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I. INTRODUCTION

If one had a question of when to timely file a document with the court system, where would he or she look for authority regarding timing issues? Many current law students, recent law school graduates, and practicing attorneys could not imagine looking somewhere other than some version of the Rules of Civil Procedure or other court rules. Yet, some would be surprised to discover that the logically and orderly numbered (though not so often easily understood) Mississippi Rules of Civil Procedure and other court rules were not always the place to look for guidance. It was not long ago, at least within this writer's life-time, that all court rules were a set of statutory procedures devised entirely by the state legislature. These rules were products of the legislative process, just like budget bills, criminal statutes, and tax measures, and were considered within the exclusive discretion of the popularly elected, legislative branch.

In 1975, however, the Supreme Court of Mississippi began the process that plucked this responsibility away from the legislature by almost "inventing," according to some, what is termed the judiciary's inherent authority to promulgate rules of practice, procedure, and evidence in Mississippi state courts. As a result, cases and other controversies examining what is included or excluded from this inherent authority have arisen from time to time. Since 1975, the focal point of these problems has been the general premise that the judicial branch now holds (and at times must protect) the power to regulate the *procedures* used in the courts of Mississippi.

Using this focal point, recent Mississippi decisions may signal an expansion in inherent power of the judiciary from a previous position with the potential of harmful consequences, depending on which side of the line your opinion or interests may fall. Therefore, it is the purpose of this Comment first to review examples of the progression in Mississippi case law regarding the line the courts have drawn between legislative and judicial rule-making authority. Next, this Comment will discuss how the recent decisions have applied this inherent authority precedent to the issue of the right to appeal. Finally, an analysis of precedent and these recent right to appeal cases will consider the implications of the potential shift in the scope of inherent rulemaking authority of Mississippi's judiciary.

II. BACKGROUND

A. Newell, Hall, *and the Adoption of Court Rules*

The modern development of the Mississippi judiciary's inherent authority to make rules of practice, procedure, and evidence began with the case of *Newell v. State*[1] decided in 1975. The appellant in *Newell* was convicted of assault and battery with intent to kill.[2] He sought review by the Supreme Court, primarily

1. 308 So. 2d 71 (Miss. 1975).
2. *Id.* at 72.

asserting that the trial court should be reversed because the jury had been erroneously instructed.[3] The specific problem was that a criminal statute,[4] as enacted by the legislature, prohibited trial judges from instructing a jury on applicable principles of law without a request from either of the parties.[5] At the trial, the jury had been left essentially uninstructed as to the law because of the statute.[6] The court acted on this result by striking down the statute and carving out what has become known as the basis for its current inherent rulemaking authority.[7]

First, the court noted that legislative suggestions concerning procedural rules deserve respect and will be followed unless they provide "an impediment to justice or an impingement upon the constitution."[8] Second, the court stated that the inherent power vested in the court "emanates from . . . the separation of powers and the vesting of judicial powers in the courts."[9] In connection with this statement, the court looked to § 144 of the Mississippi Constitution and concluded that the judicial power prescribed there includes the power to make rules of practice and procedure "for the efficient disposition of judicial business" that are not contrary to the constitution.[10] Next, the opinion proclaimed that the historical basis for the specific legislative enactment curtailing instruction of the jury was grounded on a belief in the restraint of a tyrannical monarchy and therefore outdated.[11]

Newell went further by asserting that procedural decisions regarding the court system are to be left to the judicial branch that is more well-equipped and learned in the law than the legislature.[12] Separation of powers principles from Article 1, §§ 1 and 2, together with § 144 "leave[] 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."[13] For these reasons, the court declared § 99-17-35 of the Mississippi Code (1972) invalid as contrary to the Mississippi Constitution.[14]

In the days following *Newell,* the decision was used by the court, in piecemeal opinions, to regulate areas of practice and procedure that fell within this newfound authority of the judicial branch.[15] In 1981, however, the Supreme Court attempted to create, in a complete procedural overhaul, the first "Mississippi Rules of Civil Procedure" modeled after its counterpart, the Federal Rules of Civil Procedure.[16] The mechanics of this controversy are well remembered by some and well documented for others; therefore, the details are outside the scope of this writing.[17]

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3. *Id.*
4. MISS. CODE ANN. § 99-17-35 (1972).
5. *Newell,* 308 So. 2d at 73.
6. *Id.*
7. *Id.* at 77-78; *see also* William H. Page, *Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi,* 2 MISS. C. L. REV. 4, 5 (1982).
8. *Newell,* 308 So. 2d at 76.
9. *Id.*
10. *Id.* (quoting S. Pac. Lbr. Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968) (discussing MISS. CONST. art. 1, § 144)).
11. *Id.*
12. *Id.*
13. *Id.* at 77 (citing MISS. CONST. art. I, §§ 1, 2 & 144).
14. *Id.* at 78.
15. Hall v. State, 539 So. 2d 1338, 1345 (Miss. 1989).
16. *See* Page, *supra* note 7.
17. *See id.*; *see also* Lenore L. Prather, *A Century of Judicial History,* 69 MISS. L. J. 1013, 1043-46 (2000).

