

JUDICIAL PANEL: TENNESSEE LEGAL REFORM FROM A JUDICIAL STANDPOINT

Featuring:

JUSTICE CORNELIA A. CLARK,^{*}
SENIOR JUDGE MARTHA CRAIG DAUGHTREY,^{**}
&
JUSTICE WILLIAM C. KOCH, JR.^{***}

Moderated by Professor Jeffrey Omar Usman

Moderator: I would like to begin our discussion today with considering the need to balance stability with change in the law and thinking about the evolution of the common law in particular. Justice Oliver Wendell Holmes asserted that it is not an adequate justification for a law's continuing existence that it is long-standing: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."¹ Some legal philosophers have countered with noting the importance of consistency in the law. Judge Daughtrey, you served on the Tennessee Supreme Court that decided *McIntyre v. Balentine*.² That decision is one of the most significant changes in Tennessee's common law with the court

* Justice Cornelia A. Clark was appointed to the Tennessee Supreme Court in September 2005 and was elected to a full eight-year term in August 2006. On September 1, 2010, she was sworn in as chief justice, becoming the second woman in Tennessee history to serve in that role. Prior to her appointment to the Supreme Court, Justice Clark served as director of the Administrative Office of the Courts for six years. Clark was appointed circuit court judge of the 21st Judicial District in October 1989. She was elected to a full eight-year term in 1990, and was re-elected in 1998.

** Senior Judge Martha Craig Daughtrey served as a judge on the Tennessee Court of Criminal Appeals from 1975 through 1990, and as an associate justice on the Tennessee Supreme Court from 1990 through 1993. She was the first woman on both the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court. In 1993 President Bill Clinton appointed Daughtrey to serve as a circuit judge on the U.S. Court of Appeals, Sixth Circuit. She became the first Tennessee woman to be appointed to the Sixth Circuit.

*** Justice William C. Koch, Jr. was appointed to the Tennessee Supreme Court in June 2007. Prior to joining the Supreme Court, Justice Koch spent 23 years on the Tennessee Court of Appeals. He served as presiding judge of the Middle Section of that court from 2003 to 2007.

1. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).
2. 833 S.W.2d 52 (Tenn. 1992).

transitioning from a contributory negligence to a comparative fault approach. How did you know it was time for significant change in the common law?

Judge Daughtrey: It was pretty obvious because the Court, before I came on the Court, had been repeatedly running into requests from lawyers to make that change. And the members of the court would time after time decline the request and defer to the Legislature. I am not sure why they thought the Legislature was the appropriate reformer in that sense, because it was judge-made law in the beginning. I guess they thought that there was some sort of political weight there that should come before a democratic body. People got tired of waiting. The lawyers got tired of waiting. Eventually we got a new Court in 1990. While there were two members of the new Court of 1990 who had previously been on the Supreme Court, there were three of us who were new at that point and convinced that waiting for the Legislature any longer might last another fifty or hundred years.³ That was the reason for deciding it was time to do it, frankly. That was the impetus.

Moderator: Justice Clark, when you arrive at one of those circumstances where there is a change being pressed in the common law, how do you balance stability versus a need to change?

Justice Clark: I think it is pretty difficult. And I think it requires almost a case-to-case evaluation. The examples that come immediately to my mind in the eight years I have been on the Court have really had more to do with technology. Changes in technology can sometimes drive a need to change. One of the issues I think about is also the admission of expert testimony on eyewitness identification. Criminal defense lawyers had been advocating that there are issues in how persons make identifications when they are eyewitnesses to a crime, that there are scientifically demonstrable problems with eyewitness identification, particularly cross-racial identification. Expert testimony about those problems had generally been rejected in Tennessee and many other states for a long time. As recently as the year 2000 in *State v. Coley*,⁴ we had said that such testimony had not yet reached the level of scientific validity that made it admissible under our Rules, 701, 702, 703.⁵ And yet, eventually in a case called *State v. Copeland*, the Supreme Court changed its mind, and in doing so cited the advances, not specifically in technology, but in the peer reviewed and peer-tested studies that had been conducted and in the additional evidence that

3. For discussion of the Tennessee Supreme Court's makeup during this period see generally Daniel J. Foley, *Tennessee Supreme Court: A Statistical Analysis of an Ideological Shift After the 1990 Election*, 64 TENN. L. REV. 155 (1996).

