, physicians, the courts, and society in general, that sexual abuse of children was a rare occurrence.[262]

That attitude of disregard changed in the 1970's, when health professionals began publishing data indicating that child sexual abuse was much more prevalent than previously thought.[263] Alarming statistical data showed that as many as twenty-eight percent of all females[264] and nine percent of all males[265] had been sexually abused as children.

Not only have researchers educated society of the prevalence of child abuse, but their research has also informed the public as to "who" is doing the abusing. Although statistics in this area vary widely, almost all researchers agree that at least half of sexual child abuse is carried out by a person known personally by the child,[266] the most likely of whom is a relative.[267] Most sexual abusers are male,[268] and commonly abuse minors in their own families.[269] The most likely "relative" abuser is a father figure, such as a biological father, stepfather, or live-in boyfriend of the mother.[270] One scholar estimates that one-third of all child sex abuse is perpetrated in the father-daughter relationship.[271]

With information in this area emerging into the public awareness, society has demanded that more action be taken to protect abused children. Most states have

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262. McCord, *supra* note 260, at 2-3.
263. *Id.* at 3.
264. *Id.*
265. *Id.* (citing DAVID FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 56 (1979)).
266. *Id.* at 4.
267. *Id.*
268. *Id.* at 4-5.
269. *Id.* at 4.
270. *Id.* at 5.
271. *Id.*

passed stricter statutes to aid in the prosecution of child abusers.[272] But, in view of the fact that most sexual child abuse occurs privately, in the absence of witnesses, prosecution of these crimes is difficult.[273] Many cases are never reported to proper authorities[274] and those that are discovered are extremely difficult to prosecute.[275] Very often, the sexually molested child is the only witness to the crime.[276]

In response to such low conviction rates, and public outrage that such crimes continue to go unpunished, state legislatures around the country have responded with legislation that increases the penalties for such crimes.[277] Even with the aid of harsher penalties for sexual abuse and statutory definition of the crime, prosecutions remained extremely difficult due to the nature of the crime; the victim, and therefore the primary witness, is a child.

In a typical prosecution of an accused child molester, the minor victim is thoroughly questioned by police,[278] must testify before a judge at a preliminary hearing,[279] and in those states where the crime is a felony, must testify before a grand jury.[280] All of this is required well in advance of the eminent trial. Trepidation then

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272. A majority of states now specifically define sexual offenses between adults and children and classify them as felonies. *See* ALA. CODE § 13A-6-66 (1982); ALASKA STAT. § 11.41.434 (1990); ARIZ. REV. STAT. ANN. § 13-1404 (Supp. 1990); ARK. CODE ANN. § 41-1808 (1985); CAL. PENAL CODE § 266(j) (West Supp. 1989); COLO. REV. STAT. § 18-3-405 (Supp. 1990); CONN. GEN. STAT. ANN. § 53a-71 (West 1985); DEL. CODE ANN. tit. 11, § 762 (1987); D.C. CODE ANN. §§ 22-2810, -3051 (1989); FLA. STAT. ANN. § 794.05 (West 1976); GA. CODE ANN. § 16-6-4 (1988); HAW. REV. STAT. § 707-736 (1985); IDAHO CODE § 18-1506(1) (Supp. 1989); ILL. ANN. STAT. ch. 38, para. 12-14(b)-(c) (Smith-Hurd 1989); IND. CODE ANN. § 35-42-4-3 (Burns Supp. 1989); IOWA CODE ANN. § 709.3 (West 1984); KAN. STAT. ANN. § 21-3503 (1989); KY. REV. STAT. ANN. § 510.110 (Baldwin 1985); LA. REV. STAT. ANN. § 14:81.2 (West Supp. 1990); ME. REV. STAT. ANN. tit. 17-A, § 252 (1983); MD. ANN. CODE art. 27, § 463 (1982); MASS. GEN L. ch. 265, § 22A (1980); MICH. COMP. LAWS ANN. § 750.520b (West Supp. 1989); MINN. STAT. § 609.342 (1989); MISS. CODE ANN. §§ 97-395, -101 (Supp. 1989); MO. REV. STAT. § 566.100 (1979); MONT. CODE ANN. § 45-5- 502 (1983); NEB. REV. STAT. § 28-320.01 (Supp. 1989); NEV. REV. STAT. § 200.366(2)(c) (1983); N.H. REV. STAT. ANN. § 632-A:2 (Supp. 1989); N.J. REV. STAT. § 2C:14-2 (West Supp. 1989); N.M. STAT. ANN. § 30-9-11. (Michie 1984); N.Y. PENAL LAW § 130.65(3) (McKinney 1975); N.C. GEN. STAT. § 14-27.2 (1981 & Supp. 1989); N.D. CENT. CODE § 12.1-20-03 (Supp. 1989); OHIO REV. CODE ANN. § 2907.02 (Anderson Supp. 1989); OKLA. STAT. tit. 21, § 1123 (Supp. 1989); OR. REV. STAT. § 163.425 (1985); PA. CONS. STAT. ANN. § 3122 (Purdon 1983); R.I. GEN. LAWS §§ 11-37- 8.1 to 8.4 (Supp. 1989); S.C. CODE ANN. § 16-3-655 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 22-22-7 (Supp. 1989); TENN. CODE ANN. § 39- 2-605 (1982); TEX. PENAL CODE ANN. § 22.011 (Vernon Supp. 1989); UTAH CODE ANN. § 76-5-404 (Supp. 1989); VT. STAT. ANN. tit. 13, § 3252 (Supp. 1984); VA. CODE ANN. § 18.2-67.3 (Michie Supp. 1989); W. VA. CODE §§ 61-8B-3, -5, -7, -9 (1984); WIS. STAT. ANN. § 940.225 (West 1982 & Supp. 1989); WYO. STAT. §§ 6-2-303, -304 (1983); Maria H. Bainor, Note, *The Constitutionality of the Use of Two-Way Closed Circuit Television to Take Testimony of the Child Victims of Sex Crimes*, 53 FORDHAM L. REV. 995 n.1 (1985) (statute citations originally obtained from note).