Basically, the result of the 1981 "Rules of Civil Procedure Conflict" was that *Newell* provided the vehicle for the court to adopt the rules that in turn invalidated the statutory procedure proscribed by the legislature regarding civil procedure in Mississippi trial courts.[18] The court, in large measure, "won out" due to a compromised position of the legislature.[19] Other rules followed, including the Mississippi Rules of Evidence, the Mississippi Supreme Court Rules, the Uniform Circuit Court Rules, the Uniform Criminal Rules of Circuit Court Practice, the Uniform Chancery Court Rules, and the Uniform County Court Rules.[20]

Around eight years after the adoption of these rules, the Mississippi Supreme Court issued what would become a companion case to *Newell* that further exerted the judiciary's inherent rule making authority. In *Hall v. State,*[21] the Child Sexual Abuse Act[22] was held to be unconstitutional because the statute commanded that certain hearsay statements of minor victims were admissible against alleged sex offenders at trial.[23] The court deemed the act was in direct conflict with the inherent authority of the judicial branch to prescribe trial procedure.[24] The court used *Newell,* which in the past had been confined to striking older procedural statutes and codifying trial procedure, to void a newer, seemingly substantive statute aimed at prevention of the sexual abuse of children.

Hall's reasoning began with the statement that § 144 of the Mississippi Constitution provides powers to the judiciary which include the ability to formulate rules of practice and procedure for the disposition of judicial business.[25] Support came from *Newell*'s analysis that separation of powers places procedural rulemaking within the judicial branch.[26] Further, the court stated that while the earlier interpretations of *Newell* placed emphasis on a practice or procedure determination, the judicial authority clearly included power to make rules of evidence as well as practice and procedure.[27] By order (and through the inherent authority) of the court, the Mississippi Rules of Evidence had been created and thus were within the exclusive power of the judiciary.[28]

An important footnote included in the court's opinion essentially reinforced the judiciary's option on questions of *Newell* import.[29] The court indicated that in every case it would not be bound to overturn a statute that conflicts with its power.[30] Instead, out of comity and respect for the legislature, that body could receive deference from the court, even if a specific statute improperly encroached upon judicial authority.[31]

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18. *See* Prather, *supra* note 17.
19. *Id.*
20. *Id.; see also Hall,* 539 So. 2d at 1345.
21. *Hall,* 539 So. 2d at 1340.
22. MISS. CODE ANN. §§ 13-1-401 *et seq.* (Supp. 1988).
23. *Hall,* 539 So. 2d at 1340.
24. *Id.* at 1346.
25. *Id.* at 1345 (citing MISS. CONST. art. 1 § 144).
26. *Id.* at 1345 (citing *Newell,* 308 So. 2d at 76).
27. *Id.* at 1345-46 & n.16.
28. *Id.* at 1346 & n.18 (citing *Order In the Matter of the Adoption of the Mississippi Rules of Evidence,* entered November 24, 1985, as reproduced in MISS. R. CT. 240-41 (1988)).
29. *Hall,* 539 So. 2d at 1346 & n.20; *see also* Glenn v. Herring, 415 So. 2d 695, 696 (Miss. 1982) (noting that the Court will follow legislative suggestions regarding procedural rules that are not an impediment to justice).
30. *Hall,* 539 So. 2d at 1346.
31. *Id.* at 1346-47.

B. *Court Approaches to* Newell-Hall *Problem Solving*

The approaches of Mississippi courts in solving *Newell-Hall* problems can be identified as applying at least one of four lines of reasoning to decide whether to invalidate an act of government in conflict with the judiciary's inherent authority. The different approaches include a determination of: (1) whether the governmental action is substantive or procedural in nature;[32] (2) whether the governmental act bears on the efficiency or effectiveness of the court system;[33] (3) whether some strong public policy in the governmental act merits preclusion of judicial rulemaking authority; or (4) whether the governmental act is inherently invalid because it intrudes on the power of the court or is "arguably procedural" and thus valid only by choice of the court.[34] The following explanation provides examples of how courts have accounted for these factors when undertaking a *Newell-Hall* analysis.

1. Substantive/Procedure Approach

The first approach, distinguishing between substance and procedure, was primarily emphasized during the time between the *Newell* and *Hall* decisions.[35] For example, in *Haralson v. State,* the State moved to strike the trial court "reporter's notes" on the case because Haralson's attorney had failed to give notice to that court reporter as was required by then § 9-13-33 of the Mississippi Code (1972).[36] The court responded by stating, "While the statute is purely procedural and in reality an invasion by the legislature of the rule-making power of this Court, we have followed it for many years; thus adopting it as a rule of this Court."[37] However, the court overruled its prior decisions holding that compliance with the statute was jurisdictional[38] and officially replaced the requirements of the statute with Rule 16 of the Rules of the Supreme Court.[39]

This approach was not solely confined to appeals taken between the *Newell* and *Hall* decisions. For example, evidence of the substance/procedure distinction is found in *Marshall v. State.*[40] There, a criminal defendant asked the court to invalidate the affirmation of his conviction by the Mississippi Court of Appeals, asserting that the legislature had encroached judicial inherent authority

32. *See id.* and *Newell,* 308 So. 2d at 76.