4. 32 S.W.3d 831, 838 (Tenn. 2000).

5. Tenn. R. Evid. 701; Tenn. R. Evid. 702; Tenn. R. Evid. 703.

had been generated that made it much more difficult to maintain the status quo.⁶ There were still limitations that were set, and there is still specific expertise that is required if someone is going to be granted the right to testify in a trial. But that is certainly one area where over time things change, and what is accepted under review of peers can change, as well.

Moderator: Justice Koch, when a change in the law is being proposed, the side for whom change in the law is going to lead to an adverse consequence is going to argue the importance of stability and predictability. How do you tackle that argument when considering making a change in the common law?

Justice Koch: I would say first, once the threshold, the tipping point, is reached where we think a change is necessary, then the issue becomes, “Is the change going to be prospective or retrospective?” That is a very complicated discussion. There are strong arguments on both sides. At least in my experience as an appellate judge, and certainly as a judge on the Tennessee Supreme Court, if we have decided that the change is necessary, we do examine what reliance interest the parties have on the existing rule of law. If it is important enough to make the change, I would say we typically find that it is going to apply to those people who relied on the rule of law as well. If equitable adjustments need to be made, we make them in how it is going to be enforced.

Moderator: Justice Clark, if an attorney walking into court has an established common law rule against her, what does she need to do to move the Court in the direction of adopting a new rule? Should there be a 50-state study? Should we have sociological evidence?

Justice Clark: Yes. [Laughter.] That is the short answer. Any or all of those things can help. And again, it is case specific. To use a term which may be a term of art—and I may be using it out of context—showing that there has been a change of circumstances is going to be helpful. It may be by showing the changed approach is trending in other states and the tipping point has been reached. Showing that many States are moving in a direction different from where this court has been is helpful. Showing that there has been a change in fact, or a change in technology can also be significant. For instance, during the time I was a trial judge, the admissibility of DNA evidence changed dramatically because the technology involved in testing and mapping DNA changed dramatically. So, it helps for the lawyer to be able to say, “I understand where you are. I understand in whatever case you last wrote, why you articulated why this is the rule. Here is what has changed.” And whether it is other states’ cases, or the science, or whatever

6. 226 S.W.3d 287, 300 (Tenn. 2007).

it is, that is going to help give us the most direct way out. This approach gives us an opportunity to say, “We have had this rule for twenty years, or fifty years, or whatever, but the day has come when there is a good reason for us to make a change.”

Moderator: Judge Daughtrey, is there anything in particular you would want to see in a brief or hear from an attorney trying to convince the Court to move in another direction?

Judge Daughtrey: It may be that you have to be a little careful about choosing the case. I am always reminded that when the United States Supreme Court was faced with *Mapp v. Ohio*⁷ in 1961, the case that they chose to incorporate the Fourth Amendment exclusionary rule was not a case where a murder conviction was going to be thrown out. Police Officers entered Dollree Mapp’s house without a warrant and seized a trunk that had something largely innocuous in it. All that was at stake was contraband consisting of some nude sketches and a few books. It may be that you have to pick the right case.

I think the other thing that has not been mentioned here today is the need, if you are about to undertake a major change in the law, to have, if at all possible, a unanimous Court behind it. That is what gave us some pause in the *McIntyre* case. There was pretty much a consensus that the law had to be changed, but the question was how far we should go, and what the ramifications were. It is very hard when you are making a change to try and envision everything that may be affected by it, but it is a good exercise to try and go through. And then to bring everybody on the Court in is also a very good idea. I do not think I am talking out school or out of chambers or out of the robing room when I say that there was a lot of effort that went into that, to get to the end result. There was compromise. There was at least one judge who did not want to go as far as the rest of us did, and it showed up in the final opinion. But I think when we were done, it was some really solid progress. Compare that to these wild split opinions that you get out of the United States Supreme Court. Sometimes there are changes in the law where there are plurality opinions, and you have to futz through all these opinions trying to figure out if there are as many as five people who agree on any one point. It seems to me that is not a particularly good way to do it.

