Mississippi College Law Review

Volume 40 | Issue 2 Article 9

Fall 2022

# CONSTITUTIONAL STANDOFF: AN EXAMPLE OF PRACTICAL DIFFICULTY IN MISSISSIPPI VENUE RULES

Hunter C. Ransom

# CONSTITUTIONAL STANDOFF: AN EXAMPLE OF PRACTICAL DIFFICULTY IN MISSISSIPPI VENUE RULES

*By Hunter C. Ransom*[*]

## Table of Contents



[*] Hunter C. Ransom is a 2022 graduate of Mississippi College School of Law and the Articles Editor of Volume 40 of the *Mississippi College Law Review.* He thanks his faculty advisor, Dean Deborah Challener, for her guidance, patience, and countless hours dedicated to the drafting process. He also thanks his family and friends for their support during the last three years of law school and the drafting of this Comment.

## I. INTRODUCTION

Mississippi's legislature and judiciary have been locked in a constitutional standoff over procedural rulemaking power for decades.[1] In an article describing the history of the conflict, author William H. Page has predicted that the situation will inevitably lead to "practical difficulties" down the road.[2] Years later, given ongoing conflicts among various aspects of civil procedure in Mississippi, that prediction is beginning to appear prescient. A prime example has developed in Mississippi's venue rules.

This Comment has three goals. First, it seeks to resurface Page's discussion of the "constitutional standoff."[3] Second, it describes how Page was likely correct in predicting that practical difficulties would arise down the road and provides an example in the form of present conflicts between Mississippi venue rules. Finally, it discusses potential solutions to the narrow issue of venue, ultimately concluding that a more cooperative process between the legislature and the judiciary is needed to prevent similar problems from arising in the future.

Part II of this article provides (1) a brief recitation of how the constitutional standoff between the two branches came about, (2) a short history of Mississippi's venue rules, (3) an explanation of how the standoff has potentially led to a practical difficulty in satisfying venue requirements, and (4) an explanation of the foundational concepts and federal model of venue to provide context for the analysis. Part III describes how Mississippi's venue rules present practical difficulties; this includes the narrow issue of venue, the broad issue of the constitutional standoff, and potential answers to these problems. Part IV will conclude with final thoughts and a proposed solution to this longstanding problem.

## II. BACKGROUND

### *A. Brief History of Civil Procedure Authority in Mississippi*

For years, the Mississippi Legislature had uncontested authority over procedural rulemaking in the state.[4] When the legislature repeatedly rejected attempts to reform state-court procedures, the Mississippi Supreme

---

[1] *See* William H. Page, *Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi*, 3 MISS. C. L. REV. 1 (1982).

[2] *Id.* at 4.

[3] *See id.*

[4] Page, *supra* note 1, at 5. While the Page article covers the history of Mississippi's procedural rulemaking authority up to 1982, a brief review is necessary for purposes of bringing the law completely up to date and for the discussion in this Comment.

Court sought to unilaterally reform the rules by asserting its own constitutional authority in *Newell v. State*.[5] In a landmark decision, the court laid the groundwork to be the sole power to make procedural rules as the state's judicial branch.[6]

*Newell* effectively had two relevant holdings, one narrow and one broad. The narrow holding was that a state statutory provision—by and through the legislature—which creates a procedural rule is unconstitutional.[7] The broader, more impactful observation was that the court has the sole power to make procedural rules—a power emanating from the constitutional pillars of separation of powers and the vesting of judicial power in "a Supreme Court."[8] The *Newell* court interpreted the phrase "judicial power" in the Mississippi Constitution to include the power to make rules of practice and procedure.[9] With the power to make procedural rules vested in the judiciary, separation of powers consequently prevents the legislature from limiting the judiciary's ability to do so.[10] The court rationalized its decision by asserting that the judiciary is better equipped than the legislature to promulgate procedural changes since judges and justices are "conversant with the law through years of legal study, observation, and actual trials"; legislators in non-legal professions, the court quipped, are "well intentioned, but over-burdened."[11]

---

[5] *Id.; Newell v. State*, 308 So. 2d 71 (Miss. 1975). The facts of *Newell* involve an appeal from a conviction of assault and battery with intent to murder. The defendant contended that he was prejudiced and thereby deprived of a fair trial because (1) the trial court unduly restricted his cross-examination, (2) erroneous instructions were granted to the state, and (3) a proper instruction of the defendant was refused. Specifically, there were state statutes that limited a judge's ability to instruct the jury, and it often permitted juries to decide cases from the evidence without instruction of the law. These substantive facts are not relevant to this discussion. The relevance and significance of *Newell* rests in the Court's assertion of power under the Mississippi Constitution.

[6] *Newell*, 308 So. 2d at 71.

[7] *Id.*

[8] *See id.* at 76; M.S. Const. art. 6, § 144.

[9] *Newell*, 308 So. 2d at 76 (quoting Southern Pacific Lbr. Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968)). The Court in *Reynolds* found that it has this power to make procedural rules "for the efficient disposition of judicial business."

[10] *See id.*

[11] *Id.*

In response to *Newell*, the legislature adopted its own version of the Federal Rules Enabling Act[12] in Mississippi Code § 9-3-61.[13] While this statute seemed to concur with the court's claim to sole procedural rulemaking power, the statute provided a veto power to the legislature's judiciary committees.[14] This reserved veto power was the first apparent resistance by the legislature to the court's assertion of sole procedural rulemaking power. Under this framework, the court sought to create a set of Civil Procedure rules drafted by an Advisory Committee, but the legislature repeatedly rejected the court's attempts to do so.[15]

In 1981, the court seemed to respond to the legislature's direct rejection of its proposals. Acting on its own motion, the court adopted the latest draft of the Mississippi Rules of Civil Procedure to become effective January 1, 1982, "pursuant to its inherent authority vested by the Constitution of the State of Mississippi."[16] In the order, the court provided that the "new" Rules shall control if a conflict between the Rules and any statute arises.[17] This gave the Rules, and therefore the court, controlling authority over state civil procedure.

The legislature, by concurrent resolution, formally requested the court to rescind the order so it could reconsider the constitutional questions raised by the court's action.[18] Nearly one month before the Rules' effective date, the court rejected the legislature's request and reaffirmed the court's constitutional authority proclaimed in *Newell*.[19] Soon after, the Mississippi

---

[12] 28 U.S.C. § 2072. Congress has enumerated procedural rulemaking power under Article I and III of the U.S. Constitution, and arguably pursuant to the Necessary and Proper Clause. With the Rules Enabling Act, Congress delegated its procedural rulemaking power to the Supreme Court of the United States so long as the rules did not "abridge any substantive right." 28 U.S.C. § 2072(b).