33. *See Newell,* 308 So. 2d at 76.

34. *See Hall,* 539 So. 2d at 1346 & n.20; *see also* Kala R. Holt, Note, *The Balance of Power: Weidrick v. Arnold and the Conflict over Legislative and Judicial Rulemaking Authority in Arkansas,* 46 ARK. L. REV. 627, 645-646 (1993) (citing and quoting *Hall,* 539 So. 2d at 1335; Ronald C. Morton, Comment, *Rules, Rule-making, and the Ruled: The Mississippi Supreme Court as Self-Proclaimed Ruler,* 12 MISS. C. L. REV. 293, 310-15 (1991); and Lawrence J. Franck, Comment, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform,* 43 MISS. L. J. 287, 303-04 (1972)). The "arguably procedural test" is used in a situation where an act is inherently invalid because it encroaches the power of the judiciary, acceptable only at option of the court. *Id.* at 646.

35. *Hall,* 539 So. 2d at 1345 (citing Haralson v. State, 308 So. 2d 222 (Miss. 1975); Scott v. State, 310 So. 2d 703 (Miss. 1975); and Jackson v. State, 337 So. 2d 1242, 1253-57 (Miss. 1976)). As an additional note, one should distinguish the substantive/procedure analysis in the *Newell-Hall* context from a seemingly similar conflict of laws problem arising in federal courts sitting in diversity. The two are not the same.

36. 308 So. 2d at 223.

37. *Id.* at 223-24.

38. *Id.* at 224 (This would have required dismissal of the appeal because of the statute's substantive nature.)

39. *Id.*

40. 662 So. 2d 566 (Miss. 1995).

in establishing the tribunal.[41] Through its *Newell-Hall* analysis, the court held that the power to establish the Mississippi Court of Appeals was substantive law and clearly within the authority of the legislative branch.[42] Additionally, the majority in *Marshall* determined that the right of appeal was more than substantive: it was an absolute right provided by law makers.[43] This right was not judge made or constitutional, and therefore, subject only to change as provided by the state legislature.[44]

Perhaps the best example of substantive/procedural analysis is found in the 1993 case of *Stevens v. Lake.*[45] In that decision, attorneys who had been sanctioned under the Mississippi Litigation Accountability Act[46] argued that the statute was void because it was in direct conflict with the judicially created Mississippi Rule of Civil Procedure 11.[47] The court dismissed this contention and held that the act, as indicated by its plain language, did not conflict with the rule and was therefore valid.[48] Thus, although the statute touched internal procedure of the court by authorizing litigation sanctions, it provided a separate, substantive cause of action and was permissible legislative action.[49]

2. Efficiency/Effectiveness of the Court's Approach

A second approach used in *Newell-Hall* analysis focuses on a governmental action's relationship to the efficiency or administration of justice in the court system. For example, in *Towner v. Moore ex rel. Quitman County School District,*[50] the appellants challenged the use of summary judgment procedure in a circuit court action for violation of a public servant conflict of interests statute.[51] One of the arguments for reversal was that the legislature, by enacting § 25-4-107(2) of the Mississippi Code (Supp. 1988), had guaranteed the appellants a right to trial by jury, thus precluding the granting of summary judgment.[52]

The appellants analogized the action to a civil penalty/forfeiture case or quasi-criminal action.[53] Finding that this analogy was not well founded, the court went on to state that even if that were the case "[i]t is not at all clear our legislature would have the authority to preclude summary judgment in civil penalty or forfeiture cases, or order a right to the nullification variant of the right to trial by jury."[54] Because the legislature had determined that the circuit court would have

41. *Id.* at 567.
42. *Id.* at 572.
43. *Id.* at 568-72.
44. *Id.* Chief Justice Hawkins, in concurring with the Court, placed emphasis on his disagreement with the majorityís use of *Hall* as a basis for its decision and gave a lengthy dissertation on the power of the legislature to provide laws governing the substance or subject matter jurisdiction of the courts. *Id.* at 573-80 (Hawkins, C.J., concurring).
45. 615 So. 2d 1177 (Miss. 1993).
46. MISS CODE ANN. §§ 11-55-1, *et seq.* (Supp. 1992).
47. *Stevens,* 615 So. 2d at 1183.
48. *Id.* at 1184.
49. *Id.* The court also addressed issues of comity and acquiescence with the legislature which is noted in Part II(B)(4) of this comment, *infra.*
50. 604 So. 2d 1093 (Miss. 1992).
51. *Id.* at 1095. This was a civil action commenced by the Attorney General for recovery of improperly obtained schoolteacher salaries. *Id.*
52. *Id.* at 1097.
53. *Id.* at 1098-99.
54. *Id.* at 1099; *see also Newell,* 308 So. 2d at 78.