Moderator: Justice Koch, let’s take a closer look at the United States Supreme Court and constitutional interpretation with regard to stability and change. Justice Clarence Thomas is strongly arguing that the Court puts too much emphasis on *stare decisis* in constitutional interpretation and that in fact, in constitutional interpretation, *stare decisis* should play a much lesser

7. 367 U.S. 643 (1961).

role.⁸ Critics say that undermines the integrity of the Court and leads to haphazard decisions and inconsistency. What are your thoughts on balancing *stare decisis* with stability and change in constitutional interpretation?

Justice Koch: I think *stare decisis* not only produces predictability and stability, but in my mind, it also is a safeguard against judges with agendas. As a common-law judge, I know that on many of the cases I sit on, sufficient legal principles are available to enable me to decide the case in just about any way I want to. Of course, I have to bring my colleagues around to that particular point of view. On our court, I have to count to three. On the United States Supreme Court, you have to count to five. *Stare decisis* forces a judge who thinks that the law needs to be changed to get over a much higher hurdle. The burden of proof is heavier. And it should be heavier. If we start with the assumption that the concrete is not hardened on any of the cases that have been decided, we are going to start revisiting issues depending on which way the prevailing wind is blowing. And that is a concern. I have great respect and regard for Justice Thomas, but I am not sure I am ready to throw *stare decisis* off the island quite yet.

Justice Clark: I think I agree with that. As a trial judge, one of the first things I was taught at every judicial conference was that consistency, stability, and predictability are what lawyers really value most in judges, at any level. Whatever your bent is, if people can be certain you are going to be consistently liberal or consistently conservative—use any word you want to—then they can at least prepare and give their clients good advice. So I take that seriously. I think that *stare decisis* is important. A case will come along that almost requires you to relook at whatever the underlying principle is, but I think that should be done cautiously.

Judge Daughtrey: I am just a little shocked at Justice Thomas, and that is about all I have to say.

Moderator: Judge Daughtrey, during your time serving on the Tennessee Supreme Court, the Court took a number of strong stands separating Tennessee constitutional law from federal constitutional law, in terms of providing greater, heightened protections under the state Constitution than were provided under the federal Constitution at the time. When you are looking at a similar provision—say, a search and seizure protection under the state Constitution and the federal Constitution—what leads you in the direction of legal reform as a judge in finding that greater protection in the state Constitution?

8. See KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS 281-82 (2005); McDonald v. City of Chi., Ill. 130 S. Ct. 3020, 3058-88 (2010) (Thomas, J., concurring).

Judge Daughtrey: We came onto the Supreme Court at a time when the state constitutional movement was really getting traction. There was a period during the 1980s when a lot of the state supreme courts were beginning to look at their own constitutions and realize their allegiance to the state Constitution, as long as there was not any sort of conflict with the federal Constitution. The movement was ongoing at that time. It turns out that a couple of the members of the previous Supreme Court—I am speaking now of Justice Joe Henry and at least one of his colleagues—thought that the state Constitution was worth looking to and did what they could to get the Court to think in those terms. And unfortunately there were only two votes on that question.

So when it came to us, we were ready to do a little looking at that subject. It turns out that the Tennessee Constitution was patterned after the Connecticut Constitution, which actually predated the United States Constitution. So there is something to be said for the fact that we do not have to track along after the provisions in the United States Constitution, especially when the language is different. And there are some important differences. The Free Press provision of the state Constitution, for example, is different, really dramatically different, from the wording in the United States Constitution.⁹ So, there is a rich field there to mine, and we started it. And I think it was indeed the right way to go at the time.

Moderator: Justice Clark, there are complaints that have been raised by State Supreme Court Justices in a number of states in terms of inadequacy of briefing on state constitutional issues, that essentially what you see is a citation to the Fourth Amendment, semi-colon, state Constitution. Many briefs do not go beyond that. If a lawyer wanted to come forward and put forth a meaningful argument to the Court that the Tennessee Constitution provides greater protection, what kind of arguments do you want to see that attorney marshal?