[13] *See* MISS. CODE ANN. § 9-3-61 (West 2021). The statute specifically provides, "As a part of the judicial power granted in Article 6, Section 144, of the Mississippi Constitution of 1890, the Supreme Court has the power to prescribe from time to time by general rules the forms of process, writs, pleadings, motions, rules of evidence and the practice and procedure for trials and appeals in the Court of Appeals and in the circuit, chancery and county courts of this state and for appeals to the Supreme Court from interlocutory or final orders of trial courts and administrative boards and agencies, and certiorari from the Court of Appeals."

[14] Page, *supra* note 1, at 5. The judiciary committee is comprised of legislators. *See* Mississippi Legislature, *House & Senate Committee Listings* (Aug. 17, 2021), http://www.legislature.ms.gov/committees/.

[15] *Id.*

[16] *Id.*

[17] *See id.*

[18] Page, *supra* note 1, at 6.

[19] *Id.* at 6-7.

Rules of Civil Procedure became effective.[20] The Rules remain the controlling authority for state civil procedure under *Newell* precedent, regardless of whether that precedent is constitutionally valid.[21]

The timeline from *Newell* to the adoption of the Rules demonstrated a budding conflict between the legislature and the judiciary over the authority to promulgate state civil procedural rules. This conflict seemed to be rooted in differing interpretations of the Mississippi Constitution that resulted in a "constitutional standoff" between the two branches. For years, the standoff may have been controversial, but there were no practical consequences to state civil procedure. Statutory and Rule provisions were uniform on virtually every issue, and where they differed they designated which source would control. William Page predicted this would not always be the case.[22] A potential conflict recently developed in Mississippi's venue rules that likely confirms his thesis. Specifically, the Rules' venue provision may conflict with the state's general venue statute.

### *B. A Result of the Standoff: Two Sources of Venue*

Included in the adoption of the Mississippi Rules of Civil Procedure was the Jurisdiction and Venue provision in Rule 82.[23] The court again asserted its rulemaking authority in Rule 82(b), stating that "*except as provided by this rule*, venue of all actions shall be as provided by statute."[24] The Rules' venue provision is then found in Rule 82(c), which provides:

> Where several claims or parties have been properly joined, the suit may be brought in any county in which any one of the claims could properly have been brought. Whenever an action has been commenced in a proper county, additional claims and parties may be joined . . . without regard to whether that county would be a proper venue for an independent action on such claims or against such parties.[25]

In other words, Rule 82(c) endorses the idea that if venue is proper as to one defendant, venue is proper as to all defendants.[26] With Rule 82,

---

[20] As another push-back, the legislature immediately began to consider removal of justices that voted in favor of adopting the Rules. *Id.* at 7.

[21] *See* MISS. R. CIV. P. at 8.

[22] Page, *supra* note 1, at 2.

[23] MISS. R. CIV. P. 82.

[24] *Id.* at R. 82(b) (emphasis added).

[25] *Id.* at R. 82(c).

[26] *Id.* at R. 82(c) advisory committee's note to 2004 amendment.

the court established its own parameters for venue in certain actions, intending to override any contrary statutory authority.[27] Mississippi's general venue statute originally agreed expressly to Rule 82(c), but a recent interpretation of the latest amendment to the statute suggests otherwise.

The state's general venue statute was derived from Section 495 of the Mississippi Code of 1930, and the legislature has promulgated directives on venue since then.[28] In 1972, the legislature re-compiled the statutes, turning Section 495 into Section 11-11-3.[29] This general venue statute was seemingly the uncontested authority for establishing proper venue until the Rules were adopted. Following *Newell* and the adoption of the Rules, the venue statute and Rule 82 were in conformity. As a result, the adoption of Rule 82 seemed irrelevant in terms of its venue requirements since it essentially required no more or no less than the statute to establish proper venue.

The venue statute originally provided that "civil actions of which the circuit court has original jurisdiction must be brought in the county in which the defendant *or any of them* may be found."[30] By using the phrase, "or any of them," the statute conformed with Rule 82(c) on rendering venue proper as to all defendants if it is proper as to one of them.[31] *New Biloxi Hospital, Inc. v. Frazier* illustrated what was needed to satisfy the requirements of venue under Rule 82 and the original venue statue.[32] At the same time, its facts and procedural history presented an issue to the court: what happens if the defendant on whom venue is based is subsequently dismissed from the lawsuit?[33]

In *Frazier*, the plaintiffs filed a civil action in Jackson County against a resident of Jackson County and a Mississippi corporation domiciled in Harrison County.[34] Jackson County was a proper venue at the time of filing and the defendants were properly joined.[35] The plaintiffs then

---

[27] *Id.* at R. 82.

[28] MISS. CODE ANN. § 11-11-3 Editor's and Revisor's Notes. The substance of the previous statutes is not relevant to this discussion.

[29] *Id.* § 1-1-19 (1972).

[30] *Id.* § 11-11-3 (1)(a)(i) (1999) (emphasis added). The emphasized language is significant for reasons that will be discussed later in this Comment. The statute also provided that, alternatively, venue would be proper in the county in which the cause of action occurred or accrued.

[31] *Id.* § 11-11-3(1)(a)(i); MISS. R. CIV. P. 82(c).

[32] 146 So. 2d 882 (Miss. 1962).

[33] *Id.*

[34] *Id.* at 883. Under the venue statute and Rule 82(c), venue was proper as to the Harrison County corporation because it was proper as to the Jackson County resident.