civil jurisdiction over such cases, the rights of the appellants were exactly those of any other civil litigant, which included being subject to summary judgment.[55] Therefore, the summary judgment procedure that directly related to the ability of the court to administer justice was perceived as off limits to legislative control beyond its initial substantive characterization of the cause of action.[56]

Bar disciplinary proceedings are another example of an area that bears on the effectiveness or efficiency of the court system as well as where the judiciary's rules govern the practice of law. In *Hall v. Mississippi Bar*,[57] the court expressly recognized that such regulation of the law profession is "an integral part of the functioning of the judicial branch and thus not properly subject to the [legislature]."[58] Attorney discipline is an area where the court exercises its inherent authority to administer justice in an effective manner by providing, through rule-making, the process by which disciplinary matters are handled. This is also consistent with the notion that the practice of law is a self-regulating profession.[59]

Additionally, the Mississippi Supreme Court has alluded that its adoption of internal recusal rules is within the inherent authority of the judiciary in order to promote the administration of justice. In *Tighe v. Crosthwait*,[60] on motion of a party for Justice McRae's recusal from an appeal based on a conflict of interest, Justice Prather, in her statement on the motion, wrote, "This court has inherent power, which was granted by the Mississippi Constitution 'for the fair administration of justice.'"[61] Further, this includes "the power to establish internal procedures for the administration of recusal motions, including the forced recusal of a fellow justice, where required."[62] Thus, there is strong support in the area of internal practice for the court's invocation of its inherent authority with support under the efficiency/effectiveness of the administration of justice approach.

3. Strong Public Policy Approach

A third approach to *Newell-Hall* problems is really only a slight deviation from substantive/procedural analysis, but it differs in the respect that the court will not address the problem with only a strict focus on the statute's particular substantive or procedural classification. The strong public policy approach is found in Justice McRae's reasoning in *Claypool v. Mladineo*.[63] In *Claypool*, a discovery dispute arose in a medical malpractice case where the lower court ruled that certain documents were protected under authority of §§ 41-63-9 and 41-63-23 of the Mississippi Code (1972).[64] The Supreme Court held that the statutes were enactments of the legislature pursuant to the policy of protection of

55. *Towner*, 604 So. 2d 1093, 1099 (Miss. 1992).

56. As was the case in *Marshall*, Justice Hawkins dissented based on the position that *Hall* and not *Newell* was the uncited authority for the majority's opinion and warned that this case represented an enlargement of judicial inherent authority under *Hall*. *Id.* at 1102-03 (Hawkins, P.J., dissenting).

57. 631 So. 2d 120 (Miss. 1993).

58. *Id.* at 123.

59. *See, e.g.*, ABA MODEL RULES OF PROFESSIONAL CONDUCT, *Preamble: A Lawyer's Professional Responsibilities*, at 9-10.

60. 665 So. 2d 1341 (Miss. 1995).

61. *Id.* at 1346 (statement of Prather, J.) (quoting *Newell*, 308 So. 2d at 77).

62. *Id.* at 1347 (statement of Prather, J.). Also of note, Chief Justice Hawkins joined this statement regarding the core inherent powers of the judiciary. *Id.*

63. 724 So. 2d 373 (Miss. 1998). *See also* Stevens v. Lake, 615 So. 2d 1177 (Miss. 1993) and Part II(B)(1), *supra* (discussing substantive nature of the Mississippi Litigation Accountability Act).

64. *Claypool*, 724 So. 2d at 375.

the public health, safety, and welfare by affording hospitals a right to keep certain peer review documents from being discovered in litigation.[65] Because of public policy, in turn, the statutes were substantive and expressly within the power of the legislative branch.[66] Therefore, presumably, the door has been left open for a party to argue that law deemed procedural under the first approach could still express a public policy and, because of the police powers of the legislature, essentially manufacture substance that would be beyond the reach of judicial inherent authority.

4. Direct Inherent Authority or "Arguably Procedural" Approach

Perhaps even more difficult to define than the amorphous "public policy" approach of Justice McRae, the "arguably procedural" approach has been implemented in cases where the judiciary has used its inherent authority that truly existed before *Newell* or *Hall.* This area of analysis generally raises issues that are beyond the scope of this comment.[67] However, in *State v. Blenden,*[68] an example since *Newell* and *Hall,* the court used its inherent authority to levy discovery violations against the state without specific precedent for such action.[69] In another decision, the court stated that its inherent authority precluded the use of a jury instruction specifically approved by other jurisdictions and provided grounds for reversible error.[70]

One facet of this approach is more important here because it provides that in some areas, the court will refuse to invalidate a governmental act that is within its inherent authority out of comity to the legislature or to further the interests of justice.[71] For example, in *Glenn v. Herring,*[72] the court stated that it would follow suggestions of the legislature when there is no conflict with a court rule or when the enactment is not "an impediment to justice."[73] This leaves room for discretion in the *Newell-Hall* analysis; therefore, the court may abstain from the use of inherent authority even where the statute or rule in question can be deemed procedural in nature.

