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Contested Elections as Secret Weapon: Legislative Control over Judicial Decisionmaking

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I. INTRODUCTION

What does a battle over contested election of judges look like? In Tennessee, it has taken the form of a battle over summary judgment. Since 1971, Tennessee has chosen its appellate judges through merit selection.[1] Pursuant to the "Tennessee Plan," vacancies on the appellate bench are filled by a process of application by interested lawyers, nomination of three candidates by the Judicial Nominating Commission, appointment by the governor, evaluation by the Judicial Evaluation Commission, and retention by the voters every eight years thereafter.[2] In these retention elections, voters vote "yes" or "no" on the question: "Shall *(Name of Candidate)* be retained or replaced in office as a Judge of the *(Name of Court)*?"[3] Because the Tennessee Constitution has provided since 1835 that "Judges of the Supreme Court shall be elected by the qualified voters of the State,"[4] critics of the Tennessee Plan have argued that retention elections are unconstitutional, and that only contested elections can satisfy the constitutional

* Professor, University of Tennessee College of Law. I wish to thank my research assistants, Amanda Morse and Mitchell Panter, Class of 2013, for their outstanding research assistance.

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[1] *See* TENN. CODE ANN. § 17-4-102 (2009); Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 TENN. L. REV. 501, 509–10 (2008) (describing the Tennessee Plan for merit selection of appellate judges). Merit selection has been continuously applicable since 1971 to the judges of the two intermediate appellate courts in Tennessee, the Court of Appeals and the Court of Criminal Appeals, but between 1974 and 1994, Supreme Court justices were omitted from the Tennessee Plan. *See* Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473, 482–83 (2008).

[2] *See generally* Fitzpatrick, *supra* note 1, at 482–84.

[3] TENN. CODE ANN. § 17-4-115(b)(1) (2009).

[4] TENN. CONST. art. VI, § 3.

mandate.[5]

Because the legislation authorizing the Judicial Nominating Commission and the Judicial Evaluation Commission expired on June 30, 2008,[6] proponents of contested judicial elections began agitating for legislation establishing judicial elections or, in the alternative, an amendment to the Tennessee Constitution to provide for retention elections.[7] In 2009, however, the Tennessee General Assembly passed legislation extending the Tennessee Plan until June 30, 2012.[8] With the Tennessee Plan again set to expire, the debate over contested elections has begun anew, but with an additional twist: In January 2011, for the first time since Reconstruction, the Tennessee General Assembly convened in Nashville with a Republican majority in both houses.[9] Indeed, early in the session, a bill was introduced to abolish the Tennessee Plan and institute contested elections for all appellate judges.[10] The Lieutenant Governor and Speaker of the Senate, Senator Ron Ramsey, proposed a constitutional amendment to "legitimize" the Tennessee Plan, fearing the repercussions of "high-spending political contests" for judges.[11] Ramsey's proposal was supported by

[5] *See, e.g.*, Fitzpatrick, *supra* note 1, at 476 (explaining possible unconstitutionality in selection process and advocating for elections). Professor Fitzpatrick has recently expressed a preference "to take voters out of the equation altogether and follow a system similar to the process of appointing federal judges." Blake Farmer, *Judicial Selection Critics Wave Caution Flag on Constitutional Amendment*, WPLN NEWS (Jan. 25, 2012), http://wpln.org/?p=33376; *see also infra* note 13 and accompanying text. This view is in contrast to both his initial 2008 article and a follow-up essay later that year. *See* Fitzpatrick, *supra* note 1, at 476; Brian T. Fitzpatrick, *Errors, Omissions, and the Tennessee Plan*, 39 U. MEM. L. REV. 85, 109 (2008) ("[F]or better or for worse, the Tennessee Constitution strikes a different balance between judicial independence and democratic accountability than does the federal constitution. These differences obviously need to be respected when interpreting the Tennessee Constitution.").

[6] *See* Fitzpatrick, *supra* note 1, at 485 n.109. The activities of the two commissions would cease one year from that date, on June 30, 2009. *See id.* at 485 n.110.

[7] Indeed, Professor Fitzpatrick's article, funded by the Federalist Society, was part of this effort. *See* Fitzpatrick, *supra* note 1, at 473 n.a1.

[8] 2009 Tenn. Pub. Acts Ch. No. 517.

[9] *See* Andy Sher, *New GOP Era Begins in Assembly*, CHATTANOOGA TIMES FREE PRESS, Jan. 10, 2011, http://www.timesfreepress.com/news/2011/jan/10/new-gop-era-begins-in-assembly/. The Republican majority is significant because, for historical reasons, since the end of Reconstruction, Tennessee appellate judges have been overwhelmingly Democratic. *See infra* note 205.

[10] S.B. 0699/H.B. 0958, 107th Gen. Assemb., 1st Reg. Sess. (Tenn. 2011); *see* Tom Humphrey, *Adversaries Become Allies to Protect Tennessee Judge Selection Process*, KNOXVILLE NEWS SENTINEL, Aug. 6, 2011, http://www.knoxnews.com/news/2011/aug/06/adversaries-become-allies-to-protect-tennessee/.

[11] *See* Humphrey, *supra* note 10. Although the Tennessee Supreme Court has twice upheld the constitutionality of retention elections, see White & Reddick, *supra* note 1, at 513–14, 521–22, Ramsey calls these decisions a "wink and nod to the Constitution." Humphrey, *supra* note 10.

both Tennessee Governor Bill Haslam, also a Republican, and House Speaker Beth Harwell.[12] However, Republican legislators broke with their leadership to pass a resolution in support of a constitutional amendment combining the federal advise-and-consent model for nominating judges with the current system of judicial retention elections.[13] Supporters of the current system have expressed concern that the constitutional amendment route is simply "a back door way to bring on popular election of judges."[14]

But the battle over contested election for appellate judges cannot be evaluated in a vacuum. In Tennessee, the issue of contested elections is part of a much larger issue: legislative power over the judiciary. Ironically, when Tennessee entered the union in 1796, its constitution called for complete legislative control over the judiciary, including election of all judges "by joint ballot of the two houses of the General Assembly."[15] Legislative power over the judiciary gradually eroded[16] until, in 1978, the General Assembly passed a comprehensive reform package which reorganized the Tennessee trial courts and granted the supreme court greater rulemaking power.[17] But with the advent of the Republican-controlled General Assembly, challenges have been raised to the supreme court's power to appoint the Attorney General[18] and to the operation of the Court of the Judiciary, the disciplinary body that oversees all Tennessee judges, a majority of whose members are appointed by the Tennessee Supreme Court.[19] This makes

[12] Tom Humphrey, *Haslam, Harwell, Ramsey Unite Behind Judge Selection Plan*, KNOXVILLE NEWS SENTINEL, Jan. 25, 2012, http://www.knoxnews.com/news/2012/jan/25/haslam-harwell-ramsey-unite-behind-judge-plan/. For the constitutional amendment to be successful, it would have to garner the support of two-thirds of both houses of the Tennessee General Assembly in both 2012 and 2013 and a support of the majority of Tennesseans voting in the next gubernatorial election, in 2014. *See* TENN. CONST. art. XI, § 3.

[13] *See* S.J. Res. 0710, 107th Gen. Assemb., 2d Reg. Sess. (Tenn. 2012).

[14] Humphrey, *supra* note 12 (quoting House Democratic Caucus Chairman Mike Turner (D-Old Hickory)); *see also* Frank Cagle, *Appointing State Appellate Justices Unconstitutional*, METROPULSE (Feb. 1, 2012), http://www.metropulse.com/news/2012/feb/01/appointing-state-appellate-justices-unconstitution/.

[15] *See generally* White & Reddick, *supra* note 1, at 503–04 (discussing legislative power over the courts).

[16] Legislative election of judges continued until adoption of an amendment to the Constitution in 1853. *Id.* at 505–06; *see also infra* Part III.

[17] *See* White & Reddick, *supra* note 1, at 519. Legislative power over the nominating process continues, however, as the speakers of both houses of the General Assembly are empowered to appoint all seventeen members of the Judicial Nominating Commission. *See* Fitzpatrick, *supra* note 1, at 483.

[18] Tennessee is unique in that its Constitution requires the Supreme Court to appoint the Attorney General. TENN. CONST. art. VI, § 5.

[19] *See* TENN. CODE ANN. § 17-5-101 (2009); *see generally* Tom Humphrey, *Tennessee Leaders Struggle over Who Judges the Judges*, KNOXVILLE NEWS SENTINEL, Aug. 28, 2011,

Tennessee one among many states in which the legislature has openly challenged the power of the judiciary.[20]

An additional line of attack has been opened on individual rulings of the supreme court. In the 2011 session of the General Assembly, the majority succeeded in passing legislation overruling two recent decisions of the Tennessee Supreme Court that were seen as excessively pro-plaintiff and thus unfriendly to business interests.[21] In the first of those decisions, *Hannan v. Alltel Publishing Co.*,[22] the supreme court interpreted Tennessee Rule of Civil Procedure 56 and rejected the federal *Celotex* standard for summary judgment,[23] instead requiring that the movant for summary judgment either "negate an essential element of the [nonmovant's] claim" or "show that the [nonmovant] cannot prove an essential element of [its case] at trial" in order to prevail on its summary judgment motion.[24] In the second decision, *Gossett v. Tractor Supply Co.*, the court rejected the federal *McDonnell-Douglas* framework for evaluating summary judgment motions in retaliatory discharge cases, holding instead that the *Hannan* summary judgment standard should be applied to those cases.[25]

These two legislative attacks on specific supreme court rulings could be viewed simply as isolated victories by special interests, or as discrete instances of legislative dissatisfaction with specific rulings of the court. Indeed, by flexing its legislative muscle, the General Assembly might simply be showing its disregard for the judicial branch; the legislature might be saying that it is the ultimate arbiter of the law of Tennessee. But this relatively benign interpretation of the legislature's action overlooks the larger context. The General Assembly's attempt to control the summary judgment standard constitutes a broadside attack on the supreme

http://www.knoxnews.com/news/2011/aug/28/tennessee-leaders-struggle-over-who-judges-the/ (discussing the individuals "in charge of [judicial] discipline" in Tennessee); Brandon Gee, *Turf Battle Between Legislature, Judiciary Lies on Horizon in Tenn.*, TENNESSEAN, Jan. 3, 2012, at 1A.

[20] *See* John Gibeaut, *Co-Equal Opportunity*, A.B.A. J., Jan. 2012, at 44, 46 ("[B]y 2011, the number and scope of legislative attacks had grown in dozens of states and covered nearly all phases of court administration, decision-making and judicial selection.").

[21] Gossett v. Tractor Supply Co., 320 S.W.3d 777 (Tenn. 2010), *superseded by statute*, Act of May 21, 2011, ch. 461, 2011 Tenn. Pub. Acts (codified at TENN. CODE ANN. §§ 4-21-311(e) (2011), 50-1-304(g) (Supp. 2011), 50-1-801 (Supp. 2011)); Hannan v. Alltel Publ'g Co., 270 S.W.3d 1 (Tenn. 2008), *superseded by statute*, Act of May 20, 2011, ch. 498, 2011 Tenn. Pub. Acts (codified at TENN. CODE ANN. § 20-16-101 (Supp. 2011)).

[22] *Hannan*, 270 S.W.3d at 1.

[23] Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

[24] *Hannan*, 270 S.W.3d at 9.

[25] *Gossett*, 320 S.W.3d at 777.

court's ability to interpret its own rules. And, by holding contested elections—the proverbial "sword of Damocles"—over the head of the supreme court, the legislature dared the court to reinstate the *Hannan* standard by holding the legislation unconstitutional. Thus, whatever power the General Assembly believes it has to control the interpretation of the rules of civil procedure is augmented by its threat to subject the justices of the supreme court and intermediate appellate court judges to contested elections.

In the remainder of this article, we will explore the role of summary judgment in the current showdown between the Tennessee Supreme Court and the General Assembly. In Part II, we will briefly discuss Public Chapter No. 498. In Part III, we will explore the constitutionality of the Act repealing *Hannan*. In Part IV, we will examine whether the Act exceeds the General Assembly's statutory rulemaking powers. And in Part V, we will conclude by restating the larger context, including the political realities, of the inter-branch battle.

II. PUBLIC CHAPTER NO. 498

On the last day of the 2011 regular legislative session, May 20, the Tennessee General Assembly passed Public Chapter No. 498, which purported to overrule *Hannan* by adopting the *Celotex* standard for summary judgment.[26] The operative section of the Act creates a new section of the Tennessee Code Annotated, section 20-16-101, which reads as follows:

> In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:
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> (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
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> (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.[27]

The enacted bill contained findings that expressed the legislature's purpose to overrule *Hannan* on the basis of its conflict with federal law and the finding, unsupported by any evidence in

[26] Act of May 20, 2011, ch. 498, 2011 Tenn. Pub. Acts (codified at TENN. CODE ANN. § 20-16-101 (Supp. 2011)).