273. *See* Jean L. Kelly, Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806 n.6 (1985) ("In a study of 250 cases of child sex abuse reported to New York City protective services in 1966 and 1967, there were 173 arrests, 53 convictions, and 23 offenders sentenced to prison").

274. *Id.* at 806.

275. *Id.*

276. *Id.* at 806-07.

277. *See* sources cited *supra* note 272.

278. Bainor, *supra* note 272, at 1000-01.

279. *Id.* at 1001.

280. *Id.*

haunts the child as he or she must wait, often a year or more,[281] for the terrifying trial that is to come.

When the trial finally arrives, it can be an even more terrifying experience for the child victim than the sexual abuse itself. The child victim must testify in front of the defendant,[282] who has often threatened to harm the child if the child were ever to tell of the acts, to an audience of strangers, known as a jury and spectators,[283] and a person in a high chair wearing a witch-like robe.

In response to these special needs of child victims, and the desire for higher conviction rates of sex criminals, many states have passed laws which ease the rules of procedure and evidence in child molestation cases. The two most prominent of these legislative innovations are hearsay statutes[284] and videotape statutes.[285]

Hearsay statutes create a special exception to the hearsay rule whereby statements made by child victims of sexual abuse may be recounted in a court of law by a person who heard such statements. A doctor, or the child's mother, for instance, could testify in court as to the child's account of abusive acts. This type of statute serves the two fold purpose of protecting a minor from the traumatic courtroom experience and cross-examination,[286] and increasing the chances of accurate recall, as a young child may likely forget much of the occurrence by the trial date.[287]

The other legislative innovation is the use of videotape recorders to capture the testimony of the minor while it is fresh on his mind and preserve it for use at trial. These statutes serve the above-mentioned needs by allowing the child to withdraw early and quickly from the judicial process, rather than being subjected to repeated courtroom appearances.

The political outcry for such statutes has been great. Both videotape and hearsay exception statutes have been very popular in recent years, quickly gaining bi-

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281. *Id.*

282. *See* Coy v. Iowa, 487 U.S. 1012 (1988) (sixth amendment guarantees face to face confrontation with accuser); *see also* Maryland v. Craig, 110 S. Ct. 3157 (1990); Idaho v. Wright, 110 S. Ct. 3139 (1990).

283. Bainor, *supra* note 272, at 1001.

284. *See infra* text accompanying notes 289-92.

285. *See infra* text accompanying notes 293-94.

286. At trial therefore, a child-victim's testimony may be:

> inadequate, confusing, or misleading to jurors. Common emotional reactions to sexual abuse, such as fear for safety, fear of future sexual abuse, depression, anxiety, embarrassment and negative views of sex, compromise the victim's ability to give clear and consistent testimony. Furthermore, a child who has been sexually abused by a trusted adult, and who must later testify against that adult, will have feelings of anger, fear, and ambivalence. In short, the child-witness may appear frightened, anxious, and unwilling to testify.

Veronica Serrato, Note, *Expert Testimony in Child Sexual Abuse Prosecutions: A Spectrum of Uses*, 68 B.U. L. REV. 155, 159-60 (1988).

287. If the child renders several accounts of the incident:

> the one closest in time to the sexual activity is usually the most reliable. This is true because a child's memory fades faster than an adult's. As the time between the incident and the trial may be many months, the prosecutor may wish to present into evidence the child victim's original—and thus most accurate—account.

Jean L. Kelly, Comment, *Legislative Responses to Child Sexual Abuse Cases: The Hearsay Exception and the Videotape Deposition*, 34 CATH. U. L. REV. 1021, 1026 (1985).

partisan support in state legislatures nationally. Likewise, there has been federal legislation presented on this matter which would provide for closed-circuit cross-examination of a child sexual abuse victim in federal court.[288]

At least twenty states have passed special hearsay statutes exempting sexually abused children from the general hearsay prohibition.[289] These statutes generally require the child to testify at trial, or a showing that the child is not available to testify at trial. If the child is found to be unavailable, the statutes usually require some corroboration of the abuse in lieu of the child's testimony.

Using these statutes, prosecutors often succeed in introducing statements made by the child describing his sexual occurrence, and other statements made soon after the initial statement.[290] They are less successful, however, in introducing statements made to police, social workers, or other professionals specially trained in interviewing children.[291] State courts have generally been receptive to hearsay exceptions. The constitutionality of such exceptions has been reached in at least eleven states.[292]

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288. The Congress has provided that:

> A court may, upon its own motion, or motion of any party, order that testimony of a child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court. Only the judge, parties, counsel, persons necessary to operate the equipment, and any person whose presence, in the opinion of the court, would contribute to the welfare and well-being of the child, may be present in the room with the child during the child's testimony.