III. RECENT DEVELOPMENTS: *Davis v. Nationwide Recovery* AND THE RIGHT TO APPEAL

The most recent Mississippi Supreme Court opinion utilizing the *Newell-Hall* analysis, essentially providing the basis for the questions raised in this Comment,

65. *Id.* at 377-78.

66. *Id.* at 380-81. The appellees' apparent triumph due to the court's upholding of the validity of the statute turned out to be immaterial to their cause. Later in the opinion, the court held that the trial court had misconstrued the scope of application of the statute. *Id.*

67. *See, e.g.,* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1001 (3d. ed. 2002).

68. 748 So. 2d 77 (Miss. 2000).

69. *Id.* at 89.

70. *Bolton v. State,* 643 So. 2d 942, 945 (Miss. 1994); *see also* Mississippi Ethics Comm'n v. Comm. on Prof'l Resp. of the Mississippi Bar, 672 So. 2d 1222, 1224 (Miss. 1996) (citing and quoting *Hall,* 539 So. 2d at 1339-40, and stating that ultimate authority as to the ability to issue a subpoena for information held by the Ethics Commission rested with the Supreme Court and only the Supreme Court).

71. *See Hall,* 539 So. 2d at 1345 & n.20, and *Newell,* 308 So. 2d at 77.

72. 415 So. 2d 695 (Miss. 1982).

73. *Id.* at 696; *see also Towner,* 604 So. 2d at 1101-03 (Hawkins, P.J., dissenting) (discussing McClendon v. State, 539 So. 2d 1375, 1377 (Miss. 1989); McCarty v. State, 554 So. 2d 909, 913 (Miss. 1989); and Blanks v. State, 542 So. 2d 222, 225 (Miss. 1989) as examples of the Supreme Court's allowance of the legislature to enact a valid law that it chooses to "accept").

is *Davis v. Nationwide Recovery Service, Inc.*[74] Suit was initially brought against Davis for collection of a credit card debt in the Harrison County Court.[75] That court entered judgment against Davis, and after denial of his Rule 60 motion, he appealed to the Harrison County Circuit Court.[76] Twenty-four days elapsed between the denial of the motion and his "motion for appeal" to the Circuit Court.[77] Section 11-51-79 of the Mississippi Code (1972) provided that such an appeal between the courts was required to be made within ten days of the entry of final judgment.[78] Uniform Rules of Circuit and County Court Procedure (hereinafter "U.R.C.C.C.") 5.04 and 12.03, however, provided thirty days for this type of appeal.[79]

The court, citing both *Newell* and *Hall,* unanimously concluded that the power to establish rules regarding appeals from court to court requires that statutes in conflict with court established rules are void.[80] As a result, Davis's appeal had been filed timely, and the dismissal was an abuse of the lower court's discretion.[81] The court also noted that the legislature, prior to this decision yet subsequent to Davis's appeal, had amended the statute to bring it in conformity with the court-adopted rule.[82]

Not more than six months after *Davis* was handed down, the Mississippi Court of Appeals had two occasions to consider the effect of the opinion. First, in *Mitchell v. Parker,*[83] the appellant challenged the practice of the circuit clerk's charge of a $100 filing fee for criminal appeals from municipal court to county court.[84] The trial court ruled that under § 25-7-13 of the Mississippi Code (1972) such a fee was improper.[85] The fee had already been refunded, but Mitchell's cause of action on this appeal claimed a temporary violation of his constitutional rights requiring the Court of Appeals to consider the ability of the clerk to assess this payment.[86]

The court looked to the provisions of U.R.C.C.C 12.02(B) that set the parameters for a bond to be posted for costs on appeal.[87] Judge Southwick, writing for the court, determined that a natural reading of the court rule provided for two different bonds (one for costs and one for an appearance) in Mitchell's criminal appeal.[88] Further, the opinion addressed the relevance of Mississippi statutes[89] that the rule drew upon in providing for bonds, finding that U.R.C.C.C. 12.02(B) did not contradict the statutes, but, rather, was broader in some respects.[90]

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74. 797 So. 2d 929 (Miss. 2001).
75. *Id.* at 930.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. 804 So. 2d 1066 (Miss. Ct. App. 2001).
84. *Id.* at 1068.
85. *Id.*
86. *Id.* Specifically, Mitchell was asserting his rights under the Takings Clause.
87. *Id.*
88. *Id.* at 1070.
89. *Id.* at 1069 (citing MISS. CODE ANN. §§ 99-35-1, and 99-35-3 (Rev. 2000)).
90. *Id.* at 1069-70.