[27] TENN. CODE ANN. § 20-16-101 (Supp. 2011).

the legislative history, that "this higher *Hannan* standard results in fewer cases being resolved by summary judgment in state court, increasing the litigation costs of litigants in Tennessee state courts and encouraging forum shopping . . . ."[28] The enacted bill also provided that "[e]xcept as set forth herein, Rule 56 of the Tennessee Rules of Civil Procedure remains unchanged."[29]

The most obvious question arising from this attempt to either amend Tennessee Rule of Civil Procedure 56 or overrule the Tennessee Supreme Court's interpretation of it is whether the enactment is constitutional.[30] The stage is set for the Tennessee Supreme Court to answer the age-old question: "Who has the power to prescribe the procedure of the . . . courts?"[31] Because there is no precise federal or state analogue to what has happened in Tennessee—and because Tennessee's current supreme court is especially astute and articulate in matters of civil procedure[32]—the constitutional challenge that is sure to come will shed light on the current status of inter-branch power on the state level.[33]

A second question arising from enactment of the new law is whether the legislature can depart from its own established processes for amending court rules of practice and procedure.[34] In Tennessee, as in the federal system, the constitution establishes only the supreme court, reserving to the legislature the power to establish inferior courts.[35] Analogous to Congress's enactment of the Rules Enabling Act,[36] the Tennessee legislature has arguably delegated rulemaking power for the inferior courts to the Tennessee Supreme Court: "The supreme court may make rules of practice for

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[28] Act of May 20, 2011, ch. 498, 2011 Tenn. Pub. Acts. One commentator has mistakenly asserted that "[t]he preamble did not make it into the final version of the law." Andrée Sophia Blumstein, *Bye Bye Hannan? What a Difference Two Little Words, at Trial, Can Make in the Formulation of Tennessee's Summary Judgment Standard*, TENN. B.J., Aug. 2011, at 14, 16 n.14.

[29] Act of May 20, 2011, ch. 498, § 2, 2011 Tenn. Pub. Acts.

[30] *See* 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1001 (3d ed. 2002).

[31] *Id.*

[32] For example, the Tennessee Supreme Court recently rejected the federal plausibility pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), in a strongly reasoned decision. *See* Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 425 (Tenn. 2011).

[33] However, the legislature could be viewed as engaging in an inter-branch game of "chicken" by using the specter of popular election of Tennessee's appellate court judges, including the justices of the supreme court, as a deterrent to the court's robust review of the act.

[34] *See* TENN. CODE ANN. § 16-3-404 (2009).

[35] TENN. CONST. art. VI, § 1.

[36] *See* 28 U.S.C. § 2072 (2011).

the better disposal of business before it."[37] "The supreme court has the power to prescribe by general rules the forms of process, writs, pleadings and motions, and the practice and procedure in all of the courts of this state in all civil and criminal suits, actions and proceedings."[38] "[Such rules] shall not abridge, enlarge or modify any substantive right, and shall be consistent with the constitutions of the United States and Tennessee."[39]

Tennessee's process for promulgating the rules of civil procedure differs from the federal process, however. While Congress has a negative veto over rules presented to it by the U.S. Supreme Court,[40] the Tennessee General Assembly must positively approve by joint resolution the rules presented to it by the Tennessee Supreme Court.[41] Thus, the version of Tennessee Rule of Civil Procedure 56 interpreted by the Tennessee Supreme Court in *Hannan* was actually enacted by a majority vote of the General Assembly in 1971.[42]

Yet, despite this explicit delegation of rulemaking power to the Tennessee Supreme Court by the Tennessee legislature, the Tennessee Supreme Court has referred repeatedly to its "inherent power" to promulgate rules of practice and procedure.[43] Never before has the General Assembly attempted to amend a rule of civil procedure (or, alternatively, to legislatively overrule the Tennessee Supreme Court's interpretation of a rule of civil procedure); thus, there is no case that answers the question of whether the

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[37] TENN. CODE ANN. § 16-3-401 (2009).

[38] *Id.* § 16-3-402.

[39] *Id.* § 16-3-403.

[40] *See* 28 U.S.C. § 2074 (2011).

[41] TENN. CODE ANN. § 16-3-404.

[42] Tennessee first adopted its rules of civil procedure, modeled on the Federal Rules of Civil Procedure, in 1971, to become effective on January 1, 1971. *See* TENN. R. CIV. P. 56. Major amendments to Rule 56 were enacted pursuant to the statutory process in 1993. *Id.* Rule 56 was last amended in 2007. *Id.*

The standard for granting summary judgment in Tennessee Rule of Civil Procedure 56 is virtually identical to that of Federal Rule of Civil Procedure 56. *Compare* TENN. R. CIV. P. 56.04 ("[T]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that *there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law*." (emphasis added)), *with* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that *there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law*." (emphasis added)).

[43] *See, e.g.*, State v. Mallard, 40 S.W.3d 473, 480–81 (Tenn. 2001) ("Only the Supreme Court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state."); State v. Reid, 981 S.W.2d 166, 170 (Tenn. 1998) ("It is well settled that Tennessee courts have inherent power to make and enforce reasonable rules of procedure."); Brewer v. State, 215 S.W.2d 798, 800 (Tenn. 1948) (recognizing a trial court's inherent power to "make rules of practice deemed . . . necessary for the proper trial of cases").

legislature can change a rule of civil procedure without following its own processes for doing so.

The history of the summary judgment standards in Tennessee prior to Public Chapter No. 498 can provide useful background to the present examination. An in-depth treatment of those issues and a discussion of the legislative history of the enactment itself can be found elsewhere.[44]

III. IS THE ACT CONSTITUTIONAL?

The legislative caption to Public Chapter Number 498 indicates that its purpose was to overrule the Tennessee Supreme Court's interpretation of Tennessee Rule of Civil Procedure 56 in *Hannan*.[45] The language now codified at Tennessee Code Annotated section 20-16-101 goes beyond that stated purpose and appears to overrule the language of Rule 56 itself.[46] Even if, however, the legislation only overrules *Hannan*, it is open to a constitutional challenge on separation of powers grounds. A review of the history of relevant provisions of the Tennessee Constitution, as well as like provisions in other jurisdictions, suggests that such a challenge may have merit.

A. Separation of Powers Under the Tennessee Constitution

Unlike the United States Constitution, the Tennessee Constitution contains an explicit separation of powers clause.[47] Article II, section 1 of the Tennessee Constitution provides that "[t]he powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial"[48] while article II, section 2 states that "[n]o person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others," except as otherwise permitted in the constitution.[49] This language was not present in the original

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[44] *See generally* Judy M. Cornett & Matthew R. Lyon, *Redefining Summary Judgment by Statute: The Legislative History of Tennessee Code Annotated Section 20-16-101*, 8.1 TENN. J.L. & POL'Y 100 (2012).

[45] Act of May 20, 2011, ch. 498, 2011 Tenn. Pub. Acts ("WHEREAS, the purpose of this legislation is to overrule the summary judgment standard for parties who do not bear the burden of proof at trial set forth in *Hannan v. Alltel Publishing Co.*, its progeny, and the cases relied on in Hannan.").

[46] Cornett & Lyon, *supra* note 44, at 130–31.

[47] TENN. CONST. art. II, § 2.

[48] *Id.* art. II, § 1.

[49] *Id.* art. II, § 2.

1796 version of the Tennessee Constitution.[50] That document, like the North Carolina Constitution upon which it was based, subjugated the judicial branch to the legislative branch by providing in Article V, section 1 that "[t]he judicial power of the state shall be vested in such superior and inferior courts of law and equity, as the legislature shall, from time to time, direct and establish."[51] Judges were elected by the General Assembly and served at its pleasure.[52] Although Tennessee courts, at times, spoke of the principle of the separation of powers in glowing terms,[53] they were, for all intents and purposes, beholden to the legislature.[54] This situation was untenable; "[c]ompetence and independent thought suffered to such an extent that . . . a complete overhaul of the judicial system was necessary."[55]

To this end, the delegates to the 1834 Tennessee constitutional convention agreed both to incorporate the aforementioned sections

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[50] *See* WALLACE MCCLURE, STATE CONSTITUTION-MAKING, WITH ESPECIAL REFERENCE TO TENNESSEE 44 (1916).

[51] *See* LEWIS L. LASKA, THE TENNESSEE STATE CONSTITUTION: A REFERENCE GUIDE 3 (1990) (quoting TENN. CONST. of 1796, art. V, § 1.); *see also* Bank of the State v. Cooper, 10 Tenn. (2 Yer.) 599, 601 (1831) (citing the power of the legislature to create courts under the constitution); JOSHUA W. CALDWELL, STUDIES IN THE CONSTITUTIONAL HISTORY OF TENNESSEE 148–49 (2d ed. 1907) (characterizing this as "one of the most defective and ill-considered of [the] provisions" of the 1796 Constitution and observing that "[i]t should have been plain to anyone . . . that a court created by the Legislature and subject to abolition in the same manner, was not an independent body, and certainly not co-ordinate with the law-making power").

[52] LASKA, *supra* note 51, at 4; *see also* White & Reddick, *supra* note 1, at 504 (observing that, under the 1796 Constitution, "courts only existed *if*, and *when*, and *as long* as the legislature desired" and that "the legislature maintained the power to abolish the supreme court since it was not created by the constitution").

[53] In *Cooper*, for example, Judge Jacob Peck expounded upon separation of powers principles as follows:

> The framers of the constitution never dreamed of admitting the exercise of arbitrary power in any department of the government. The legislative, the executive and the judicial departments are three lines of equal length, balanced against each other, and the framework, forming an equilateral triangle, becomes stronger the more its parts are pressed. Like the foundation of our religion, the trinity, it is the key on which the whole arch rests. The people have erected it; they have seen its suitability for duration, and compared its proportions with the external view of the pyramid, whose age is untold, and which alone, of all the works of man, has withstood the ravages of time.

Cooper, 10 Tenn. (2 Yer.) at 611.

[54] *See* LASKA, *supra* note 51, at 8. Lewis Laska indicates that:

> Legislative control of the judiciary in general was the cause of many of the court system's deficiencies. Frequent legislative modifications of the system served only to exacerbate the problems. The threat of politically motivated impeachment continually hung above the judges' heads [and] unsuccessful litigants commonly turned to the general assembly seeking legislative redress through private acts, an early fixture in Tennessee statutory law.

Id.

[55] *Id.* at 64.

regarding the separation of powers and to vest the judicial powers "in one Supreme Court, in such Inferior Courts as the Legislature shall from time to time ordain and establish . . . ."[56] Together, Article II, sections 1 and 2 and Article VI, section 1 of the 1835 constitution establish the judiciary as an independent branch of government in Tennessee, one "which cannot easily be manipulated and controlled by the legislature, and which serves as a check upon its power."[57] In the years following the adoption of the 1835 constitution, Tennessee courts repeatedly stressed the vitality of the separation of powers doctrine and the importance of maintaining the integrity of the branches of government.[58] The constitution, however, left two key issues unaddressed: the scope of the judicial powers and the methods available to the courts to protect those powers.

First, although Article II, sections 1 and 2 of the Tennessee Constitution and the cases interpreting those sections make clear that the judicial branch is an independent department of the government and that the legislative and executive branches are not to usurp its powers, the provisions are silent on the extent of the judicial powers.[59] Thus, it was left to the courts to consider their scope. In one early case, the Tennessee Supreme Court quoted

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[56] TENN. CONST. of 1835, art. VI, § 1. Note, however, that the decision to broaden the independence of the judicial branch was not unanimous; Newton Cannon, who would serve as Tennessee's Governor from 1835 to 1839, and was "one of the leading members of the [1834] Convention," made a motion to restore the language of article V, section 1 of the 1796 Constitution, which nineteen other delegates supported. *See* CALDWELL, *supra* note 89, at 203–04.

[57] LASKA, *supra* note 51, at 111 (citing Miller v. Conlee, 37 Tenn. (5 Sneed) 432, 433 (1858)); *see* CALDWELL, *supra* note 51, at 197. However, the legislature retained the responsibility for electing judges until 1853. MCCLURE, *supra* note 50, at 54–55.

[58] *See, e.g.*, Richardson v. Young, 125 S.W. 664, 670 (Tenn. 1910) ("[T]he powers that are committed by the people to one branch cannot be exercised by those performing duties in another without express authority to do so, or the exercise of such powers becomes essential or appropriate to the effective discharge of the duties imposed upon such branch.") (quoting Overshiner v. State 59 N.E. 468, 469 (Ind. 1901)); Mabry v. Baxter, 58 Tenn. (11 Heisk.) 682, 689 (1872) ("It is essential to the maintenance of republican government, that the action of the legislative, judicial and executive departments should be kept separate and distinct, as it is expressly declared it shall be by the Constitution, Art. 2, secs. 1 & 2. The most responsible duty devolving upon this court is to see that this injunction of the Constitution shall be faithfully observed."); State v. Armstrong, 35 Tenn. (3 Sneed) 634, 654 (1856) ("[E]ach department is limited within its own appropriate sphere. To each has been delegated by the people—whose agents they are—such portion of sovereignty as was deemed expedient. . . . [N]either can assume the exercise of any of the powers conferred upon either of the others . . . .").

[59] *See Richardson*, 125 S.W. at 668 ("The Constitution does not define in express terms what are legislative, executive, or judicial powers."); *see also* discussion *infra*, of other state constitutional provisions that expressly designate certain powers and responsibilities to the judicial branch.

Chief Justice John Marshall of the United States Supreme Court for the proposition that "the difference between the departments, undoubtedly is, that the legislator makes, the executive executes, and the judiciary construes the law."[60] Broadly, this means that "[t]he legislative branch has the authority to make, alter, and repeal the law; the executive branch administers and enforces the law; and the judicial branch has the authority to interpret and apply the law."[61] The courts also enjoy certain inherent powers necessary to carry out their judicial function, including, but not necessarily limited to, the power to enforce their judgments[62] and to promulgate rules governing their own practice and procedure.[63] As discussed below,[64] this power to develop and enact rules of procedure governing the courts has been recognized by the General Assembly.[65] The power of the courts to promulgate necessary procedural rules however, "exists by virtue of the establishment of a court and not by largess of the legislature."[66] In other words, the rulemaking power recognized by the legislature does not necessarily define the scope of that power, which derives from a state constitution "which, by necessity, grants all powers necessary to engage in the complete performance of the judicial function."[67]

Relying upon their inherent powers, and looking to Chief Justice Marshall's seminal opinion in *Marbury v. Madison*,[68] Tennessee courts have used the power of judicial review to strike down laws that unconstitutionally infringe upon the powers of the judiciary.[69]

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[60] *Mabry*, 58 Tenn. (11 Heisk.) at 690 (quoting Wayman v. Southard, 23 U.S. 1, 46 (1825)).