S. 533, 101st Cong., 1st Sess. § 201 (1989).

289. *Ala. Code* § 15-25-3 (Supp. 1988 & 1989); *Ariz. Rev. Stat. Ann.* § 13-4253 (Supp. 1989); *Conn. Gen. Stat. Ann.* § 54-86g (West 1989); *Fla. Stat. Ann.* § 92.54 (West Supp. 1989); *Ga. Code Ann.* § 24-3-16 (Michie Supp. 1989); *Ind. Code Ann.* § 35-37-4-6 (Burns Supp. 1989); *Iowa Code Ann.* § 910A.14 (West Supp. 1989); *Kan. Crim. Proc. Code Ann.* § 22-3434 (Vernon Supp. 1989); *Ky. Rev. Stat. Ann.* § 421.350 (Baldwin Supp. 1989); *La. Rev. Stat. Ann.* § 15-283 (West 1986); *Md. Cts. & Jud. Proc. Code Ann.* § 9-102 (Supp. 1989); *Mass. Gen. L.* ch. 278, § 16D (1987); *Minn. Stat.* § 595.02 (1988); *Miss. Code Ann.* § 13-1-407 (Supp. 1989); *N.Y. Crim. Proc. Law* § 65.10 (McKinney 1987); *Okla. Stat.* tit. 10, § 1148 (1987); *Pa. Cons. Stat.* § 5985 (Supp. 1989); *R.I. Gen. Laws* § 11-37-13.2 (Supp. 1989); *Tex. Rev. Civ. Stat. Ann.* art. 38.072 (West Supp. 1989); *Vt. R. Evid.* 804(a); Paula S. Coons, Note, *The Revision of Article 38.071 After* Long v. State: *The Troubles of a Child Shield Law in Texas*, 40 BAYLOR L. REV. 267, 290 n.143 (1988) (statute citations originally obtained from note).

290. Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 535 (1988).

291. *Id.*

292. People v. Wood, 776 P.2d 1083 (Colo. 1989) (constitutionality not reached directly but overruled trial court implying validity of statute); *In re* Marcus E., 539 N.E.2d 344 (Ill. App. Ct. 1989) (hearsay exception does not violate due process); State v. Petry, 524 N.E.2d 1293 (Ind. Ct. App. 1988) (constitutionality of hearsay statute affirmed); State v. Bellotti, 383 N.W.2d 308 (Minn. Ct. App. 1986) (statute not unconstitutional on its face; meets *Roberts* test); New Jersey Div. of Youth & Family Serv. v. S.S., 447 A.2d 183 (N.J. Sup. Ct. 1982) (testimony admissible under hearsay exception); Holland v. State, 770 S.W.2d 56 (Tex. Ct. App. 1989) (hearsay statute held constitutional); State v. Van Matre, 777 P.2d 459 (Utah 1989) (statute held not violative of confrontation clause per se; not violative of prohibition against vagueness); State v. LaRose, 554 A.2d 227 (Vt. 1988) (challenge to hearsay statute under confrontation clause without merit); State v. Jones, 772 P.2d 496 (Wash. 1989) (hearsay statute not violative of confrontation clause). *But see* Hall v. State, 539 So. 2d 1338 (Miss. 1989) (violative of state constitution requirement that rules of evidence remain exclusive function of court).

Likewise, videotape statutes have been extremely popular. At least thirty-five states have enacted videotape statutes.[293] These statutes typically try to treat the child's testimony as if it were trial testimony, allowing defense to be present, and allowing cross-examination of the child at the taping session. Of those statutes not allowing cross-examination, the tape is treated as a deposition or preliminary hearing. Through these statutes, prosecutors are able to get the child's testimony while it is fresh on the child's mind, and lessen the impact that the judicial system will have on the mental well being of the child by requiring he or she to testify only once in a setting somewhat more comfortable than the courtroom. Using this method, the child will have to give his or her testimony to authorities only once, and can then go on with the business of being psychologically rehabilitated from the trauma he or she has suffered without the anxiety of future court testimony to contend with. At least eight states have ruled on the constitutionality of their videotape statutes.[294]

Following this national trend, the Mississippi legislature passed the Evidence of Child Sexual Abuse Act.[295] This legislation was clearly passed as a matter of public policy, in an attempt to increase the number of child molestation convictions, and to protect those molested children from further trauma.

The court in *Hall v. State*, however, refused to recognize this legislative hearsay exception and held the statute to have been supplanted by MRE 803.[296] In so holding, the court struck down a statute on wholly procedural grounds, thereby thwarting the legislature's public policy determination that children accusing others of child abuse should be afforded some protection from the court. Furthermore, the