Justice Clark: First, the very best that they can marshal. It is surprising

9. Article I, Section 19 of the Tennessee Constitution provides

That the printing presses shall be free to every person to examine the proceedings of the Legislature; or of any branch or officer of the government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty. But in prosecutions for the publication of papers investigating the official conduct of officers, or men in public capacity, the truth thereof may be given in evidence; and in all indictments for libel, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other criminal cases.

sometimes that cases will get to our Court and the attorneys in their briefing really have not given careful thought to those nuances. Those nuances are important. If the language of the Tennessee Constitution differs from that of the United States Constitution, then clearly, we would like for lawyers to talk about why the difference may be meaningful, why it may lead us to a different interpretation. We are often going to start from the position that if the language is similar, even if not identical, it is at least helpful to review what the federal constitutional cases say. Then we may move to a different position, or we may not. Lawyers can be very effective or they can be very ineffective in their adherence to or failure to adhere to the basic idea that what we want to hear is the nuance. We know the general principles. We want them to focus on what is different, and why that gives support to the position they are taking.

We also want, in more general ways, the lawyers to take the time to be sure that if they are making a Fifth Amendment argument to us that they are not citing Sixth Amendment cases and vice versa. We often see that. They find black letter principles, and they sound good, but when you really drill down to what the cases are about, they are deciding very different issues, and that makes them less helpful.

Judge Daughtrey: Justice Clark, do you all send letters out before the arguments saying, “We would also like to see you address . . .”?

Justice Clark: Our internal operating procedures now suggest that if we have a particular issue we want to focus on, we put that in the grant order. Usually, a Rule 11 application is granted on all issues raised, unless we say otherwise, but then we say what we would particularly like them to address at oral argument. And anybody who does not understand that is the defining issue for us, then [Laughter.] they are not paying a lot of attention. You are laughing, but sometimes lawyers get to court and are still not arguing about that issue.

Justice Koch: Justice Brennan probably started the new Federalist movement back in the 1970s when the majority on the Supreme Court changed. Justice Brennan wrote a series of articles suggesting that if lawyers wanted to further develop constitutional protections and individual liberties, they ought to look to state courts.¹⁰ Many people considered Justice Brennan to be a sore loser and that he was making this argument only because he was no longer commanding majorities. In fact, Justice

10. See generally William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Jeffrey Omar Usman, *The Game Is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution*, 77 TENN. L. REV. 57, 98-99 (2009) (addressing Justice Brennan’s role in spurring new judicial federalism).

Brennan's suggestion was entirely consistent with what the Founding Fathers had in mind. You will recall they did not set up a bunch of lower federal courts when they set up the Supreme Court. They believed that state courts would decide these issues, and they thought they were perfectly competent in doing that.

Justice Brennan's position perhaps deserves more deference than it has gotten in some quarters. But that being said, I think the dirty little secret is what state supreme courts had been doing. Up until the 1960s or 1970s, the state supreme courts had been riding the coattails of the United States Supreme Court. And so a lawyer would temerarily get up in front of the Court and say, "The Tennessee Constitution protects this right." And the Court would write an opinion that would say essentially, "Our constitutional provision is virtually the same as the provision in the United States Constitution, and so we are just going to adopt the Supreme Court's interpretation." To me, that statement triggers *stare decisis*. When the 1990s came along and there was some necessity to revisit those questions, one of the hurdles you had to get over was that a prior Tennessee Supreme Court had said our constitutional provision is virtually identical to the federal provision. So then you have to start digging into that.

And just to be honest with you, the lawyers have been very little help.¹¹ Most of the arguments you make are going to be based on the history of the document, the constitutional principles that were embraced in 1796 when the fifty-five folks met up in Knoxville to draft our Constitution. Judge Daughtrey is exactly right, it is a cut and paste job from other constitutional principles from around the country. We have many lawyers who will say that our Constitution provides far broader protection than the federal Constitution. I would say, "OK, what is next?" And they say, "Well, we are going to move on to our next argument." I sit up there thinking, "Where is the beef?" A difference in language is very helpful; that gives you room to talk. But some of the differences in language simply are so subtle that it can be very hard to construct an argument that there was an intention to do something different. Basically the quality of the arguments that the lawyers give us is going to influence the quality of the result. On constitutional questions, I would love to know the names of any lawyers who have run over to the archives at the University of Tennessee or up to North Carolina where some of our organic documents are kept and who have actually tried to read some of them to give us some better idea about what really might have been going on in 1796.