[61] Richardson v. Tenn. Bd. of Dentistry, 913 S.W.2d 446, 453 (Tenn. 1995) (citing TENN. CONST. art. II, §§ 1, 2; State v. Brackett, 869 S.W.2d 936, 939 (Tenn. Crim. App. 1993)); *accord* Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827, 843 n.8 (Tenn. 2008) (citing *Richardson*, 125 S.W. at 668); State v. King, 973 S.W.2d 586, 588 (Tenn. 1998) (quoting *Brackett*, 869 S.W.2d at 939); Caudill v. Foley, 21 S.W.3d 203, 209 (Tenn. Ct. App. 1999) (citing *Richardson*, 913 S.W.2d at 453; *Richardson*, 125 S.W. at 668; *Brackett*, 869 S.W.2d at 939).

[62] *See, e.g.*, Chaffin v. Robinson, 213 S.W.2d 32, 34 (Tenn. 1948); Osgood Co. v. Bland, 141 S.W.2d 505, 506 (Tenn. Ct. App. 1940).

[63] *See Chaffin*, 213 S.W.2d at 34; *Osgood Co.*, 141 S.W.2d at 506–07; *see also* State v. Reid, 981 S.W.2d 166, 170 (1998) (recognizing Tennessee court's "inherent power to make and enforce reasonable rules of procedure" (citations omitted)).

[64] *See* discussion *infra* Part IV.

[65] *See* TENN. CODE ANN. §§ 16-3-401 to -402 (2009); *Reid*, 981 S.W.2d at 170.

[66] Haynes v. McKenzie Mem'l Hosp., 667 S.W.2d 497, 498 (Tenn. Ct. App. 1984) (citing Anderson Cnty. Quarterly Court v. Judges of 28th Judicial Circuit, 579 S.W.2d 875 (Tenn. Ct. App. 1978)).

[67] *Anderson Cnty. Quarterly Court*, 579 S.W.2d at 877.

[68] Marbury v. Madison, 5 U.S. 137 (1803).

[69] In denying a petition to rehear in *Biggs v. Beeler*, 173 S.W.2d 946 (Tenn. 1943), Justice Alexander Chambliss wrote that beginning with *Marbury*,

in which Chief Justice Marshall sailed an uncharted sea, and, citing no authority, relied

This is not to say the courts have exercised this power with relish or abandon. To the contrary, Tennessee's courts have displayed caution in finding a legislative act unconstitutional for any reason,[70] but particularly due to a perceived violation of the separation of powers.[71] This hesitance is due to several factors. First, the courts understand that their own autonomy and power as a co-existent branch of government depends upon the recognition of the power of the other branches within their own spheres.[72] Second, "it is impossible to preserve perfectly the theoretical lines of demarcation between the executive, legislative and judicial branches of government."[73] Indeed, the Tennessee Supreme Court recently

> alone on principle and reason, our Courts have not hesitated to strike down legislative action which disregarded, transgressed and defeated, either directly or indirectly, mandates of the organic and fundamental law laid down in the Constitution. This in the performance of their sworn duty, undeterred by clamor or criticism.

Id. at 948; *see also* Caudill v. Foley, 21 S.W.3d 203, 209–10 (Tenn. Ct. App. 1999) (citing cases in which the courts held statutes "unconstitutional and void" (citations omitted)).

[70] *See, e.g.*, Waters v. Farr, 291 S.W.3d 873, 882 (Tenn. 2009) ("Our charge is to uphold the constitutionality of a statute wherever possible. 'In evaluating the constitutionality of a statute, we begin with the presumption that an act of the General Assembly is constitutional.'" (citing and quoting State v. Pickett, 211 S.W.3d 696, 700 (Tenn. 2007)).

[71] *See* Tenn. Envtl. Council v. Water Quality Control Bd., 250 S.W.3d 44, 53 (Tenn. 2007) ("[T]he courts are required by the separation of powers doctrine to respect the General Assembly's considerable legislative discretion, and to presume that legislative actions are constitutional." (citation omitted)). *But see Anderson Cnty. Quarterly Court*, 579 S.W.2d at 878 ("[T]he separation of powers doctrine, properly understood, imposes on the judicial branch not merely a [*n*]*egative* duty *not* to interfere with the executive or legislative branches, but a *positive* responsibility to perform its own job efficiently. This *positive* aspect of separation of powers imposes on courts affirmative obligations to assert and fully exercise their powers, to operate efficiently by modern standards, to protect their independent status, and to fend off legislative or executive attempts to encroach upon judicial prerogatives.").

[72] In an opinion written at the turn of the twentieth century, the state supreme court wrote:

> In the division of the powers of the three separate and co-ordinate branches of the government certain powers are confided to each, and the judiciary has no more right or warrant to invade and usurp the powers vested in either of the other branches of the government than have the other branches the right to invade and usurp the powers confided to the judicial department of the government; and to do so would be to violate that provision of the constitution so earnestly relied upon by the defendant,—that the three departments of the government are separate and distinct. And, on the other hand, if the court should permit itself to be influenced in the slightest degree by what had been said or done in political conventions, or what had been said and done in obedience to public opinion, in its investigation of and construction of the constitution, it would tend to destroy its own independence, which, in its own sphere, is as absolute and as much protected and guarded in the constitution as is that of the other departments in their respective spheres. It is only by remembering the limits of the power confided to the judicial department of the government and respecting the independence of the other departments, that the judiciary can maintain its own independence in the proper sense of the term . . . .

State *ex rel.* Robinson v. Lindsay, 53 S.W. 950, 951–52 (Tenn. 1899).

[73] Underwood v. State, 529 S.W.2d 45, 47 (Tenn. 1975) (citing Bank of Commerce & Trust Co. v. Senter, 260 S.W. 144, 151 (Tenn. 1924); Richardson v. Young, 125 S.W. 664 (Tenn.

observed that "the Constitution of Tennessee does not prohibit the three branches of government from cooperating with each other," and that, in fact, "[t]he public welfare demands cooperation between the legislative and judicial branches of our government, and an avoidance of unnecessary controversies between them."[74] Given these restrictions on the use of judicial review, it is instructive to briefly survey the cases in the modern era in which Tennessee courts have exercised the power to preserve their ability to enact rules of practice and procedure, as well as circumstances in which the courts have deferred to the legislature.

1. Cases Asserting Power in the Judicial Branch

One area in which the separation of powers issue has arisen is in the regulation of attorneys. In *Belmont v. Board of Law Examiners*,[75] the petitioner, who had previously failed the Tennessee bar examination four times, was denied the opportunity to sit for the exam a fifth time by the Board of Law Examiners, an administrative arm of the Tennessee Supreme Court, pursuant to a supreme court Rule.[76] His petition for writ of certiorari to the Tennessee Supreme Court argued that the court's rule was rendered null and void by a statute that prohibited any state licensing agency from enforcing a rule or regulation limiting the number of times that an otherwise qualified person could sit for a licensing examination.[77] The court held that the statute could apply to boards, commissions, and agencies that are supervised by the

1910)); *see also* State v. King, 973 S.W.2d 586, 588–89 (Tenn. 1998) ("[B]ecause the defining powers of each department are not always readily identified, recognizing an encroachment by one department upon another is sometimes difficult." (quoting Summers v. Thompson, 764 S.W.2d 182, 189 (Tenn. 1988)); House v. Creveling, 250 S.W. 357, 359 (Tenn. 1923) (recognizing the difficulty in preserving the "theoretical lines" between the branches of the government).

[74] *In re* Bell, 344 S.W.3d 304, 314 n.13 (Tenn. 2011) (quoting Petition for Rule of Court Activating, Integrating & Unifying the State Bar of Tenn., 282 S.W.2d 782, 787 (Tenn. 1955)). *Bell* referred specifically to the statute creating the Court of the Judiciary, which investigates and determines sanctions for misconduct by Tennessee judges. *Id.* at 313. While promoting the Court of the Judiciary as an example of inter-branch cooperation, the court also reiterated that the General Assembly has recognized that it is the court that "has 'general supervisory control over all the inferior courts of the state' . . . and that this inherent, plenary power derives from the common law and not from the General Assembly." *Id.* at 313 (quoting TENN. CODE ANN. §§ 16-3-501 to -503 (2009)). The recent controversy over the Court of Judiciary in Tennessee is discussed further *infra*, Part IV.

[75] Belmont v. Bd. of Law Exam'rs, 511 S.W.2d 461 (Tenn. 1974).

[76] *Id.* at 462.

[77] *Id.* at 462–63 (citing TENN. CODE ANN. § 4-1902 (current version at TENN. CODE ANN. § 4-19-102 (2011)).

legislature, but that an amendment to the statute that specifically applied it to the Board of Law Examiners,[78] an agency of the judicial branch, was unconstitutional.[79] The court relied heavily upon a then-recent decision by the Tennessee Court of Appeals,[80] in which the intermediate appellate court had written that the "supreme judicial and judicial supervisory power is an inherent power of the supreme court and has been so recognized by the legislative branch of our government,"[81] and that "'[i]f the matter of admission of an attorney to the bar is an exercise of a judicial power, that power lies with the supreme court and constitutionally cannot be interfered with by the legislative department of the tripartite government of this State.'"[82] Having held the application of the statute to the Board of Law Examiners unconstitutional on separation of powers grounds, the court dismissed the petition.[83]

After *Belmont*, the supreme court addressed whether the Tennessee Board of Dentistry, an administrative board responsible for licensing, regulating, and disciplining Tennessee's practitioners of dentistry, had the power to consider the constitutionality of a statute assessing civil penalties.[84] Citing cases from other jurisdictions, the court observed that it is "widely recognized" that "[a]n agency is not authorized to consider or question the constitutionality of a legislative act; nor may it declare unconstitutional the statutes which it was created to administer or enforce."[85] The basis for this general rule in Tennessee is the separation of powers provisions in the state constitution and the fact that, since *Marbury v. Madison*, "it has been the sole obligation of the judiciary to interpret the law and determine the

[78] *See* 1972 Tenn. Pub. Acts 1293.

[79] *Belmont*, 511 S.W.2d at 464.

[80] Cantor v. Brading, 494 S.W.2d 139 (Tenn. Ct. App. 1973). That case involved an action by former lawyers who had been permanently disbarred and sought a decree of reinstatement pursuant to a statute enacted by the General Assembly in 1971. *Id.* at 139 (citing TENN. CODE ANN. §§ 29-3-201 to-204 (repealed March 30, 2000)). The Court of Appeals held that admission of attorneys to the bar falls within the inherent powers of the judicial branch, and that the statute violated the separation of powers clause by "strip[ping] the Supreme Court of its right to exercise its inherent power to consider the qualifications of a formerly disbarred person and to determine whether to grant him a license and admit him to practice law again." *Cantor*, 494 S.W.2d at 145.

[81] *Belmont*, 511 S.W.2d at 463 (quoting *Cantor*, 494 S.W.2d at 142).

[82] *Belmont*, 511 S.W.2d at 463 (quoting *Cantor*, 494 S.W.2d at 141).

[83] *Belmont*, 511 S.W.2d at 464.

[84] Richardson v. Tenn. Bd. of Dentistry, 913 S.W.2d 446, 449 (Tenn. 1995). The Board had held that "it was without jurisdiction to consider federal or state constitutional challenges to the statute or its application . . . ." *Id.* at 450–51.

[85] *Id.* at 452.

constitutionality of actions taken by the other two branches of government."[86] Ultimately, the court clarified that "[t]he facial constitutionality of a statute may not be determined by an administrative tribunal in an administrative proceeding," but that an agency may initially rule on an "'as applied' challenge to the constitutionality of a statute" and "may address a claim that an agency's procedure is constitutionally deficient."[87] Following the principles set forth in *Richardson*, the court recently interpreted a provision of the Uniform Administrative Procedures Act.[88] The court held that, to the extent the provision required a petitioner to exhaust administrative remedies before filing a declaratory judgment action challenging the constitutionality of a statute on its face, the provision violated separation of powers principles.[89]

The court's most emphatic statement regarding the separation of powers in recent years is its 2001 decision in *State v. Mallard*.[90] In *Mallard*, the court considered a statute that set forth several enumerated factors for courts to consider, "in addition to all other logically relevant factors," when "determining whether a particular object is drug paraphernalia as defined by [Tennessee Code Annotated section] 39-17-402."[91] One of the factors to consider was "[p]rior convictions, if any, of the owner or of anyone in control of the object for violation of any state or federal law relating to controlled substances . . . ."[92] The lower courts had held that by requiring courts to consider prior convictions as evidence, the statute directly conflicted with Tennessee Rule of Evidence 404(b), which stated that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait" except in certain circumstances.[93] Justice William M. ("Mickey") Barker, writing for a unanimous court, engaged in an extended discussion of the separation of powers clause and the power granted to the judiciary by the Tennessee Constitution.[94]

The court observed that, while it may consent to the legislature's

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[86] *Id.* at 453 (citing Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 148 (Tenn. 1993)).

[87] *Richardson*, 913 S.W.2d at 454–55.

[88] TENN. CODE ANN. § 4-5-225 (2011).

[89] Colonial Pipeline Co. v. Morgan, 263 S.W.3d 827, 845–46 (Tenn. 2008).