[35] *Id.* at 884. The plaintiffs had established proper venue under both Rule 82 and Section 11-11-3 in Jackson County by filing against a resident of Jackson County and joining a Harrison County plaintiff.

dismissed their claims as to the Jackson County resident, so the Harrison County defendant filed a motion to change venue to Harrison County.[36] That motion was denied, and the case against the corporation went to trial, resulting in a judgement against the corporation.[37] The corporation appealed, contending that the trial court erred in overruling its motion to change venue after the plaintiffs dismissed the defendant on whom proper venue in Jackson County was based.[38]

Thus, the issue before the court was whether an action against a non-resident in what would be an improper venue could be maintained when the resident upon whom proper venue is based is dismissed from the action.[39]

Citing statutory authority and state precedent, the court held that subsequent dismissal of the party upon whom venue is based does not destroy proper venue as to the remaining defendants.[40] As a result, the court found that the action could be maintained despite the Jackson County resident's subsequent dismissal from the action.[41] The court seemed to recognize the potential for a plaintiff to abuse this rule by filing a frivolous lawsuit against a defendant in a proper venue in order to join other defendants over whom venue would not be proper. Establishing a three-prong test, the court made it clear that venue cannot be based on a "fraudulently joined"[42] defendant, requiring that:

> (1) the action must be initiated in good faith in the bona fide belief that the plaintiff has a good cause of action against the defendant upon whom venue is based; (2) the claim against the defendant upon whom venue is based must be neither fraudulent nor frivolous nor made with the intention of depriving the other defendants of their right to be sued in their own counties; and (3) there must be a reasonable claim of liability asserted against the defendant upon whom venue is based.[43]

---

[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* "Fraudulent joinder" may have various meanings between state and federal civil procedure. This Comment uses the terminology to describe such a situation where a plaintiff joins a defendant to establish proper venue, knowing such "anchor" defendant will likely be dismissed.
[43] *Id.* at 885.

As attempts to abuse the *Frazier* holding inevitably began to arise, this three-part test became the inquiry as to whether a defendant was fraudulently joined to establish venue.[44] However, this "framework" was all built on the uniform assertion of the venue statute and Rule 82(c) that if venue is proper as to one defendant, it is proper as to all of them. The statute has since been amended, raising more concerns than simply whether venue is still proper as to all defendants if it is proper as to one of them.

### *C. Amendment of the Venue Statute and* Forrest General Hospital v. Upton

In 2004, the legislature amended Section 11-11-3 "to revise the venue in civil actions."[45] With this amendment, the legislature added several lengthy subsections to the statute.[46] Namely, the legislature added subsection (2), which provides that "in any civil action in which more than one plaintiff is joined, each plaintiff shall independently establish venue; it is not sufficient that venue is proper for any other plaintiff joined in the civil action."[47] Additionally, the language "or any of them" was omitted from subsection (1).[48] As a result, the current general venue statute provides that: "civil actions of which the circuit court has original jurisdiction must be brought in the county where *the* defendant resides . . . ."[49]

With respect to plaintiffs, the amendment expressly indicates that each must establish proper venue, and it is insufficient that venue is proper only as to one of the plaintiffs in a civil action.[50] The amendment is not so clear where defendants are concerned.[51] Particularly in light of recent interpretations, it is unclear whether the legislature intended its removal of "or any of them" from the statute to require a plaintiff to establish that venue is proper as to each individual defendant.[52] Additionally, the amendment potentially broke the statute's conformity with Rule 82(c) with respect to

---

[44] *See* Stubbs v. Mississippi Farm Bureau Cas. Ins. Co., 825 So. 2d 8 (Miss. 2002); Blackledge v. Scott, 530 So. 2d 1363 (Miss. 1988).

[45] H.B. 13, 2004, 1st Ex. Sess. (Miss. 2004).

[46] *Id.*

[47] MISS. CODE ANN. § 11-11-3(2) (West 2004). Other changes include subsection (1)(b), a fallback provision if no proper venue is available under subsection (1)(a); subsection (3), a specific venue provision for malpractice actions; and subsection (4), a forum non conveniens provision.

[48] *Id.*

[49] *Id.* §11-11-3(1)(a)(i) (emphasis added). The statute also provides that actions can be brought in the county where a substantial alleged act or omission occurred or where a substantial event that caused the injury occurred.

[50] *Id.* § 11-11-3(2).

[51] *See id.*

[52] *See* Forrest Gen. Hosp. v. Upton, 240 So. 3d 410, 421-22 (Miss. 2018) (Coleman, J., concurring).

the notion that venue is proper as to all defendants if it is proper as to one of them.

The court first acknowledged the 2004 amendment in *Park on Lakeland Drive v. Spence*.[53] In that case, a plaintiff filed an action against Rankin County defendants in Hinds County.[54] The plaintiff then joined a Hinds County defendant to establish proper venue.[55] The court noted that the legislature had since amended Section 11-11-3, but it applied the pre-amendment version since the original suit was filed in 2004.[56] Applying the *Frazier* test, the court found that the plaintiff fraudulently joined the Hinds County defendant to establish proper venue and correctly determined that venue was improper.[57] However, because it applied the pre-amendment version of the statute, it gave no guidance on what effect, if any, removal of the "or any of them" language had on venue in multi-defendant cases.

Then, in 2018, the court heard *Forrest General Hospital v. Upton*.[58] In that case, several issues surrounding the amendment came to light, including whether venue is still proper as to all defendants if it is proper as to one of them under the 2004 amendment.[59] The court ultimately declined to address the specific issue because it was able to decide the case without doing so.[60] However, the defendants' arguments against proper venue gave much to consider.[61] More importantly, a concurring opinion by Justice Coleman not only interpreted the effect of the amendment, but also told the court it was time to acknowledge what the amendment might have meant.[62]

1. Facts and Procedural History of *Upton*[63]

In *Upton*, the plaintiff went to the emergency room at Forrest General Hospital after experiencing severe pain in his left hand.[64] The

---

[53] 941 So. 2d 203, 205 (Miss. 2006).

[54] *Id.*

[55] *Id.*

[56] *Id.* at 206.

[57] *Id.* at 208.

[58] 240 So. 3d at 410.

[59] *Id.*

[60] *Id.*

[61] *See id.* at 414 (where, among other points, the defendants argued that the plaintiff fraudulently joined UMMC, a Hinds County defendant, to establish proper venue in Hinds County, and that venue was only proper in Forrest County).

[62] *Id.* at 420-21.

[63] The substantive facts of *Upton* are relevant to the discussion to understand why the plaintiff joined the parties in the lawsuit.