This marked the point where *Davis* was important in the opinion. Judge Southwick first stated that a right to appeal must be provided by statute,[91] but once that right exists, the Supreme Court may provide the rules of procedure.[92] Next, and most crucial, the opinion noted that the distinction between the right to appeal and the right to regulate an appeal may cause an area of uncertainty for the court.[93] Quoting *Moore v. Sanders,* Judge Southwick stated that "until recently statutes that set a 'time with which appeals shall be taken are both mandatory and jurisdictional, and must be strictly complied with. The court is without power to ingraft any exception on the statute.'"[94] Further, he alluded that this could conflict with *Davis*'s holding that a court rule setting the time for an appeal controls when in conflict with a statute to the contrary, but that a substantive/procedural determination is not necessary.[95]

The opinion resolved the problem squarely presented in *Mitchell* by noting the "'cooperative spirit' in an effort to provide for the 'fair and efficient administration of justice'" required by *Newell* and finding that there was no conflict between the plain language of the statutes and U.R.C.C.C. 12.02.[96] For that reason, it was not necessary to overrule the statutes that were enacted subsequent to the court rule.[97] Thus, *Mitchell* avoided the use of the *Newell-Hall* doctrine to strike the statutes because they were consistent with the court rule.

The Court of Appeals, however, was not able to avoid the direct implications of *Newell-Hall* and the *Davis* opinion less than a month later when it decided *Wolfe v. City of D'Iberville.*[98] In that case, a property owner sued D'Iberville for its refusal to connect water and sewer lines to certain buildings as a result of the owner's failure to pay past due service charges.[99] Wolfe brought suit in county court for damages and after an adverse summary judgment and some twenty-seven days later, appealed the decision to circuit court.[100] That court adopted the conclusions of fact and law of the lower court and affirmed the summary judgment.[101] The circuit court went further by finding that Wolfe's appeal was time barred for failure to comply with § 11-51-79 of the Mississippi Code (1972), which provided ten days to file a notice of appeal and bond from county to circuit court.[102]

The dismissal by the circuit court was squarely at odds with U.R.C.C.C. 5.04 as well as the *Davis* opinion.[103] Thus, the Court of Appeals did consider the appeal of summary judgment because it was not, in fact, time barred.[104] More important than the disposition of Wolfe's specific cause, however, was that Judge

91. *Id.* at 1070 (citing Bickham v. Dep't of Mental Health, 592 So.2d 96, 97 (Miss. 1991)).
92. *Id.* (citing *Bolton,* 643 So. 2d at 945).
93. *Id.*
94. *Id.* (quoting *Moore,* 569 So. 2d at 1150).
95. *Id.*
96. *Id.* (quoting *Newell,* 308 So. 2d at 78).
97. *Id.*
98. 799 So. 2d 142 (Miss. Ct. App. 2001).
99. *Id.* at 143.
100. *Id.* at 144.
101. *Id.*
102. *Id.* at 146.
103. *Id.*
104. *Id.* at 146-47. The grant of summary judgment was upheld on the merits despite the court's ruling that the trial court erred by finding that appeal from county to circuit court was time barred. As an additional note, Wolfe's did not technically have to be decided by the Court of Appeals because Wolfe cited no case law in any brief that he filed prior to his appeal which was an independent ground for ruling against him. *Id.*

Southwick, while concurring in the judgment that *Davis* controlled, expounded upon the *Newell-Hall* problem presented by the *Davis* opinion.[105]

Judge Southwick began by acknowledging that the *Newell* holding provided the authority for the present day Mississippi Rules of Civil Procedure and Rules of Evidence.[106] Next, *Davis,* upon which the majority had relied, was cited for its pronouncement that under the authority of *Newell* and *Hall* and in the interest of uniformity of court procedure, the time for appeals from court to court was controlled by the U.R.C.C.C., exclusive of contrary statutory procedures.[107] This was all well for purposes of Wolfe's appeal; however, Judge Southwick went on to question the propriety of holding that the right to appeal should fall within the inherent authority of the courts.[108]

In support of the possibility that *Davis* had created a conflict in precedent, the concurrence noted the problem with distinguishing between substantive and procedural acts in the area of the right to appeal.[109] Specifically, Judge Southwick pointed to *Gill v. Mississippi Department of Wildlife Conservation*[110] and *Fleming v. State*[111] that state the right to appeal is purely a matter of statute and within the powers of the legislature.[112] He also stated that *Moore v. Sanders*[113] is perhaps most directly on point, quoting that "statutes setting a 'time within which appeals shall be taken are both mandatory and jurisdictional, and must be strictly complied with. The court is without power to ingraft any exception on the statute.'"[114]

Taking this into account, the concurrence next discussed the "cooperative spirit" that had existed between the judiciary and the legislature in matters concerning the timing of appeals.[115] The legislature has essentially allowed the court to set the time for appeals in particular areas.[116] Judge Southwick further stated:

> I believe that under proper understanding of the constitutional divide between legislative and judicial powers, as defined just the previous year in *Moore v. Sanders,* there was no defect in the legislature's imposing appeal time limits by statute. Indeed, the legislature continued to assert authority over appeals from county courts in the statute later struck down in *Davis.* Nonetheless, a branch of government could be commended for not insisting on exercising its full range of power. Indeed the Supreme Court reciprocates when it attempts to accommodate the legislature by considering statutory procedural rules in a 'cooperative spirit' in an

105. *Id.* at 148 (Southwick, P.J., concurring).

