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Constitutional Law—Arkansas’s Current Procedural Rulemaking Conundrum: Attempting to Quell the Political Discord

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CONSTITUTIONAL LAW—ARKANSAS’S CURRENT PROCEDURAL
RULEMAKING CONUNDRUM: ATTEMPTING TO QUELL THE POLITICAL
DISCORD

The history of American freedom is, in no small measure, the history of procedure.

*Justice Felix Frankfurter*¹

I. INTRODUCTION

Following a routine surgical procedure, Teresa Broussard discovered an unusual burn at her incision site accompanied by black and purple lines, severe pain, and swelling.² Believing the issues to be attributable to the surgery, Teresa admitted herself to the emergency room where her physician released her stating that the damaged skin would soon heal.³ Teresa failed to improve and sloughing dead tissue developed on Teresa’s neck and chest, forcing her to seek immediate treatment at a burn center.⁴ Teresa brought suit against the hospital as well as the doctors and nurses present throughout her operation, asserting negligent medical treatment during and after her surgery.⁵ Despite evidence of negligence, the circuit court granted the physician’s motion for summary judgment because Teresa’s expert witness did not work within the same precise specialty as the defendant—a procedural necessity.⁶

While the right to bring a claim for a civil wrong is one of America’s constitutional strongholds,⁷ the difference between a claimant’s successful recovery and a dismissed claim often hinges on a simple procedural rule.⁸ Teresa’s failure to comply with such a rule meant that the court granted her physician’s motion for summary judgment because her experts did not con-

1. *Malinski v. New York*, 324 U.S. 401, 414 (1945) (Frankfurter, J., concurring).

2. *Broussard v. St. Edward Mercy Health Sys., Inc.*, 2012 Ark. 14, at 2, 386 S.W.3d 385, 387.

3. *Id.* at 2, 386 S.W.3d at 387.

4. *Id.* at 3, 386 S.W.3d at 387.

5. *Id.*

6. *Id.* at 3–8, 386 S.W.3d at 388–90 (referencing the requirements of ARK. CODE ANN. § 16-114-206(a) (Repl. 2006)).

7. *See* U.S. CONST. amend. VII.

8. *See, e.g., Broussard*, 2012 Ark. 14, at 1–4, 386 S.W.3d at 387–88; *Bayer Crop-Science L.P. v. Schafer*, 2011 Ark. 518, at 13, 385 S.W.3d 822, 831; *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 8–11, 308 S.W.3d 135, 141–42; *Summerville v. Thrower*, 369 Ark. 231, 238–39, 253 S.W.3d 415, 420–21 (2007).

stitute “medical care providers of the same specialty as the defendant.”⁹ Similar rules of civil procedure have long accompanied substantive laws, pronouncing the steps required to have a right or duty judicially enforced.¹⁰

The seeming accord of Arkansas’s procedural and substantive laws has recently come to a halt, threatening the state’s system of judicial enforcement.¹¹ Overruling portions of the Arkansas General Assembly’s Civil Justice Reform Act (CJRA),¹² the Supreme Court of Arkansas has repeatedly held that various provisions of the CJRA violate the state’s constitutional grant of procedural rulemaking power to the judiciary.¹³ Over time, the debate has intensified over the authority to promulgate Arkansas’s rules of pleading, practice, and procedure.

The Supreme Court of Arkansas currently holds the ultimate power in declaring Arkansas’s procedural rules.¹⁴ Contrary to this system, however, the General Assembly’s Senate Joint Resolutions Five and Six, introduced in the 2013 session, proposed a grant of exclusive procedural rulemaking authority to the Legislature.¹⁵ Although neither of the resolutions passed, the legislature’s notion still stands. These two branches of Arkansas government must find a way to reconcile their authority with what will best promote the constitutional rights of plaintiffs and defendants, as well as the core democratic principles of separation of powers and judicial efficiency. Allowing the court to maintain its rulemaking authority, while permitting the general assembly to amend or annul new rules by a two-thirds majority of each house, appears to be a compromise tailored to remedy the current procedural conundrum.

This note first details Arkansas’s current system of procedural rulemaking and the problem facing the state’s rules of pleading, practice, and procedure. It then examines the growing discord between the legislature and the judiciary, analyzing recent case law in light of Arkansas’s CJRA and the

9. *Broussard*, 2012 Ark. 14, at 1–2, 386 S.W.3d at 387 (quoting ARK. CODE ANN. § 16-114-206(a)).

10. *See, e.g.*, FED. R. CIV. P.; ARK. R. CIV. P.; CAL. R. CT.; TENN. R. CIV. P.; TEX. R. CIV. P.

11. *See* Civil Justice Reform Act of 2003, No. 649, 2003 Ark. Acts 2130 (codified at ARK. CODE ANN. §§ 16-55-201 to -220, 16-114-206, -208 to -212 (Repl. 2006)); *Broussard*, 2012 Ark. 14, at 2, 386 S.W.3d at 387; *Bayer*, 2011 Ark. 518, at 13, 385 S.W.3d at 831; *Johnson*, 2009 Ark. 241, at 8–11, 308 S.W.3d at 141–42; *Summerville*, 369 Ark. at 239, 253 S.W.3d at 421.

12. 2003 Ark. Acts 2130.

13. *See, e.g.*, *Broussard*, 2012 Ark. 14, at 1–2, 386 S.W.3d at 387; *Bayer*, 2011 Ark. 518, at 9–13, 385 S.W.3d at 829–31; *Johnson*, 2009 Ark. 241, at 8–11, 308 S.W.3d at 141–42; *Summerville*, 369 Ark. at 239, 253 S.W.3d at 421.

14. *See* ARK. CONST. amend. 80, § 3.

15. S.J. Res. 5, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); S.J. Res. 6, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

proposed Senate Joint Resolutions that aimed to vest rulemaking authority entirely in the General Assembly. Finally, this note proposes that Arkansas can quell the current procedural rulemaking discord by taking a lesson from other states and the Federal Rules of Civil Procedure:¹⁶ permit the Supreme Court of Arkansas to maintain its procedural rulemaking authority, while providing Arkansas's General Assembly with amendment and annulment power exercisable by a two-thirds majority. This system allows judicial and legislative oversight, thereby complying with the separation of powers doctrine and encouraging judicial efficiency—while protecting the rights of Arkansas's citizens.

II. BACKGROUND

Arkansas's procedural rulemaking system has historically followed the traditional model, allowing judges to mandate court rules using their hands-on expertise with pleading, practice, and procedure.¹⁷ In recent years, however, procedural reform has become a hot-button issue nationwide,¹⁸ and with Congress's Civil Justice Reform Act of 1990,¹⁹ a wave of similar state acts arose in an effort to address problems of case backlog, delay, excessive costs, and inefficiency.²⁰ In light of Arkansas's current system of procedural rulemaking, the political back-and-forth that has arisen from Arkansas's CJRA and its subsequent partial-nullification lay the foundation for the state's procedural rulemaking discord.²¹ This section examines Arkansas's current system of procedural rulemaking promulgation, followed by a look at the political tug-of-war that has arisen from Arkansas's CJRA and its judicial response.

A. Arkansas's Current System of Rulemaking Authority

Amendment 80, which took effect in 2001, delegated Arkansas's procedural rulemaking power to the Supreme Court of Arkansas: "The Supreme Court shall prescribe the rules of pleading, practice and procedure for all

16. See, e.g., FED. R. CIV. P.; CAL. R. CT.; TENN. R. CIV. P.; TEX. R. CIV. P.

17. See generally Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 893–97 (1999) (discussing the rise of the court rulemaking model throughout the twentieth century).

18. See Courtney A. Nelson, Case Note, *To Truly Reform We Must Be Informed: Davis v. Parham, the Separation of Powers Doctrine, and the Constitutionality of Tort Reform in Arkansas*, 59 ARK. L. REV. 781, 781 (2006).

19. 28 U.S.C. §§ 471–482 (2013).

20. Bone, *supra* note 17, at 904; see also *State Reforms*, AM. TORT REFORM ASS'N, <http://www.atra.org/legislation/states> (last visited Nov. 17, 2013) (presenting an interactive map of the United States with links to each state's enacted tort reform statutes).