11. See generally Jeffrey Omar Usman, *Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions*, 14 NEV. L.J. 63, 78-83 (2013) (discussing the failure of attorneys to adequately respond to the opportunities presented by new judicial federalism).

Judge Daughtrey: In Washington, when I had my confirmation hearing, I got raked over the coals by a member of the Senate Judiciary Committee for some of the opinions the Court had written having to do with the death penalty under the Tennessee Constitution. I had not written any of them, but I was about to be crucified for my association—guilt by association. So I tried to explain that yes we did hold that, but we were looking, not at the federal Constitution but instead the Tennessee Constitution. The question was, “Why would you hold a crazy thing like that when the federal Constitution has never been interpreted that way?” And I would say, well, we did hold that, and we held that under the state Constitution which is, of course, not exactly the same as the federal Constitution. Finally, this Senator said, “You know, I think that is just an excuse. It looks to me like the provisions under both those Constitutions are the same.” And I said, “Well Senator, if you will look at Article 1, Section 1 of the Tennessee Bill of Rights, which originally was at the front of the Constitution and not at the back of it, it says that if the citizens of Tennessee become unhappy with their state government, they have a right to rebel and overthrow that government.” And I said, “I do not think there is a provision like that in the United States Constitution.” [Laughter.] And I rested my case.

Moderator: I would like to go a little more in depth on some of the unique provisions of the Tennessee Constitution.

Judge Daughtrey: Well, that is one. [Laughter.]

Moderator: I am also curious about effective arguments that lawyers can make in pushing reform with some of the provisions that are in the Tennessee Constitution but not the United States Constitution. Assuming that you are not trying to justify your client’s rebellion against the state, but instead make use, perhaps, of the Open Courts Clause,¹² Justice Koch, what wealth of material is available for lawyers if they want to make use of such a provision?

Justice Koch: For those of you who would like to go on legal archaeological digs, you can trace many parts of our Constitution, including the Open Courts Provision, back to Magna Carta. There are centuries of discussions by the English courts, by early American courts, state and federal, about Article I, Section 17 of the Tennessee Constitution, of what it means and does not mean.¹³ So you have common law doctrines, you have historical papers, you have scholarly articles written by many academicians over the years, and books. The irony of it is that now, most of our research

12. TENN. CONST. art. I, § 17.

13. See William C. Koch, Jr., *Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333 (1997), for Justice Koch’s in-depth analysis of the Open Courts Clause.

is done on Westlaw and Lexis. And the materials on Westlaw and Lexis only go back so far. So, for example, if the answer to your question might be in 3 Tennessee, you are not going to find that on Westlaw or Lexis. I have not gone up and looked, but I am hoping that the Belmont Law Library has a set of the Tennessee Reports. Many of these precedents are still valid, but they are not readily available electronically. Accordingly, you must do the research the old-fashioned way. And that means that you hope the library has it, and if the library does not, you are going to have to get it on loan, or you have to know somebody who will pull it out of the archives. Many of these very important documents and precedents are just not readily available because they are not in electronic format right now, and you just have to find them.

Moderator: Justice Clark, the Court acts to reform not just through its judicial decisions but also through its rulemaking role and its supervision of the bar. Would you take the audience through how major innovations occur in terms of the Court's rulemaking and its supervision of the bar?

Justice Clark: Over the last forty or so years, the Tennessee Supreme Court has by rulemaking improved and raised the bar and the expectations about ethical conduct. The Court has made significant strides on a lot of other issues related to the administration of justice. The Court now has fifty-two rules. Some of them are very significant. There are rules that govern the entire ethical conduct of lawyers, the rules that you must follow and the rules that are to be followed if lawyer misconduct is reported. There are rules that govern the ethical conduct of judges. Those are very significant, and those are the rules that must be followed under the Board of Judicial Conduct, which is created by statute now and its members appointed by members of the Legislature.¹⁴

The process differs, in many cases now, on issues such as Access to Justice, where the Court, following the lead of the Tennessee Bar Association and others, said there is something that we know and now we are going to really emphasize it. And what we know is that there are many, many Tennesseans who have legal problems but they do not have the resources to hire a lawyer. In the civil arena, there is no constitutional or statutory right to have an attorney appointed. But there are many adverse things that can happen to people that would not happen if they had legal advice. And so the Court lifts this up. It created a Commission, and it created a rule, because the Court believes in being transparent and saying, "Here is what we want to do, and here is how we want to accomplish it."