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293. ALA. CODE § 15-25-2 (Supp. 1989); ALASKA STAT. § 12.45.047 (1989); ARIZ. REV. STAT. ANN. § 13-4252 (Supp. 1988 & 1989); ARK. CODE ANN. § 43-2036 (Supp. 1985); CAL. PENAL CODE § 1346 (West Supp. 1989); COLO. REV. STAT. § 18-3-413 (Supp. 1988); CONN. GEN. STAT. ANN. § 54-86g (West Supp. 1989); DEL. CODE ANN. tit. 11, § 3511 (1987); FLA. STAT. ANN. § 92.53 (West Supp. 1989); ILL. ANN. STAT. ch. 38, para. 106A-1 (Smith-Hurd Supp. 1989); IND. CODE. § 35-37-4-6 (Supp. 1989); IOWA CODE ANN. § 910A.14 (West Supp. 1989); KAN. CRIM. PROC. CODE ANN. § 22-3433 (Vernon Supp. 1989); KY. REV. STAT. ANN. § 421.350 (Baldwin Supp. 1989); LA. CODE CRIM. PROC. ANN. arts. 420.3-.5 (West Supp. 1989); ME. REV. STAT. ANN. tit. 15 § 1202 (West Supp. 1988 & 1989); MASS. GEN. L. ch. 278, § 16D (1989); MINN. STAT. § 595.02(3) (Supp. 1989); MISS. CODE ANN. § 13-1-407 (Supp. 1989); MO. REV. STAT. §§ 491.675-.693 (Supp. 1989); MONT. CODE ANN. § 46-15-401 (1987); NEV. REV. STAT. § 174.227 (1985); N.H. REV. STAT. ANN. § 517:13-a (Supp. 1989); N.M. STAT. ANN. § 30-9-17 (Michie Supp. 1989); OHIO REV. CODE ANN. § 2907.41 (Anderson 1987); OKLA. STAT. tit. 10, § 1147 (Supp. 1989); R.I. GEN. LAWS § 11-37-13.2 (Supp. 1989); S.C. CODE ANN. § 16-3-1530(G) (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 23A-12-9 (Supp. 1988); TENN. CODE ANN. § 24-7-116 (Supp. 1989); TEX. CODE. CRIM. PROC. ANN. art. 38.071, § 5 (Vernon Supp. 1988); UTAH CODE ANN. § 77-35-15.5 (Supp. 1989); VT. R. EVID. 804(a); WIS. STAT. § 967.04 (Supp. 1989); WYO. STAT. § 7-11-408 (1987); Coons, *supra* note 289, at 290 n.144 (statute citations originally obtained from note).

294. Limestone County Dept. of Human Resources v. McAllister, 541 So. 2d 1099 (Ala. Civ. App. 1988) (videotape statute held constitutional); Jaggers v. State, 536 So. 2d 321 (Fla. Dist. Ct. App. 1988) (no unconstitutional infirmities in law); State v. Johnson, 729 P.2d 1169 (Kan. 1986) (video statute held not violative of confrontation clause); Commonwealth v. Willis, 716 S.W.2d 224 (Ky. 1986) (videotape statute not violative of confrontation clause or separation of powers doctrine); New Jersey Div. of Youth & Family Serv. v. S.S., 447 A.2d 183 (N.J. Sup. Ct. 1982) (videotape statute constitutional); Commonwealth v. Bizzaro, 535 A.2d 1130 (Pa. Super. Ct. 1987) (statute not unconstitutional per se); State v. Thomas, 442 N.W.2d 10 (Wis. 1989) (use of screen separating defendant from accuser during videotaping of testimony not unconstitutional). *But see* People v. Bastien, 541 N.E.2d 670 (Ill. 1989) (statute held unconstitutional, violating confrontation rights).

295. MISS. CODE ANN. § 13-1-401 (Supp. 1989).

296. Hall v. State, 539 So. 2d 1338 (Miss. 1989).

court struck down section 13-1-401, not because it directly conflicted with MRE 803, but because it set out additional exceptions not yet included in the court's rule.[297] The rule and the statute were not in conflict, nor were they in *pari materia;* the statute simply recognized an exception in addition to those twenty-four exceptions found in rule 803. The court did not look to the policies behind the statute; nor did they discuss whether the statute was substantive, or affected substantive rights. Using phrases like "effect a delicate balance between the twin towering goals of the trial process: truth and fairness" and "challenges the soul of the trial process," the court simply noted that the statute dealt with what evidence was admissible at trial and held, based upon that procedural characterization, that the statute was invalid.[298]

In *Whitehurst v. State,*[299] the court rendered a portion of a D.U.I. statute void based on its exclusive rulemaking authority.[300] *Whitehust* dealt with section 63-11-7 of the Mississippi Code.[301] This code provision provides authorization for a law enforcement officer to test the blood of a person who is found unconscious or dead as a result of an automobile accident when the officer "has reasonable grounds to believe the person to have been driving . . . under the influence of intoxicating liquor."[302] The statute also provides that the results of that blood test "shall not be used in evidence against such person so tested."[303] Although there is little statutory history of section 63-11-7, one can presume that the legislature sought to exclude such in order to protect the tested party from self incrimination,[304] much like the Implied Consent Law permits a person to refuse a breath test if he so desires.[305] Under the legislative scheme, a person had a substantive right to prevent test results from his blood from being used against him in court. The court's rules of evidence, however, did not recognize this right. The court looked to MRE 401 and 1103 and held that section 63-11-17 was inconsistent with the court's rule and therefore null.[306] In this decision too, without looking to whether the statute created any substantive rights, the court held a legislative statute intended to protect substantive rights void.

It cannot be assumed that the court will always supplant statutes with "procedural" elements, however. In *McCarty v. State,*[307] the court held a post-rule statute governing multi-count indictments to be valid. Section 99-7-2 of the Mississippi

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297. The court has now amended its rules to include a "tender years" exception to the hearsay rule. MISS. R. EVID. 617, 803(25), & 804(a)(6).

298. *Hall,* 539 So. 2d at 1344-46.

299. 540 So. 2d 1319 (Miss. 1989).

300. *Id.*

301. MISS. CODE ANN. § 63-11-7 (1972).

302. *Id.*

303. *Id.*

304. The court did note, although a constitutional challenge was not raised, that warrantless blood tests are permitted under the constitution. *Id.* at 1423.