21. See *supra* note 11.

courts; provided these rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution.”²² Amendment 80 also permits the General Assembly, by a two-thirds vote of the membership of each house, to annul or amend certain rules adopted by the Supreme Court of Arkansas.²³ However, rules of pleading, practice, and procedure are not listed as amendable or unamendable.²⁴ The General Assembly reaffirmed Amendment 80 in 2003 by enacting Arkansas Code Annotated section 16-11-301, which states that “[a]ll statutes concerning pleading, practice, and procedure in all courts shall be deemed superseded by rules adopted by the Supreme Court pursuant to . . . Amendment 80.”²⁵

Before Amendment 80’s enactment, Arkansas’s General Assembly possessed authority to enact statutes addressing procedural issues.²⁶ Against this legislative power, the Supreme Court of Arkansas struggled to merge its “constitutional and inherent power to regulate procedure in the courts” with the simultaneous authority of the General Assembly.²⁷ At that time, if a statute conflicted with a court-promulgated rule, the court only deferred to the legislature “when the statutory rule [was] based upon a fixed public policy which ha[d] been legislatively or constitutionally adopted and ha[d] as its basis something other than court administration.”²⁸

Amendment 80’s enactment clarified that the judicial branch has the ultimate authority to promulgate procedural rules and that any procedural stat-

22. ARK. CONST. amend. 80, § 3.

23. *Id.* § 9. Section 5 allows the supreme court to promulgate rules concerning the appellate jurisdiction of the court of appeals. *Id.* § 5. Section 6(B) gives the supreme court control of the circuit courts. *Id.* § 6(B). Section 7(B) allows the supreme court to establish “[t]he jurisdictional amount and the subject matter of civil cases that may be heard in the District Courts.” *Id.* § 7(B). Section 7(D) gives the supreme court superintending control of the division of district courts into subject matter divisions. *Id.* § 7(D). Section 8(A) allows the supreme court to prescribe the duties of circuit court referees or masters. *Id.* § 8(A). Section 8(B) allows the supreme court to prescribe the duties of district court magistrates. *Id.* § 8(B). See also Kimberly J. Frazier, Legislative Note, *Arkansas’s Civil Justice Reform Act of 2003: Who’s Cheating Who?*, 57 ARK. L. REV. 651, 668–69 (2004) (emphasizing that the supreme court’s authority is not subordinate when it comes to procedural rules).

24. See ARK. CONST. amend. 80, § 9; Frazier, *supra* note 23.

25. ARK. CODE ANN. § 16-11-301 (Repl. 2010); see also Frazier, *supra* note 23, at 669.

26. See 2 DAVID NEWBERN ET AL., ARKANSAS CIVIL PRACTICE AND PROCEDURE § 1:3 (5th ed. 2013).

27. *Id.*

28. *Citizens for a Safer Carroll Cnty. v. Epley*, 338 Ark. 61, 64, 991 S.W.2d 562, 564 (1999) (citing *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994); *Curtis v. State*, 301 Ark. 208, 212, 783 S.W.2d 47, 49 (1990)); see also Frazier, *supra* note 23 (indicating that it is unclear whether the supreme court will continue to defer to the general assembly when the statute is based on public policy).

utes promulgated by the legislative branch are superseded by the court's rulemaking power.²⁹

B. Political Discord: Legislature v. Judiciary

Vesting procedural rulemaking authority entirely in the judiciary left Arkansas's General Assembly without a voice regarding pleading, practice, and procedure;³⁰ however, Arkansas's CJRA purportedly allowed the legislature to impede on the court's rulemaking power by minimizing so-called "frivolous lawsuits"³¹—a concept commonly known as "tort reform."³² Shortly after the CJRA's enactment, the Supreme Court of Arkansas declared many of the CJRA's provisions unconstitutional by examining the separation of powers and distinguishing the blurred line between substance and procedure.³³

1. Arkansas's Civil Justice Reform Act of 2003

The General Assembly enacted the CJRA to remedy conditions "adversely impacting the availability and affordability of medical liability insurance" and to "improve access to the courts for deserving claimants."³⁴ To accomplish this, the CJRA made significant procedural changes regarding nearly every stage of the litigation process: (1) pleadings, (2) venue, (3) allocation of fault among parties and nonparties, (4) bifurcated trials, and (5) damages.³⁵

Altering Arkansas's pleading rules,³⁶ the CJRA added the requirement that a medical malpractice claim must include an affidavit signed by an ex-

29. See ARK. CONST. amend. 80, § 3.

30. See NEWBERN ET AL., *supra* note 26.

31. See Ryan Kent Culpepper, Comment, *Justice Reformed: Johnson v. Rockwell Automation, Inc., Torts, and the Separation of Powers in Arkansas*, 63 ARK. L. REV. 283, 283 (2010).

32. See Civil Justice Reform Act of 2003, No. 649, 2003 Ark. Acts 2130 (codified at ARK. CODE ANN. §§ 16-55-201 to -220, 16-114-206, -208 to -212 (Repl. 2006)); Culpepper, *supra* note 31.

33. See, e.g., Broussard v. St. Edward Mercy Health Sys., Inc., 2012 Ark. 14, at 1–2, 386 S.W.3d 385, 387; Bayer CropScience L.P. v. Schafer, 2011 Ark. 518, at 13, 385 S.W.3d 822, 831; Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, at 8–11, 308 S.W.3d 135, 141–42; Summerville v. Thrower, 369 Ark. 231, 239, 253 S.W.3d 415, 421 (2007).

34. 2003 Ark. Acts 2130 at sec. 26; see also Nelson, *supra* note 18, at 792–93 (showing that the CJRA's policy rationale is closely linked with that of Arkansas's Medical Malpractice Act).

35. See Robert B Leflar, *How the Civil Justice Reform Act Changes Arkansas Tort Law*, ARK. LAW., Fall 2003, at 26, 26–27.

36. ARK. R. CIV. P. 7–11.

pert in the same medical field as the defendant.³⁷ The statute requires that if this affidavit is not filed within thirty days of the complaint, the case must be automatically dismissed.³⁸

The CJRA also altered Arkansas's venue law.³⁹ Prior to 2003, a person was only subject to a lawsuit in the county of his residence, the county of his principal place of business, the county where the injury occurred, or in Pulaski County for specified actions involving the State.⁴⁰ Arkansas's law now provides that all civil actions, other than six specifically excluded actions, may also be brought in the county of the plaintiff's residence or principal place of business.⁴¹ For medical malpractice actions, however, the CJRA limited venue to "the county in which the alleged act or omission occurred."⁴²

Concerning personal injury actions, the CJRA replaced Arkansas's system of joint and several liability⁴³ with a system of several-only liability.⁴⁴ Prior to the CJRA, if two or more defendants were at fault, a prevailing plaintiff could collect damages from any liable party, regardless of his or her percentage of fault.⁴⁵ Conversely, the CJRA provides that each defendant's liability "shall be several only and shall not be joint."⁴⁶ Each defendant is only liable for his or her share of the damages in proportion to his or her percentage of fault.⁴⁷ In furtherance of several-only liability, the CJRA also established a procedure whereby fact finders in personal injury cases must "consider the fault of all persons or entities who contributed to the . . . injury

37. ARK. CODE ANN. § 16-114-209(b)(1) (Repl. 2006), *invalidated in part by Summer-ville*, 369 Ark. 231, 253 S.W.3d 415.

38. *Id.* § 16-114-209(b)(3)(B).

39. *See id.* § 16-55-213 (Repl. 2005); *see also* Kelly W. McNulty, *Ark. Code Ann. § 16-55-213: Tort Reform Brings Sweeping Changes to Venue Law in Arkansas*, ARK. LAW., Winter 2009, at 10, 10–11 (contrasting Arkansas's venue law before and after the CJRA's enactment).

40. McNulty, *supra* note 39, at 10.

41. ARK. CODE ANN. § 16-55-213(a)(3); *see also* McNulty, *supra* note 39, at 11.

42. ARK. CODE ANN. § 16-55-213(e).

43. *See* Crystal Tessaro, Note, *NationsBank, N.A. v. Murray Guard, Inc.: Lawyers Can No Longer Bank on Arkansas's Application of Comparative Fault in Multi-Tortfeasor Cases*, 55 ARK. L. REV. 659, 665–68 (2002), for an overview of Arkansas's system of joint and several liability before the CJRA's enactment.

44. ARK. CODE ANN. § 16-55-201 (Repl. 2006); *see also* Samuel T. Waddell, Comment, *Examining the Evolution of Nonparty Fault Apportionment in Arkansas: Must a Defendant Pay More Than Its Fair Share?*, 66 ARK. L. REV. 485, 485 (2013) (describing the abolishment of joint and several liability and the enactment of fair share liability).

45. *See* Frazier, *supra* note 23, at 671.

46. ARK. CODE ANN. § 16-55-201(a).

47. *Id.* § 16-55-201(b)(1).

. . . , regardless of whether the person or entity was or could have been named as a party to the suit.”⁴⁸

Before the CJRA, courts had discretion to order a bifurcated trial according to the Arkansas Rules of Civil Procedure.⁴⁹ Conversely, the CJRA allows either party to request a bifurcated trial in any case where punitive damages are sought.⁵⁰ If the trial is bifurcated, it proceeds in two stages.⁵¹ During the first stage of the trial, the fact finder “determine[s] whether compensatory damages are to be awarded.”⁵² If compensatory damages are awarded, the second stage begins, during which the fact finder “determine[s] whether and in what amount punitive damages will be awarded.”⁵³ Evidence of the defendant’s financial condition is only permitted during the second stage of the bifurcated trial.⁵⁴

Finally, the CJRA placed limitations on damages.⁵⁵ As to punitive damages, the Act limited plaintiffs’ damages to the greater of \$250,000 or three times the amount of compensatory damages, but no more than \$1 million.⁵⁶ Restricting compensatory damages, the CJRA limited evidence of damages for the costs of medical care to “those costs actually paid by or on behalf of the plaintiff,” or those for which the plaintiff or a third party remained responsible.⁵⁷

Although the CJRA’s beneficiaries are quietly touted as defendants and their liability insurers,⁵⁸ the overall purpose of the CJRA was to reduce legislatively perceived excesses in medical liability litigation by targeting procedural law.⁵⁹ Despite its aim, the effects of the CJRA are felt throughout

48. *Id.* § 16-55-202(a) (Repl. 2006), *invalidated by* Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, 308 S.W.3d 135; *see also* Waddell, *supra* note 44, at 486 (detailing the subsequent history of the nonparty-fault provision).