[64] *Upton*, 240 So. 3d at 411-12.

hospital determined that a blockage of blood flow was the problem.[65] A physician employed by South Mississippi Emergency Physicians ("SMEP") consulted with the plaintiff after the test.[66] Almost seven hours after the test, a different physician employed by the Hattiesburg Clinic operated on the plaintiff's hand.[67] The plaintiff told the physician he suffered from reperfusion syndrome after the operation, but the physician merely told him to return in one month without prescribing him medication.[68] Nine days later, the plaintiff experienced extreme pain in his hand and sought treatment at the University of Mississippi Medical Center ("UMMC") in Hinds County.[69] UMMC gave him antibiotics and informed him that if he had waited a month as the physician told him to, his hand likely would have required amputation.[70] The plaintiff also alleged that he suffered from several other medical conditions that Forrest General Hospital failed to discover.[71]

The plaintiff filed suit in Hinds County, naming Forrest County, Forrest General Hospital, the physician from the Hattiesburg Clinic, the Hattiesburg Clinic itself, the physician from SMEP, and SMEP itself as defendants (collectively referred to by the court as "Forrest County Defendants").[72] Initially, the plaintiff did not include UMMC as a defendant, but argued that Hinds County was a proper venue because the acts or omissions that served as the basis of his claims continued to occur and were discovered in Hinds County.[73] The Forrest County defendants argued that, with respect to themselves, venue was proper only in Forrest County and not Hinds County.[74] The plaintiff then amended his complaint to add UMMC as a defendant in an attempt to establish proper venue in Hinds County.[75]

The defendants filed a motion for dismissal or, in the alternative, severance of the claims against them and transfer of venue to Forrest County.[76] In so doing, the defendants argued that venue was not proper in

---

[65] *Id.* at 412.
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*
[75] *Id.* Under the pre-amendment standard, venue would have been proper in Hinds County as to the Forrest County defendants if the plaintiff had originally added UMMC as a party at the time of filing.
[76] *Id.* at 413.

Hinds County since (1) the original causes of action alleged by the plaintiff occurred in Forrest County, (2) the plaintiff only named Forrest County defendants, and (3) UMMC was not an original party.[77] In response, the plaintiff argued that his amended complaint related back to the time of filing.[78] The plaintiff based his argument on the notion that under Section 11-11-3, venue is proper as to all defendants if it is proper as to one of them. Specifically, the plaintiff argued that if the court found the Forrest County defendants were joined correctly and that venue was proper as to UMMC under the statute, the amended complaint adding UMMC as a defendant related back and established proper venue as to all defendants.[79] The circuit court ultimately denied the defendants' motion to transfer venue, finding that the plaintiff's choice of Hinds County was appropriate under the general venue statute.[80]

The defendants appealed, raising three issues: (1) that venue is determined by the filing of the original complaint and not the amended complaint; (2) that the plaintiff fraudulently joined UMMC to establish venue in Hinds County; and (3) that venue was proper only in Forrest County.[81] In response, the plaintiff argued that (1) under Section 11-11-3, if venue is proper as to one defendant, it is proper as to all defendants; (2) his amended complaint properly joined UMMC; and (3) the amended complaint related back to the original complaint to establish proper venue in Hinds County.

2. Majority Opinion Delivered by Justice Chamberlain

The court ultimately found that Hinds County was not a proper venue, but not for reasons involving the 2004 amendment. First, despite its previous claim to procedural rulemaking power in *Newell*, the court quoted state precedent that "venue is a function of statute."[82] Next, it noted that "where venue is [proper] as to one defendant, it is [proper] as to all

---

[77] *Id.*

[78] *Id.*

[79] *Id.* Relation back is a concept of civil procedure that allows a plaintiff to add claims or parties after the statute of limitations has run, recognized in both the Federal and Mississippi Rules of Civil Procedure. FED. R. CIV. P. 15(c); MISS. R. CIV. P. 15(c). The plaintiff also argued that he originally filed the claim under the general venue statute on grounds that a "substantial event" occurred in Hinds County. *Upton*, 240 So. 3d at 413. These are separate issues and will not be discussed in depth in this Comment.

[80] *Upton*, 240 So. 3d at 414. The circuit court found that both Hinds County and Forrest County were proper venues.

[81] *Id.*

[82] *Id.* at 415 (quoting Park on Lakeland Drive, Inc. v. Spence, 941 So. 2d 203, 206 (Miss. 2006)).

defendants" under both Section 11-11-3 and Rule 82(c).[83] Finally, the Court cited its *Frazier* holding that "subsequent dismissal of the defendant upon whom venue is based does not destroy proper venue."[84] Oddly enough, the court conceded that it is "bound to follow the plain and ordinary meanings of the Rules of Civil Procedure."[85]

Thus, avoiding commentary on the 2004 amendment, the court held that the amended complaint adding UMMC as a defendant did not relate back to the original complaint.[86] Applying the principles discussed, the court found that venue was not proper in the instant case for several reasons: (1) the original complaint named only Forrest County defendants; (2) the plaintiff did not allege that any of the defendants resided or acted in Hinds County; and (3) the Forrest County defendants treated the plaintiff only in Forrest County.[87] The court declined to address whether Hinds County would have originally been a proper venue for the Forrest County defendants since the plaintiff did not allege that venue was proper in Hinds County under the original complaint.[88] Considering the plaintiff blatantly filed the action against the Forrest County defendants in an improper venue, the court was correct to do so.[89] However, had the plaintiff joined UMMC as a defendant from the beginning of the suit, the court would have had an opportunity to address the effect of the 2004 amendment.

3. Concurring Opinion by Justice Coleman

Justice Coleman specially concurred, suggesting that the Court reexamine its "continued adherence to and citation of the concept that where venue is proper to one defendant it is proper to all of them."[90] Based on multiple principles of state precedent indicating that venue is governed by statute, he opined that the omission of the words "or any of them" in the 2004 amendment of the venue statute indicated a rejection by the legislature of the notion that defendants can be sued in any county if at least one defendant could be found in that county.[91] He argued that this notion was

---

[83] *Id.* at 416 (alteration in original) (quoting Est. of Jones v. Quinn, 716 So. 2d 624, 627 (Miss. 1998)).

[84] *Id.* (quoting Austin v. Wells, 919 So. 2d 961, 964 (Miss. 2006)).

[85] *Id.* at 418 (quoting Veal v. J.P. Morgan Tr. Co., 955 So. 2d 843, 845 (Miss. 2007)) (referring to the Mississippi Rules of Civil Procedure).

[86] *See id.* at 420.

[87] *Id.* at 416-17.

[88] *Id.* at 416.

[89] *Id.* at 417.

[90] *Id.* at 421 (Coleman, J., concurring). Chief Justice Waller joined the concurrence.

