

A Problematic Procedure: The Struggle for Control of Procedural Rulemaking Power*

I. INTRODUCTION

In *Bayer CropScience LP v. Schafer*, the Arkansas Supreme Court invalidated the punitive damages cap passed as part of the sweeping tort-reform legislation known as the Civil Justice Reform Act.¹ In response, the Arkansas General Assembly proposed a constitutional amendment that would have stripped the Arkansas Supreme Court of its power to prescribe rules of pleading, practice, and procedure for state courts.² Although the proposal did not pass, its sponsors expressed interest in proposing similar legislation in the future,³ prompting the Arkansas Supreme Court to commission a special task force to review the current rules of procedure in the state.⁴

This note analyzes these recent developments and argues that a shift of procedural rulemaking power from the Arkansas Supreme Court to the Arkansas General Assembly would significantly diminish the separation of powers balance between

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1. 2011 Ark. 518, at 11, 13-14, 385 S.W.3d 822, 830-32 (invalidating Arkansas Code Annotated section 16-55-208 under article 5, section 32 of the Arkansas Constitution, which prohibits the Arkansas General Assembly from enacting laws that limit “the amount to be recovered for injuries resulting in death or for injuries to persons or property”).

2. S.J. Res. 5, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); *see also* ARK. CONST. amend. 80, § 3 (granting the Arkansas Supreme Court the sole authority to prescribe the rules of pleading, practice, and procedure for all state courts). The legislature proposed other legislation to the same effect, which was also rejected. *See* S.J. Res. 6, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

3. *See* Rob Moritz, *Lawmakers Struggle with Tort Reform*, ARK. NEWS (Apr. 15, 2013, 2:00 AM), <http://arkansasnews.com/sections/news/lawmakers-struggle-tort-reform.html> (“Maybe if the Arkansas Supreme Court issues some new rules [the Arkansas General Assembly] can come back next session and deal with punitive caps in the constitution, which is the only thing you really have to put in the constitution.”).

4. *In re* Appointment of a Special Task Force on Practice and Procedure in Civil Cases, 2013 Ark. 303, at 2, 2013 WL 3973978, at *2 [hereinafter *In re* Appointment] (per curiam); *see also* Max Brantley, *The Supreme Court Responds to Legislative Discussion on Tort Reform*, ARK. BLOG (Aug. 2, 2013, 2:33 PM), <http://www.arktimes.com/ArkansasBlog/> (discussing the task force).

the judicial and legislative branches. Such a shift would align Arkansas with the minority of states that vest procedural rulemaking power in the legislature and also further centralize the state government around the Arkansas General Assembly. This places the politicization of the Arkansas judicial system at risk and promises to have far-reaching implications for both the judiciary and citizens of Arkansas.

Part II of this note discusses separation of powers under the Arkansas Constitution, and Part III analyzes tort reform and the Arkansas Supreme Court's recent decision in *Schafer*. Part IV then explores one proposed amendment to the Arkansas Constitution and examines various approaches to civil rulemaking power in other states. Lastly, Part V recommends the Arkansas General Assembly abandon legislation resembling Senate Joint Resolution 5 and, instead, seek a balanced approach to the rulemaking process.

II. SEPARATION OF POWERS AND ARKANSAS PROCEDURAL REFORM

The Arkansas Constitution of 1874 divided the state government into three individual branches, each with their own distinct powers.⁵ In particular, article 4, section 2 of the Arkansas Constitution includes the following separation of powers clause: "No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."⁶ Today, legislative, executive, and judicial powers are vested in the Arkansas General Assembly,⁷ the Governor of Arkansas,⁸ and the Arkansas Supreme Court,⁹ respectively. Although the Arkansas Constitution grants the Arkansas Supreme Court the sole authority to prescribe the rules of pleading, practice, and procedure in all state courts,¹⁰ it has not always explicitly stated as much. Instead, Arkansas, like a

5. See ARK. CONST. art. 4, § 1.

6. ARK. CONST. art. 4, § 2.

7. ARK. CONST. art. 5, § 1.

8. ARK. CONST. art. 6, § 2.

9. ARK. CONST. amend. 80, § 1.

10. ARK. CONST. amend. 80, § 3 ("The Supreme Court shall prescribe the rules of pleading, practice, and procedure for all state courts . . .").

majority of states, has slowly moved toward exclusive judicial control of the rulemaking process through procedural reform.¹¹

Historically, the Arkansas General Assembly possessed much greater control over procedural rules. For more than 140 years, statutes governed civil procedure in Arkansas state courts.¹² In 1868, the legislature adopted a “Code of Practice in Civil Cases” based on New York’s influential Field Code.¹³ Despite occasional amendments, the Arkansas Civil Code served as the state’s procedural law until 1979.¹⁴ The first significant shift away from legislative control occurred in 1973, when the Arkansas General Assembly passed legislation that conferred upon the Arkansas Supreme Court the power to “prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings in civil cases in all courts in this state.”¹⁵ This shift of power over procedural rules was modeled on the judicially promulgated Federal Rules of Civil Procedure.¹⁶

Similarly, legislative delegation of rulemaking power in Arkansas resulted in the promulgation of state procedural rules under the authority of the Arkansas Supreme Court.¹⁷ In 1974, the Arkansas Supreme Court appointed a committee to prepare a set of rules patterned after the federal rules.¹⁸ The Arkansas Supreme Court adopted the committee’s proposed rules in December 1978.¹⁹

Despite this newly created stability, tension continued to exist between the two branches over the constitutional authority with respect to the procedural rules.²⁰ In its order adopting the new Arkansas Rules of Civil Procedure, the Arkansas Supreme Court referred not only to the 1973 statute delegating

11. See DAVID NEWBERN ET AL., *ARKANSAS CIVIL PRACTICE & PROCEDURE* § 1:2 (5th ed. 2010) (“The process began in 1973, when the General Assembly, using language similar to that found in the Rules Enabling Act, enacted a statute purporting to confer upon the Arkansas Supreme Court the power to ‘prescribe . . . rules of pleading, practice, and procedure . . .’”).