49. *See* ARK. R. CIV. P. 42(b).

50. ARK. CODE ANN. § 16-55-211(a)(1) (Repl. 2006); *see also* Frazier, *supra* note 23, at 669–70 (asserting that the CJRA deprives the court of discretion by making bifurcation mandatory in cases requesting punitive damages if any party requests bifurcation more than ten days before trial).

51. *See* ARK. CODE ANN. § 16-55-211(a)(2).

52. *Id.* § 16-55-211(a)(2)(A).

53. *Id.* § 16-55-211(a)(2)(B).

54. *Id.* § 16-55-211(b).

55. *Id.* § 16-55-208 (Repl. 2006), *invalidated by* Bayer CropScience L.P. v. Schafer, 2011 Ark. 518, 385 S.W.3d 822; *id.* § 16-55-212 (Repl. 2006), *invalidated in part by* Johnson v. Rockwell Automation, Inc., 2009 Ark. 241, 308 S.W.3d 135.

56. *Id.* § 16-55-208(a).

57. ARK. CODE ANN. § 16-55-212(b).

58. *See, e.g.*, Robert B Leflar, *The Civil Justice Reform Act and the Empty Chair*, 2003 ARK. L. NOTES 67, 67; Nelson, *supra* note 18, at 792.

59. *See* Leflar, *supra* note 58; Nelson, *supra* note 18, at 792.

Arkansas's litigation practice, oftentimes far removed from the medical liability arena.⁶⁰

2. *The Court Interprets the Law: Judicial Fallout*

The CJRA's broad-sweeping effects prompted the Supreme Court of Arkansas to examine the constitutionality of the Act's provisions.⁶¹ Viewed in light of Amendment 80 and Arkansas's separation of powers doctrine, the court distinguished the line between substance and procedure, holding several of the CJRA's provisions unconstitutional.⁶²

In *Summerville v. Thrower*⁶³—four years after the CJRA's enactment—the court held unconstitutional the statutory requirement of dismissing medical malpractice actions for failure to timely submit a reasonable cause affidavit.⁶⁴ The provision's unconstitutionality stems from its direct conflict with Rule 3 of the Arkansas Rules of Civil Procedure regarding the commencement of an action.⁶⁵ Examining this conflict, the court defined the line between substance and procedure:

The boilerplate definition of substantive law is “[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of parties,” while procedural law is defined as “[t]he rules that prescribe the steps for having a right or duty judicially enforced, as opposed to the law that defines the specific rights or duties themselves.”⁶⁶

Two years later, in *Johnson v. Rockwell Automation, Inc.*,⁶⁷ the Supreme Court struck down two more provisions of the CJRA.⁶⁸ First, the

60. See Leflar, *supra* note 58.

61. See, e.g., *Broussard v. St. Edward Mercy Health Sys., Inc.*, 2012 Ark. 14, at 1–2, 386 S.W.3d 385, 387; *Bayer CropScience L.P. v. Schafer*, 2011 Ark. 518, at 13, 385 S.W.3d 822, 831; *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 8–11, 308 S.W.3d 135, 141–42; *Summerville v. Thrower*, 369 Ark. 231, 239, 253 S.W.3d 415, 421 (2007).

62. *Broussard*, 2012 Ark. 14, at 1–2, 386 S.W.3d at 387; *Bayer*, 2011 Ark. 518, at 13, 385 S.W.3d at 831; *Johnson*, 2009 Ark. 241, at 8–11, 308 S.W.3d at 141–42; *Summerville*, 369 Ark. at 239, 253 S.W.3d at 421.

63. 369 Ark. 231, 253 S.W.3d 415 (2007).

64. *Id.* at 239, 253 S.W.3d at 421 (holding that the thirty-day dismissal requirement of ARK. CODE ANN. § 16-114-209(b)(3)(A) (Repl. 2006) is directly in conflict with Rule 3 of the Arkansas Rules of Civil Procedure).

65. See ARK. R. CIV. P. 3; *Summerville*, 369 Ark. at 239, 253 S.W.3d at 421.

66. *Summerville*, 369 Ark. at 237, 253 S.W.3d at 419–20 (alteration in original) (quoting BLACK'S LAW DICTIONARY 1443, 1221 (7th ed. 1999)).

67. 2009 Ark. 241, 308 S.W.3d 135.

68. *Id.* at 8–11, 308 S.W.3d at 141–42 (holding that the CJRA's medical-costs provision, codified at ARK. CODE ANN. § 16-55-212(b) (Repl. 2006), and the CJRA's nonparty fault provision, codified at ARK. CODE ANN. § 16-55-202 (Repl. 2006), violated Arkansas's constitution).

court held that the nonparty-fault provision, which required the fact finder to consider the negligence or fault of nonparties, violated the separation of powers under the Arkansas Constitution.⁶⁹ By setting up a procedure to determine the fault of a nonparty and requiring consideration of the nonparty's fault, the court ruled that the General Assembly bypassed the court's rules of pleading, practice, and procedure.⁷⁰ Second, the court held unconstitutional the CJRA's medical-costs provision, which limited evidence of damages for the costs of medical care to costs actually paid by or on behalf of the plaintiff, or those for which the plaintiff remained responsible.⁷¹ This provision violates Arkansas's separation of powers doctrine because determining what constitutes admissible evidence is a duty constitutionally left to the court's discretion.⁷² The *Johnson* court added to *Summerville*'s differentiation between substance and procedure by holding that a legislative provision dictating procedure need not directly conflict with one of the court's procedural rules to be unconstitutional.⁷³

Further analyzing the blurred line between substance and procedure in *Cato v. Craighead County Circuit Court*,⁷⁴ the Supreme Court of Arkansas found a statute providing exemption from civil process for active duty members of the organized militia⁷⁵ to be substantive, rather than procedural; therefore, the statute does not violate the separation of powers doctrine.⁷⁶ In its analysis, the court further clarified this doctrine by stating that any statute that "bypasses our rules of pleading, practice, and procedure by setting up a procedure of its own . . . violates the separation-of-powers doctrine."⁷⁷

In *Bayer CropScience L.P. v. Schafer*,⁷⁸ the court struck down yet another CJRA provision when it held that the CJRA's statutory cap on punitive damages violated the Arkansas Constitution's prohibition of limiting damages in personal injury actions.⁷⁹ Although this CJRA provision did not

69. *Id.* at 8–9, 308 S.W.3d at 141 (discussing ARK. CODE ANN. § 16-55-202).

70. *Id.* at 9, 308 S.W.3d at 141.

71. *Id.* at 10–11, 308 S.W.3d at 142.

72. *Id.*, 308 S.W.3d at 142.

73. *See Johnson*, 2009 Ark. 241, at 8, 308 S.W.3d at 141 (referencing *Summerville v. Thrower*, 369 Ark. 231, 237, 253 S.W.3d 415, 419–20 (2007)); *see also* NEWBERN ET AL., *supra* note 26 (proposing that the holding in *Johnson* flows from the exclusivity of the court's constitutional rulemaking authority).

74. 2009 Ark. 334, 322 S.W.3d 484.

75. ARK. CODE ANN. § 12-62-403 (Repl. 2003).

76. *Cato*, 2009 Ark. 334, at 7–11, 322 S.W.3d at 488–90.

77. *Id.* at 8–9, 322 S.W.3d at 489.

78. 2011 Ark. 518, 385 S.W.3d 822.

79. *Id.* at 11–13, 385 S.W.3d at 830–31 (holding ARK. CODE ANN. § 16-55-208 (Repl. 2006) unconstitutional).

raise procedural or separation of powers issues, the court's holding further illustrates its willingness to critically examine the CJRA.⁸⁰

Finally, the Supreme Court of Arkansas held in *Broussard v. St. Edward Mercy Health System, Inc.*⁸¹ that the statute requiring a medical care provider of the same specialty, practice, and locality as the defendant to provide expert testimony in malpractice actions violated the separation of powers.⁸² The court determined that this provision creates a procedural law that is solely within the province of the courts because it does not define rights or duties, but rather sets witness qualifications.⁸³ The court referenced *City of Fayetteville v. Edmark*,⁸⁴ which states “[t]he trial court controls the admissibility of evidence and the determination of applicable law and always has the inherent authority to secure the fair trial rights of litigants before it.”⁸⁵

Since the CJRA's enactment, the Supreme Court of Arkansas has consistently investigated the Act's provisions for potential unconstitutionality.⁸⁶ The court has gone so far as to hold that *any* statute creating a procedural rule violates the separation of powers, even if the provision does not directly conflict with the court's rules of pleading, practice, and procedure.⁸⁷

3. *The Legislative Response: Senate Joint Resolutions Five and Six*

The 89th General Assembly's Regular Session convened on January 14, 2013.⁸⁸ The Arkansas Constitution permits each regular legislative ses-

80. *See id.*, 385 S.W.3d at 830–31.