[91] *Id.*

grounded in the outdated, pre-amendment version of the venue statute.[92] Since it is no longer found in the venue statute, Justice Coleman argued, the court should abandon this rule.[93]

*Upton* provided the perfect example of a plaintiff trying to manipulate venue to maximize convenience. By adding a Hinds County defendant, Upton sought to establish proper venue in Hinds County and avoid having to litigate his claims either separately between the two counties or entirely in Forrest County. Ultimately, because Upton originally sued only Forrest County defendants in Hinds County, the answer was clear: venue was not proper as filed.[94] As a result, the inquiry centered around a relation-back issue: whether, in determining whether venue was proper at the time of filing, the addition of a defendant to establish proper venue relates back to the time of filing.[95] Even if the court had answered this question in the affirmative, the question whether venue should have been proper as to the Forrest County defendants under the 2004 amendment would still be an issue.

Justice Coleman's concurrence presented a potential practical difficulty caused by the constitutional standoff between the legislature and the judiciary. His primary argument was that venue is a function of statute and that the legislature intended to abandon the rule that venue is proper to all defendants if it is proper as to at least one defendant. While the court does generally defer to the legislature and apply the venue statute, it still reserves "ultimate responsibility" for establishing venue requirements to itself.[96] Based on this reservation, it is irrelevant whether the court follows the statutory requirements for venue; under *Newell* and its progeny, any contrary statutes must still yield to Rule 82's directives. Thus, while Justice Coleman is correct that the court generally follows statutory authority in determining proper venue, there is still an unsettled clash of authority between Rule 82 and statutory authority on venue.

### *D. Noteworthy Considerations: Venue and its Foundational Policy*

Venue refers to the particular court within a court system where a plaintiff can file a lawsuit.[97] In the federal court system, each district is a

---

[92] *Id.* at 422.

[93] *Id.*

[94] *Id.* at 420.

[95] *See id.* at 417-20.

[96] Canadian Nat'l v. Smith, 926 So. 2d 839, 845-46 (Miss. 2006) (citing MISS. R. CIV. P. 82).

[97] JOSEPH W. GLANNON ET AL., CIVIL PROCEDURE: A COURSEBOOK 367 (3d ed. 2017).

distinct venue that covers a geographic area.[98] State court systems are divided by districts comprised of either one or multiple counties.[99] Each county has its own judicial district[100] which serves as a distinct venue.[101] When a lawsuit is filed, not only must the court have subject matter jurisdiction over the type of claim brought and personal jurisdiction over the defendant(s), but the court must also be a proper venue.[102] Therefore, absent consent or waiver, a court cannot hear a case unless it is brought in a proper venue.[103]

Venue is a function of convenience and efficiency, ensuring a case is litigated in a court that is conveniently located and has some connection to the parties.[104] However, more than one venue may be proper under the applicable venue statute.[105] Therefore, while venue is about convenience and efficiency, it is also implicitly about choice of forum. Because venue also facilitates choice of forum, some parties will try to manipulate it.[106]

Venue is similar to personal jurisdiction in that it considers the relationship between the defendant and the forum, but different in that it is neither constitutionally compelled nor focused on the defendant's interest.[107] In fact, the United States Constitution has nothing to say about venue and therefore does not restrict a plaintiff's choice.[108] For federal courts, Congress passed venue statutes that set out which federal districts are proper venues and restrict litigation to courts that are convenient.[109] The Federal Rules of Civil Procedure clear the way for statutes to be the primary venue authority, stating that the rules "do not extend or limit the jurisdiction

---

[98] *Id.*

[99] *See* Miss. Sec'y of State, 2020 Mississippi Judiciary Directory and Court Calendar 49-50 (2020), https://www.sos.ms.gov/content/documents/ed_pubs/pubs/2020JD/Entire%20Directory%20Court%20Calendar%202020.pdf.

[100] *Id.*

[101] GLANNON, *supra* note 97, at 368.

[102] *Id.* at 370.

[103] *Id.* at 383.

[104] *Id.* at 368.

[105] *Id.* at 383.

[106] In Uffner v. La Reunion Francaise, 244 F.3d 38 (1st Cir. 2001), the plaintiff departed from Puerto Rico to the Virgin Islands on his yacht, and the yacht sank one mile off the coast of Puerto Rico. When the defendant insurers denied his claim for the yacht, the plaintiff sued. He filed in Puerto Rico rather than the Virgin Islands because it was more convenient for him.

[107] GLANNON, *supra* note 97, at 368. Personal jurisdiction requirements focus on the defendant's interests under the Fourteenth Amendment's Due Process clause.

[108] *Id.* at 369. While the general federal venue statute is 28 U.S.C. § 1391, there are specialized venue statutes for racketeering cases, copyright and infringement matters, removed cases, etc. *Id.* at 384.

[109] *Id.*

of the courts or the venue of action in those courts."[110] States have their own venue statutes as well, and while they are typically similar to the general federal venue statute, they are not always identical.[111] A perfect example is Mississippi's venue statute—absent the issues at hand, at least.

## III. ANALYSIS

William Page argued that while courts must inevitably make procedural laws, they should do so by adjudication—not by unilateral adoption of Rules as the court did in *Newell*.[112] His reasoning was that such adjudication is subject to subsequent legislation, giving the legislature a say in the matter.[113] While he is correct, this Comment argues that something more is needed. Specifically, it suggests that a solution may be found in a cooperative procedural rulemaking process between the legislature and the judiciary, similar to the federal model between Congress and the Supreme Court of the United States. Practical problems are less likely to arise where the branches cooperate throughout the rulemaking process.

The *Newell* court based its claim to sole procedural rulemaking power on the fundamental concept of separation of powers.[114] However, the concept of checks and balances is equally fundamental. Although the legislature and the judiciary are entitled to their enumerated powers under the constitution, they must also act as checks on each other to prevent abuse of such powers. This is not to say that the Mississippi legislature and the court have not historically adhered to checks and balances; *Newell* and the events that followed simply demonstrate a potential violation of checks and balances that resulted in a constitutional "standoff" over procedural rulemaking power. Regardless of whether the two branches have cooperated lately, the underlying conflict stemming from *Newell* has never been settled. Page argued that such a situation would "inevitably result in practical difficulties."[115] As he predicted, the standoff seems to have resulted in a practical difficulty in Mississippi's venue rules.

This analysis will first describe where the practical difficulty arises in Mississippi's venue rules. It will then discuss two unanswered questions in addressing the narrow issue of venue. Finally, it will propose answers to both questions and discuss how similar problems could be prevented by resolving the broader issue of the constitutional standoff.

---

[110] FED. R. CIV. P. 82.
[111] GLANNON, *supra* note 97, at 370.
[112] Page, *supra* note 1, at 45.
[113] *Id.*
[114] *Newell*, 308 So. 2d at 76.
[115] Page, *supra* note 1, at 4.