12. *Id.*

13. *Id.*

14. *Id.*

15. ARK. CODE ANN. § 16-11-302 (repealed 2003).

16. NEWBERN ET AL., *supra* note 11, § 1:2.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

rulemaking power to the state courts, but also to the state judiciary's "constitutional and inherent power to regulate procedure in the courts."²¹ The court subsequently reactivated the committee in 1982 "to advise it with respect to needed changes, serve as a vehicle for continuous review, and draft and promulgate guidelines for processing suggested changes or modifications to the Rules of Civil Procedure."²² This "Committee on Civil Practice" now meets twice a year and recommends changes to state procedural rules to the Arkansas Supreme Court.²³ The court then determines whether or not to adopt the proposed changes and may also amend the rules at any time without consulting the committee.²⁴

In November 2000, Arkansas voters approved amendment 80 to the Arkansas Constitution by ballot initiative.²⁵ This amendment drastically revised the Arkansas court system by repealing a significant portion of the Constitution of 1874, merging the courts of law and equity, and modernizing the state's court system.²⁶ Importantly, amendment 80 also added language to the Arkansas Constitution expressly vesting the Arkansas Supreme Court with the power to "prescribe the rules of pleading, practice and procedure for all courts."²⁷ Thus, amendment 80 formerly conferred control over the civil rulemaking process to the Arkansas Supreme Court.²⁸

In *Johnson v. Rockwell Automation, Inc.*, the Arkansas Supreme Court held that the rulemaking authority over procedural matters is exclusive to the judicial branch, and the Arkansas General Assembly's tampering with procedural law violates the separation of powers clause.²⁹ In *Johnson*, the court

21. *In re* Rules of Civil Procedure, 264 Ark. 964, 964 (1978) (no parallel citation available).

22. NEWBERN ET AL., *supra* note 11, § 1:12 (footnote and internal quotation marks omitted).

23. *Id.*

24. *Id.* For example, the Arkansas Supreme Court amended Arkansas Rule of Appellate Procedure 3 in 1999, without the committee's input, by striking a particular requirement in a notice of appeal. *See generally* *In re* Rule 3, Rules of Appellate Procedure—Civil, 336 Ark. 645 (1999) (no parallel citation available).

25. NEWBERN ET AL., *supra* note 11, § 1:2.

26. *Id.*

27. ARK. CONST. amend. 80, § 3.

28. NEWBERN ET AL., *supra* note 11, § 1:2.

29. 2009 Ark. 241, at 7-9, 308 S.W.3d 135, 141 (invalidating a portion of the Civil Justice Reform Act under the separation of powers clause of the Arkansas Constitution).

established two important principles: (1) a statute is invalid if it purports to bypass the court's rules; and (2) a statute does not have to directly conflict with an existing rule to be held unconstitutional.³⁰ Although *Johnson* was a landmark decision, the court's stance on the rulemaking power was a natural result of decades of procedural reform, as the process had gravitated toward exclusive judicial control.³¹

Since *Johnson*, however, the Arkansas Supreme Court has been reluctant to strike down legislation under the separation of powers clause.³² Although the court has heard several cases concerning the exclusivity of the judicial rulemaking power,³³ it distinguished all but one of these decisions from *Johnson* because the laws under review did not create a procedural law protected by amendment 80.³⁴ In these cases, the court held the substantive law did not attempt to bypass the "rules of pleading, practice, and procedure by setting up an alternate procedure for having a right or duty judicially enforced."³⁵

30. See *id.* at 8, 308 S.W.3d at 141. The court also distinguished between substantive and procedural rules by citing *Black's Law Dictionary*. Law is substantive when it is "[t]he part of the law that creates, defines, and regulates the rights, duties, and powers of parties," whereas [p]rocedural law is a collection of "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." *Id.* (quoting BLACK'S LAW DICTIONARY 1221, 1443 (7th ed. 1999)) (internal quotation marks omitted).

31. See Ryan Kent Culpepper, Note, *Justice Reformed: Johnson v. Rockwell Automation, Inc., Torts, and the Separation of Powers in Arkansas*, 63 ARK. L. REV. 283, 301 (2010).

32. See *id.* at 310. (noting the deference given to the Arkansas General Assembly by the Arkansas Supreme Court in cases following *Johnson*).

33. See *Broussard v. St. Edward Mercy Health Sys., Inc.*, 2012 Ark. 14, at 6, 386 S.W.3d 385, 389 (holding "the authority to decide who may testify and under what conditions is a procedural matter solely within the province of the courts pursuant to section 3 of amendment 80 and pursuant to the inherent authority of common-law courts"); *Cato v. Craighead Cnty. Circuit Court*, 2009 Ark. 334, 6-7, 322 S.W.3d 484, 488 (holding a statute providing that members of organized militias such as the National Guard are exempt from civil process while going to, remaining at, or returning from any place where they may be required to attend for military duty was a substantive law); see also *ProAssurance Indem. Co., v. Metheny*, 2012 Ark. 461, at 16, 425 S.W.3d 689, 698; *C.B. v. State*, 2012 Ark. 220, at 6, 406 S.W.3d 796, 800; *Clark v. Johnson Reg'l Med. Ctr.*, 2010 Ark. 115, at 9, 362 S.W.3d 311, 316; *Nelson v. State*, 2011 Ark. 429, at 8, 384 S.W.3d 534, 538.

34. *Cato*, 2009 Ark. 334, at 9, 322 S.W.3d at 489.