305. *See* MISS. CODE ANN. § 63-11-5 (Supp. 1991).

306. 540 So. 2d at 1323.

307. 554 So. 2d 909 (Miss. 1989).

Code provides that two or more offenses may be charged in the same indictment if the crimes are closely based on the same transaction.[308] Although the court's rules did not have a provision for multi-count indictments, the court accepted a single indictment charging the defendant with two separate counts of burglary as valid under the legislature's statute.[309] In concluding that the statute was valid, the court seemed to rely on the fact that the statute was composed as a matter of public policy. "The Legislature adopted this statute as a matter of state policy and although it addressed a matter of practice and procedure in criminal prosecutions this Court accepted and enforced it."[310] But the court went further stating that the statute "enjoys enforceability, 'not because of any legal validity conferred upon [it] by the legislature, but because we have adopted [it] in prior proceedings before this Court.' "[311]

In *City of Mound Bayou v. Johnson*,[312] the court not only reaffirmed its power to make rules, but also affirmed its power to create its own jurisdiction. The plaintiff in *Mound Bayou v. Johnson* brought a civil rights action against the city of Mound Bayou and police officer Alfred Thompson.[313] The circuit court judge held that the action was time barred, but certified the question for hearing by the Mississippi Supreme Court via interlocutory appeal.[314] Without even discussing whether the court had jurisdiction to hear the case, the court heard and ruled on whether the statute of limitations had run on the plaintiff's claim.[315] Justice Hawkins, however, in another harsh dissent, pointed out to the majority that the court had no legal authority to hear the appeal. The only code provision permitting a party to appeal an interlocutory order from circuit court was Mississippi Code Annotated section 11-7-213, providing for appeals on orders for new trials based on inappropriate damage awards.[316] Justice Hawkins questioned the legitimacy of the court to create jurisdiction for itself, in light of constitutional restrictions which limited the court's jurisdiction to only those areas permitted by statute.[317] Dissenters notwithstanding, the supreme court summarily declared and affirmed its own power to create its own jurisdiction.[318]

The court's most recent decision on this issue, *Duncan v. St. Romain*,[319] adds no new light on this issue of court standards of review for conflicting statutes, except to reiterate the message to the practicing bar that the rules exclusively control state practice. In *Duncan* the court, without much discussion, summarily declined the

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308. MISS. CODE ANN. § 99-7-2 (Supp. 1989).
309. *McCarty*, 554 So. 2d at 914.
310. *Id.*
311. *Id.*
312. 562 So. 2d 1212 (Miss. 1990).
313. *Id.* at 1213.
314. *Id.* at 1212.
315. *Id.* at 1215.
316. *Id.* at 1223 (Hawkins, J., dissenting).
317. *Id.* at 1225.
318. 562 So. 2d 1212.
319. 569 So. 2d 687 (Miss. 1990).

opportunity to make an exception for parties acting in good faith reliance on conflicting statutes.[320]

3. "Arguably Procedural" Test

Thus, the court in its post-*Hall* decisions, does not seem to take public policy into consideration when determining whether a statute has been supplanted or not, but instead bases its decisions of rulemaking on the notion of absolute separation of powers between governmental branches. The only issue that the court seems to look to is whether the statute can in any way be characterized as procedural. Likewise, the court legitimizes its own rules in much the same fashion, holding that if they are at all dealing with matters of procedure, such as MSCR 5, they are inherently valid under the court's understanding of its judicial role under separation of powers doctrine. With regard to those statutes the court has decided to recognize as valid, it has done so on an ad hoc basis, giving little reason for their decision other than "we don't have to recognize them, but we chose to." The court's standard in determining the validity of statutes is whether the legislative act is "arguably procedural;" if that is so, the statute is inherently invalid, and can enjoy recognition only by grace of the court.

The court's "arguably procedural" test works well in easy cases – that is cases in which the statutes in question are clearly "wholly procedural," and can therefore be said to have been supplanted with some certainty.[321] It is doubtful that the legislature has any legitimate public policy interest in the method of service of process required by a party,[322] or the method used to compute time.[323] Similarly, it is doubtful that the court would ever supplant a statute requiring the mandatory purchase of automobile insurance, or regulating bingo.

Between these clearly defined ends of the spectrum, however, is a large grey area not yet addressed by the court, which will at some point probably be litigated to the expense and detriment of all parties. The court in *Duncan,* for example, held that the forty-five day appeal provision provided for by section 11-51-5 was supplanted by MSCR 4(a). But the court did not address whether it would recognize the statute's tolling provision for infancy and disability.[324] One would assume that since the rule does not provide for such a saving clause, the provision no longer exists, much like the court treated the hearsay exception in *Hall.*

While the court's rules work well in "easy" cases, and have generally lead to greater efficiency in the administration of justice,[325] the absence of a clear standard, by which the validity of a statute can be determined prospectively, has, in the "hard" cases, led not to judicial efficiency but judicial inefficiency. Parties,

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320. *Id.* at 688.

321. See the appendix of each set of rules for a list of statutes altered or supplanted by the rules.

322. *See* MISS. R. CIV. PRO. 4.

323. *See* MISS. R. CIV. PRO. 6.

324. "[S]aving to persons under a disability of infancy or unsoundness of mind the like period after the disability shall have been removed." MISS. CODE ANN. § 11-51-5 (Supp. 1989) (repealed 1991).