### *A. The Practical Difficulty and its Implications*

Assuming there is any real meaning in the legislature's omission of the language "or any of them" in the 2004 amendment to the venue statute, the amendment poses several potential problems. The central issue is that there would no longer be uniform requirements between Section 11-11-3 and Rule 82(c) for establishing proper venue. Following this central issue are potential substantive and procedural problems. Substantively, it is unclear whether the statute still endorses the rule that venue is proper as to all defendants if it is proper as to one of them, or whether the amendment reflects legislative intent to abandon the rule.

Procedurally, there is the issue of whether legislative authority in Section 11-11-3 or judicial authority in Rule 82(c) governs venue. The court in *Upton* first indicated that venue is a function of statute, meaning courts must look to whether the statute is satisfied in determining proper venue.[116] On the other hand, the court subsequently indicated that it is bound to follow the plain and ordinary meanings of the Rules of Civil Procedure.[117] Thus, there is an issue of whether the judiciary (by and through Rule 82(c)) or the legislature (by and through Section 11-11-3) has the authority to govern venue. There could even be a possibility that both must be satisfied.

To summarize the situation under the current rulemaking system, there are two issues to consider. The first is the narrow issue of whether there is a conflict between Section 11-11-3 and Rule 82. This turns entirely on interpretation of the amendment to the venue statute. While it may not be possible to answer this question with certainty, some of the different interpretations of the amendment can be analyzed to evaluate each interpretation's advantages, consequences, and how they may serve the underlying policy of venue. The second issue is whether, in a conflict between the two, the statute or the rule should control. This issue would turn on resolution of the constitutional standoff between the legislature and the judiciary. This Comment argues that a more cooperative system between the two branches could resolve all of the above concerns.

---

[116] *Upton*, 240 So. 3d at 421.

[117] *Id.* at 418.

### *B. The Narrow Issue: Interpreting the Amendment*

Since the rule may appear to mean one thing while the statute appears to mean another, there are several different approaches available. This section will analyze the different solutions, addressing policy considerations in the process. Policy considerations generally include the purpose of venue and how each solution furthers that purpose, how it impacts the parties, and its effect on judicial efficiency. One option is to simply conclude that the amendment had no substantive effect on venue and to read the amended statute in harmony with Rule 82. Another option is to agree with Justice Coleman that the omission of "or any of them" did in fact reflect the legislature's intent to abandon the rule. A final option is to follow the example of the federal structure of venue rules and expressly defer venue requirements to the statutory authority.

#### 1. Reading the Amended Statute in Harmony with Rule 82

The legislature's silence on the omission of "or any of them" from the amendment could mean that there was no intention to abandon the notion that venue is proper to all defendants if it is proper to one of them. By expressly including Section 11-11-3(2) in the same 2004 amendment, the legislature was clear that in multi-plaintiff lawsuits, each plaintiff must independently establish proper venue.[118] The legislature could have simply said the same thing for defendants in Section 11-11-3(1)(a)(i), but it did not do so.

Additionally, there are no explicit statements in the legislative history of Section 11-11-3 as to whether the legislature intended to abandon the rule by omitting the language "or any of them."[119] In the five pages of legislative highlights for the 2004 session, the only comment on the amendment to Section 11-11-3 is "the bill also makes changes to venue."[120] Based on this comment, it is suspect to assume that the simple omission of "or any of them" meant the legislature intended to make such a substantial change. Requiring plaintiffs to establish that venue is proper as to each individual defendant is a substantial change indeed.

Finally, as discussed, Justice Coleman cited multiple Mississippi Supreme Court cases in his concurrence reflecting the notion that venue is

---

[118] To refresh, Section 11-11-3(2) provides that each plaintiff must independently establish proper venue, and it is not sufficient that venue is proper for any other plaintiff joined in the action.

[119] MS Legis. High., 2004 Sess.

[120] *Id.*

a function of statute.[121] However, only two of these cases were decided after the 2004 amendment. Neither case ascertained the meaning of the amendment; one of them involved a different provision of the venue statute and the other was originally filed before the amendment.[122] Therefore, it cannot be said that the Supreme Court's jurisprudence leading up to *Upton* is consistent with Justice Coleman's concurrence. Accordingly, there is no real precedent indicating an abandonment of the rule.

When considering the legislative history, lack of Supreme Court pronouncements on the amendment, and the fact that the legislature could have expressly made such a substantial change as clearly as it did for plaintiffs in Section 11-11-3(2), the omission should not likely be construed to reflect a major change in the statutory requirements to establish proper venue as to defendants. To take this position would mean the statute must be read in harmony with Rule 82 as it always has been, before and after Justice Coleman's concurrence. This would mean Mississippi's venue situation essentially does not change from how it was before the 2004 amendment. Both the venue statute and Rule 82 would "agree" that venue is proper as to all defendants if it is proper as to one of them.

If this approach is taken, there remains another potential substantive issue. As discussed, the current principle is that subsequent dismissal of the defendant upon whom venue is based does not destroy proper venue,[123] and the three-part *Frazier* test is used to prevent abuse of this rule in the form of fraudulent joinder.[124] But these rules raise concern in themselves, including whether subsequent dismissal of the defendant on whom venue is based should destroy proper venue and, if so, whether the test under *Frazier* is the appropriate test.

Although the court quickly recognized the issue of fraudulent joinder and created the three-part *Frazier* test to address it, there is an argument that the "proper to one, proper to all" rule makes sense in the first place. While the rule provides convenience to the plaintiffs and efficiency to the courts in litigating all related claims in one forum, the venue must also be fair to defendants. The current framework arguably pits convenience and efficiency against fairness. However, proper venue must involve a balance between the three. A potential remedial rule could be that subsequent dismissal of the defendant upon whom venue is based can at least be grounds for any of the other defendants to file a motion to either dismiss the case or at least change venue.

---

[121] *Upton*, 240 So. 3d at 421.

[122] *Id.* (citing Park on Lakeland Drive, Inc. v. Spence, 941 So. 2d 203, 206 (Miss. 2006); Miss. Crime Lab v. Douglas, 70 So. 3d 196, 202 (Miss. 2011)).

[123] *Id.* at 413.

[124] *Frazier*, 146 So. 2d at 882.