35. *Id.*

III. ARKANSAS TORT REFORM AND *BAYER CROPSCIENCE LP V. SCHAFFER*

In *Schafer*, the Arkansas Supreme Court upheld a \$42 million punitive damages award against German chemical and pharmaceutical giant Bayer and several of its subsidiaries.³⁶ In doing so, the court invalidated section 16-55-208 of the Arkansas Code Annotated—a statutory limitation on punitive damages—on separation of powers grounds.³⁷ The court did not address the constitutional question of exclusive judicial rulemaking power under amendment 80, section 3 or the two principles for bypassing the judicial rulemaking power addressed in *Johnson*.³⁸

A. The Statutory Punitive Damages Cap

The public outcry over excessive jury verdicts prompted state legislatures across the United States to adopt tort-reform legislation.³⁹ The Arkansas General Assembly followed suit with the Civil Justice Reform Act of 2003.⁴⁰ The Act made several major changes to tort law in Arkansas, including “higher and different burdens of proof for punitive damages, diminished venue options, no possibility for joint liability, different pleading requirements, and a maximum jury award of \$1 million for punitive damages.”⁴¹

Before the Civil Justice Reform Act, Arkansas did not have a specific statutory limitation on punitive damages.⁴² Nevertheless, the Arkansas Rules of Civil Procedure and state common law addressed the issue of excessive jury verdicts.⁴³ Procedural rules allowed the court to grant a new trial or reduce the amount of damages in an excessive verdict for several

36. *Bayer Cropscience LP v. Schafer*, 2011 Ark. 518, at 2, 385 S.W.3d 822, 825.

37. *See id.* at 12-13, 385 S.W.3d at 831.

38. *See id.* at 13-14, 385 S.W.3d at 831.

39. Kimberly J. Frazier, Note, *Arkansas’s Civil Justice Reform Act of 2003: Who’s Cheating Who?*, 57 ARK. L. REV. 651, 653 (2004).

40. 2003 Ark. Acts. 2130.

41. *See Frazier, supra* note 39, at 652. With the Civil Justice Reform Act, the legislature stated that it sought to improve the “availability and affordability of medical liability insurance . . . and affordability of medical care and of health insurance coverage in this state.” 2003 Ark. Acts. 2130, 2145.

42. Frazier, *supra* note 39, at 678.

43. *See id.*

reasons, including when an award appeared to have been given “under the influence of passion or prejudice.”⁴⁴

Despite the fact that the jury awards in the state had been reasonable, the Arkansas General Assembly concluded that the existing procedural rules were inadequate to solve the problem of excessive verdicts.⁴⁵ As part of the Civil Justice Reform Act, the Arkansas General Assembly included the following provision that remains codified within the Arkansas Code Annotated:

(a) Except as provided in subsection (b) of this section, a punitive damages award for each plaintiff shall not be more than the greater of the following: (1) Two hundred fifty thousand dollars (\$250,000); or (2) Three (3) times the amount of compensatory damages awarded in the action, not to exceed one million dollars (\$1,000,000).⁴⁶

B. *Bayer Cropscience LP v. Schafer*

Schafer arose following Bayer’s development of LibertyLink Rice, a genetically modified rice resistant to certain herbicides.⁴⁷ In 2006, the United States Department of Agriculture began to find trace amounts of LibertyLink Rice in the United States rice supply.⁴⁸ Not only had the USDA not granted approval of the genetically modified rice, but no foreign government had authorized its commercial use for human consumption.⁴⁹ The worldwide reaction was resoundingly negative, resulting in a dramatic decrease in exports of American rice.⁵⁰

Arkansas rice farmers filed suit against Bayer, alleging the company knew that foreign countries did not import genetically modified rice and that contamination of the United States rice supply would stunt the export market and adversely affect the price of domestic rice.⁵¹ The farmers filed a pretrial motion

44. *Id.* (quoting ARK. R. CIV. P. 59(a)(4)) (internal quotation marks omitted).

45. *Id.* at 680-81.

46. ARK. CODE ANN. § 16-55-208(a) (Repl. 2005), *invalidated by* Bayer Cropscience LP v. Schafer, 2011 Ark. 518, 385 S.W.3d 822.

47. *Schafer*, 2011 Ark. 518, at 2, 385 S.W.3d at 826.

48. *Id.* at 3, 385 S.W.3d at 826.

49. *Id.*

50. *See id.* at 4, 385 S.W.3d at 826 (“Between 2005 and 2008, exports of American rice decreased by 622,972 metric tons.”).

51. *Id.* at 4, 385 S.W.3d at 827.

asking the circuit court to declare the limitation on punitive damages from the Civil Justice Reform Act unconstitutional.⁵² The circuit court ruled the statute unconstitutional⁵³ and found “substantial evidence that Bayer knew or should have known, in light of the surrounding circumstances, that its conduct would naturally and probably result in injury or damage and that it continued the conduct with malice or reckless disregard of the consequences from which malice could be inferred.”⁵⁴ The jury then awarded punitive damages of \$42 million to the plaintiff farmers.⁵⁵

C. The Arkansas Supreme Court Decision

In contrast with its decision in *Johnson*, the court did not address whether section 16-55-208 violated the separation of powers clause.⁵⁶ The court also declined to mention the exclusivity of the judicial rulemaking power.⁵⁷ Instead, the court focused its separation of powers analysis on the workers’ compensation amendment in article 5, section 32,⁵⁸ which reads:

The General Assembly shall have power to enact laws prescribing the amount of compensation to be paid by employers for injuries to or death of employees, and to whom said payment shall be made. It shall have power to provide the means, methods, and forum for adjudicating claims arising under said laws, and for securing payment of same. Provided, that otherwise no law shall be enacted limiting the amount to be recovered for injuries resulting in death or for injuries to persons or property; and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such action shall be prosecuted.⁵⁹

The court specifically focused on the phrase “no act of the General Assembly shall limit the amount to be recovered for injuries resulting in death or for injuries to persons or

52. *Schafer*, 2011 Ark. 518, at 6, 385 S.W.3d at 827.