81. 2012 Ark. 14, 386 S.W.3d 385.

82. *Id.* at 4–8, 386 S.W.3d at 388–90 (holding unconstitutional the portion of ARK. CODE ANN. § 16-114-206(a)(1)–(2) (Repl. 2006) requiring proof of medical negligence “[b]y means of expert testimony provided only by a medical care provider of the same specialty as the defendant”).

83. *Id.* at 6, 386 S.W.3d at 389.

84. 304 Ark. 179, 801 S.W.2d 275 (1990).

85. *Broussard*, 2012 Ark. 14, at 7, 386 S.W.3d at 389 (quoting *Edmark*, 304 Ark. at 194, 801 S.W.2d at 283).

86. *See, e.g., id.* at 6–8, 386 S.W.3d at 389–90.; *Bayer CropScience L.P. v. Schafer*, 2011 Ark. 518, at 9–13, 385 S.W.3d 822, 829–31; *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 5–11, 308 S.W.3d 135, 139–42; *Summerville v. Thrower*, 369 Ark. 231, 237–39, 253 S.W.3d 415, 419–21 (2007).

87. *See, e.g., Cato v. Craighead Cnty. Cir. Ct.*, 2009 Ark. 334, at 8–9, 322 S.W.3d 484, 489; *Johnson*, 2009 Ark. 241, at 8, 308 S.W.3d at 141.

88. *89th General Assembly—Regular Session 2013*, ARK. ST. LEGISLATURE, <http://www.arkleg.state.ar.us/assembly/2013/2013R/Pages/Home.aspx> (last visited Nov. 17, 2013); Bob Estes & Jack McNulty, *Report on the Regular Session of the 89th General Assembly*, ARK. LAW., Summer 2013, at 16, 16.

sion to refer three constitutional amendments to the people for a vote.⁸⁹ Proposals for amendments begin in the Senate as Senate Joint Resolutions (SJR) and in the House of Representatives as House Joint Resolutions (HJR).⁹⁰ Senator Eddie Joe Williams (“Senator Williams”) introduced SJR Five⁹¹ and Six⁹² in an attempt to vest complete procedural rulemaking control in Arkansas’s General Assembly.⁹³ Senator Williams introduced two resolutions so that if one failed, the other could be amended for a successful vote.⁹⁴ Initially, the action was on SJR Six, but then it was abandoned in favor of SJR Five.⁹⁵

Both SJRs attempted to achieve essentially the same thing.⁹⁶ Each proposed revising Amendment 80 to provide that the General Assembly would prescribe the rules of pleading, practice, and procedure for all courts and that the Supreme Court of Arkansas would have no authority to promulgate rules, except as expressly delegated by the legislature.⁹⁷ The resolutions also proposed that the General Assembly, as opposed to Supreme Court rule, would provide the right of appeal to an appellate court from the circuit courts, along with other rights of appeal.⁹⁸ After abandoning SJR Six, Senator Williams amended SJR Five to maintain Amendment 80’s grant of rule-making authority in the Supreme Court, while bestowing authority on the General Assembly to enact laws that adopt, amend, affect, or supersede the court’s rules.⁹⁹ SJR Five added that the General Assembly would be authorized to regulate the award of damages, including punitive damages.¹⁰⁰ De-

89. ARK. CONST. art. 19, § 22; *see also* Estes & McNulty, *supra* note 88, at 22–23 (describing the constitutional amendments proposed during the Regular Session of the 89th General Assembly).

90. Estes & McNulty, *supra* note 88, at 22.

91. S.J. Res. 5, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

92. S.J. Res. 6, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

93. *See* Joey McCutchen, *Protect Our 7th Amendment Rights*, SECURE ARK. (Mar. 20, 2013), <http://securetherepublic.com/arkansas/2013/03/20/protect-our-7th-amendment-rights/>; *see also* Jodiane Tritt, *Fourth Week of the Session Comes to a Close*, ARK. HOSP. ASS’N LEGIS. BULL. (Ark. Hosp. Ass’n, Little Rock, Ark.), Feb. 8, 2013, at 2, *available at* <http://www.arkhospitals.org/archive/Legisbulletinpdf/AHALegislativeBulletin02-08-13.pdf> (summing up the fourth week of the legislative session and Senator Williams’s SJR 5 and SJR 6).

94. *See* Estes & McNulty, *supra* note 88, at 22.

95. *See id.*

96. *See id.* at 22–23.

97. S.J. Res. 5, 89th Gen. Assemb., Reg. Sess. § 2 (Ark. 2013); S.J. Res. 6, 89th Gen. Assemb., Reg. Sess. § 2 (Ark. 2013).

98. Ark. S.J. Res. 5 § 3; Ark. S.J. Res. 6 § 3; *see also* Estes & McNulty, *supra* note 88, at 22–23 (describing the constitutional amendments proposed during the Regular Session of the 89th General Assembly).

99. *See* Estes & McNulty, *supra* note 88, at 22–23.

100. Ark. S.J. Res. 5 § 1; *see also* Estes & McNulty, *supra* note 88, at 22–23 (describing the progression of SJR 5 during the Regular Session of the 89th General Assembly).

spite these alterations, SJR Five did not receive sufficient votes to constitute one of the three proposed constitutional amendments referred to the people for a vote.¹⁰¹

4. *Special Task Force on Practice and Procedure in Civil Cases*

In light of the back-and-forth between the judiciary and the legislature, the Supreme Court of Arkansas created a Special Task Force on Practice and Procedure in Civil Cases (“Task Force”).¹⁰² The court determined that the 2013 legislative session, coupled with the recent cases overruling provisions of the CJRA, revealed a need for review and revision of the Arkansas Rules of Civil Procedure.¹⁰³

Referencing its process, which allows any member of the bench, bar, or public to recommend changes to the procedural rules, the court mentioned that all debating parties had failed to submit concerns or recommendations to its Committee on Civil Practice.¹⁰⁴ Moving past this fact, the court acknowledged that a thorough examination of the concerns raised by these debates warranted the creation of the Task Force.¹⁰⁵

In its January 10, 2014 report, the Task Force proposed changes to seven existing rules and recommended the adoption of one new rule.¹⁰⁶ The report’s two major proposals concerned allocation of nonparty fault and Rule 11 of the Arkansas Rules of Civil Procedure.¹⁰⁷ In its final report—issued on January 30, 2014—the Task Force additionally recommended amending Rule 702 of the Arkansas Rules of Evidence¹⁰⁸ by adding a “same

101. Estes & McNulty, *supra* note 88, at 23.

102. *In re* The Appointment of a Special Task Force on Practice and Procedure in Civil Cases, 2013 Ark. 303, at 1–2, 2013 WL 3973978, at *1–2 (per curiam).

103. *Id.* at 1, 2013 WL 3973978, at *1.

104. *Id.* at 1–2, 2013 WL 3973978, at *1–2.

105. *Id.*, 2013 WL 3973978, at *1–2.

106. *In re* Special Task Force on Practice & Procedure in Civil Cases, 2014 Ark. 5, at 1–9, 2014 Ark. LEXIS 64, at *1–17 (per curiam).

107. *Id.* at 3–7, 2014 Ark. LEXIS 64, at *6–14.

108. ARK. R. EVID. 702. The current rule reads as follows: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” *Id.* The Task Force recommended adding the following subdivision:

(b) In addition to the requirements of paragraph (a) of this rule, a witness in an action for medical injury may testify as to the applicable standard of care, compliance with that standard, and failure to act in accordance with that standard only if:

(1) the witness is a medical care provider of the same specialty as the person whose conduct is at issue when that person is a physician, dentist, or other health care professional for whom areas of specialization are commonly recognized; or

specialty” requirement for experts in medical injury actions reminiscent of section 16-114-206 of the Arkansas Code, which was held unconstitutional in *Broussard*.¹⁰⁹

For allocation of nonparty fault, the Task Force recommended requiring a defendant to assert a contribution claim within the party’s answer.¹¹⁰ The fact finder would then be charged with determining the nonparty’s pro rata share of responsibility for the plaintiff’s damages.¹¹¹ Concerning actions for personal injury, medical injury, wrongful death, or property damage, the fact finder would determine the fault of both parties and nonparties who may have liability for the plaintiff’s harm under two circumstances: (1) the plaintiff settles with a nonparty; or (2) the defendant asserts a contribution claim within his or her answer and the defendant meets the burden of establishing a prima facie case of the nonparty’s fault.¹¹²

The recommended changes to Rule 11 of the Arkansas Rules of Civil Procedure follow the language of Rule 11’s counterpart appellate rule,¹¹³ proposing a nonexclusive list of seven sanctions available to the trial court.¹¹⁴ Under proposed Rule 11.1, the plaintiff must append to the complaint a certificate stating that he has consulted a qualified expert who believes there is a good faith basis for setting forth the claim.¹¹⁵

In its final report, the Task Force recommended altering the requirements of medical injury experts who testify “as to the applicable standard of care.”¹¹⁶ The suggested amendment adds a “same specialty” requirement for experts when the defendant is a “health care professional for whom areas of specialization are commonly recognized.”¹¹⁷ When the defendant is employed in a nonspecialized health care profession, however, an expert must

(2) the witness is a medical care provider with the same type of professional license, certificate, registration, or other authorization as the person whose conduct is at issue when that person is a health care professional for whom areas of specialization are not commonly recognized.