325. *See supra* notes 218-19 and accompanying text.

judges, and even the high court itself, do not know whether a statute is valid or not, until the issue is raised and adjudicated before the supreme court.[326] Of course the court is not necessarily wholly to blame for this inefficiency. The standard the court uses in this regard is whether a statute can be arguably characterized as "procedural." Thus the source of inefficiency is not necessarily the court, but the litigants, in their attempt to use questionably procedural statutes, and the legislature, in their passage of arguably procedural law.

D. Senate Bill 2792 and Areas of Conflict Which Remain

The legislature has, at least for now, acquiesced in this power struggle. In the spring of 1991, the state's lawmakers passed Senate Bill Number 2792, which amended and repealed statutes in an attempt to conform the Mississippi Code to the Mississippi Rules of Court.[327] Whether this bill was an admission on the part of lawmakers of the court's legitimate authority over procedural matters, a recognition that the court's rules simply worked better, or an acknowledgment that, legitimate rulemaker or not, the legislature was powerless to enforce its rules in the judiciary, the fact remains that the Mississippi Code now, with only a few exceptions,[328] provides for procedures identical to the court rules.

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326. At least under MISS. SUP. CT. R. 5 the court can hear the issue on interlocutory appeal if it so choses, regardless of the court in which the issue was raised.

327. S. 2792, Ch. 573, 1991 Mississippi Session Laws.

328. The following code sections were not amended or repealed by Senate Bill 2792:

CURRENT STATUTE	DIFFERENCE IN RULE
9-1-57 Plan for electronic storage system.	Controlled by MRCP 5.
9-5-137 Other duties of the clerk.	Ignores MRCP 77(c) and other court rules relating to duties of clerks.
9-7-171 General Docket	MRCP 79(a) controls the General Docket.
11-1-51 Copy of books, papers, or documents furnished—issuance and service of subpoenas duces tecum.	Governed by Discovery Rules, MRCP 26-37.
11-5-31 Before whom answers of nonresidents may be sworn to [sic].	Forms of pleading controlled by MRCP 7-12.
11-5-85 Decree to operate as a conveyance.	Controlled by MRCP 70(a).
11-45-3 Service of summons and conduct of case.	Does not acknowledge MRCP.
11-51-7 Appeals from interlocutory order or decree, how and when allowed.	Supplanted by MSCR 5; *See* City of Mound Bayou v. Johnson, 562 So. 2d 1212 (Miss. 1990).
11-51-9 Decrees in matters testamentary.	Under MRCP, courts are empowered to make all orders necessary to carry out judgments.
13-1-13 Witness may be examined touching interest or convictions.	Governed by MRE, impeachment rules.
13-1-21 Communications privileged; exception.	Medical privilege covered by MRE 503.
13-1-22 Confidentiality of priest-penitent communications.	Priest-penitent privilege covered by MRE 505.
21-1-21 Appeal.	Provides for 10 day appeal to supreme court in annexation cases; MSCR 4 provides 30 days to appeal.
21-1-37 Appeal.	(Same)
23-15-933 Appeal from Judgement in election contests.	Provides 3 day appeal to supreme court in election case; MSCR 4 provides 30 days to appeal.
23-15-961 Exclusive procedures for contesting qualifications of candidate for primary election; exceptions.	(Same)
23-15-963 Exclusive procedures for contesting qualifications of candidate for general election; exceptions.	(Same)

CURRENT STATUTE	DIFFERENCE IN RULE
25-5-35 Appeals.	(Same)
63-11-7 Blood test of dead or unconscious accident victims.	Contradicts MRE 401 on relevancy and MRE 501 on privilege.
73-31-29 Communications by client to psychologist privileged.	Covered by MRE 503.
73-33-16 Ownership of working papers; privileged communications.	C.P.A. privilege inoperative under MRE 501.
93-5-2 Divorce on grounds of irreconcilable differences.	Speaks of "bill" rather than rule's term "complaint."
93-11-19 How duties of support are enforced—jurisdiction of proceedings.	(Same)
93-11-21 Verification of Petition for enforcement.	(Same)
93-11-25 Petition on behalf of minor.	(Same)
93-11-27 Duty of court of this state as initiating state.	(Same)
93-11-29 Costs and fees.	(Same)
93-11-61 Form of certificate and order of chancery court.	(Same)
93-11-63 Form of testimony by complainant.	(Same)

List of statutes obtained from Jeffrey Jackson, Reporter, Supreme Court Advisory Committee, Subcommittee on MSCR.

These changes notwithstanding, areas do still remain of which the Mississippi practitioner should be cognizant, and proceed with caution. The Mississippi Code Annotated still provides for privileges[329] which are not recognized, or are elucidated differently, than in the Mississippi Rules of Evidence. While section 13-1-21 may still provide for an accountant's privilege, it is doubtful that the supreme court, under its "arguably procedural" test, will recognize that privilege.

The legislature also failed to amend several statutes setting appeal times different from those delineated in MSCR 4. While the statute still calls for ten days in which to perfect an appeal in annexation cases,[330] the general supreme court rule sets a thirty-day appeals deadline.[331]

Mississippi Code section 11-1-59 provides that in any civil action against a medical professional for malpractice, the pleadings shall not contain the dollar amount claimed.[332] MRCP 8 provides for the complaint to demand the relief to which the pleading party deems himself entitled.[333] What's a plaintiff's lawyer to do?