53. *Id.* at 6-8, 385 S.W.3d at 828-29.

54. *Id.* at 7, 385 S.W.3d at 828.

55. *See id.* at 8, 385 S.W.3d at 828.

56. *See id.* at 13-14, 385 S.W.3d at 831-32.

57. *See Schafer*, 2011 Ark. 518, at 13-14, 385 S.W.3d at 831-32.

58. *Id.* at 12-14, 385 S.W.3d at 831.

59. ARK. CONST. art. 5, § 32, *amended by* ARK. CONST. amend. 26.

property.”⁶⁰ Bayer defended the constitutionality of section 16-55-208 by arguing that article 5, section 32 only applies to compensatory damages, rather than punitive damages.⁶¹ Although the court recognized the differences between compensatory and punitive damages, it nonetheless cited precedent establishing that the damages are so intertwined that a new trial must be ordered when an error occurs with either an award of compensatory or punitive damages.⁶² The court concluded, “an award of punitive damages is nonetheless an integrant part of the amount recovered for injuries resulting in death or for injuries to persons or property.”⁶³ Therefore, article 5, section 32 governed the punitive damages at issue in *Schafer*.⁶⁴

The Arkansas Supreme Court affirmed the circuit court’s decision and held that section 16-55-208 violated article 5, section 32 because it limited the amount of recovery outside the employer-employee relationship.⁶⁵ Since the court found the damages cap unconstitutional under article 5, section 32, it did not address whether the statute conflicted with the exclusive judicial rulemaking power established in *Johnson*.⁶⁶ In other words, although *Johnson* and *Schafer* were both grounded on a separation of powers rationale, they used different sections of the Arkansas Constitution to find an overreach of legislative power.⁶⁷

IV. PROPOSED AMENDMENTS AND PROCEDURAL RULEMAKING IN OTHER STATES

A. The Arkansas Proposals

During the 2013 meeting of the Arkansas General Assembly, legislators proposed constitutional amendments in

60. *Schafer*, 2011 Ark. 518, at 11, 385 S.W.3d. at 830 (alterations omitted) (quoting *Baldwin Co. v. Maner*, 224 Ark. 348, 349, 273 S.W.2d 28, 30 (1954)).

61. *Id.* at 9, 385 S.W.3d at 829.

62. *Id.* at 12-13, 385 S.W.3d at 831.

63. *Id.* at 13, 385 S.W.3d at 831 (internal quotation marks omitted).

64. *Id.*

65. *Schafer*, 2011 Ark. 518, at 13, 385 S.W.3d at 831.

66. *Id.* at 13-14, 385 S.W.3d at 831-32.

67. Compare *Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, at 8-9, 308 S.W.3d 135, 141 (analyzing constitutionality under article 4, section 2 and amendment 80, section 3), with *Schafer*, 2011 Ark. 518, at 13, 385 S.W.3d at 831 (analyzing constitutionality under article 5, section 32).

response to *Schafer*.⁶⁸ The proposed amendments would have created an exception to the Arkansas General Assembly's restriction on limiting damages for injuries⁶⁹ and would have effectively stripped the Arkansas Supreme Court of its authority to prescribe the rules of pleading, practice, and procedure for all state courts.⁷⁰

Specifically, during the 2013 session, the Arkansas General Assembly considered Senate Joint Resolution 5 ("SJR 5"), which would have made four changes to the Arkansas Constitution.⁷¹ First, SJR 5 would have allowed the legislature, by a three-fifths vote, to set awards of non-economic damages.⁷² Second, the bill would have specifically limited punitive damages to five times the amount of compensatory damages or another percentage set by a two-thirds vote of the legislature.⁷³ Third, SJR 5 would have given the legislature the power to "prescribe the rules of pleading, practice and procedure for all courts," directing the legislature to "delegate nonexclusive authority to the Supreme Court."⁷⁴ More specifically, the bill stated that the Arkansas Supreme Court would have "no authority to prescribe rules of pleading, practice, and procedure and rules of evidence for courts," except as expressly delegated by the legislature.⁷⁵ Finally, SJR 5 would have required a three-fifths vote by the legislature to override a procedural rule in effect as of January 1, 2015.⁷⁶

Legislators discussed and debated these proposed amendments for two hours in committee meetings, but the legislation failed to advance by a voice vote.⁷⁷ Although the bill did not reach the floor of either house, legislators from both sides showed interest in passing similar legislation in the future and vowed to revisit the issue.⁷⁸ In response to the proposed amendments and the legislature's continued discussion of the

68. Moritz, *supra* note 3 (noting the Arkansas Assembly "consider[ed] proposed constitutional amendments to recommend for referral to the 2014 general election ballot").

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

70. *See* Moritz, *supra* note 3.

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

72. S.J. Res. 5, 89th Gen. Assemb., Reg. Sess.

73. S.J. Res. 5, 89th Gen. Assemb., Reg. Sess.

74. S.J. Res. 5, 89th Gen. Assemb., Reg. Sess.

75. S.J. Res. 5, 89th Gen. Assemb., Reg. Sess.

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

77. Moritz, *supra* note 3.

78. *See id.*

rulemaking process, the Arkansas Supreme Court commissioned a special task force to review several current rules of civil practice and procedure.⁷⁹ In January 2014, the Arkansas Supreme Court published the recommendations of the task force in two *per curiam* opinions and opened a public-comment period for the proposed rules.⁸⁰ On August 7, 2014, upon endorsement from the Committee on Civil Practice, the Arkansas Supreme Court adopted the proposed amendments to Arkansas Rules of Civil Procedure 9, 49, and 52.⁸¹

B. Tort Reform in Other States

Since the Federal Rules of Civil Procedure were passed enacted in 1938, all fifty states have addressed the civil rulemaking process through some type of procedural reform.⁸² In the majority of states, the judicial branch controls the rulemaking process, and a minority of states feature a set of codified statutes passed through the legislative branch, which can then delegate some of the rulemaking authority to the judicial branch.⁸³

79. See generally *In re* Appointment, 2013 Ark. 303, 2013 WL 3973978 (per curiam); see also Brantley, *supra* note 4.

80. *In re* Special Task Force on Practice and Procedure in Civil Cases, 2014 Ark. 5 (per curiam) (no parallel citation available); *In re* Special Task Force on Practice and Procedure in Civil Cases – Final Report, 2014 Ark. 47 (per curiam) (no parallel citation available).