[90] State v. Mallard, 40 S.W.3d 473 (Tenn. 2001).

[91] *Id.* at 479 n.4 (quoting TENN. CODE ANN. § 39-17-424 (1997)).

[92] TENN. CODE ANN. § 39-17-424(2).

[93] *Mallard*, 40 S.W.3d at 480 (quoting TENN. R. EVID. 404(b)).

[94] *See id.* at 475, 480–83.

enacting rules of evidence from time to time, "any exercise of that power . . . must inevitably yield when it seeks to govern the practice and procedure of the courts," because "[o]nly the supreme court has the inherent power to promulgate rules governing the practice and procedure of the courts of this state."[95] For any other branch of government to exercise this power would violate article II, section 2 of the Tennessee Constitution, as "[t]he court is supreme in fact as well as in name."[96] Although Tennessee courts have, from time to time, agreed to rules of procedure or evidence promulgated by the legislature where such rules "(1) are reasonable and workable within the framework [of] the judiciary, and (2) work to supplement the rules already promulgated by the supreme court,"[97] this consent by the courts has been "purely out of considerations of inter-branch comity and is not required by any principle of free government."[98] This "courtesy does not extend to the surrendering of judicial power," because the judicial branch has "'an imperative duty . . . to protect its jurisdiction at the boundaries of power fixed by the constitution.'"[99] Crucially, the court then stated as follows:

> Just as the General Assembly has no constitutional power to enact rules that infringe upon the protections of the Declaration of Rights, the legislature can have no constitutional authority to enact rules, either of evidence or otherwise, that strike at the very heart of a court's exercise of judicial power. Among these inherent judicial powers are the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved. As an essential corollary to these principles, any determination of what evidence is *relevant*, either logically or legally, to a fact at issue in litigation is a power that is entrusted solely to the care and exercise of the judiciary. Indeed, a "court's constitutional function to independently

[95] *Id.* at 480–81. This language from *Mallard* has been quoted on many occasions by Tennessee courts, including in two recent Supreme Court decisions. *See* Keough v. State, 356 S.W.3d 366, 370 (Tenn. 2011) (citing inherent power as authority for adopting Supreme Court Rule pertaining to procedure in post-conviction cases); Webb v. Nashville Area Habitat for Humanity, 346 S.W.3d 422, 436 (Tenn. 2011) (using *Mallard* as authority for determination that "such a broad and sweeping change" as adoption of the federal pleading standard set forth in *Twombly* and *Iqbal* "should come by operation of the normal rule-making process, not by judicial fiat in the limited context of a single case").

[96] *Mallard*, 40 S.W.3d at 481 (quoting Barger v. Brock, 535 S.W.2d 337, 341 (Tenn. 1976)).

[97] *Id.* at 481.

[98] *Id.* at 482.

[99] *Id.* (quoting State *ex rel.* Shepherd v. Neb. Equal Opportunity Comm'n, 557 N.W.2d 684, 693 (Neb. 1997)).

> decide controversies is impaired if it must depend on, or is limited by, another branch of government in determining and evaluating the facts of the controversies it must adjudicate." Consequently, any legislative enactment that purports to remove the discretion of a trial judge in making determinations of logical or legal relevancy impairs the independent operation of the judicial branch of government, and no such measure can be permitted to stand.[100]

Despite this strong language, the court did not strike down Tennessee Code Annotated section 39-17-424 as an unconstitutional violation of separation of powers.[101] Instead, mindful of its duty to construe legislative enactments as constitutional if at all possible, the court concluded that, despite the clear statement in the statute that courts "shall consider" certain factors, the statute only suggested, rather than required, trial courts to consider the factors and thus it supplemented, rather than impaired, the Rules of Evidence.[102] *Mallard* is not remembered, however, for this strained construction of a statute helping define the term "drug paraphernalia," but rather for the court's expansive view of the judicial powers that preceded it.

The quoted paragraph from *Mallard* represented a clear extension of the court's definition of the judicial powers beyond previous cases, at least in the modern era. It is notable that, until reaching this point in the opinion, the court had relied primarily upon Tennessee case law.[103] In this paragraph, however, the court chose to cite primarily persuasive authority from other jurisdictions, including Nebraska,[104] Illinois,[105] Texas,[106] and New Hampshire.[107] This suggests the adoption of a new standard in Tennessee. Moreover, although the *Mallard* court leaned heavily upon a Tennessee case, *Anderson County Quarterly Court*, for general language regarding courts' inherent powers, that case took a much more restrictive view of the term "inherent judicial powers."[108]

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[100] *Id.* at 483 (citations omitted).

[101] *Id.* at 484–85.

[102] *Id.* at 483–84.

[103] *See id.* at 473–82.

[104] State *ex rel.* Shepherd v. Neb. Equal Opportunity Comm'n, 557 N.W.2d 684, 693 (Neb. 1997).

[105] People v. Jackson, 371 N.E.2d 602, 604 (Ill. 1977).

[106] Morrow v. Corbin, 62 S.W.2d 641, 645 (Tex. 1933).

[107] Opinion of the Justices, 688 A.2d 1006, 1016 (N.H. 1997).

[108] *See* Anderson Cnty. Quarterly Ct. v. Judges of 28th Jud. Circuit, 579 S.W.2d 875, 878 (Tenn Ct. App. 1978).

Specifically, the court of appeals had stated in *Anderson County Quarterly Court* that "[i]nherent powers consist of all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective," and that the inherent powers doctrine has been used primarily, but not exclusively, to secure "relatively minor fiscal expenditures necessary for the courts to operate."[109] It is a significant step from this definition of "inherent powers" to the much broader description of those powers in *Mallard*: "the powers to hear facts, to decide the issues of fact made by the pleadings, and to decide the questions of law involved," and "[a]s an essential corollary to these principles, any determination of what evidence is *relevant*, either logically or legally, to a fact at issue in litigation . . . ."[110] It is not surprising, therefore, that Professor Don Paine[111] wrote in the weeks following *Mallard* that the opinion "may contain the most significant procedural development I have witnessed since licensure almost 40 years ago. This precedent will be cited for years to come in constitutional attacks on statutes."[112]

2. Cases Deferring to the Legislative Branch

Although the court has, on occasion, taken a broad view of its own powers, it has also, when appropriate, deferred to the legislature to create policy in the area of judicial practice and procedure. In *Underwood v. State*,[113] for example, a defendant found not guilty of

[109] *Id.* at 879 (citations omitted). The specific examples given by the court of appeals of circumstances in which courts have exercised their inherent powers included fixing the amount of salaries or the time at which a salary increase would take place, hiring employees, and controlling courthouse space. *Id.* (citations omitted).

[110] State v. Mallard, 40 S.W.3d 473, 483 (Tenn. 2001).

[111] Don Paine has served as Reporter to the Tennessee Supreme Court Advisory Commission on Rules of Practice and Procedure, President of the Tennessee and Knoxville Bar Associations, a named partner in a Knoxville civil litigation firm, and a Professor of Civil Procedure at the University of Tennessee College of Law. *See Donald F. Paine*, PAINE, TARWATER & BICKERS, LLP, http://www.painetarwater.com/attorneys/paine.php, (last visited June 10, 2012).

[112] Donald F. Paine, *Separation of Powers and the 'Mallard' Decision*, TENN. B.J., Dec. 2001, at 24. Prof. Paine noted in a recent Tennessee Bar Journal article that "reread[ing]" *Mallard* would be key to determining the constitutionality of Public Chapter Number 498. Donald F. Paine, *Can the General Assembly Overrule Supreme Court Rules?*, TENN. B.J., Dec. 2011, at 37 ("In a 'whereas' clause the lawmakers expressly stated that their purpose was to 'overrule' *Hannan*. Can they do that? I don't know, but I reckon it will take a Tennessee Supreme Court opinion to resolve the issue.").

[113] Underwood v. State, 529 S.W.2d 45 (Tenn. 1975).

a criminal offense sought to have his criminal records expunged.[114] The trial court granted the State's motion to dismiss the petition on grounds that the expungement statute was unconstitutional.[115] The defendant appealed, and the supreme court held that the expungement statute did not violate the separation of powers provisions of the Tennessee Constitution because it was "[a] legislative enactment which does not frustrate or interfere with the adjudicative function of the courts," and thus "does not constitute an impermissible encroachment upon the judicial branch of government."[116]

In *Newton v. Cox*,[117] the court clarified that its power to regulate the legal profession in Tennessee did not preclude the legislature from passing reasonable restrictions on the practice.[118] The statute in question, Tennessee Code Annotated section 29-26-120, limited contingency fees for plaintiffs' attorneys in medical malpractice actions to one-third of the award.[119] One plaintiff's attorney in a medical malpractice case had neglected to tell his client about the statute while simultaneously charging him a fifty percent contingency fee.[120] The client, after learning of the statute, sued the attorney, who argued that the statute violated separation of powers, among other provisions of the state constitution.[121] Although the trial court agreed with the attorney,[122] the supreme court reversed.[123] With regard to the separation of powers issue, the court held that the statute did not "directly conflict with the supreme court's authority to regulate the practice of law" and instead was a legitimate "exercise of the legislature's police powers, intended to protect the public."[124]

In *State v. King*,[125] the court granted King permission to appeal an order to address the constitutionality of a statute[126] that required trial courts to instruct juries regarding parole and release

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[114] *Id.* at 46.

[115] *Id.* (interpreting TENN. CODE ANN. §§ 40-4001 to -4004 (current version at TENN. CODE ANN. § 40-32-101 to -104 (2006 & Supp. 2011))).

[116] *Underwood*, 529 S.W.2d at 47.

[117] Newton v. Cox, 878 S.W.2d 105 (Tenn. 1994).

[118] *Id.* at 112.

[119] *Id.* at 107 (quoting TENN. CODE ANN. § 29-26-120 (1976)).

[120] *Newton*, 878 S.W.2d at 106–07.

[121] *Id.* at 107.

[122] *Id.*

[123] *Id.* at 112.

[124] *Id.*

[125] State v. King, 973 S.W.2d 586 (Tenn. 1998).

[126] TENN. CODE ANN. § 40-35-201(b)(2) (Supp. 1994).

eligibility when either party requested such an instruction.[127] King argued that this statute violated the separation of powers because it "improperly encroache[d] upon the judicial function of determining the law appropriate for jury consideration in each case."[128] The court conceded that "the statute constitute[d] an overlapping of the legislative power with that of the judiciary"; however, "having already acknowledged the authority of the legislature to provide a range of punishment instruction," the court concluded that requiring an explanation to the jury "of the reality of early release and parole is no further an encroachment into the judicial function."[129] Because "[t]he jury must still decide the issue of guilt or innocence, and the trial court must still decide the ultimate sentence to be imposed," the court determined that Tennessee Code Annotated section 40-35-201(b)(2) did not violate the separation of powers clauses of the Tennessee Constitution.[130]

In the years since *Mallard*, the separation of powers issue has arisen most often in the context of workers' compensation law, an area highly regulated by statute but over which the courts also have significant authority.[131] In *Martin v. Lear Corp.*,[132] the issue was whether a workers' compensation claimant could introduce the testimony of a physician who had examined him at the employer's request.[133] The resolution of this issue required the court to consider the interaction of a workers' compensation provision[134] and a rule of civil procedure.[135] The employer, citing the procedural rule

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[127] *King*, 973 S.W.2d at 587.

[128] *Id.* at 589.

[129] *Id.*

[130] *Id.*

[131] Tennessee's workers' compensation law is found in Tennessee Code Annotated sections 50-6-101 to -801. Interestingly, workers' compensation cases in Tennessee are appealed directly from the trial court to the Tennessee Supreme Court, rather than funneling through the intermediate Court of Appeals like other civil cases. TENN. CODE ANN. § 50-6-225(e)(1) (2008). The Tennessee Supreme Court has established a Special Workers' Compensation Appeals Panel to hear the majority of such appeals, with the Panel's opinions subject to the review of the full court. *Id.* § 50-6-225(e)(3) & (5)(A); TENN. SUP. CT. R. 51. A discussion of recent changes to Tennessee's workers' compensation law can be found *infra*, Part IV.

[132] Martin v. Lear Corp., 90 S.W.3d 626 (Tenn. 2002).

[133] *Id.* at 628.

[134] *Id.* (quoting TENN. CODE ANN. § 50-6-204 (f) (1999) ("Any physician whose services are furnished or paid for by the employer and who treats or makes or is present at any examination of an injured employee may be required to testify as to any knowledge acquired by such physician in the course of such treatment or examination as same relates to the injury or disability arising therefrom.")).

[135] *Id.* (quoting TENN. R. CIV. P. 26.02(4)(B) ("A party may not discover the identity of, facts known by, or opinions held by an expert who has been consulted by another party in anticipation of litigation or preparation for trial and who is not to be called as a witness at trial except as provided in Rule 35.02 or upon a showing that the party seeking discovery

that protects from discovery the opinion of a consulting expert who will not be called as a witness, claimed that the workers' compensation statute suggesting otherwise violated separation of powers principles.[136] The court held that it did not for two reasons: first, because the statute did not impermissibly conflict with Rule 26.02, but merely limited its application in certain circumstances; and second, because the General Assembly "is the appropriate body to set the policy that governs workers' compensation cases," and the statute is consistent with the remedial nature of the workers' compensation system.[137]

Four years after *Martin*, the court in *Lynch v. City of Jellico*[138] addressed whether the administrative benefit review process established by statute violated Article II, section 2 of the Tennessee Constitution.[139] Amendments to the Tennessee workers' compensation statute in 2004 established that, prior to filing suit against their employer, workers' compensation claimants must first submit to an administrative benefit review process through the state Department of Labor and Workforce Development.[140] Only after the benefit review conference proves fruitless may the employee or employer file a complaint related to the claim in the Circuit or Chancery Court.[141] In *Lynch*, the court reversed the holding of the trial court that this process was unconstitutional.[142] As to the separation of powers argument, the court stated that "the benefit review conference does not substitute for a workers' compensation action" and that "[t]he courts will ultimately adjudicate a worker's claim if the case is not settled at the benefit review conference."[143] Therefore, the court held that "the benefit review process does not frustrate the adjudicative function of the judicial branch."[144] Thus, despite the court's strong language in *Mallard*, it has consistently given leeway to the legislature to create procedures consistent with the statutory purpose, at least in the

cannot obtain facts or opinions on the same subject by other means.")).