In re Special Task Force on Practice & Procedure in Civil Cases—Final Report, 2014 Ark. 47, at 3, 11 (per curiam).

109. *In re Special Task Force—Final Report*, 2014 Ark. 47, at 3–11, 2014 Ark. LEXIS 122, at *2–13 (discussing the holding in *Broussard v. St. Edward Mercy Health Sys., Inc.*, 2012 Ark. 14, at 7, 386 S.W.3d 385, 389 and the same-specialty requirement in Arkansas).

110. *In re Special Task Force*, 2014 Ark. 5, at 4, 2014 Ark. LEXIS 64, at *4.

111. *Id.* at 2, 2014 Ark. LEXIS 64, at *4–6.

112. *Id.*, 2014 Ark. LEXIS 64, at *5–6.

113. ARK. R. APP. P. CIV. 11 (stating the sanctions available for frivolous appeals and other misconduct).

114. *See In re Special Task Force*, 2014 Ark. 5, at 4–5, 2014 Ark. LEXIS 64, at *9–12.

115. *Id.* at 5, 2014 Ark. LEXIS 64, at *11.

116. *In re Special Task Force—Final Report*, 2014 Ark. 47, at 3–11, 2014 Ark. LEXIS 122, at *2–13 (per curiam).

117. *Id.* at 9, 2014 Ark. LEXIS 122, at *11.

only be “a medical care provider with the same type of professional license, certificate, registration, or other authorization” as the defendant.¹¹⁸

The Supreme Court subsequently referred the Task Force’s proposed rules to its Committee on Civil Practice (“Committee”) and published them for comment.¹¹⁹ The Committee reviewed the proposed rules, along with numerous comments from the bench, bar, and public, and submitted a report to the court.¹²⁰ On August 7, 2014, the Supreme Court of Arkansas issued three separate per curiam orders addressing the work of the Committee and the Task Force.¹²¹

The first order adopted the Committee’s proposed changes to Arkansas Rules of Civil Procedure 9, 49, and 52 concerning allocation of fault to absent alleged tortfeasors.¹²² The amendment permits fact finders to assess fault against nonparties as well as parties with whom the plaintiff settles outside of court.¹²³ In a dissenting opinion with which Justice Karen R. Baker joined, Justice Josephine Linker Hart maintained the following in light of the newly adopted rules:

First, the rules are unclear. Second, the rules are unfair. Third, the rules may not survive further constitutional scrutiny. Fourth, there are other solutions.

....

Furthermore, in adopting this labyrinthine set of rules governing allocation of fault, we venture into the creation of substantive law, not procedural law, and we, ourselves, violate the dictates of separation of powers. Had the majority sought to effect a procedural rule, they could have done so by providing a simple jury instruction advising the jury not to allocate to the defendant the fault of any other entity and to allocate to the de-

118. *Id.* at 9–10, 2014 Ark. LEXIS 122, at *11–12.

119. *In re Special Task Force on Practice & Procedure in Civil Cases—Ark. R. Civ. P. 9, 49, 52, & Ark. R. App. P. Civ. 8*, 2014 Ark. 340, at 1, 2014 Ark. LEXIS 439, at *1 (per curiam).

120. *Id.*, 2014 Ark. LEXIS 439, at *1.

121. *See In re Special Task Force on Practice & Procedure in Civil Cases—Proposed Amendments to Ark. R. Civ. P. 11 & 42*, 2014 Ark. 344, 2014 Ark. LEXIS 438 (per curiam); *In re Special Task Force on Practice & Procedure in Civil Cases—Proposed Amendment to Ark. R. Civ. P. 3*, 2014 Ark. 343, 2014 Ark. LEXIS 437 (per curiam); *In re Special Task Force—Ark. R. Civ. P. 9, 49, 52, & Ark. R. App. P. Civ. 8*, 2014 Ark. 340, 2014 Ark. LEXIS 439; *see also* Brian G. Brooks, *Adventures in Rule Making: The Court Struggles to Make Sense Out of Non-Party Fault, and Other Outgrowth From Tort Reform—A Guest Blog Post by Brian G. Brooks*, REPORTED DECISIONS (Aug. 8, 2014), <http://reporteddecisions.com/2014/08/08/adventures-in-rule-making-the-court-struggles-to-make-sense-out-of-non-party-fault-and-other-outgrowth-from-tort-reform-a-guest-blog-post-by-brian-g-brooks/>.

122. *In re Special Task Force—Ark. R. Civ. P. 9, 49, 52, & Ark. R. App. P. Civ. 8*, 2014 Ark. 340, at 1–2, 2014 Ark. LEXIS 439, at *1–4.

123. *Id.* at 4–11, 2014 Ark. LEXIS 439, at *4–14.

fendant only the fault attributable to the defendant's acts or omissions, thus avoiding the problems engendered by the adoption of these rules.¹²⁴

Justice Hart's dissent highlights the implications of the language "may have . . . liability"—precisely how far does this new language extend?¹²⁵ "Does it include those who are immune, those who are outside the long-arm jurisdiction of the Court, and those who are protected by the Workers' Compensation bar?"¹²⁶ Despite Justice Hart's dissent, the amendments to Arkansas Rules of Civil Procedure 9, 49, and 52 will go into effect on January 1, 2015.¹²⁷

The court's second and third per curiam opinions sought further comments on the proposed amendments to Arkansas Rules of Civil Procedure 3, 11, and 42.¹²⁸ The court suggested an amendment to Rule 3 "providing for presuit notice for medical-malpractice cases, [which] would be effective upon the General Assembly's enactment of a companion limitations-tolling provision."¹²⁹ As to Rule 11, the court suggested that "when a party's claim or affirmative defense may only be established in whole or in part by expert testimony," the attorney's signature on the pleading or motion certifies that "the party has consulted with at least one expert, or has learned in discovery of the opinion of at least one expert" who is "competent" and who determines that "there is a reasonable basis to assert the claim or affirmative defense."¹³⁰ Finally, the court proposed an amendment to Rule 42, which provided in its addition to the Reporter's Notes that "[t]he circuit court, in the exercise of its discretion, determines whether liability for punitive damages is to be decided in the first or second phase of the bifurcated proceeding."¹³¹ As the comment period expired on September 30, 2014, the Supreme Court of Arkansas will issue another per curiam opinion concerning its adoption of the changes to Rules 3, 11, and 42.¹³²

124. *Id.* at 14, 18, 2014 Ark. LEXIS 439, at *17, 22–23 (Hart, J., dissenting).

125. *Id.* at 14–15, 2014 Ark. LEXIS 439, at *17–18.

126. Brooks, *supra* note 121.

127. *In re Special Task Force—Ark. R. Civ. P. 9, 49, 52, & Ark. R. App. P. Civ. 8*, 2014 Ark. 340, at 2–3, 2014 Ark. LEXIS 439, at *3.

128. *See In re Special Task Force on Practice & Procedure in Civil Cases—Proposed Amendment to Ark. R. Civ. P. 3*, 2014 Ark. 343, at 1, 2014 Ark. LEXIS 437, at * 1 (per curiam); *In re Special Task Force on Practice & Procedure in Civil Cases—Proposed Amendments to Ark. R. Civ. P. 11 & 42*, 2014 Ark. 344, at 2–3, 2014 Ark. LEXIS 438, at *2–3 (per curiam).

129. *In re Special Task Force—Proposed Amendments to Ark. R. Civ. P. 3*, 2014 Ark. 343, at 1, 2014 Ark. LEXIS 437, at * 1.

130. *In re Special Task Force—Proposed Amendments to Ark. R. Civ. P. 11 & 42*, 2014 Ark. 344, at 1–2, 2014 Ark. LEXIS 438, at *1–2.

131. *Id.* at 8–10, 2014 Ark. LEXIS 438, at *10–12.

132. On November 2, 2014, the date of this note's completion, the Supreme Court of Arkansas had not yet issued its per curiam opinion. *See In re Special Task Force—Proposed*

III. ARGUMENT

Quelling the current procedural discord requires a new formulation of Arkansas's system of rulemaking. By examining various models in light of Amendment 80 and Arkansas's separation of powers doctrine, this note asserts that a mixed-branch approach to rulemaking is the best course of action.