81. See generally *In re* Special Task Force on Practice and Procedure in Civil Cases – Ark. R. Civ. P. 9, 49, 52, and Ark. R. App. P.-Civ. 8, 2014 Ark. 340 [hereinafter *In re* Final Rules] (per curiam) (no parallel citation available).

82. See generally Charles Alan Wright, *Procedural Reform in the States*, in 24 F.R.D. 85-121 (1960) (outlining the changes made by each state to conform to the Federal Rules of Civil Procedure).

83. Compare 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 or modify any substantive right and shall preserve the right of trial by jury as declared in this Constitution.”), and GA. CODE ANN. § 15-2-18(a) (“The Supreme Court and the Justices thereof shall have the power to prescribe, modify, and repeal rules of procedure, pleading, and practice in civil actions and proceedings in the courts of this state and of practice and procedure for appeal or review in all cases, civil and criminal, to or from any of the courts or tribunals of this state. The rules shall not abridge, enlarge, or modify the substantive rights of any litigant.”), with CAL. CONST. art. VI, § 6(c)–(d) (“The council may appoint an Administrative Director of the Courts, who serves at its pleasure and performs functions delegated by the council or the Chief Justice, other than adopting rules of court administration, practice and procedure. To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute.

1. Majority Rulemaking Power

The majority of states have a similar history to Arkansas with respect to procedural reform.⁸⁴ Since 1911, the movement for reform at the federal level shifted to “a system of rules promulgated by the Supreme Court of the United States which would serve as a model for the states.”⁸⁵ This shift led to the passage of the Rules Enabling Act in 1934 and the Federal Rules of Civil Procedure in 1938.⁸⁶ Most states recognize that rulemaking authority is inherent in the judicial branch, but others, like Arkansas, have constitutional provisions vesting the power in its highest court.⁸⁷ This shift in the rulemaking process away from state legislatures reflects the rationale that “neither Congress nor the state legislatures should continue the haphazard, wasteful and unscientific method of regulating the minutiae of judicial procedure by statute.”⁸⁸ While most states grant the judicial branch exclusive control over the rulemaking process, in a few states the judiciary’s rules can be overruled by a two-thirds majority of the legislature.⁸⁹

Tort-reform legislation prompts lawmakers in many states to renew their interest in procedural rulemaking.⁹⁰ In *Best v. Taylor Machinery Works*,⁹¹ the Illinois Supreme Court was confronted with a case featuring circumstances similar to both *Johnson* and *Schafer*. In *Best*, the court held that a statutory cap on compensatory damages for non-economic injuries violated the state’s separation of powers clause.⁹² The court found that the legislature overstepped into the court’s power to reduce

The rules adopted shall not be inconsistent with statute.”), and N.Y. CONST. art. VI, § 30 (“The legislature may, on such terms as it shall provide and subject to subsequent modification, delegate, in whole or in part, to a court, including the appellate division of the supreme court, or to the chief administrator of the courts, any power possessed by the legislature to regulate practice and procedure in the courts.”).

84. Wright, *supra* note 82, at 86-87.

85. *Id.* at 86.

86. NEWBERN ET AL., *supra* note 11, § 1:2.

87. Annotation, *Power of Court to Prescribe Rules of Pleading, Practice, or Procedure*, 158 A.L.R. ANN. 705, 706 (1945); *see also* ARK. CONST. amend. 80, § 3 (relevant constitutional provision in Arkansas).

88. Wright, *supra* note 82, at 86.

89. *See, e.g.*, ALASKA CONST. art. IV, § 315.

90. Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 471 (1997).

91. 689 N.E.2d 1057 (Ill. 1987).

92. *Id.* at 1079-80.

excessive verdicts with remittitur.⁹³ The court concluded this overreach was tantamount to a legislative veto over a distinct, inherent judicial power not explicitly guaranteed by the Illinois Constitution.⁹⁴ As in *Best*, other states have found tort-reform legislation unconstitutional on separation of powers grounds, but it seems that no state has yet responded by passing a constitutional amendment that would strip its respective high court of exclusive rulemaking power.

2. *Minority Rulemaking Power*

California and New York have resisted the procedural-reform movement and have yet to transfer the rulemaking power to the judicial branch.⁹⁵ Instead, both states feature procedural codes that can be amended only by a vote of the legislature.⁹⁶ New York has retained and amended its influential Field Code, and the New York Constitution currently permits the legislature to delegate specific portions of the rulemaking authority to the judiciary.⁹⁷ Like New York, California's judicial branch also possesses supplemental rulemaking power.⁹⁸ Therefore, although both New York and California's judicial branches enjoy some rulemaking authority, their authority is secondary to that of the legislature.⁹⁹

In California, procedure became a polarizing issue after legislators and special-interest groups began using procedural law to advance their political agendas, such as tort reform.¹⁰⁰ For forty years, the California legislature deferred authority over procedural rulemaking to an advisory committee, but legislators

93. *Id.* at 1080.

94. *See id.* at 1079-80.

95. CAL. CONST. art VI, § 6(d) ("To improve the administration of justice the council shall . . . adopt rules for court administration, practice and procedure. . . . The rules adopted shall not be inconsistent with statute."); N.Y. CONST. art. VI, § 30 ("The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised.").