136 *Martin*, 90 S.W.3d at 631.

137 *Id.* at 631–32.

138 Lynch v. City of Jellico, 205 S.W.3d 384 (Tenn. 2006).

139 *Id.* at 388.

140 *Id.* at 390–91 (citing TENN. CODE ANN. §§ 50-6-203(a), 50-6-225(a)(1) (2005)).

141 *Id.* at 391 (citing TENN. CODE ANN. § 50-6-225(a)(2)(A) (2005)).

142 *Id.* at 389–90. In addition to concluding that the mandatory benefit review process violated separation of powers principles, the trial court had also held that it violated the due process and open courts protections of the Tennessee Constitutions. *Id.*

143 *Id.* at 393.

144 *Id.*

area of workers' compensation law.[145]

A recent per curiam opinion by the court[146] provides insight into what might be a nascent conflict between the legislative and judicial branches in Tennessee over workers' compensation law. Tennessee Code Annotated section 50-6-204(d)(5) allows for either party in a workers' compensation dispute to "request an independent medical examiner from the commissioner's registry" if there is a dispute as to the degree of the employee's medical impairment.[147] Under the statute, this independent medical examiner's written impairment rating "*shall be presumed to be the accurate impairment rating; provided, however, that this presumption may be rebutted by clear and convincing evidence to the contrary*."[148] In *Mansell*, the trial court had granted the employee's motion to quash the employer's request for an independent medical impairment rating, holding that the statute applies only during the administrative review process and not after a court acquires jurisdiction.[149] The court indicated that to hold otherwise and prevent the court from choosing the impairment rating would "usurp[] [a] judicial power that is basically vested in [the court] once the law suit is filed."[150] On appeal, both the employer and the Attorney General, as amicus curiae, argued that the process "does not interfere with the adjudicative function" because the presumption of correctness granted to the rating by the statute may be overcome by clear and convincing evidence.[151] The supreme court remanded to the trial court to allow the parties and the Attorney General to more fully develop the record.[152] The court indicated, however, that it was interested in addressing the constitutional issue by ordering that the hearing on remand occur within ninety days and that any appeal of the trial court's judgment be placed directly on the court's docket rather than being referred to the Special Workers' Compensation Appeals Panel.[153]

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[145] An exception to this came in 2003 when the court, citing its inherent power to promulgate rules governing practice and procedure, held that the thirty-day period for filing a notice of appeal in civil actions set forth in Tennessee Rule of Appellate Procedure 4 controls whether or not a statistical data form is filed contemporaneously with the judgment, as required by Tennessee Code Annotated section 50-6-244(b). *See* Corum v. Holston Health & Rehab. Ctr., 104 S.W.3d 451, 454–55 (Tenn. 2003).

[146] Mansell v. Bridgestone Firestone N. Am. Tire, LLC, No. M2010-02093-SC-R3-WC, 2011 WL 3758562 (Tenn. Aug. 25, 2011).

[147] *Id.* at *1 (quoting TENN. CODE ANN. § 50-6-204(d)(5) (2008 & Supp. 2010)).

[148] *Id.* (quoting TENN. CODE ANN. § 50-6-204(d)).

[149] *Id.* at *2.

[150] *Id.* at *3.

[151] *Id.*

[152] *Id.* at *5.

[153] *Id.* (citing TENN. SUP. CT. R. 51, § 2).

B. Source of Judicial Power over Rulemaking in Other Jurisdictions

While a separate and independent judiciary is an essential component of the federal government and every state government, the particular interplay among the branches differs from state to state. The power of the judicial branch vis-à-vis the legislature obviously manifests itself in the rulemaking process established in each state.[154] It is also helpful, however, to briefly survey other jurisdictions for their view on the separation of powers provisions of their constitutions and specifically, the ability of the legislatures in those states to enact procedural rules.

In some states, the constitution expressly grants the power to make rules of practice and procedure to the judiciary. The Arizona Constitution, for example, grants to the Arizona Supreme Court the "[p]ower to make rules relative to all procedural matters in any court."[155] Because of this constitutional power, "if the legislature intrudes into the procedural realm, a question implicating the separation of powers doctrine is raised."[156] Despite this broad grant of power, the judiciary in Arizona will still conclude that the legislature's action is permissible if it "'seem[s] reasonable and workable'" and supplements, rather than contradicts, the existing rules made by the court.[157] However, the court draws the line "when a conflict arises, or a statutory rule tends to engulf a general rule of admissibility," such as when the legislature attempts to repeal a rule of evidence or civil procedure.[158] In other words, the Arizona legislature and supreme court "both have rulemaking power, but . . . in the event of irreconcilable conflict between a procedural statute and a rule, the rule prevails."[159] Specifically, "the legislature cannot enact a statute that 'provides an analytical framework contrary to the [procedural] rules.'"[160] Other states with like constitutional provisions have used similar language to reaffirm the power of the judiciary over procedural rulemaking.[161]

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[154] *See, e.g.*, JEFFREY A. PARNESS & CHRIS A. KORBAKES, A STUDY OF THE PROCEDURAL RULE-MAKING POWER IN THE UNITED STATES 22–64 (1973) (providing a state-by-state survey of the rulemaking power).

[155] ARIZ. CONST. art. 6, § 5(5).

[156] Encinas v. Pompa, 939 P.2d 435, 437 (Ariz. Ct. App. 1997) (citing ARIZ. CONST. art. 3; Pompa v. Superior Court, 931 P.2d 431, 433 (Ariz. Ct. App. 1997)).

[157] State *ex rel.* Collins v. Seidel, 691 P.2d 678, 682 (Ariz. 1984); *Encinas*, 939 P.2d at 437.

[158] *Collins*, 691 P.2d at 682.

[159] Seisinger v. Siebel, 203 P.3d 483, 487 (Ariz. 2009).

[160] *Id.* (quoting Barsema v. Susong, 751 P.2d 969, 974 (Ariz. 1988)).

[161] *See, e.g.*, ARK. CONST. amend. 80, § 3 ("The Supreme Court shall prescribe the rules of pleading, practice and procedure for all courts; provided these rules shall not abridge, enlarge

In at least one state with such constitutional language, Florida, the legislature has attempted to limit the state supreme court's power to establish rules of practice and procedure through constitutional amendment.[162]

In other states, the constitution does not expressly grant the power of procedural rulemaking to the courts, but the judiciary has held that ability is a necessary corollary to the power that has been granted to them by the people through the constitution. The Kentucky Constitution, for example, simply states that the judicial power shall be vested in the state supreme court and lower courts and that "[t]he court shall constitute a unified judicial system for operation and administration."[163] Courts there have held that this

> grant of the judicial power to the courts carries with it, as a necessary incident, the right to make that power effective in the administration of justice under the Constitution. Rules of practice and procedure are, fundamentally, matters within the judicial power and subject to the control of the courts in the administration of justice.[164]

Thus, the circumstance in Kentucky is comparable to that in Tennessee: there is no express grant of power over practice and procedure in the state constitution, but the judiciary has held that

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or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution."); Winberry v. Salisbury, 74 A.2d 406, 408 (N.J. 1950) (quoting N.J. CONST. art. VI, § 2, ¶ 3, which provides that "[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts"); City of Fargo v. Ruether, 490 N.W.2d 481, 483 (N.D. 1992) (citing N.D. CONST. art. 6, § 3, which gives the state supreme court "authority to promulgate rules of procedure, including appellate procedure, to be followed by all the courts of this state"). The constitutions of at least two states, Alaska and Missouri, grant the state supreme court the power to create procedural rules for "all courts and administrative tribunals," but reserves some limited "veto power" to the legislature. ALASKA CONST. art. IV, § 15 ("The supreme court shall make and promulgate rules governing the administration of all courts [and] governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house."); MO. CONST. art. 5, § 5 (stating that any procedural rule "may be annulled or amended in whole or in part by a law limited to the purpose").

[162] Gibeaut, *supra* note 20, at 44. The Florida Constitution states that "[t]he supreme court shall adopt rules for the practice and procedure in all courts" and that "rules [of court] may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature." FLA. CONST. art. V, § 2(a). In 2011, the Florida legislature placed a measure on the November 2012 ballot that "would lower the threshold needed to repeal a rule of procedure to a 50 percent vote from the two-thirds majority now required." Gibeaut, *supra* note 20, at 49; *see also Initiatives/Amendments/Revisions*, FLA. DIV. OF ELECTIONS, June 21, 2011, http://election.dos.state.fl.us/initiatives/initdetail.asp?account=10&seqnum=81.

[163] KY. CONST. § 109.

[164] Burton v. Mayer, 118 S.W.2d 547, 549 (Ky. 1938) (emphasis omitted) (citation omitted) ("The courts accept legislative *co-operation* in rendering the judiciary more effective. They deny the right of legislative *dominance* in matters of this kind.").

such power is necessary to the exercise of the inherent power that does inure to the judiciary.[165]

Even in states where the judiciary's power to enact rules of practice and procedure is granted by statute,[166] and not expressly or implicitly by the state constitution, the courts may vigorously stress their power to regulate their own procedural rules. For example, the Indiana Supreme Court has stated "that the procedural rules of the judiciary, as promulgated from time to time by this Court, are independent of legislative sanction."[167] On the one hand, this stands for the proposition that if the court has "failed to speak" in a particular area, then judicial procedure may be provided by legislative enactment until such time as the court "elect[s] to alter [it] or abrogate it by rule."[168] On the other hand, "[i]t is a fundamental rule of law in Indiana that 'in the event of a conflict between a procedural statute and a procedural rule adopted by the supreme court, the latter shall take precedence.'"[169] The judicial branches in other states also appear to have had the rulemaking power expressly granted by statute, but those statutes arguably recognize, rather than confer, the power.[170] Tennessee, of course, also has a statutory rulemaking procedure, but it is debatable whether the court's authority to promulgate procedural rules derives from its inherent powers or the legislative enactment.[171]

C. Application to Tennessee Code Annotated section 20-16-101

Do the decisions of the Tennessee courts and persuasive authority from other jurisdictions provide any hint as to how the Tennessee courts will respond to the new summary judgment legislation? Perhaps, although examples of a state legislature's overruling of either a rule of civil procedure or a judicial interpretation of such a rule are exceedingly rare.[172] However, two major lessons can be

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[165] *See also* Hathcock v. S. Farm Bureau Cas. Ins. Co., 912 So. 2d 844, 848 (Miss. 2005) (interpreting the "judicial power" granted by MISS. CONST. art. VI, § 144, to include the ability to regulate practice and procedure in the lower courts).

[166] *See, e.g.*, IND. CODE ANN. § 34-8-1-3 (West 2011).

[167] State v. Bridenhager, 279 N.E.2d 794, 796 (Ind. 1972).

[168] *Id.*

[169] Bowyer v. Ind. Dep't of Natural Res., 798 N.E.2d 912, 916 (Ind. Ct. App. 2003) (quoting Jackson v. City of Jeffersonville, 771 N.E.2d 703, 706 (Ind. Ct. App. 2002)).

[170] *See* IDAHO CODE ANN. § 1-212 (2012) (following a series of opinions in which the Idaho Supreme Court recognized its inherent powers to promulgate rules of practice and procedure); IOWA CODE ANN. § 602.4201 (Supp. 2012).

[171] *See infra* Part IV.

[172] One example of such legislative action comes from Massachusetts. In *Bengar v. Clark Equipment Co.*, 517 N.E.2d 1286, 1287 (Mass. 1988), the Supreme Judicial Court of

gleaned from the separation of powers cases in Tennessee and elsewhere.

On the one hand, the Tennessee courts have given the General Assembly quite a bit of leeway to regulate procedure where the legislature has established a statutory scheme, such as in workers' compensation and some criminal cases. Even in spheres where the courts are highly protective of their power, such as with their regulation of attorneys, they have been willing to allow the legislature to limit that power in order to protect the public.[173] It is true that the legislature in Tennessee has, indeed, established a statutory scheme with regard to procedural rulemaking.[174] However, the summary judgment legislation clearly exceeds that power because it engages in the development of procedural rules outside the process set forth by both custom and statute.[175] Thus, the Tennessee courts are unlikely to view this as a circumstance in which they would typically defer to the legislature to establish procedural rules and standards.[176]

On the other hand, courts are unlikely to sanction the exercise of judicial review, or any of their other inherent judicial powers, by the other two branches of government.[177] And the definition of

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Massachusetts interpreted Massachusetts Rule of Civil Procedure 15(c) to prohibit an amended complaint

> to relate back to the date of the commencement of the action when . . . the amendment seeks to add a new defendant after the statute of limitations has run and to allege against that new defendant a theory of liability wholly different from the theory of liability of the original complaint.