On the other hand, this approach does arguably comply with the policy behind venue. Again, venue is about convenience and efficiency for the parties and the court.[125] Allowing the plaintiff to litigate all his claims against all potential defendants is both convenient for the parties and an efficient use of the court's resources. At the end of the day, if the defendants truly should not be in a particular court, venue is not the only procedural defense available.[126]

2. Agreeing with Justice Coleman

Another solution is to agree with Justice Coleman that venue is entirely a function of statute and that the legislature intended to abandon the rule with the 2004 amendment. This approach implicates one of two outcomes: a concession by the court that the legislature has the primary power to regulate procedure, overturning *Newell*, or at least a determination that the "standoff" is irrelevant as it relates to venue. With the statute being the primary authority for proper venue, there would be no concern for the inconsistency with Rule 82. With Justice Coleman's interpretation, it follows that the statute alone would require plaintiffs to establish proper venue as to each defendant, likely eliminating any possibility of "fraudulent joinder."

This approach arguably serves the policy of venue that the court must be an appropriate location for the lawsuit. In requiring the plaintiff to establish proper venue as to each defendant, there would be no question that venue is proper as to all defendants.[127] However, this places a higher burden on the plaintiff in having to establish that venue is proper as to all individual defendants. While at face value this approach sounds fair to all parties, it raises the possibility that injured plaintiffs, like the plaintiff in *Upton*, would have to litigate claims against all defendants separately in different venues even if the defendants were all responsible for the plaintiff's injury. This is not only inconvenient for the plaintiff, but it is also an inefficient use of court resources which increases the chances of fragmented lawsuits.

---

[125] GLANNON, *supra* note 97, at 368.

[126] Defendants may also raise lack of personal jurisdiction, lack of subject matter jurisdiction, and other Rule 12 defenses. *See* MISS. R. CIV. P. 12(b); FED. R. CIV. P. 12(b).

[127] And since Section 11-11-3(2) expressly requires each plaintiff in a lawsuit with multiple plaintiffs to establish proper venue, there would be no issue of improper venue as to any parties. MISS. CODE ANN. § 11-11-3(2) (West 2004).

3. Following the Example of Federal Venue

Another possibility is to consider how the federal structure of civil procedure rules could be a model for Mississippi's rules, both procedurally and substantively. The federal venue statute, 28 U.S.C. § 1391(b), provides that a civil action may be brought in a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located.[128] The Federal Rules of Civil Procedure strictly provide that the rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts.[129] In other words, the rules clear the way for statutory authority to govern venue.

Substantively, for purposes of residency under the federal venue statute, an individual is a resident of a state if that state is their domicile.[130] For corporations and unincorporated entities, domicile is any district in which the corporation would be subject to the court's personal jurisdiction with respect to the civil action in question.[131] Therefore, if an individual defendant resides in a judicial district where a suit is brought, and another individual that is properly joined as a defendant is domiciled in the same state but a different judicial district, venue is proper as to both defendants under Section 1391(b). The Federal Rules of Civil Procedure then acknowledge that they have no effect on proper venue.

Mississippi could follow this example. At the state level, counties can essentially be analogized to federal judicial districts. It is no less convenient for a citizen of Mississippi to travel to another county within the state to defend a lawsuit in state court than it is for that citizen to travel to another judicial district in the state to defend a lawsuit in federal court. Therefore, if venue is proper as to one defendant, it should be proper as to all other defendants, even if they reside in different counties.

Procedurally, Mississippi's rules could follow the federal structure as well. As discussed, federal venue is governed by federal statute 28 U.S.C. § 1391(b), while Rule 82(c) of the Federal Rules of Civil Procedure acknowledge the statute's authority. By setting forth the rules of venue in a statute and endorsing the statute's rules with Rule 82, federal venue eliminates any conflict between the two authorities. Mississippi could likely follow this example and amend Rule 82(c) of the Mississippi Rules

---

[128] Venue is also proper in a district where a substantial part of events or omissions giving rise to the claim occurred or, if there is no proper venue under § 1391(b)(1)-(2), in any district in which any defendant is subject to the court's personal jurisdiction with respect to such action. 28 U.S.C. § 1391(b)(3).

[129] FED. R. CIV. P. 82.

[130] 28 U.S.C. § 1391(c)(1).

[131] *Id.* § 1391(c)(2).

of Civil Procedure to endorse the state venue statute to achieve uniformity. If needed, Section 11-11-3 could again be amended to solve the ambiguity in whether venue is proper to all defendants if it is proper to one.

Federal venue rules also are already considered to effectuate the policies underlying venue, since many venue concepts were built on federal case law.[132] Therefore, Mississippi's venue rules would not likely implicate any policy concerns against the concept of venue. Ultimately, many of the issues surrounding Mississippi's venue rules would be solved by taking this approach and following the federal model. However, the federal venue rules are structured this way because there is a cooperative process between Congress and the United States Supreme Court in drafting and revising the Federal Rules of Civil Procedure.[133] This is another lesson Mississippi can take from the federal government, which leads to discussion of the broader issue.

### *C. The Broad Issue: Resolving the Standoff*

Regardless of how either of the two previous questions are answered, they share a common solution: a cooperative system between the legislature and the judiciary. The venue issue is just one example of an inevitable practical difficulty that may arise without cooperation between the legislature and the judiciary. While the potential conflict between Rule 82 and the venue statute is a significant issue that needs clarification, the real issue is the constitutional standoff.

Whether the power to regulate procedure rests with the judiciary or the legislature has been a topic of debate outside of Mississippi jurisprudence and long before *Newell*.[134] In the context of the United States, the U.S. Constitution should be a prime place to look since it explicates the precepts of checks and balances.[135] It follows that when considering this issue as it applies to Mississippi, the Mississippi Constitution should be consulted as well. However, the United States Constitution is silent on the issue, and guidance must consequently come from other sources.[136] Similarly, while the Mississippi Constitution provides some commentary, it does not expressly delegate procedural rulemaking power to either branch.[137]

---

[132] *See Uffner*, 244 F.3d at 38.

[133] GLANNON, *supra* note 97, at 34.

[134] *See* WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 1001 (4th Ed.).

[135] *Id.*

[136] *Id.* This proposition is strictly included to analogize; this Comment will not discuss this issue as it relates to the federal context.

[137] *See* MISS. CONST. art. 4, § 90(c), (s).