The court has likewise not yet ruled on the authority of the legislature to provide for fee shifting in certain cases.[334] MRCP 54(d) defines costs, but does not include any provision for award of attorney's fees.

Although the legislature has attempted to duplicate the court's rules in the code, the bar should be aware that these, and other discrepancies between the rules and the code do remain. As such, a counsel who relies too heavily on his or her code may cause exposure to malpractice.[335] Likewise, such a lawyer may lose an opportunity to thwart the opponent who relies on a statute which, under the "arguably procedural" test, has been supplanted.

E. Hope for the Legislature or Expanded Power for the Court?

The court writes rules and supplants laws by characterizing statutes as "procedural" and thus inherently under its exclusive control. Through this same dichotomy, the legislature may be able to once again govern certain areas previously thought lost to the court. The area of "privilege," for example, is addressed by the court in MRE 501-505. Thus, under the court's present posture, an additional privilege, such as C.P.A.-client,[336] would not likely be recognized by the court. The legislature could, however, effectuate the same policy by creating an "immunity" for C.P.A.'s, whereby the accountant would be immune from punishment

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329. MISS. CODE ANN. §§ 13-1-21; 13-1-22; 63-11-7; 73-33-16.

330. MISS. CODE ANN. §§ 21-1-21, -37.

331. MISS. SUP. CT. R. 4.

332. MISS. CODE ANN. § 11-1-59 (1990).

333. MISS. R. CIV. P. 8(a)(2).

334. *See, e.g.*, MISS. CODE ANN. § 63-17-151 (Miss. 1990) ("Lemon Law" providing for refund of automobile not conforming to warranties within first year of operation; provides for award of attorney fees to prevailing consumer).

335. By missing an appeal deadline for example; *see* Duncan v. St. Romain, 569 So. 2d 687 (Miss. 1990).

336. MISS CODE ANN. § 73-33-16 (1990).

for failure to testify regarding client discussions and work product.[337] Such a statute, similar to the "Charitable Immunity" statute, could hardly be said to tread on the court's "procedure" territory, and yet would still achieve the same policy goals as section 13-1-21.

Likewise the lawmakers may be able to achieve policy ends sought through laws creating "presumptions," an area arguably procedural and therefore covered by MRE, through statutes couching the policy in terms of "burdens of proof."[338] Mississippi's uninsured motorist statute, section 13-1-124,[339] for example, created a presumption that the owner/operator of a vehicle was uninsured, once certain affidavits were submitted.[340] But suppose, instead that the statute stated that insurance companies had the "burden of proof" in cases involving uninsured motorist coverage. The policy of requiring the party most able to bear the expense of learning the insurance status of the driver would be met, without a "procedural" means.

Admittedly, cloaking policy in terms of "burden of proof," and "immunity" is merely legislative characterization, and could be struck down as such by the court. This once again demonstrates both the overlap between "substance" and "procedure," and likewise illustrates the danger of the court's posture. The court is basically unbridled in its power to strike a law, and has been slow to define its limits. If the court through characterization can strike the preceding hypothetical statutes, what is to stop it from striking presently existing "burden of proof" statutes?[341]

Similarly illustrative of the danger of the court's power are limitation of actions. Statutes of limitations aid in the efficiency and orderly management of justice. To shorten one is to lessen the caseload of a particular class of cases.[342] Doing so, they could conceivably be considered procedural. And indeed in the area of conflict-of-laws, the court has considered statutes of limitations as procedural.[343]

In altering a statute of limitations, however, a would-be plaintiff's ability to recover for a claim may be negatively affected. Stated another way, his substantive rights would be altered. Also significantly affected by any statute of limitations is the field or industry directly to whom the statute is aimed. Most notably affected is the insurance industry, who, when statutes are long, are forced to charge larger premiums to their insured, who in turn are forced to charge higher rates to their patrons.

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337. Jeffrey Jackson, C.L.E. Presentation, *Inherent Judicial Power in Mississippi and Beyond: Some Observations on the Doctrine in* Hosford *and* Hall, 39-40 (April 1991) (on file with Mississippi College, office of Continuing Legal Education).

338. *Id.*

339. Now repealed under Senate Bill 2792.

340. The affidavit referred to in 1(c) of the statute would be in conflict with the hearsay rule.

341. *See e.g.*, MISS. CODE ANN. §§ 29-15-7; 41-29-148; 75-4-403; 89-7-125.

342. Patricia M. Danzon, *The Effects of Tort Reform on the Frequency and Severity of Medical Malpractice Claims*, 48 OHIO ST. L.J. 413 (1988); Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROB. 57, 71-72 (1986).

343. Johnson v. State, 529 So. 2d 577 (Miss. 1988).

Thus far, the court has not passed any general statute of limitation rule, but it has passed MSCR 4, which limits the time in which a party must perfect his appeal to "30 days after the date of entry of judgment."[344] At least four statutes, however, set other time limits of appeal for election appeals.[345] The court has not as of yet had to determine whether the statute or the rule is controlling in election appeals. Likewise, the ten day time limit for appeals in annexation cases[346] has not been specifically addressed by the court, but given the court's decision in *Duncan,* the court's rule would be the safest bet. It has been suggested by one member of the court that a defendant's right to a trial 270 days from arraignment provided for in section 99-17-1 of the Mississippi Code, be altered or abridged by the court under the inherent powers doctrine.[347]