96. CAL. CONST. art VI, § 6(d); N.Y. CONST. art. VI, § 30.

97. Koppel, *supra* note 90, at 465-66; N.Y. CONST. art. VI, § 30 ("The legislature may, on such terms as it shall provide and subject to subsequent modification, delegate, in whole or in part, to a court, including the appellate division of the supreme court, or to the chief administrator of the courts, any power possessed by the legislature to regulate practice and procedure in the courts.").

98. CAL. CONST. art VI, § 6(d).

99. CAL. CONST. art VI, § 6(d); N.Y. CONST. art. VI, § 30.

100. Koppel, *supra* note 90, at 471.

began to take a more active role in the late 1980s.¹⁰¹ The surge in political polarization of the California Rules of Civil Procedure raised several key issues, such as “procedural politicking by special interest groups.”¹⁰² Judicial discretion in providing summary judgment has oscillated as changes in political power make it a “political football” in the state.¹⁰³ Scholars lamented that “increased congressional rulemaking activity” would have had an adverse effect “on the integrity of the . . . rulemaking process and on the . . . rules themselves.”¹⁰⁴ As states debate changing their rulemaking process because of tort reform, California’s “procedural politicking by special interest groups” demonstrates the impact of return to legislative rulemaking.¹⁰⁵

V. ANALYSIS AND RECOMMENDATIONS

The magnitude of any procedural change depends largely on whether the Arkansas General Assembly agrees with the rule changes proposed by the Arkansas Supreme Court. Although there are compelling public-policy arguments on both sides of the debate, the struggle promises to have a significant impact on the Arkansas judicial system.¹⁰⁶

A. Arkansas General Assembly Agrees With Rule Changes

The first possible outcome would be for the Arkansas General Assembly to accept the changes made to the current rules as adopted by the Arkansas Supreme Court.¹⁰⁷ In response to the proposed amendments and the continued discussion of the rulemaking process by the legislature, the Arkansas Supreme Court appointed a special task force to thoroughly examine Arkansas’s rules of practice and procedure.¹⁰⁸ The court alluded

101. *Id.*

102. *Id.* at 472 (discussing the issue in the context of summary judgment).

103. *Id.*

104. *Id.*

105. Koppel, *supra* note 90, at 472.

106. 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).

107. See *In re* Final Rules, 2014 Ark. 340 (per curiam) (no parallel citation available).

108. *In re* Appointment, 2013 Ark. 303, at 1-2, 2013 WL 3973948, at *1-2.

to the *Johnson* and *Schafer* decisions, stating that the task force should focus its work on the “debate surrounding recent cases involving issues of damages and liability in civil litigation.”¹⁰⁹ The task force was composed of a diverse mix of minds, representing many different groups across the legal field.¹¹⁰ In August 2014, the Arkansas Supreme Court adopted three of the proposed amendments to Arkansas Rules of Civil Procedure 9, 49, and 52.¹¹¹

Although the court updated the Rules, the changes fail to address legislative concerns following the decisions in *Johnson* and *Schafer*. The new subdivision of Arkansas Rule of Civil Procedure 9 draws from the portion of the Civil Justice Reform Act that was held unconstitutional in *Johnson* by making the Rule “the exclusive procedural mechanism for asserting the right to an allocation of nonparty fault” under Arkansas law.¹¹² Although this amendment addresses some of the concerns over the Rules, these three changes do not resolve the power struggle between the Arkansas General Assembly and the Arkansas Supreme Court.

If the battle is only over the allocation of fault to a non-party, which can be resolved by the court simply reviewing and reaching a compromise with respect to the Rules, then the constitutional process set in place by amendment 80 is working, and a shift of the rulemaking power is unnecessary. The legislative push for a shift in the separation of powers doctrine demonstrates either impatience with the political process or the Arkansas General Assembly’s willingness to return to the pre-FRCP rulemaking process long abandoned by an overwhelming majority of the states.¹¹³

109. *Id.* at 1, 2013 WL 3973948, at *1.

110. The task force included Chairman Professor John Watkins of Fayetteville, State Representative Mary Broadaway of Paragould, Brian Brooks of Greenbrier, Paul Byrd of Little Rock, Kevin Crass of Little Rock, Jim Julian of Little Rock, State Senator David Johnson of Little Rock, Troy Price of Little Rock, Mike Rainwater of Little Rock, and State Representative Matthew Shepherd of El Dorado. *Id.* Republican State Senator Jeremy Hutchinson, who proposed Senate Joint Resolution 2, a bill which addressed the tort reform concerns without stripping the rulemaking power from the Arkansas Supreme Court, stated that he believed the high court would make some rule changes before the next legislative session. Moritz, *supra* note 3.

111. *In re* Special Task Force, 2014 Ark. 340, at 2 (per curiam) (no parallel citation available).

112. *Id.* at 5 (no parallel citation available).

113. Culpepper, *supra* note 31, at 284-85, 300-01.

Even if the Arkansas Supreme Court's decision miraculously resolves the issues on both sides, a similar set of concerns could arise over new tort-reform policy or other procedural rules. The recently proposed legislation varies wildly, as some proposals represent significant reform, while others seek a laissez-faire approach.¹¹⁴ Although the recent changes may represent a compromise between moderates on both sides, those with extreme views will undoubtedly continue to fiercely debate the rulemaking process. Notably, the court's decision on the constitutionality of the new rules was not unanimous; Justice Hart argued in her vigorous dissent that the new rules will likely be challenged, starting the whole process over again.¹¹⁵ Maybe Justice Hart is right. Perhaps the conflict between the judicial and legislative branches has simply been delayed, rather than solved, by the new rules.

B. Arkansas General Assembly Rejects Rule Changes

If the Arkansas Supreme Court's changes to the Arkansas Rules of Civil Procedure fail to satisfy the majority of the legislature, a power struggle will likely occur at the next meeting of the Arkansas General Assembly, which begins in early 2015. Three possible outcomes could occur if the recent changes fail to bring compromise to the state legislature.