Id. Shortly after *Bengar* was decided, the Massachusetts legislature adopted a revised statute clarifying that such amendments were permissible and would relate back. MASS. GEN. LAWS ANN. ch. 231, § 51 (2000). "Given both the timing and the wording of the enactment, it is obvious that the Legislature's intent was to overrule *Bengar*." Wood v. Jaeger–Sykes, Inc., 536 N.E.2d 1100, 1102 (Mass. App. Ct. 1989).

[173] TENN. CODE ANN. §§ 23-1-101 to -4-105 (2009).

[174] *Id.* §§ 16-3-401 to -408.

[175] *See infra* Part IV.

[176] Because Public Chapter Number 498 applies only to cases filed after July 1, 2011, there has not yet been an opportunity for Tennessee's appellate courts to consider the constitutionality of the act. The Tennessee Court of Appeals recently stated in dicta, however, that "the legislative effort to dictate the practice and procedure to be followed by the courts under these circumstances is inappropriate and unavailing due to the separation and independent powers of the three branches of government." Lee v. Lyons Constr. Co., No. 2009-0263-11, at n.1 (Tenn. Ct. App. Dec. 19, 2011). Interestingly, this language was not included in a superseding opinion filed less than a month later. *See* Lee v. Lyons Constr. Co., No. E2010–02388–COA–R3–CV, 2012 WL 57059 (Tenn. Ct. App. Jan. 10, 2012).

[177] At the beginning of the 2012 legislative session, Sen. Mae Beavers (R-Mt. Juliet) introduced Senate bill 2348, which would have abolished the Tennessee Supreme Court's power of judicial review. S. 2348, 107th Gen. Assemb., 2d Sess. (Tenn. 2012) ("The supreme court shall have no jurisdiction to determine the constitutionality of a statute which has been properly enacted by the general assembly and become law in accordance with Article II,

"inherent powers" in Tennessee appears, after *Mallard*, to include any activities essential to perform the judicial function, including procedural rulemaking. The courts in Tennessee do not have the benefit of an explicit constitutional basis for the conclusion that courts have the complete power over procedural rulemaking. However, there is established precedent for the determination that the ability to create and develop procedural rules is necessary to the exercise of the courts' independent power under the Tennessee Constitution, one which has a long history dating back to the 1835 constitution.[178]

The language in *Mallard* is most instructive. A court's role in determining whether to grant or deny summary judgment is significantly different depending on whether it applies the *Celotex* or *Hannan* standards.[179] The essential difference between the two is the amount of evidence required at the summary judgment stage for the moving party to shift the burden of production to the non-movant and, ultimately, to determine whether there is a genuine issue of material fact about each and every element of the claim.[180] Although courts do not weigh the evidence at this stage, this determination surely requires a judge "to hear facts . . . and to decide the questions of law involved."[181] The imposition of a new summary judgment standard, then, impairs a "court's constitutional function to independently decide controversies."[182] Thus, the courts could very well hold that the legislation exceeds the legislature's constitutional authority by enacting "rules, either of evidence or otherwise, that strike at the very heart of a court's exercise of judicial power."[183] Further, this is a circumstance where the courts are unlikely to concede power to the legislature "purely out of

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[section] 18 and Article III, [section] 18 of the Tennessee constitution."); *see generally* Bill Raftery, *Tennessee Bill Would End Judicial Review of All Statutes, But Loophole Might Allow Court of Appeals & Court of Criminal Appeals to Hear Such Cases*, GAVELTOGAVEL.US (Jan. 13, 2012), http://gaveltogavel.us/site/2012/01/13/tennessee-bill-would-end-judicial-review-of-all-statutes-but-loophole-might-allow-court-of-appeals-court-of-criminal-appeals-to-hear-such-cases/ (noting that bill attempted to strip judicial review by statute rather than by constitutional amendment as is being attempted in New Hampshire). Senator Beavers later withdrew her bill under pressure from legislators in both parties. Erik Schelzig, *Beavers Withdraws Bill to Ban Judicial Review*, DESERET NEWS, Jan. 23, 2012, http://www.deseretnews.com/article/700218240/Beavers-withdraws-bill-to-ban-judicial-review.html.

[178] State v. Mallard, 40 S.W.3d 473, 483 (Tenn. 2001).

[179] *See* Blumstein, *supra* note 28, at 15–17.

[180] *Id.*

[181] *Mallard*, 40 S.W.3d at 483 (quotation omitted).

[182] *Id.* (quotation omitted).

[183] *Id.* (citation omitted).

considerations of inter-branch comity," because that "courtesy does not extend to the surrendering of judicial power."[184]

D. The Current Political Climate in Tennessee

The Tennessee Supreme Court's willingness to invalidate the Public Chapter Number 498 may be affected by political realities. On January 11, 2011, for the first time since Reconstruction, the Tennessee General Assembly convened in Nashville with a Republican majority in both houses.[185] The newly inaugurated Governor, Bill Haslam, was likewise a Republican. With this triumvirate of Republican control, the General Assembly was free to continue the business-friendly agenda it had begun under the previous Governor, Democrat Phil Bredesen, and to intensify its ongoing campaign against the perceived excesses of the Tennessee Supreme Court.[186] Republican legislators sponsored employer-friendly changes in the workers' compensation scheme and passed statutes limiting monetary recovery by tort plaintiffs.[187] Most recently, in addition to their attempt to overturn the *Hannan* summary judgment standard, the legislature has sought greater power over the Court of the Judiciary. Underlying all these efforts is the specter of the contested election of appellate judges, which in recent years has hovered over all encounters between the supreme court and the General Assembly. One legal seminar recently posited that the Tennessee Supreme Court may hesitate to overturn Public Chapter Number 498 because it is fearful of contested judicial elections.[188]

In 2004, the General Assembly enacted the Workers' Compensation Reform Act of 2004, a massive overhaul of Tennessee's workers' compensation system.[189] Most notably, the Act required that injured workers first mediate their claims with the Department of Labor before they could avail themselves of the court system.[190] Likewise, the Act severely restricted injured

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[184] *Id.* at 482 (quotation omitted).

[185] Sher, *supra* note 9.

[186] *See id.*

[187] *Id.*; Mike Morrow, *Tort Reform Bill Passes Senate*, TENN. REPORT (May 12, 2011), http://tnreport.com/blog/2011/05/12/tort-reform-bill-passes-senate/.

[188] David Johnson, Miller & Martin, Summary Judgment in Tennessee: How Legislative Changes Benefit Employers, Continuing Legal Education seminar sponsored by Tennessee Bar Association (July 14, 2011).

[189] *See* Workers' Compensation Reform Act of 2004, ch. 962, 2004 Tenn. Pub. Acts 2346.

[190] *See id.*

workers' potential recoveries.[191] During the 2011 session, the General Assembly passed even more employer-friendly workers' compensation legislation,[192] requiring that an injured worker's treating physicians must "communicate" with and provide medical records to the patient's employer, even if the employee specifically requests otherwise, and redefining what injuries are compensable through the workers' compensation scheme.[193] Further, on June 16, 2011, Governor Haslam signed into law the Tennessee Civil Justice Act of 2011.[194] This long-awaited tort reform measure[195] caps non-economic damages for individual plaintiffs in most civil actions at $750,000, and punitive damages at $500,000.[196] Some members of the legislature have complained that this tort reform did not go far enough to protect business interests in the state, and additional reforms were enacted during the 2012 legislative session.[197]

The General Assembly has also turned its attention to the Court of the Judiciary. Established by statute, the court investigates allegations of misconduct by Tennessee judges and imposes discipline.[198] The Court of the Judiciary has sixteen members: ten judges appointed by the Tennessee Supreme Court, three members appointed by the Tennessee Bar Association, and one member each appointed by the Governor, the House speaker, and the Senate speaker pro tempore.[199] As one commentator puts it, "the judicial branch is in control."[200] The Court of the Judiciary was criticized by

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[191] *Id.*

[192] *See* Act of June 6, 2011, ch. 416, 2011 Tenn. Pub. Acts 1503, *available at* http://www.tn.gov/sos/acts/107/pub/pc0416.pdf.

[193] *Id.*

[194] Tennessee Civil Justice Act of 2011, ch. 510, 2011 Tenn. Pub. Acts.

[195] For the typical competing views on the desirability of so-called "tort reform" in Tennessee, *compare* Mike Morrow, *Talking Tort Reform*, TENN. REPORT (Feb. 23, 2011), http://tnreport.com/blog/2011/02/23/talking-tort-reform/ (reporting panel discussion by former Mississippi state senator Charlie Ross, Vanderbilt Law School Professor James Blumstein, and Ted Frank, adjunct fellow at the Manhattan Institute's Center for Legal Policy), *with* Laura Thornquist, *Tort Reform in TN a Solution Without a Problem*, PUBLIC NEWS SERVICE (Mar. 23, 2011), http://www.publicnewsservice.org/index.php?/content/article/19090-1 (reporting on views of Tennessee Association for Justice, formerly the Tennessee Trial Lawyers Association).

[196] Tennessee Civil Justice Act of 2011, ch. 510, § 10, 2011 Tenn. Pub. Acts.

[197] *See, e.g.*, Act of Apr. 27, 2012, ch. 1046, 2012 Tenn. Pub. Acts (providing that the "loser pays" all litigation costs, including the defendant's attorney's fees, when a complaint is dismissed for failure to state a claim upon which relief can be granted).

[198] TENN. CODE ANN. § 17-5-101 (2009).

[199] *Id.*; *see generally* Walter T. Durham, *Tennessee State Historian*, TENNESSEE STATE LIBRARY AND ARCHIVES, http://www.tennessee.gov/tsla/history/tnhistorian/heritage.htm (last visited Apr. 3, 2012) ("State lawmakers have left us the legacy of three states in one—Tennessee divided into three grand divisions.").

[200] Tom Humphrey, *Tom Humphrey: Tennessee Leaders Struggle Over Who Judges the*

Republicans for failing to effectively police the judiciary, with critics pointing to the fact that few complaints resulted in discipline, and much of the discipline was issued in the form of private reprimands.[201] In response, a Republican legislator introduced a bill during the 2011 session to shrink membership on the Court of the Judiciary to twelve, all of them appointed by either the House speaker or the Senate pro tempore.[202] Under the Republican proposal, "the Legislature would be in control."[203] Although a compromise proposal was enacted in 2012, the legislature's restructuring of the Court of the Judiciary is an additional example of the tension between the legislative and judicial branches, and represents "a fairly straightforward assault on the independence of the judicial branch."[204]

Perhaps the most frightening political reality for the current supreme court is the prospect of contested elections. Although Tennessee's judicial retention elections are non-partisan, the

Judges, KNOXVILLE NEWS SENTINEL (Aug. 28, 2011), http://www.knoxnews.com/news/2011/aug/28/tennessee-leaders-struggle-over-who-judges-the/.

[201] *See id.*

[202] *See id.* A minority of the members of the Court of the Judiciary—five of the twelve appointees—would have been judges under Sen. Beavers' proposed legislation. Andrea Zelinski, *Judicial Ethics Panel Makeup Debated*, TENN. REPORT (Feb. 2, 2012), http://tnreport.com/blog/2012/02/02/judicial-ethics-panel-makeup-debated/.

[203] Tom Humphrey, *Tom Humphrey: Tennessee Leaders Struggle Over Who Judges the Judges*, KNOXVILLE NEWS SENTINEL (Aug. 28, 2011), http://www.knoxnews.com/news/2011/aug/28/Tennessee-leaders-struggle-over-who-judges-the/ (observing that the "bill is largely founded on the premise that the judges can't be trusted to police themselves, and that, to some, is at least pretty darned insulting—if not in violation of separation-of-powers provisions of the state constitution."). Contributing to this legislative lack of faith in judicial self-policing was the spectacular downfall of a Knox County, Tennessee, criminal court judge in 2011. *See* Jamie Satterfield, *Court of Secrecy: How Richard Baumgartner, a drug-addicted judge, stayed on the bench despite warnings*, KNOXVILLE NEWS SENTINEL (Feb. 12, 2012), http://www.knoxnews.com /news/2012/feb/12/court-of-secrecy-how-baumgartner-was-allowed-to/ (detailing saga of Judge Richard Baumgartner, who, having founded Knox County's Drug Court, became addicted to prescription pain medication and used a female defendant in his drug court as his supplier, resulting in new trials in high-profile murder cases over which he had presided). Ironically, unlike Tennessee's appellate judges, trial judges such as Baumgartner are chosen by popular election. *See id.*

[204] *Tom Humphrey: Tennessee Leaders Struggle Over Who Judges the Judges*, *supra* note 203. In the 2012 session, the General Assembly passed legislation replacing the Court of the Judiciary with a Board of Judicial Conduct. Judges still constitute ten of the sixteen members of the Board, but they will be appointed by various judicial organizations rather than by the Tennessee Supreme Court and Tennessee Bar Association. The remaining six members of the Board, three lawyers and three laypersons, will be appointed by the Governor and the Speakers of the House and Senate. Additionally, the legislation introduced many procedural changes to the disciplinary process for judges. *See* Act of Apr. 9, 2012, ch. 819, 2012 Tenn. Pub. Acts; *see also* Lucas L. Johnson II, *New Discipline Panel to Have More Accountability (*Apr. 15, 2012), http://www.knoxnews.com/news/2012/apr/15/new-discipline-panel-to-have-more-accountability/.

supreme court has historically been a Democratic bastion.[205] The only Tennessee Supreme Court justice who has failed to win retention under Tennessee's merit selection plan, Penny J. White, was defeated by a concerted effort led by the Tennessee Conservative Union, supported by state Republican leaders, who painted her as a liberal extremist who put the rights of criminals before the rights of victims.[206] The admitted goal of at least some of those who promote contested elections is to influence the outcome of judicial decisions.[207] The Lieutenant Governor and Speaker of the Senate, Ron Ramsey, admits that the legislature is skeptical of the current supreme court, noting that he hopes the present system, with a Republican governor in place, will "mov[e] [the court] to the right a little bit."[208]

But the reality that contested judicial elections are costly has led to an unlikely coalition between lawyers' groups and business advocates. Contested elections are opposed by the Tennessee Chamber of Commerce and Industry, the Tennessee Business Roundtable, and Tennesseans for Economic Growth,[209] who undoubtedly see the cost of supporting candidates in judicial elections as siphoning off money that could be used to support candidates for other offices. But the message to the state supreme court seems clear: *Don't go too far to the left, or we will institute contested elections and spend millions to defeat you*.[210] It remains to

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[205] Between 1886 and 1998, sixty-three justices served on the Tennessee Supreme Court. Of those sixty-three, only two were Republicans, with one Republican, George H. Brown, Jr.—the first African-American to serve on the court—serving for less than one year in 1980. The remaining sixty-one justices were Democrats, with three calling themselves "independent" Democrats to denote their opposition to Democratic Governor Malcolm R. Patterson in the 1910 election. *See* JAMES W. ELY, JR., A HISTORY OF THE TENNESSEE SUPREME COURT 155, 190–01, 232, 271–77, 311 (2002).