106. *Id.* (citing F. Keith Ball, Comment, *The Limits of the Mississippi Supreme Court's Rulemaking Authority,* 60 MISS. L.J. 359, 363-64 (1990)).

107. *Id.* (citing *Davis*, 797 So. 2d at 939).

108. *Id.*

109. *Id.*

110. 574 So. 2d 586 (Miss. 1990).

111. 553 So. 2d 505 (Miss. 1989).

112. *Wolfe,* 799 So. 2d at 148 (Southwick, P.J., concurring) (discussing *Gill,* 574 So. 2d at 590 and *Fleming,* 553 So. 2d at 506).

113. 569 So. 2d 1148 (Miss. 1990).

114. *Wolfe,* 799 So. 2d at 148 (Southwick, P.J. concurring) (quoting *Moore,* 569 So. 2d at 1150). This quote was also referenced by Judge Southwick in the majority opinion in Mitchell v. Parker, 804 So. 2d 1066 (Miss. Ct. App. 2001), discussed above.

115. *Wolfe,* 799 So. 2d at 149.

116. *Id.* (discussing MISS. CODE ANN. § 11-51-5 (1972) (repealed 1991 MISS. LAWS ch. 573, § 141)).

> effort to provide for the 'fair and efficient administration of justice....' The legislature has retained the central statute creating the *right* to appeal, which is granted to either party after a final judgment in circuit or chancery court in a civil case. That statute is indispensable since the right to appeal is solely a matter of statute. For now.[117]

This being said, the opinion next turned to the reasons for this position and viewing *Davis* narrowly rather than as a mandate that the judiciary possesses complete control over the entire appeals process.[118] According to Judge Southwick, a broad view would be a revolutionary turn in the separation of powers analysis of the court.[119] He next reviewed the limited criteria available in making a distinction between practice and substance in rule making, finding that leaving the right of appeal to the legislature is consistent with the republican form of government as required by the United States Constitution and prior practice.[120] Adding that cases such as *Gill* and *Moore* signal that the Mississippi Supreme Court has not created a right to appeal for all situations, he analogized the right to appeal with statutes of limitations that control whether a party has timely commenced a claim.[121] These are "indisputably policy decisions, unrelated to the internal operation of either the trial or the appellate court, [and they] are for the legislature."[122]

In conclusion, Judge Southwick posited that *Davis* could be interpreted narrowly by reasoning that the case necessarily addressed the only statute that set a period of time for appeals to be taken from court to court.[123] In the interest of consistency, the statute presented an error that had to be corrected by the court "in order to avoid leaving well-hidden traps even for the reasonably cautious."[124] By following this reasoning, Davis could avoid being read broadly and as a displacement of prior cases concerning the right to appeal.[125]

IV. ANALYSIS AND CONCLUSION

The recent *Newell-Hall* decisions implicitly or explicitly raise the question of whether *Davis* has in fact extended the judiciary's authority beyond where it stood before Mr. Davis delayed more than ten days to file his notice of appeal from county to circuit court. Additionally, at least Judge Southwick seems concerned that the judiciary could go even further and that *Newell-Hall* has become the basis to forestall future legislative efforts that may greatly hamper the public interest. However, for the following reasons, although not necessarily for the reasons that Judge Southwick has presented in his *Wolfe* concurrence, *Davis* should be read narrowly.

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117. *Id.* (quoting *Newell*, 308 So. 2d at 78, and citing MISS. CODE ANN. § 11-51-3 (Supp. 2000) (emphasis in original)).

118. *Id.*

119. *Id.*

120. *Id.* at 150 (citing U.S. CONST. art. IV, § 4 and Lawrence J. Franck, Comment, *Practice and Procedure in Mississippi: An Ancient Recipe for Modern Reform*, 43 MISS. L. J. 287, 303-304 (1972)).

121. *Id.* at 150-51 (citing *Gill*, 574 So. 2d at 586 and *Moore*, 569 So. 2d at 1148).

122. *Id.* at 151.