1. Rulemaking Power Shifts to the Legislature

The first possible outcome involves the Arkansas General Assembly passing a constitutional amendment resembling SJR 5 that would strip the Arkansas Supreme Court of its rulemaking power and shift that power to the legislature. This shift would align Arkansas with the minority of jurisdictions and significantly alter the separation of powers balance in state

114. Frazier, *supra* note 39, *passim* (noting the various approaches to tort-reform legislation, including limits on punitive and compensatory damages, restricting recovery from plaintiffs who are partially at fault, and the laissez-faire approach that leaves reform to the common-law system).

115. Justice Hart argued that although the rules no longer violate amendment 80, section 3, they could still be unconstitutional because the *Johnson* court declined to address the remaining constitutional challenges. *In re* Final Rules, 2014 Ark. 340, at 14 (Hart, J., dissenting) (no parallel citation available). Local news outlets reported that the decision was the first in which the Arkansas Supreme Court split on a rule change. Max Brantley, *Arkansas Supreme Court: Another Sign of Fracturing*, ARK. BLOG (Aug. 13, 2014, 7:01 AM), <http://www.arktimes.com/ArkansasBlog/>.

government. Critics advance three basic policy arguments against legislative control of the rulemaking process.¹¹⁶

The first argument is that the highest court of any state has superior expertise in procedure and rules.¹¹⁷ This argument recognizes that judges are best positioned to control what occurs in their courtrooms.¹¹⁸ Every day, judges “see, talk to, and decide the fate of people standing directly before them,” and the judicial branch, not the legislature, is accountable for what occurs in the courtroom.¹¹⁹ Therefore, in theory, a court making the rules will apply its expertise to ensure the rules are fair and consistent.

The second argument is that judicial control over the rulemaking power insulates the rules from the political process.¹²⁰ Although some argue that the rules should be presented to the legislature, vesting the power in the courts protects the rules from the inherent pressures of the legislative branch.¹²¹ Critics fear certain rules will become “political football[s]” used by lobbyists and special-interest groups, while other less controversial rules will be forgotten.¹²² One driving force behind the procedural reform movement was the concern that certain rules could be lost in legislative delay.¹²³ However, the rules remain exposed to the democratic process when in the hands of the Arkansas Supreme Court because the public elects the justices in staggered, statewide elections.¹²⁴

Finally, a shift in rulemaking power from the Arkansas Supreme Court to the Arkansas General Assembly would centralize the state government around the legislature. This would dramatically alter the landscape of the state’s government, which is already heavily centralized around the legislative branch.¹²⁵ Although the Governor can veto

116. See Dean, *supra* note 106, at 149-51 (discussing several such arguments).

117. See *id.* at 149-50.

118. See *id.*

119. Terry B. Friedman, *The Politicization of the Judiciary*, 82 JUDICATURE 6, 7 (1998).

120. Dean, *supra* note 106, at 149.

121. See *id.* at n.44 (listing some of the significant scholarship on the issue).

122. See Koppel, *supra* note 90, at 472-73.

123. Dean, *supra* note 106, at 149-50.

124. See ARK. CONST. amend. 80, § 18 (“Supreme Court Justices and Court of Appeals Judges shall be elected on a nonpartisan basis . . .”).

125. See, e.g., ARK. CONST. art. 6, § 15 (stating the Governor’s veto can be overridden by a simple majority vote in both houses of the Arkansas General Assembly).

legislation passed by the Arkansas General Assembly, a simple majority vote of the legislature can override the veto.¹²⁶ The absence of a supermajority requirement effectively renders the Governor's veto power moot and gives the Arkansas General Assembly significant authority not seen in other states.¹²⁷ For example, both California and New York, which feature legislative rulemaking authority, require a two-thirds vote of the legislature to override executive vetoes.¹²⁸ Therefore, proposed amendments giving the judicial rulemaking power to the legislature would create another exclusive power for the legislative branch and further threaten the separation of powers in Arkansas. This could eliminate an important balance between the branches of the Arkansas government and could make the majority party in the legislature considerably more powerful.

2. Rulemaking Power Stays with the Judiciary

The second outcome would be for the rulemaking power to remain in the exclusive control of the Arkansas Supreme Court. Although this would keep Arkansas in line with the majority of other states, legislative concerns over tort reform will continue to persist. Unless the Arkansas Supreme Court's recent rule changes create an unlikely compromise, legislators will continue to debate the issue of exclusive judicial rulemaking power and propose additional constitutional amendments similar to SJR 5 in upcoming sessions.

Critics advance several basic policy arguments against judicial control of the rulemaking process.¹²⁹ One argument is that judges, like all humans, are inherently biased.¹³⁰ Although Arkansas judges do not run on a party platform,¹³¹ critics argue that members of the court have their own political predispositions and are personally attached to, and comfortable with, the existing rules.¹³² Accordingly, the Arkansas Supreme Court justices arguably would resist changing existing rules

126. See ARK. CONST. art. 6, § 15.

127. See ARK. CONST. art. 6, § 15.

128. See *e.g.*, CAL. CONST. art. IV, § 10(a); N.Y. CONST. art. IV, § 7.

129. See Dean, *supra* note 106, at 151.

130. *Id.*

131. See ARK. CONST. amend. 80, § 18(A) (stating judges "shall be elected on a nonpartisan basis").

132. See Dean, *supra* note 106, at 151.

under this argument.¹³³ Some also assert that the legislative branch is more in touch with the current needs of litigants and members of the bar and should be able to more effectively find solutions to these problems, even over concerns about legislative delay.¹³⁴

A second argument is that the legislature better reflects the public will and the democratic process.¹³⁵ Although this argument is perhaps weakened in Arkansas because judges are popularly elected, the state's government still features a traditional approach to the procedural rulemaking process.¹³⁶ Even if the Arkansas General Assembly employed New York's Field Code approach, rule changes would have to go through the lengthy legislative process in order to bring back the more traditional, pre-FRCP democratic process.