[206] Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decision?*, 72 N.Y.U. L. REV. 308, 310 (1997).

[207] *See* Fitzpatrick, *supra* note 1, at 497 (noting with approval that "[judges] report on surveys that the prospect of running in the referenda influences their decisions on the bench."). The influence exerted on judges' decisions by their fear of losing the next election is sometimes termed "democratic accountability." *See, e.g.*, *id.* at 496–97.

[208] Humphrey, *supra* note 10.

[209] *Id.*

[210] This message has been tempered somewhat by the General Assembly's recent adoption of a resolution supporting a constitutional amendment that would combine the federal advise-and-consent model for nomination of judges with Tennessee's current practice of judicial retention elections. *See* discussion, *supra* Part I & n.12–14. However, if the constitutional amendment fails when placed on the ballot in 2014, as at least one commentator has predicted, contested elections may be back on the table. *See* Cagle, *supra* note 14 ("The fact remains that the constitution requires elected judges, and the people will likely vote to return to the practice.").

be seen what effect this threat will have on the courts' review of Public Chapter Number 498.

IV. DOES THE ACT EXCEED THE GENERAL ASSEMBLY'S STATUTORY POWER?

Regardless of whether Public Chapter Number 498 is unconstitutional as violating the separation of powers clause, the question arises of whether the act is void because it violates the terms of the General Assembly's purported delegation of power to the supreme court. Although the history of Federal Rule of Civil Procedure 4 makes it clear that Congress retains the power to promulgate, or at least amend, the Federal Rules of Civil Procedure outside the process enacted by the Rules Enabling Act,[211] the situation in Tennessee is not so clear. To the extent that Tennessee's system for promulgating the rules of practice and procedure depends upon legislative delegation of power in Tennessee Code Annotated section 16-3-403, the federal analogue is persuasive.[212] But Tennessee's system also differs from the federal system, not only because the General Assembly must actively approve of all rules of civil procedure, but also because the legislature has itself declared that the Tennessee Supreme Court's power over procedure is "full, plenary, and discretionary."[213] Thus, the General Assembly has assigned itself a role in the promulgation and amendment of the rules of civil procedure, one which arguably leaves no room for ad hoc rulemaking by the legislature, such as the recent act purporting to overrule *Hannan*.[214]

The delegation issue can be analyzed in terms of three sequential questions: (1) Did the General Assembly have any power to delegate when it purported to delegate rulemaking power to the Tennessee Supreme Court?; (2) If so, did it delegate all of its power, or did it retain residual rulemaking power after the delegation?; and (3) If it did retain any rulemaking power, did the General Assembly limit its own exercise of that power by prescribing a limited role for itself in the rulemaking process?

As to the first question—whether the General Assembly had any

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[211] *See generally* Kent Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1207–08 n.135 (1987); *see* discussion *supra* Part III.

[212] *See* TENN. CODE ANN. § 16-3-504 (2009).

[213] *Id.*

[214] *Id.*; *see* Act of May 20, 2011, ch. 498, § 1, 2011 Tenn. Pub. Acts.

rulemaking power to delegate—the Tennessee Supreme Court has made apparently conflicting statements.[215] The court has at times identified the Rules as deriving from the joint power of the General Assembly and the Tennessee Supreme Court. For example, in *Tennessee Department of Human Services v. Vaughn*,[216] the court referred to the rules as "galvanized into law by joint judicial and legislative action."[217] Similarly, in *Frye v. Blue Ridge Neuroscience Center*,[218] the court declared, "[t]he rules governing practice and procedure in the trial and appellate courts of Tennessee were promulgated by the General Assembly and the Supreme Court . . . [and] have the force and effect of law."[219] More explicitly, the Tennessee Court of Appeals has stated, "Those rules [of Civil Procedure] were drafted by the Supreme Court of Tennessee under authority delegated to the court by the Tennessee General Assembly."[220]

However, the Tennessee Supreme Court has also insisted on its own "inherent power to promulgate [the] rules," wholly apart from

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[215] *Compare* Tenn. Dep't of Human Servs. v. Vaughn, 595 S.W.2d 62 (Tenn. 1980) *with* State v. Mallard, 40 S.W.3d 473 (Tenn. 2001).

[216] *Vaughn*, 595 S.W.2d 62. *Vaughn* is cited by one commentator for the proposition that a constitutional challenge to the act "would not be an easy case to make." Blumstein, *supra* note 28, at 18.

[217] *Vaughn*, 595 S.W.2d at 63. This statement could be read as dicta, since the court's holding rested on its determination that a statutory privilege against testifying granted to defendants in bastardy proceedings violated both the United States and Tennessee Constitutions. *Id.* at 71. The court's statement responded to a statement in the Court of Appeals opinion that "Tennessee Rules of Civil Procedure are not laws." *Id.* at 63. The full statement, in the typically flowery language of Justice Henry, is as follows: "It ill behooves any court—particularly an appellate court—to denigrate this trilogy of Rules [civil, criminal, and evidence] galvanized into law by joint judicial and legislative action and marking the methodology of trial and appellate practice under modern and enlightened Tennessee jurisprudence." *Id.*

[218] Frye v. Blue Ridge Neuroscience Ctr., P.C., 70 S.W.3d 710 (Tenn. 2002).

[219] *Id.* at 713 (quoting Crosslin v. Alsup, 594 S.W.2d 379, 380 (Tenn. 1980)). In this case, there was no conflict between a statute and a rule of civil procedure. *Cf. id.* at 712. Instead, the only issue was whether the statute of limitations had run when the plaintiff attempted to take advantage of the savings statute, TENN. CODE ANN. § 28-1-105 (2000), but had failed to comply with the provisions of either TENN. R. CIV. P. 3 (requiring the renewal of process) or TENN. R. CIV. P. 41.01 (requiring, upon filing of a notice of voluntary dismissal, service of the complaint upon a party who had never been served with process). The court apparently included this quote from its earlier decision in *Crosslin*, 594 S.W.2d at 380, in order to justify its application of traditional statutory interpretation rules to TENN. R. CIV. P. 3. *See also* Temlock v. McGinnis, 211 S.W.3d 238, 242 (Tenn. Ct. App. 2006) (quoting *Frye*'s statement that Tennessee Rules of Civil Procedure "have the force and effect of law" and concluding, "[g]iven this, we will apply the same rules of construction [to Tenn. R. Civ. P. 4] as we use to interpret a statute").

[220] Mid-South Pavers v. Arnco Constr., Inc., 771 S.W.2d 420, 422 (Tenn. Ct. App. 1989) (citation omitted).

any delegation of power by the General Assembly.[221] The case that is most on point with the current state of the law is *Mallard*.[222] As noted earlier, the *Mallard* court insisted on its own inherent rulemaking power.[223] However, the court also recognized a limited role for legislative rulemaking:

> The authority of the General Assembly to enact rules of evidence in many circumstances is not questioned by this Court. Its power in this regard, however, is not unlimited, and any exercise of that power by the legislature must inevitably yield when it seeks to govern the practice and procedure of the courts.[224]

Noting the fuzzy line between substance and procedure, the supreme court elaborated on the respective powers of the General Assembly and the court:

> [W]e have frequently acknowledged the broad power of the General Assembly to establish rules of evidence *in furtherance of its ability to enact substantive law*. But, as the General Assembly can constitutionally exercise only the legislative power of the state, its broad ability to enact rules for use in the courts must necessarily be confined to those areas that are appropriate to the exercise of that power. Although any discussion of the precise contours of this legislative power is not appropriate in this case, it is sufficient to acknowledge that such power exists and that it is necessarily limited by the very nature of the power itself.[225]

Thus, although the court's analysis is less than pellucid, the court appears to confine the General Assembly's rulemaking power to its substantive legislative power.[226] In other words, the court seems to deny to the General Assembly any freestanding rulemaking power apart from the enactment of substantive law.[227]

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[221] State v. Mallard, 40 S.W.3d 473, 480–81 (Tenn. 2001).

[222] *Id.*

[223] *Id.* at 480–81.

[224] *Id.* at 480.

[225] *Id.* at 481 (citing Daugherty v. State, 393 S.W.2d 739, 743 (Tenn. 1965)) (emphasis added).

[226] It was this principle that presumably led Rep. Mike Stewart (D-Nashville) to state that, while he understands the legislature's role in setting policy, the proposed legislation overruling *Hannan* dealt with procedural rules, and was different from a statute creating substantive law. Statement by Rep. Stewart, House Judiciary Committee, May 3, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=419..

[227] In a recent case, the Tennessee Supreme Court seemed to meld these two lines of cases—joint power and inherent power—by asserting that the Rules of Civil Procedure "are

If Tennessee's legislature lacks freestanding rulemaking authority, it is less powerful than the United States Congress in this regard. In at least three instances, Congress has passed legislation inconsistent with the Federal Rules of Civil Procedure.[228] The most notable instance of congressional rulemaking was its treatment of amendments to Rule 4 in 1982, first passing legislation to postpone the amendments proposed by the United States Supreme Court and then drafting and passing its own version of the amendments.[229] In none of these instances does it appear that a challenge was raised to Congress's power to legislate rules. Indeed, some scholars have asserted that the congressional delegation of rulemaking power to the Supreme Court in the Rules Enabling Act is unconstitutional because, in light of the practical inability to separate procedure and substance, it permits the Supreme Court to make substantive law.[230]

Assuming that the Tennessee General Assembly had rulemaking power to delegate in Tennessee Code Annotated section 16-3-403, does it retain any rulemaking power post-delegation? The rulemaking power of Congress may provide a valid analogue to the post-delegation power of Tennessee's General Assembly. Like the General Assembly, Congress has legislatively delegated the power to promulgate rules of practice and procedure to the Supreme Court.[231] And like the Tennessee General Assembly, Congress must approve of proposed rules before they become effective.[232] However, on the eve of the adoption of the Tennessee Rules of Civil Procedure, the Tennessee legislature, unlike Congress, expressly declared: "This part shall constitute a broad conference of full, plenary and

promulgated by this court and approved by the General Assembly pursuant to this court's 'inherent power to promulgate rules governing the practice and procedure of the courts of this state.'" Hall v. Haynes, 319 S.W.3d 564, 571 (Tenn. 2010) (quoting *Mallard*, 40 S.W.3d at 481).

228 *See* WRIGHT, ET AL., *supra* note 30, at § 1001.

229 For the fascinating history of these amendments, *see generally* Sinclair, *supra* note 211.

230 *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications,* 90 MINN. L. REV. 1303 (2006). In a variation on this theme, the former Reporter to the Advisory Committee on the Civil Rules has opined that the U.S. Supreme Court's "freewheeling rewriting of the Civil Rules" has precipitated a "crisis [in] procedural rulemaking." Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 600 (2010). Professor Carrington identifies pervasive changes to or (mis)readings of the rules in an effort by the Supreme Court to "calm the unrest of those who saw themselves as present or prospective defendants in civil cases." *Id.* at 613. Paralleling the situation currently facing Tennessee, the modifications of the rules "conform[] to the deregulation or tort-reform politics favored by many business interests." *Id.* at 600.

231 28 U.S.C. § 2072 (2011).

232 *Id.* § 2074.

discretionary power upon the supreme court."[233] If "full" and "plenary" power resides in the supreme court, it would seem that the General Assembly can have no residual rulemaking power.

Nevertheless, in crafting the process by which the Rules of Civil Procedure are promulgated, the General Assembly crafted a role for itself. If Congress's negative veto power over the federal rules indicates that rulemaking power originates in and remains with Congress,[234] then the Tennessee General Assembly's role of giving positive approval to the rules may indicate its ultimate power over rulemaking. Indeed, in Tennessee, if rulemaking power inheres in the supreme court, regardless of the statutory delegation, then it seems illogical that the court submits its rules to the General Assembly for approval. If the Tennessee General Assembly has no power over rulemaking, then its approval of the court's rules would seem to be, at best, superfluous.

Assuming, therefore, that the General Assembly retains some power over rulemaking, what is the scope of that power? One limitation on the General Assembly's power is found in the process it has prescribed for promulgating the rules. The rules are initially drafted by the Tennessee Supreme Court, but become effective only after the General Assembly approves them by joint resolution.[235] Thus, the legislature has delimited its role in the rulemaking process to one of approval only. It has not preserved for itself any role in the process of making rules other than that of approving rules drafted by the supreme court.[236] To the extent it might have had power to engage in naked rulemaking prior to the delegation, it has instead chosen to confine its role to approval of rules presented

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[233] TENN. CODE ANN. § 16-3-504 (2009).