123. *Id.*

124. *Id.*

125. *Id.*

Davis is not a step forward for the judiciary's inherent authority because the court has gone nowhere. First, the *time* with which to make an appeal is procedural and should be considered as such under a basic procedural/substantive *Newell-Hall* analysis. By regulating the time parameters of an appeal, the court has stayed within the doctrine because the time within which to take an appeal looks much like a regulation that concerns internal procedure of the court but without a substantive cause of action attached. The legislature should thus view court-to-court procedure as off-limits because of the lack of substance — no new cause or right of action has been raised. The prescription of appeal timing is not like the policy decision of having a Litigation Accountability Act.[126] Instead, timing is more like a statute requiring that the request of a trial transcript be made within a given period[127] where inconsistency in authority is likely to leave, in the words of Judge Southwick, "well-hidden traps even for the reasonably cautious"[128] if those cautious persons have to look in more than one place for the rule and guess which rule is applicable.

The time for an appeal is also important to the efficiency/effectiveness of the administration of justice. Much like the use of all permissible court procedures[129] in determining a resolution after the original action has been brought pursuant to a substantive right granted by the legislature, the timing bears on how the court system operates as a whole. In an earlier day and age, it may have been efficient to provide timing rules legislatively, but because of a change in the times and an increase in the volume of cases, the courts are in a much better position to determine how the court system as a whole should operate, which is consistent with the core principles of *Newell.*[130]

Second, accepting that the right to regulate timing of appeals is within the inherent authority of the judiciary under *Newell-Hall,* the *Davis* holding does not conflict with the cases that Judge Southwick discussed in *Wolfe. Moore* is distinguishable because the quote relied upon in *Mitchell* and later in *Wolfe* regarding the power of the court to "ingraft" exception upon a right of appeal statute is misplaced. That quote was supplied in *Moore* through Presiding Justice Hawkins, an ardent opponent of *Hall,*[131] and comes directly from *Turner v. Simmons,*[132] a case decided in 1911.[133] Further, there is no indication that *Hall* even came into play in the *Moore* decision[134] because the court was dealing with a substantive right of appeal, not a timing issue. The appellant in *Moore* was appealing a decision of a county board of supervisors, a governmental body outside the court system. For this reason, the right of appeal so vigorously protected with old case law by Justice Hawkins does not concern the timing of appeal from court to court.

126. *See Stevens,* 615 So. 2d at 1177.
127. *See Haralson,* 308 So. 2d at 222.
128. *Wolfe,* 799 So. 2d at 151 (Southwick, P.J., concurring).
129. *See Towner,* 604 So. 2d at 1093.
130. *See Newell,* 308 So. 2d at 76.
131. *See Hall,* 539 So. 2d at 1349-65 (Hawkins, P.J., dissenting).
132. 54 So. 658 (Miss. 1911).
133. Justice Hawkins gives an "also" cite to Dependents of Townsend v. Dyer Woodturnings, 459 So. 2d 300 (Miss. 1984) in support of his 1911 case; however, *Townsend* itself involved an appeal *from* an administrative proceeding to court, not a *court to court* appeal.
134. *See Moore,* 569 So. 2d at 1148.

In *Wolfe*, Judge Southwick's concurrence cited other cases that by distinction also support this reading of *Davis*. *Gill v. Mississippi Department of Wildlife Conservation*[135] did indeed hold that a right of appeal is solely a matter of statute; however, this was an appeal from the State Employee Appeals Board, and as was the case in *Moore,* outside the court system. Further, *Fleming*[136] concerned the right of appeal in relation to the Post Conviction Relief Act, arguably after the defendant's case was finished with its turn in the court system. One other case merits mention and distinction here, *Marshall,*[137] where the defendant sought to invalidate the establishment of the Court of Appeals. At the core of the court's response was that the right to appeal was statutory and substantive as to the availability of courts to which the defendant could address his contentions, not whether the court system could or could not regulate the timing of when he had to do so.[138]

In conclusion, *Davis* should be read narrowly: the opinion merely holds the time in which an appeal may be taken, while in the court system, is for the judiciary to decide through the making of rules of procedure. The substance is for the legislature because, just as it regulates through statutes of limitations, the elected representatives can decide who gets into the court system, but once the parties want to move within the court system, judicial rules come into play exclusively. *Davis* has not moved the line of judicial inherent authority; it has brightened it. Those contemplating the answer to the question "where do I look for the rules regarding the timing of filing documents for a case that is already in the court system?" will know, just as they have learned in civil procedure---the applicable rules of court.

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135. 574 So. 2d 586 (Miss. 1990).
136. 553 So. 2d 505 (Miss. 1989).
137. 662 So. 2d 566 (Miss. 1995).
138. This distinguishes between the right to take an appeal and the way in which the court rules provide that it will move through the court system. In *Marshall,* the court noted the system used to appropriate cases to the Court of Appeals through the Supreme Court with the reserved right of the appellant to petition that court after being heard in the Court of Appeals. The legislature was regulating the *right* to appeal, with the court's being concerned with the system in which it would hear it. *See Marshall,* 662 So. 2d at 566.