If the rulemaking process is left with the judiciary, but a compromise cannot be reached, then politicization could threaten the Arkansas Supreme Court. Since justices are elected by popular vote,¹³⁷ critics of judicial decisions would naturally begin to run campaigns that resemble partisan campaigns for other elected positions.¹³⁸ Politicization of the judicial system could also threaten to distort the traditions of judicial independence and fairness.¹³⁹ Although “[e]lected representatives should be ousted when their votes contradict the will of the people they represent . . . [judges] . . . should be removed from office only when they lack the integrity, intelligence, or diligence necessary to perform their duties, or if they overreach beyond their constitutional role to follow, not

133. *See id.*

134. *See id.* at 149-51.

135. *Id.* at 151.

136. *See* NEWBERN ET AL., *supra* note 11, § 1:2.

137. ARK. CONST. amend. 80, § 18(A).

138. *See* Friedman, *supra* note 119, at 7 (criticizing the process of electing judges in partisan campaigns).

139. *Id.* For example, critics already question the fairness of the Arkansas Supreme Court's new rules. *See* Brantley, *supra* note 115 (“The Court is too concerned with what the legislature thinks about them and showing them how sensitive the court is to the legislatures [sic] concerns. It is not their job to please the legislature.”). Justice Hart warned that the rule changes might cast further doubt on the fairness of the Arkansas Supreme Court's rulemaking process, and she suggested reexamining *Johnson*, and possibly permitting the Arkansas General Assembly to make the law, if fairness cannot be maintained. *See In re Final Rules*, 2014 Ark. 340, at 14-17 (Hart, J., dissenting) (no parallel citation available).

make, law.”¹⁴⁰ While maintaining the separation of powers balance between the executive and judicial branches is important, the independence of the judiciary could be at stake.

3. *Proposed Balanced Approach*

The Arkansas General Assembly has a third option—to adopt a balanced approach to the procedural rulemaking process. This approach would keep Arkansas aligned with the majority of jurisdictions and also address concerns of critics who believe there is a lack of a legislative input in the rulemaking process. The balanced approach could also put an end to the tort-reform debate that has hampered both the legislature and the courts for the last several years.

Exclusive control of the procedural rulemaking process by either the legislative or the judicial branch is not without downsides. Exclusive legislative control could lead to a state government centralized around the Arkansas General Assembly, and exclusive judicial control could result in the further politicization of Arkansas Supreme Court elections. In every state, the “democratic system of separated power depends on constructive tension between the branches of government.”¹⁴¹ Unfortunately, without “open communication between the branches, this tension could grow into a destructive confrontation.”¹⁴² Not only will the judiciary suffer, but the public will also feel the negative consequences.¹⁴³ In order for “judges . . . to preserve an independent judiciary capable of resolving conflicts peaceably, [they] must reach across the divide and involve [themselves] in the legislative process.”¹⁴⁴ Therefore, in an effort to protect the independence of the courts, the judicial branch must find a way to include the legislature in the rulemaking process and also maintain the separation of powers mandated by the Arkansas Constitution.

Compromise could start modestly—the judiciary could provide the Arkansas General Assembly with a voice on the Committee of Civil Practice, which consists of a diverse group

140. Friedman, *supra* note 119, at 7.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

of judges, practicing attorneys, and academics.¹⁴⁵ The Arkansas Supreme Court could expand the Committee to include two additional seats reserved specifically for two members of the Arkansas General Assembly. With the initiation of the task force and the recent rule changes, the Arkansas Supreme Court has demonstrated its willingness to consider the interests and concerns of the legislature regarding procedural rules.¹⁴⁶ Since the Committee on Civil Practice meets twice a year and proposes the amendments to the rules on an annual basis, these reserved seats would give the legislators a voice in the rulemaking process.¹⁴⁷

A second feature of a balanced approach would be the creation of a symbolic legislative veto of procedural changes adopted by the Arkansas Supreme Court, similar to the executive veto held by the Governor. This option provides an opportunity for the Arkansas General Assembly to express its concerns with procedural rules without stripping the power from the judiciary. The legislature, by a two-thirds vote, would be able to veto a change to the Arkansas Rules of Civil Procedure. Although the Arkansas Supreme Court would still be able to overrule the veto because of its exclusive power, the legislature would be allowed to express its concerns with the current state of the procedural process.¹⁴⁸ Such a veto would also bring an appropriate amount of attention to policy concerns with the rules without jeopardizing the independence of the judicial system. This option provides the “constructive tension” necessary for the separation of powers doctrine to work effectively, without excessively centralizing the Arkansas government around the legislature.¹⁴⁹

VI. CONCLUSION

Although Arkansas should not shift the exclusive rulemaking power to the Arkansas General Assembly, changes

145. See *Committee on Civil Practice*, ARKANSAS JUDICIARY, <https://courts.arkansas.gov/administration/boards-committees/committee-civil-practice> (last visited Aug. 23, 2014).

146. See *In re Final Rules*, 2014 Ark. 340, at 1-4 (no parallel citation available). Some have been critical of the court’s willingness to appease the legislature. See Brantley, *supra* note 115.

147. See NEWBERN ET AL., *supra* note 11, § 1:12.

148. *Id.* § 1:3.

149. See Friedman, *supra* note 119, at 7.

to the rulemaking process could bridge the current divide between the Arkansas General Assembly and the Arkansas Supreme Court. Even though the legislature is trying to address the issues of tort reform in Arkansas, proposed amendments would distort the balance of the separation of powers in the state and dangerously centralize the government around the legislative branch. To prevent this, Arkansas should adopt a modified balanced approach to the procedural rulemaking process that allows the Arkansas General Assembly to have limited input without compromising the exclusive procedural rulemaking power of the Arkansas Supreme Court.

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