[234] *See* WRIGHT ET AL., *supra* note 30, § 1001 ("[T]he weight of authority in this country supports the right of Congress to prescribe rules of judicial procedure for the federal courts.").

[235] TENN. CODE ANN. §§ 16-3-401 to -403 (2009). TENN. CODE ANN. § 16-3-406 (2009) provides: "After the rules have become effective, all laws in conflict with the rules shall be of no further force or effect." Quoting this language, Don Paine observes: "It is noteworthy that no Code section provides for nullification of a Supreme Court rule by subsequent legislation on the same subject." Paine, *Can the General Assembly Overrule Supreme Court Rules?*, *supr*a note 112, at 37.

[236] Recently, the supreme court, recognizing the delineation of authority in the rulemaking process, declined to interpret one of the discovery rules in a way that was inconsistent with legislative history, despite the fact that Tennessee is in the extreme minority of jurisdictions on the issue. Instead, it deferred to the rulemaking process and simply expressed its preference for Tennessee to join other states in following changes in the corresponding federal rule. *See* Thomas v. Oldfield, 279 S.W.3d 259, 264 (Tenn. 2009). Similarly, in *Webb*, the supreme court declined to adopt the federal "plausibility" pleading standard by judicial decision, instead deferring to the rulemaking process. Webb v. Nashville Habitat for Humanity, Inc., 346 S.W.3d 422, 424, (Tenn. 2011).

to it. This interpretation of the General Assembly's residual power harmonizes with its grant of "full" and "plenary" power to the supreme court.[237] Within Tennessee's statutory rulemaking scheme, the supreme court wields "full" and "plenary" power to write the rules; the General Assembly's only power is one of approval or disapproval.

This interpretation, however logical, seems to be challenged by the declaration of the supreme court in *Tennessee Dep't of Human Services v. Vaughn* that

> [t]hese rules [the Rules of Civil Procedure], along with the Rules of Criminal Procedure and the Rules of Appellate Procedure, are "laws" of this state, in full force and effect, until such time as they are superseded by legislative enactment or inconsistent rules promulgated by this court and adopted by the General Assembly.[238]

This quote from *Vaughn*, which is not part of the court's holding but responds only to the court of appeals' erroneous assertion that the "Tennessee Rules of Civil Procedure are not laws[,]"[239] has been relied on by lower courts for the proposition that "[t]he Tennessee Rules of Civil Procedure are 'laws' and are subject to being superseded in the same manner as statutes."[240] If this interpretation of *Vaughn*'s declaration is valid, then presumably the General Assembly can make and amend court rules at will. However, it appears that the statement in *Vaughn* simply refers to the status of the rules and the necessity for the courts to interpret them just as any other "laws" would be interpreted.

As noted, the supreme court in *Mallard* suggested another boundary. Namely, the General Assembly's power over court rules extends only to matters of substance: "[W]e have frequently acknowledged the broad power of the General Assembly to establish rules of evidence in furtherance of its ability to enact substantive law."[241] It is not clear precisely what type of substance-based or substance-linked rule the court had in mind—the court gave no

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[237] TENN. CODE ANN. § 16-3-504.

[238] Tenn. Dep't of Human Servs. v. Vaughn, 595 S.W.2d 62, 63 (Tenn. 1980). Professor Don Paine opined in December 2011 that when Justice Henry wrote this "dictum" in *Vaughn*, he did so "mistakenly." Paine, *Can the General Assembly Overrule Supreme Court Rules?*, *supra* note 112, at 37.

[239] *Vaughn*, 595 S.W.2d at 63.

[240] Lady v. Kregger, 747 S.W.2d 342, 345 (Tenn. Ct. App. 1987). This quote has also been relied upon by one commentator, who asserts that a challenge to the constitutionality of Public Act 498 "[will] not be an easy [one] to make." Blumstein, *supra* note 28, at 18.

[241] State v. Mallard, 40 S.W.3d 473, 481 (Tenn. 2001).

example of such a rule—but a court of appeals case may provide an example. In *Lady v. Kregger*,[242] the court of appeals addressed a clear conflict between the service provisions of Tennessee's uninsured motorist statute and Tenn. R. Civ. P. 3, governing service of process.[243] The court's resolution of the conflict seems to reflect the *Mallard* court's suggestion that the legislature has the power to make only substance-specific rules. The court held that "[t]he intention of the Legislature in enacting [the uninsured motorist statute] was to provide an efficient procedure whereby the Plaintiffs could obtain complete relief when injured by an uninsured motorist."[244] The court's reasoning was two-pronged. First, the court reasoned that "[s]uspension of the T.R.C.P. Rule 3 requirement[s] . . . is consistent with the legislative intent to provide an efficient procedure."[245] Second, the court quoted a general provision of the Tennessee Code Annotated: "If provisions of different titles or chapters of the code appear to contravene each other, the provisions of each title or chapter shall prevail as to all matters and questions growing out of the *subject matter* of that title or chapter."[246]

Treating the Rules of Civil Procedure as "laws" subject to interpretation pursuant to this section, the court held that "the specific provisions in [the uninsured motorist statute] prevail over the conflicting general provisions in T.R.C.P. Rule 3."[247] Several points are noteworthy here. First, the statutory service provisions applied only to one type of action: suit against an uninsured motorist carrier.[248] Second, the court discerned a clear substance-related purpose for the procedural provision: providing an efficient remedy—more efficient than the cumbersome reissuance requirements of Rule 3—for plaintiffs injured by uninsured motorists.[249] Finally, the court applied the canon of statutory construction that "the specific controls the general" to give effect to the substance-related statutory provision.[250] Thus, the *Lady* court's

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[242] *Lady*, 747 S.W.2d at 342.

[243] *Id.* at 343. Specifically, the statute permitted service upon the plaintiff's uninsured motorist carrier without compliance with Rule 3's "requirement that new process be issued every six months or the action be refiled yearly." *Id.* at 345.

[244] *Id.* at 345.

[245] *Id.*

[246] *Id.* (quoting TENN. CODE ANN. § 1-3-103) (emphasis added).

[247] *Id.*

[248] *Id.* at 344.

[249] *See id.* at 345.

[250] *Id.*

resolution of the conflict indicates that the substance-related rulemaking power acknowledged by the *Mallard* court probably refers to substance-*specific* procedures.

Public Chapter Number 498 does not qualify as the sort of substance-specific rule to which legislative power extends. The Act sets a new standard for granting summary judgment that is trans-substantive—applicable to any civil action, rather than limited to a specific type of action. Because summary judgment involves only the evaluation of claims and evidence, and by definition, involves no evaluation of the substance of a claim, a change in the summary judgment standard could not be classified as substantive.[251] Public Chapter Number 498 fails the *Mallard* court's definition of valid legislative rulemaking.

No Tennessee court has ever held that a Rule of Civil Procedure could be legislatively overruled. In every case in which a statute and a court rule were alleged to conflict, the Tennessee courts have harmonized the two, sometimes giving effect to the statute and sometimes to the rule. For example, in *State ex rel. Leech v. Wright*,[252] a suit seeking ouster of the Lincoln County Road Commissioner, the supreme court stated that "if there is any conflict between any express provision of the ouster statutes and the Tennessee Rules of Civil Procedure, the ouster statute should prevail."[253] Nevertheless, the court read the ouster statute as governing only amendments to the *form* of the complaint, holding that Tennessee Rule of Civil Procedure 15 governs substantive amendments and reversing the trial court's denial of the motion to amend.[254] In *Mid-South Pavers v. Arnco Construction*, the Tennessee Court of Appeals harmonized the statute governing revivor of actions with Tennessee Rule of Civil Procedure 25.01 by holding that Rule 25.01 sets forth the first step in the revivor process, while the statute prescribes the second step in the process.[255] Therefore, the plaintiff should have complied with both

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[251] Of course, Tennessee's summary judgment standard may well be "substantive" for *Erie* purposes. *See* Matthew R. Lyon, Shady Grove*, the Rules Enabling Act, and the Application of State Summary Judgment Standards in Federal Diversity Cases*, 85 ST. JOHN'S L. REV. 1011, 1052–53 (2011) (arguing that federal courts sitting in diversity should apply state summary judgment standards where those standards diverge from the federal *Celotex* standard).

[252] State *ex rel.* Leech v. Wright, 622 S.W.2d 807 (Tenn. 1981).

[253] *Id.* at 810–11.

[254] *Id.* at 811. *See also Frye*, 70 S.W.3d at 716 (stating "we must construe Rules 3 and 41.01 of the Tennessee Rules of Civil Procedure and the Tennessee saving statute together in a working order" and reading the language of the statute to require compliance with Rule 3).

[255] Mid-South Pavers, Inc. v. Arnco Constr., Inc., 771 S.W.2d 420, 423 (Tenn. Ct. App. 1989).

the rule and the statute to effectively revive its action.[256]

These efforts by the courts to harmonize apparently conflicting statutes and court rules are consistent with the *Mallard* court's restrained approach to inter-branch comity. Unfortunately, it is doubtful that Public Chapter Number 498 can be saved by resourceful reading. First, the statute purports to establish an entirely novel standard for summary judgment: the statute provides that the movant "shall prevail" if it meets the *Celotex* standard.[257] Read literally, this enactment provides no opportunity for the nonmovant to respond to the movant's showing. The *Hannan* standard merely prescribes the showing necessary for the movant to shift the burden of production to the nonmovant; it does not permit the movant to "prevail" regardless of any showing by the nonmovant.[258] This difficulty might be overcome by resourceful reading,[259] but if the Tennessee Supreme Court is faced with one of the very rare cases in which the second prong of the *Hannan* test is implicated,[260] there appears to be no way to harmonize the statute and the *Hannan* standard other than by reinserting the two words "at trial" into the second prong.

In summary, then, the General Assembly's attempt to amend Tennessee Rule of Civil Procedure 56 in Public Chapter Number 498 probably exceeded its power under the statutory scheme for the promulgation and amendment of the Tennessee Rules of Civil Procedure. In light of the supreme court's "full, plenary and discretionary power" within the statutory scheme, there is no residual power in the legislature to enact rules of practice and procedure for the courts. Because the legislature's only role within

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[256] *Id.* Specifically, the court held that Rule 25.01 changed the statutory scheme from a requirement of consent or *scire facias* to a simple motion and order of substitution of parties. However, the second statutory step—filing the order in duplicate in the probate court—was not addressed by the rule; therefore, that portion of the statute must still be complied with. *Id.*

[257] Act of May 20, 2011, ch. 498, § 1, 2011 Tenn. Pub. Acts ___.

[258] At least one commentator has glossed over this distinction by asserting that both *Byrd* and *Hannan* set the standard by which the movant should prevail, rather than simply articulating the movant's initial burden of production. *See* Blumstein, *supra* note 28, at 16 (chart comparing *Byrd*, *Hannan*, and Public Chapter Number 498).

[259] The court might read the poorly drafted statute to merely reflect the legislature's intention that the movant can "shift the burden of production to the nonmovant" by complying with either of the statutory prongs. This charitable reading is arguably no more extreme than the *Mallard* court's willingness to read the verb "shall" as "should." *See supra* note 102 and accompanying text.

[260] *See generally* Judy M. Cornett, *The Legacy of* Byrd v. Hall*: Gossiping About Summary Judgment in Tennessee*, 69 TENN. L. REV. 175 (2001) (discussing why the *Hannan* standard will arise very rarely in summary judgment practice).

this statutory scheme is to approve rules of civil procedure promulgated by the supreme court, it has no power to create rules outside this process.[261] Although, as the *Mallard* court recognized and the *Lady* court held, the legislature can validly enact substance-specific rules of procedure, Public Chapter Number 498 is trans-substantive.[262]

V. CONCLUSION

The current situation in Tennessee is a vivid illustration of how the mere threat of contested judicial elections can affect the legal climate. The legislature's attempt to amend Tennessee's summary judgment rule, or to overrule the Tennessee Supreme Court's interpretation of it, all while circumventing the established rulemaking process, adumbrates much larger issues about the independence of the judicial branch. Legal arguments can be made about the validity of Public Chapter Number 498—it violates the separation of powers clause of the Tennessee Constitution; it trenches upon the inherent powers of the Tennessee Supreme Court; it runs afoul of the statutory process that by definition delimits the Tennessee General Assembly's power to make rules of practice and procedure. But the real battle being fought in Tennessee is not one between *Celotex* and *Hannan*—it is, as the *Mallard* court put it, a battle between "courtesy" and "concession."

[261] Notably, during the very brief debate over the legislation on the floor of the Tennessee Senate, Sen. Lowe Finney (D-Jackson) implored the sponsor, Sen. Brian Kelsey (R-Germantown) to allow the Rules Committee the opportunity to review the bill before passage. Statement of Sen. Finney, Senate Floor, May 20, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=43288. Sen. Kelsey responded that the because the bill had been introduced months earlier, the Tennessee Bar Association had the opportunity to take it to the Rules Committee, but had not done so, and at any rate, it was unnecessary for the Rules Committee to review it. Statement of Sen. Kelsey, Senate Floor, May 20, 2011, available at http://tnga.granicus.com/MediaPlayer.php?view_id=186&clip_id=43288.

[262] Although one commentator has sought to relate Public Chapter Number 498 to tort reform measures passed during the same legislative session, the legislature itself made no reference to tort reform in the preamble to the bill that was eventually enacted, undermining any argument that the act had a substance-specific purpose. *See* Blumstein, *supra* note 28, at 17.