This section first discusses the arguments for both purely legislative and purely judicial forms of procedural rulemaking. The note then examines the federal model of procedural rulemaking, as well as the processes adopted by various states, to demonstrate why the majority of jurisdictions follow a mixed approach. Finally, this section illustrates how using both Arkansas's Supreme Court and General Assembly to promulgate procedural rules will properly effectuate substance and comply with the state's separation of powers doctrine.

A. Purely Legislative, Purely Judicial, or a Mixed Approach?

Contrary to the majority of models, a multitude of arguments exist for both purely legislative and purely judicial rulemaking authority.¹³³ Courts in over twenty states appear to have exclusive authority to adopt rules of pleading, practice, and procedure.¹³⁴ The source of this authority ranges from constitutional provisions, to common law authority, to statutory grant, to a combination of the three.¹³⁵ Although no state maintains a system of purely legislative procedural rulemaking, SJR Five and SJR Six would have insti-

Amendments to Ark. R. Civ. P. 3, 2014 Ark. 343, at 1, 2014 Ark. LEXIS 437, at * 1; *In re Special Task Force—Proposed Amendments to Ark. R. Civ. P. 11 & 42*, 2014 Ark. 344, at 3, 2014 Ark. LEXIS 438, at *3.

133. See, e.g., Bruce L. Dean, Comment, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 149–51 (1988); A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 5–14 (1958); Roscoe Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 43–46 (1952); Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 RUTGERS L.J. 907, 907–08 (2001).

134. CHRISTOPHER REINHART & GEORGE COPPOLO, COURT RULES IN OTHER STATES—LEGISLATIVE APPROVAL, 2008-R-0430, CONN. GEN. ASSEMBLY OFFICE OF LEGIS. RES. (2008), available at <http://www.cga.ct.gov/2008/rpt/2008-R-0430.htm> (providing a summary and table listing every state's system of procedural rulemaking).

135. *Id.*

tuted such a system, and arguments exist encouraging this form of procedural rulemaking.¹³⁶

I. Purely Legislative v. Purely Judicial Rulemaking

Traditionally, the legislative branch is vested with the authority to create and enact law.¹³⁷ As this branch is elected “of the people, by the people, [and] for the people,”¹³⁸ it seems logical to extend the legislature’s authority to procedural rules. Victor Schwartz, coauthor of the most widely used torts casebook in the United States, *Prosser, Wade and Schwartz’s Torts: Cases and Materials*,¹³⁹ illustrates the quintessential argument in favor of vesting rulemaking authority in the legislature:

It is not rocket science, but a high school civics lesson showing that the legislative branch makes or creates law, the executive branch enforces the law, and courts interpret the law. The government works best when each branch respects the role of the others.

Unfortunately, that mutual respect has broken down in the past decade in the area of civil justice.¹⁴⁰

Additional arguments in favor of a purely legislative form of procedural rulemaking include judicial resistance, judicial bias, the perception that judges might be out of touch with the needs of litigants and attorneys, a belief that the legislature better reflects the public will, and concerns that judicial rulemaking might inhibit or unreasonably broaden substantive rights.¹⁴¹

Conversely, as the majority of state supreme courts are endowed with primary procedural rulemaking authority, purely judicial rulemaking is not without its own supporting arguments: judicial freedom from political pressures, judicial expertise with procedural issues, avoidance of legislative delay to enact needed procedural changes, public expectation of judicial efficiency, the ability to make minor rule changes without undergoing complete

136. See, e.g., Schwartz & Lorber, *supra* note 133, at 907–08 (arguing that judicial nullification of civil justice reforms erodes the fundamental balance of powers between courts and legislatures).

137. See generally 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1001 (3d ed. 1998) (describing the development of court rulemaking from nineteenth century England to modern America).

138. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), available at http://avalon.law.yale.edu/19th_century/gettyb.asp.

139. VICTOR E. SCHWARTZ ET AL., PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS (12th ed. 2010); see also Schwartz & Lorber, *supra* note 133, at 907 n.1 (describing the textbook as the most widely used in America).

140. Schwartz & Lorber, *supra* note 133, at 907.

141. Dean, *supra* note 133, at 151.

procedural reform, and consistent interpretation of rules by the body that created them.¹⁴²

Although some argue that judicial rulemaking may create or inhibit substantive rights, inefficient procedures created by a legislature that does not deal with the court system on a daily basis are more likely to restrict these rights.¹⁴³ Because courts see these faulty rules firsthand, they should have the authority to change the rules quickly and effectively.¹⁴⁴ Anything but quick and effective, mass legislative reform takes years to filter through the legislative system and is the epitome of judicial inefficiency.¹⁴⁵ Judicial efficiency instead requires necessary minor amendments according to the experience of judges and the suggestions of attorneys and litigants.¹⁴⁶ Requiring these small changes to compete for legislative attention is both inefficient and unlikely to successfully procure effective procedure.¹⁴⁷

As this proposal suggests, because small procedural modifications would be promulgated after committee suggestions and through the expertise of a qualified bench of judges, “[t]he chances of any high-handed infringement of substantive rights . . . are too small to be taken seriously.”¹⁴⁸ However, if a rule managed to impinge on a substantive right, abiding by the proposal suggested by this note, the legislature could amend or annul the rule by a two-thirds majority of each house.

In addition to legislative inefficiency, many of the pro-legislative-rulemaking arguments—judicial resistance to change, judicial bias, out-of-touch judges, and the perception that the legislature better reflects the public will¹⁴⁹—are nullified by the fact that the seven justices of the Supreme Court of Arkansas are elected by the general public.¹⁵⁰ Section 16 of Amendment 80 describes the qualifications for an Arkansas Supreme Court justice: (1) a justice must be a licensed attorney in Arkansas “for at least eight years immediately preceding the date of assuming office”, and (2) the justice must be elected by the general public to serve an eight-year term.¹⁵¹

As Arkansas’s justices are elected according to public will, if a change is necessary to encourage a more efficient court system, a judge will likely

142. Dean, *supra* note 133, at 149–51.

143. See Levin & Amsterdam, *supra* note 133, at 10–11.

144. See *id.*

145. See *id.*

146. See *id.* at 11.

147. See *id.*

148. Pound, *supra* note 133, at 46.

149. Dean, *supra* note 133, at 151 (comparing judicial rulemaking power with legislative rulemaking power).

150. *Arkansas Supreme Court*, ARK. JUDICIARY, <https://courts.arkansas.gov/courts/supreme-court> (last visited Nov. 17, 2013) (describing the election process for justices and the jurisdiction and power of the court).

151. ARK. CONST. amend. 80, § 16(A), (D).

be anything but resistant to that change; an ineffective system only creates more strain on the judicial process, the brunt of which falls on judges.¹⁵² A judge who has been a licensed attorney for a minimum of eight years will not suddenly be out of touch with the needs of litigants and attorneys.¹⁵³ Additionally, Arkansas's Committee on Civil Practice directly advises judges of the needs of litigants and attorneys.¹⁵⁴ If the judiciary decided to ignore those needs, the legislative oversight proposed by this note would allow Arkansas's General Assembly to amend or annul the erroneous rule.

2. *A Model Examination*

The federal model and the majority of state models bestow authority on both the judiciary and the legislature, vesting primary rulemaking power in the courts.¹⁵⁵ Allowing the Supreme Court of Arkansas to continue promulgating rules of pleading, practice, and procedure, while granting the General Assembly amendment and annulment powers, permits the benefits of both the federal model and the state majority model. In light of the various aspects of successful court rulemaking, Arkansas's movement to a more even-handed system would promote the system of checks and balances and encourage judicial efficiency.¹⁵⁶

a. The federal model

The federal model allows both the judicial and legislative branches to effectuate rules of pleading, practice, and procedure.¹⁵⁷ The Supreme Court of the United States, pursuant to the Rules Enabling Act,¹⁵⁸ promulgates the Federal Rules of Civil Procedure (FRCP), which are subject to Congressional approval.¹⁵⁹ While the primary responsibility for rule development lies in judicial committees, Congress has seven months to veto promulgated rules before they become part of the FRCP.¹⁶⁰ The commentary to 28 U.S.C. §

152. See Levin & Amsterdam, *supra* note 133, at 11 (detailing the issues that can arise from ineffective court procedure).

153. See generally *Arkansas Supreme Court*, *supra* note 150 (describing the qualifications for Arkansas Supreme Court justices).

154. *In re* The Appointment of a Special Task Force on Practice and Procedure in Civil Cases, 2013 Ark. 303, at 1, 2013 WL 3973978, at *1 (per curiam) (outlining the structure of Arkansas's Committee on Civil Practice).

155. See 28 U.S.C. §§ 2071–2074 (2013); REINHART & COPPOLO, *supra* note 134.

156. See Levin & Amsterdam, *supra* note 133, at 42.

157. 28 U.S.C. §§ 2071–2074.

158. Judicial Improvements and Access to Justice Act, Pub. L. No. 100–702, § 401, 102 Stat. 4642, 4648–50 (1988) (codified as amended at 28 U.S.C. §§ 2072–2077 (2013)).