F. Petitioning the Court

One final area of concern is the method by which one should recommend rule changes to the court. With power over procedure currently vested in the judiciary, without regard to public policy, the question arises as to how a member of the populace is to supplicate the court to consider a conceived rule. Obviously, when a citizen has certain legislation he wishes to be considered by the lawmaking body, he petitions his representative and, if enough support for the notion exists, the legislature considers the proposal through committees, public debate, and in open debate on the House and Senate floors. When representatives run for office, they will take stands on these issues and are presumably elected for the planks making up their platforms. Election of the judiciary, however, is somewhat different, as candidates for the court do not traditionally take positions on issues of public concern. They will customarily run on their good name and qualifications for office rather than specific issues which they intend to change when elected. As the basic precept of the judicial system is fairness, it would be difficult for a judicial candidate to do little more. If one were to develop a platform as to what he or she will change if elected, the candidate would be deciding cases outside of their specific factual context. Likewise, it would be difficult for a candidate to claim, "I'm more fair than my opponent." Thus, name and qualification are generally all that are considered in the election of the justices.

In taking on the responsibility of rulemaking, are the court justices retreating from their positions of political silence? While cases are to be decided on their individual merits, rules are decided outside this "case or controversy" domain. Thus, it would be perfectly permissible, and indeed foreseeable for court justices to, when campaigning, promise the public that if elected they would favor a reform

344. MISS. SUP. CT. R. 4.

345. MISS. CODE ANN. § 23-15-933 (three day limit on election appeals); MISS. CODE ANN. § 23-15-961 (three day limit on appeals from qualification for office in primary elections); MISS. CODE ANN. § 23-15-963 (three day limit on appeals from qualification for office in general elections); MISS. CODE ANN. § 25-5-35 (fifteen day limit on appeal for special removal elections).

346. MISS. CODE ANN. § 21-1-21, -37 (Supp. 1989).

347. Flores v. State, 586 So. 2d 811, 815 (Miss. 1991) (McRae, J., dissenting).

of rule 11 sanctions, or implementation of a class action rule. It seems a bit demeaning that justices of the state's highest court would have to participate in partisan politics on the mud-slinging level that occurs in Mississippi.[348] Yet, with the public attention, and public criticism that decisions like *Hall* has received,[349] it appears that the court has indeed placed itself in that position.[350]

As to the question of how one is to petition the court to consider a rule, Justice Robertson may have already answered the question in a recent article.[351] Justice Robertson, in criticizing the legislature for enacting statutes which are "arguably beyond its legislative authority"[352] suggested that the legislature should communicate its concerns to the court in whatever means is appropriate. "I answer, if formality is desired and appropriate, pass a resolution; if informality will suffice, pick up the telephone."[353] Thus, Justice Robertson is inviting the legislature to do whatever it believes appropriate to get the court's attention. The same could then be said for the public at large. If members of the public are tired of waiting for the court who, after promising to consider an evidentiary "tender years" exception for almost two years, has still not passed such a rule,[354] perhaps demonstrations outside the Gartin Building, similar to those abortion rallies held across the street at the Capitol would be in order; or a deluge of phone calls and letters to the court's members may be required. The court, in taking it upon itself to legislate, may also have to act like a legislature in responding to the wishes of the public.

VI. CONCLUSION

The supreme court's decision in *Duncan* indicates the intention of the court to continue its precedent in *Hall,* in prohibiting the legislative branch from having any voice in those matters which the court perceives as procedural, whatever those may be. Despite no specific constitutional basis for its power, and indeed a constitutional amendment prohibiting court action short of a specific constitutional provision, the court continues to hold that the power to make rules is inherently and exclusively its own. Thus legislators, in their consideration of bills, must consider not only cost, policy concerns, and public desire of the legislation, but now must

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348. Governor William Allain was accused of being a homosexual in the 1983 gubernatorial race. Attorney General Mike Moore was portrayed as a radical hippie in 1987 election.

349. Jack Elliot, *Justices' Ruling Leaves Mississippi Courts in Limbo in Cases of Sex Abuse of Children,* JACKSON CLARION LEDGER, Nov. 28, 1989, at B1; Jack Elliot, *Lawyers Debate Effect of Court Rulings on Child Abuse Case,* JACKSON CLARION LEDGER, May 21, 1989, at B5; Jack Elliot, *Edwards Man Gets New Trial After Law Ruled Unconstitutional,* VICKSBURG EVENING POST, Feb. 10, 1989, at C; Jack Elliot, *New Ruling May Cut Abuse-Law Agendas,* MEMPHIS COMMERCIAL APPEAL, Feb. 14, 1989, at B1; Ann Peck, *Supreme Court Goes Soft on Child Abusers,* MISSISSIPPI VOICES FOR CHILDREN & YOUTH, 1989, at 1 ("Let the word go out: Mississippi is haven to the child abuser.").

350. Justice Hawkins feared in his dissent in *Hall* that the voters of Mississippi would react negatively to such a decision. 539 So. 2d at 1351 ("Guess who's going to win?").

351. James L. Robertson, *Discovering Rule 11 of the Mississippi Rules of Civil Procedure,* 8 MISS. C. L. REV. 111 (1988).

352. *Id.* at 115.

353. *Id.* at 115 n.18.

354. On March 27, 1991, the tender years hearsay exception was incorporated into MRE 617, 803(25), and 804(a)(6), two years after the *Hall* decision.

consider whether any portion of the law can conceivably be considered procedural, and therefore in our court's view, unconstitutional.