Section 90 of the Mississippi Constitution prohibits the legislature from passing local, private, or special laws in several matters,[138] including regulating practice in courts of justice[139] and providing for changes of venue in civil and criminal cases.[140] Some have interpreted this to be an express delegation of rulemaking power to the legislature.[141] However, because Section 90 is a limiting provision in prohibiting the legislature from passing local or special laws rather than general laws, it is unclear whether the constitution actually enumerates rulemaking power to the legislature. There is no other provision in the constitution on this issue.

Thus, the Mississippi Constitution is silent on any specific delegation of procedural rulemaking power to either the judiciary or the legislature. However, the *Newell* court said it best. The judiciary—comprised of jurists—is likely more fit to rulemake than legislators, who are "well intentioned, but over-burdened."[142] The legislature seemed to respect this proposition by its enactment of Section 9-3-61 after *Newell*.[143]

The court's primary argument for asserting its procedural rulemaking power in *Newell* was separation of powers. However, as discussed earlier, along with separation of powers comes the concept of checks and balances.[144] As co-equal branches, the legislature and the judiciary are checks on each other. In deferring to the legislature for questions of venue, the court seems to respect the legislature's authority to make procedural rules to some degree, just as the legislature did likewise with the enactment of Section 9-3-61. The reality is that neither branch should have the primary, unchallenged power to make rules, and a more cooperative system between the legislature and the judiciary is needed. As mentioned, this is the kind of system Congress and the United States Supreme Court use in drafting and revising the Federal Rules of Civil Procedure. Emulating it would allow Mississippi to attain uniformity, not only between venue rules, but all rules of procedure.

---

[138] *Id.* § 90.

[139] *Id.* § 90(s).

[140] *Id.* § 90(c).

[141] 3 JEFFREY JACKSON ET AL., ENCYCLOPEDIA OF MISSISSIPPI LAW § 19:23 (3d ed. 2021).

[142] *Newell*, 308 So. 2d at 76.

[143] The legislature delegated power to make procedural rules to the court while reserving a veto power in the legislature's judiciary committees.

[144] *Separation of Powers*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/separation_of_powers_0#:~:text=Separation%20of%20powers%20is%20a,is%20more%20powerful%20than%20another (last visited Feb. 18, 2021).

The cooperative system would begin with the presumption that the legislature ultimately has the power of procedural rulemaking.[145] Although the rest of the Mississippi Constitution is silent on whether the legislature or the judiciary has the power to make procedural rules, Sections 90(s)[146] and 90(c)[147] provide the reasonable inference that the legislature is granted the power of making procedural rules.[148] The legislature would then delegate the power to make procedural rules to the Mississippi Supreme Court, as it seemingly already has done with Section 9-3-61.[149] At this point, it would normally be up to the court to create and revise the rules themselves or delegate it to rules advisory committees.[150] However, because the legislature has also expressly provided for an advisory committee on rules by statute, the court may be obligated to delegate its initial rulemaking to the committee.[151] Because this committee is made up of members selected by various court judges, the Mississippi Bar, and other members of the legal profession, it makes sense that the committee would create the rules.[152]

A significant portion of this process is already in place under Sections 9-3-61 and 9-3-65, but the court is not obligated to send updated rules to the legislature, and this is where the cooperation should take place. In the federal process, once the U.S. Supreme Court receives updated rules from its rules advisory committee, it must approve the changes and submit them to Congress.[153] If Congress does not reject or modify the rules, those

---

[145] To analogize with the federal government: while the Constitution does not expressly indicate that Congress has the power over procedural rules, it is inferred under Articles I and III of the Constitution. U.S. CONST. art. I, III. Many states are under this presumption as well, as the Supreme Courts of those states are granted the power to make rules of civil procedure under state statute prescribed by the legislature. *See* Zachary Clopton, *Making State Civil Procedure*, 104 CORNELL L. REV. 1, 46 (2018).

[146] The legislature can make general laws regulating the practice in courts of justice. MISS. CONST. art. 4, § 90(s).

[147] The legislature can make general laws providing for changes of venue in both civil and criminal actions. *Id.* § 90(c).

[148] Thus, like Congress presumably having the power to make procedural rules under Articles I and III, the legislature presumably has the power under Sections 90(s) and 90(c). *Id.* § 90(c), (s).

[149] *See* MISS. CODE ANN. § 9-3-61. Congress has done this with the United States Supreme Court through the Federal Rules Enabling Act. *See* 28 U.S.C. § 2072(b).

[150] The United States Supreme Court delegates its authority to the Judicial Conference of the United States, whose Advisory Committee on Civil Rules, composed of lawyers, judges, and law professors, does the actual work of drafting and recommending rule changes. GLANNON, *supra* note 97, at 34.

[151] *See* MISS. CODE ANN. § 9-3-65 (West 2021).

[152] *See id.*

[153] GLANNON, *supra* note 97, at 34.

rules automatically go into effect.[154] Thus, while the rules may go into effect through Congress's inaction, the legislative branch at least has the opportunity to weigh in. Turning to Mississippi, rather than simply adopt new rules unilaterally, as the court did in the initial adoption of the Mississippi Rules of Civil Procedure, it should submit new or amended rules to the legislature for approval.

This kind of cooperative process has several benefits. For one, under the advisory committee, procedural rules are made by the types of people that are fit for creating them: judges, lawyers, law professors, and other members of the legal profession. Secondly, the court would not bear the responsibility of creating the rules but would be able to comment and make suggestions to the rules as it sees fit. Additionally, the legislature would be able to provide a check on the rules by being the final step before adoption of new or amended rules, without any issue of violating separation of powers. Finally, the constitutional standoff over rules of practice and procedure would no longer be an issue, and it would eliminate the possibility of another situation similar to that of the venue rules.

## IV. CONCLUSION

While solutions to Mississippi's venue problem can be found in different methods of interpretation, there are broader issues to consider. The venue problem is direct evidence of Page's prediction: practical difficulties inevitably arise when branches of government depart from foundational constitutional concepts.[155] Even if the venue issue is resolved, other aspects of state law are subject to practical difficulties stemming from the constitutional standoff between the legislature and the judiciary. Page concluded that, while the judiciary should contribute to rulemaking, some form of a legislative check is needed.[156] Based on the successful uniformity between federal statutory authority and the Federal Rules of Civil Procedure, the best solution is a form of cooperative process. While the cooperative process between Congress and the U.S. Supreme Court in drafting and amending the Federal Rules of Civil Procedure is arguably the best model, it is just one possible example Mississippi could consider.

---

[154] *Id.*

[155] *See* Page, *supra* note 1, at 3.

[156] *Id.* at 43.