159. 28 U.S.C. §§ 2072, 2074; see also WRIGHT ET AL., *supra* note 137.

160. 28 U.S.C. §§ 2073–2074; see also WRIGHT ET AL., *supra* note 137, § 1001 n.18.

2074 describes the Congressional approval procedure as “passive.”¹⁶¹ In other words, “[i]nertia means approval. If Congress does nothing within the seven-month period stipulated by the statute, the new rules go into effect.”¹⁶²

The federal system allows both judicial and legislative rulemaking involvement pursuant to the following structure: (1) the Advisory Committee on Civil Rules, composed of judges, lawyers, and law professors appointed by the chief justice,¹⁶³ proposes an amendment; (2) the proposal is reviewed by the Supreme Court’s Committee on Practice and Procedure; (3) the amendment is circulated to the public for comment; (4) the proposal returns to the Advisory Committee, which may make additional changes; (5) the final draft is approved by both the Advisory Committee and the Committee on Practice and Procedure and is forwarded to the United States Judicial Conference; (6) if accepted by the Judicial Conference, the proposed amendment is submitted to the Supreme Court; and (7) after promulgation by the Supreme Court, the new rule becomes effective the following December 1, unless Congress takes action to amend or annul it.¹⁶⁴

Abiding by this process allows the Supreme Court to create rules that further an efficient judicial system,¹⁶⁵ as opposed to rules that are procedurally inefficient or unfeasible.¹⁶⁶ Along with promoting judicial efficiency, the federal system simultaneously allows Congress to ensure that the rules do not impinge on or create any substantive rights;¹⁶⁷ therefore, Congress’s ability to approve, amend, or annul the procedural rules allows an important check and balance to occur.¹⁶⁸

As the judiciary remains the branch most affected by the procedural rules, allowing a committee composed of legal professionals who deal with procedure daily ensures that the rules encourage effective courts. Similar to the federal model’s Advisory Committee on Civil Rules, nearly four decades ago the Supreme Court of Arkansas adopted a process that “allows any member of the bench, bar, or general public to suggest changes . . . or provide input on” the court’s procedural rules.¹⁶⁹ A committee composed of both plaintiffs’ and defense attorneys reviews the suggestions and submits

161. 28 U.S.C.A. § 2074 cmt. (West 2006).

162. *Id.*

163. ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6–7 (1958).

164. 28 U.S.C. §§ 2071–2074; *see also* WRIGHT ET AL., *supra* note 137, § 1001 n.18.

165. *See* Bone, *supra* note 17, at 924–25.

166. *See* Levin & Amsterdam, *supra* note 133, at 10–11.

167. *See generally id.* at 18–20 (considering why procedural rules intimately tied with substantive implications require legislative review).

168. *See id.* at 42. *See generally* Bone, *supra* note 17, at 892–93 (describing the checks and balances inherent within the federal court rulemaking model).

169. *See In re The Appointment of a Special Task Force on Practice & Procedure in Civil Cases*, 2013 Ark. 303, at 1, 2013 WL 3973978, at *1 (per curiam).

them to the court for consideration.¹⁷⁰ Although the court can bypass committee consideration, this system allows the rulemaking process to consider not only judicial expertise and legislative oversight but also recommendations of the people who practice according to the rules on a daily basis.¹⁷¹

Subsequent to the committee's suggestions, the Supreme Court of Arkansas determines whether to promulgate a new or revised procedural rule.¹⁷² Adhering to the federal model, if Arkansas's General Assembly had the opportunity to alter or reject newly proposed rules, each proposal would have a further check on its potential impact on substantive rights.¹⁷³ This check and balance would allow both branches to have a say while promoting judicial efficiency and complying with Arkansas's constitutional requirement that the state's Supreme Court prescribe procedural rules.

If Arkansas shadowed the federal model, following approval and promulgation by its supreme court, the rule or amendment would be sent to the General Assembly for approval, amendment, or rejection.¹⁷⁴ Like the federal model, approval would be passive—if not immediate¹⁷⁵—while amendment or rejection would require a two-thirds majority of both houses by the next legislative session.¹⁷⁶ This mixed approach allows both branches to voice their concerns while preventing each from overstepping its power.¹⁷⁷

b. State models

Courts are authorized to adopt procedural rules in nearly every state.¹⁷⁸ In most of these states, the legislature also plays a role in procedural rule-making.¹⁷⁹ According to a 2008 report on procedural rules, approximately thirty states provide some role for the legislature in regard to promulgating court rules, but no state vests rulemaking authority entirely in the legislature.¹⁸⁰ Although the courts in approximately twenty states have exclusive authority to adopt procedural rules, each state's approach varies from the

170. *See id.*, 2013 WL 3973978, at *1.

171. *See id.* at 1–2, 2013 WL 3973978, at *1–2.

172. *See id.* at 2, 2013 WL 3973978, at *2.

173. *See generally* Bone, *supra* note 17, at 892–93 (describing the checks and balances inherent within the federal court rulemaking model).

174. *See* 28 U.S.C. § 2074 (2013); WRIGHT ET AL., *supra* note 137, § 1001 n.18.

175. *See* 28 U.S.C.A. cmt. § 2074 (West 2006).

176. *See generally* Levin & Amsterdam, *supra* note 133, at 37–40 (urging that procedural rules should be the product of both the court and the legislature).

177. *See* REINHART & COPPOLO, *supra* note 134.

178. *Id.*

179. *See id.*

180. *See id.*

next.¹⁸¹ Despite this variation, it is clear that a combination of judicial and legislative input is the stronghold of the majority's method of procedural rulemaking.¹⁸²

Florida, for example, allows definitive legislative oversight of judicial rules through the legislature's annulment power.¹⁸³ The state's constitution explicitly gives its supreme court power to adopt rules of practice and procedure, but the "[r]ules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature."¹⁸⁴ This system of amendment and annulment power falls fairly in line with the federal system.¹⁸⁵ Allowing this form of legislative oversight ensures that the proposed rules comply with the state's constitution and allows a further check on the rule's potential implications.

Similar to Florida's system, Texas's constitution empowers its supreme court to adopt rules of administration and procedure.¹⁸⁶ The state's constitution also provides that the court's procedural rules must be consistent with the state's laws, which means that Texas's legislature still reserves the power to annul or amend the court's rules by operation of law.¹⁸⁷ Again, this system follows the majority pattern, permitting legislative oversight.

Departing from a system of mere amendment and annulment power, Tennessee's proposed procedural rules do not take effect until they are reported to the state's General Assembly and approved by a resolution of both houses.¹⁸⁸ Regarding the court's ability to propose rules, "Tennessee's constitution does not explicitly address the power to make rules of practice" and procedure.¹⁸⁹ Although the state's courts have discussed its inherent rule-promulgation authority,¹⁹⁰ Tennessee's statutes grant its courts the power to adopt rules, which must be approved by the legislature.¹⁹¹ This system allows more legislative oversight than most because enacting a rule requires the approval of each house. Despite the house resolution requirement, Tennessee's system still complies with the majority of states by allowing legislative oversight of the court's proposed procedural rules.

181. *See id.*

182. *See id.*

183. *See* FLA. CONST. art. V, § 2(a); *see also* REINHART & COPPOLO, *supra* note 134.

184. FLA. CONST. art. V, § 2(a).

185. *See supra* Part III.A.2.a.

186. TEX. CONST. art. V, § 31(a)–(b).

187. *See id.* § 31(b).

188. TENN. CODE ANN. § 16-3-404 (West, Westlaw through 2014 2d Reg. Sess.).

189. REINHART & COPPOLO, *supra* note 134.

190. *See, e.g.,* Barger v. Brock, 535 S.W.2d 337, 340–42 (Tenn. 1976); State v. Brackett, 869 S.W.2d 936, 939–40 (Tenn. Crim. App. 1993).

191. *See* TENN. CODE ANN. §§ 16-3-401 to -404 (West, Westlaw through 2014 2d Reg. Sess.).

Unique in its approach, California empowers a judicial council to adopt rules for court administration, practice, and procedure.¹⁹² The state's constitution directly endows a judicial council, comprised of judges, members of the state bar, and one member of each house of the legislature, with this power.¹⁹³ Although the rules must comply with the state's statutes, California does not appear to bestow approval, amendment, or annulment powers on the legislature.¹⁹⁴ Nonetheless, this system gives the legislature limited oversight of procedural rulemaking by allowing a member of each house to sit on the judicial council.¹⁹⁵ Although this check on judicial power may seem minimal, it still constitutes a more stringent check and balance than Arkansas's current system.

While differences exist in nearly every state's model of procedural rulemaking, legislative oversight and compliance with the state's other laws are the strongholds of an overwhelming majority.¹⁹⁶ Permitting both judicial and legislative involvement in Arkansas's rules of civil procedure would coincide with the majority model, thereby allowing a system of checks and balances to ensure effective courts.

B. Benefits of a Mixed Rulemaking Approach in Arkansas

Adhering to the proposal suggested by this note takes advantage of the judicial benefits, while allowing many legislative benefits as well. Although neither scheme on its own is without reason, in Arkansas, Amendment 80 mandates that the Supreme Court hold ultimate procedural rulemaking authority.¹⁹⁷ Therefore, to encompass the benefits of both systems, vesting Arkansas's General Assembly with legislative oversight of procedure is a compromise allowing the best aspects of both schemes to flourish.

This mixed approach retains the advantages of both the purely judicial and purely legislative system while simultaneously reducing the risks involved with each.¹⁹⁸ To achieve such an approach, the following sets forth the requisite consideration:

[T]he terms under which rule-making may be entrusted to the courts, and the scope and conditions of legislative veto if one is to be provided, can be formulated only after inquiring why the vesting of rule-making power in the judiciary is intrinsically sound, what, specifically, are the ad-

192. See REINHART & COPPOLO, *supra* note 134; CAL. CONST. art. VI, § 6.

193. CAL. CONST. art. VI, § 6.

194. See *id.*; see also REINHART & COPPOLO, *supra* note 134.

195. CAL. CONST. art. VI, § 6(a).

196. See REINHART & COPPOLO, *supra* note 134.

197. ARK. CONST. amend. 80, § 3.

198. See Levin & Amsterdam, *supra* note 133, at 10 (describing the ideal system of procedural rulemaking).

vantages promised, and what dangers or disadvantages run with the grant. To retain the advantages while reducing the risks is to approach the ideal.¹⁹⁹

Vesting rulemaking authority in Arkansas's judiciary is intrinsically sound because the citizens elect their judges in statewide nonpartisan elections.²⁰⁰ As members of the bar working within the court system on a daily basis, these individuals have the necessary experience with procedural issues and a desire to improve the rules of pleading, practice, and procedure to create better access to justice for Arkansas's citizens. The concern of allowing nonlawmakers to promulgate court procedure would be lessened by the General Assembly's ability to amend or annul unreasonable rules.

This mixed system would permit Arkansas's General Assembly to amend and annul unreasonable rules, but only by a supermajority. The two-thirds majority requirement will likely prevent unreasonable amendments and annulments from occurring and require that the disputed rule or amendment necessitate legislative interference.

1. *The Separation of Powers*

This proposal's constitutional soundness emanates from its compliance with Arkansas's separation of powers doctrine, which provides the following:

The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.

No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others²⁰¹

As the CJRA and its subsequent partial nullification have shown, the fundamental balance of powers must be restored between the judicial and legislative branches.²⁰² This balance requires that the legislature creates law while the judiciary interprets it.²⁰³ Within the procedural rulemaking arena, however, the traditional view has permitted courts to promulgate the narrowly tailored area of procedure because of the court's familiarity and ex-

199. *Id.*

200. *See generally Arkansas Supreme Court, supra* note 150 (describing the election process for justices and the jurisdiction and power of the court).

201. ARK. CONST. art. IV, §§ 1–2.

202. *See Schwartz & Lorber, supra* note 133, at 938.

203. *See id.* at 907.

pertise with what constitutes an efficient court system.²⁰⁴ Due to this allowance, the notion that the legislature creates substantive rules and the judiciary creates procedural rules is accepted as compliant with the separation of powers doctrine.²⁰⁵

Unwilling to accept this extension of judicial power, various commentators see the judiciary's exercise of rulemaking authority as an overstepping of its distinct governmental role.²⁰⁶ Overruling this strict interpretation, however, Amendment 80's express grant of procedural rulemaking authority to the judiciary extends the judicial branch's power to include that of court rule promulgation.²⁰⁷ Because of both the traditional view and Amendment 80, Arkansas's delegation of rulemaking authority to the judiciary is appropriate.

Contrary to Arkansas's Constitution, portions of the General Assembly's CJRA violated the separation of powers doctrine because the Act created rules that are constitutionally left to the court's discretion.²⁰⁸ Similarly, vesting rulemaking authority completely in the legislature, as SJR Five and Six attempted to do, violates the separation of powers as Arkansas's judiciary has interpreted it. Providing the legislature with a form of amendment and annulment power would appear to more evenhandedly balance the authority between Arkansas's Supreme Court and General Assembly. The court would maintain its constitutional grant of procedural rulemaking authority while allowing the legislature to amend or annul any rules that appeared to expand, create, or impinge on substantive rights.

2. *Procedure Effectuates Substance*

No hard and fast line exists between procedure and substance.²⁰⁹ Although Arkansas's courts have attempted to define the line, it is undeniable that procedural rules have substantive effects.²¹⁰ For instance, pleading requirements, if left unmet, will inherently prevent a party from setting forth a substantive claim worthy of judicial intervention.²¹¹

Rules of pleading, practice, and procedure are intended to prescribe the steps for having a right or duty judicially enforced.²¹² Court rule makers are

204. See Levin & Amsterdam, *supra* note 133, at 10.

205. See *id.* at 33.

206. See Schwartz & Lorber, *supra* note 133, at 917–20.

207. See ARK. CONST. amend. 80, § 3.

208. See *id.*

209. See Bone, *supra* note 17, at 909–14.

210. See *id.*

211. See ARK. R. CIV. P. 7–11.

212. See, e.g., FED. R. CIV. P.; ARK. R. CIV. P.; CAL. R. CT.; TENN. R. CIV. P.; TEX. R. CIV. P. See also *supra* Part III.A.2.b.

inevitably better suited to integrate and maintain a system of court procedure that will enable the legislature's substantive rules to flourish.²¹³ "[s]o long as court rule[-]makers stick to their area of special competence—inferring general principles from existing practice and choosing rules that implement those principles well in light of practice realities—they act legitimately."²¹⁴

As the line between substance and procedure is a thin one, however, bestowing amendment and annulment authority on the General Assembly would ensure that the court's procedure does not impede on or create any substantive rights. Additionally, requiring the procedural rules to comply with the constitution and statutory law would prevent the rules from infringing on any previously existing substantive rights.

IV. CONCLUSION

If the court is required to enforce justice, it must maintain the power and ability to do so.²¹⁵ Although the courts must always adhere to substantive law, loading them with legislated procedural requirements will do nothing but prevent substantive law from being successfully enforced.²¹⁶ The fact remains that the Supreme Court of Arkansas has instant familiarity with the day-to-day practice of the courts.²¹⁷ The judiciary should be permitted to continue enacting procedural changes simply and without the delay massive legislative interference would inevitably cause.²¹⁸ As this note has addressed, however, the political discord between both branches mandates a reformulation of Arkansas's current procedural rulemaking system.

Although Arkansas's General Assembly currently has amendment and annulment power of rules adopted by the Supreme Court pursuant to certain sections of Amendment 80, the procedural rulemaking power is not one of the sections specified.²¹⁹ Under Amendment 80, "[a]ny rules promulgated by the Supreme Court pursuant to Sections 5, 6(B), 7(B), 7(D), or 8 of this Amendment may be annulled or amended, in whole or in part, by a two-thirds (2/3) vote of the membership of each house of the General Assembly."²²⁰ Amending section 9 to encompass annulment and amendment pow-

213. See Bone, *supra* note 17, at 955.

214. *Id.*

215. See Pound, *supra* note 133, at 45–46.

216. See *id.*

217. See generally Levin & Amsterdam, *supra* note 133, at 10 (asserting that legislatures lack instant familiarity with the inner workings of courts).

218. See generally *id.* at 10–11 (suggesting that legislative procedural reform is undeniably inefficient).

219. See NEWBERN ET AL., *supra* note 26.

220. ARK. CONST. amend. 80, § 9. Section 5 allows the Supreme Court to promulgate rules concerning the appellate jurisdiction of the Court of Appeals. *Id.* § 5. Section 6(B) gives the Supreme Court control of the circuit courts. *Id.* § 6(B). Section 7(B) allows the jurisdic-

ers over the Supreme Court's rulemaking authority would quell the current discord by allowing both the judicial and legislative branch to effectuate Arkansas's rules of pleading, practice, and procedure.

The proposal suggested by this note would allow the Supreme Court of Arkansas to maintain its rulemaking authority, while also permitting Arkansas's General Assembly to amend or annul new rules by a two-thirds majority of each house. Legislative approval of new rules would be passive—effective upon promulgation by the Supreme Court—and require disapproval of a supermajority by the end of the following legislative session. Adhering to the federal model and the state majority rule, this system would allow both branches to oversee the rules, while complying with the separation of powers and encouraging judicial efficiency—essential components of protecting Arkansans' right to justice.

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tional amount and the subject matter of civil cases that may be heard in the district courts to be established by Supreme Court rule. *Id.* § 7(B). Section 7(D) gives the Supreme Court superintending control of the division of district courts into subject matter divisions. *Id.* § 7(D). Section 8 allows the Supreme Court to prescribe the duties of circuit court referees or masters. *Id.* § 8(A). Section 8 also allows the Supreme Court to prescribe the duties of district court magistrates. *Id.* § 8(B).

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