So in many situations, we start those things ourselves. In other situations,

14. See generally Tenn. Code Ann. § 17-5-101 through Tenn. Code Ann. § 17-5-314.

the Tennessee Bar Association or another lawyer or law-related group may petition us. We have rules now that govern continuing legal education. We have rules that govern how a person is qualified to take the bar exam and to be admitted as a lawyer. In each of those, we have independent bodies that we appoint, and they oversee these rules. And often those are the people who propose to us changes in the rules. And they do that by filing a petition, by stating what they want to change, and by stating why they want to change the rule.

Almost one hundred percent of the time, we will publish proposed rules for public comment. We do that on the front end without making any statement about whether we support any or all of it. We have a petition that has just been filed suggesting some significant changes to Rule 21¹⁵ concerning continuing legal education. We will discuss that in the next week or two. I predict that we will publish the petition for public comment, and we will encourage all lawyers to comment on it, to tell us what they like about it, to tell us what they do not like. The petitioning group has presented a statement of reasons why the changes are needed, and they may be asked to respond to comments on the back end. Those are the ways in which the administration of justice, the ways in which we do business when making changes by rule rather than case law.

Moderator: Judge Daughtrey, when you were serving on the Tennessee Supreme Court, a number of these administrative extensions of the Court were created. How important are those administrative outlets for the Court to properly perform its function?

Judge Daughtrey: Well, one of the interesting things about that is you get a commission going to come up with some rules or some procedures, and immediately what you get is really good interaction with the bar, with the lawyers who are on that commission. I think it may have been the commission of the rules of criminal procedure, but what I remember distinctly is there were meetings on Saturday mornings, early. I would go down to the Supreme Court building and make sure the door was open. There was no security at the time. You just unlocked it from the inside, and anybody who wanted to could come in. And I had to then rush upstairs and make an urn of coffee and bring the doughnuts, etc. And that is what we did; we did not have any staff to do that. As a matter of fact, you go far enough back and there was only an executive secretary at the Supreme Court and maybe one or two assistants. So there was no Administrative Office of the Courts to help us with that. If you were going to try to get something going in terms of the Commission on ADR, for example, if you were the judge that was thinking that something ought to be changed, or

15. TENN. SUP. CT. R. 21.

added, or done, you had to be willing to show up on Saturday morning and make the coffee and bring the doughnuts.

But the payoff was that we not only made progress, but the process also kept the members of the Court in a zone of reality because they were dealing with lawyers who were in court and who had suggestions for how things can be improved. And it is something I miss. There is not anything like that anymore. There are some committees in the various circuits—rules committees where the judges meet with the lawyers once a year, maybe—but it does not have that sort of down-home, integrated sort of basis that the State Supreme Court rules committees had.

Moderator: It sounds like there are a lot of opportunities for learning from the bar in creating and structuring rules and moving forward on that front. On the opposite end of the spectrum, how much of a role is there for the court in trying to persuade the bar so as to move the bar in a particular direction?

Justice Koch: I am thinking of one effort, before Judge Daughtrey's time, when the Court decided to unify the bar. That did not go well. As I recall, the Court issued the rule and then pulled it back about nine months later. A wise person named Abraham Lincoln said, not quite in the terms that I am going to say it, but there is an axiom that a leader without followers is just out for a walk. [Laughter.] There are going to be occasions when we are going to have to sell ideas rather than decree them.

That is where these advisory commissions and ad hoc bodies with leaders of various bar groups can be very helpful in terms of having a very healthy give and take. We start out with one set of perceptions. The bar starts out with a different set. We find a meeting of the minds, and then when that rule goes out for comment, we have a number of advocates at the bar already because they have been involved in preparing it.

I think a great example of that, perhaps, would be the revisions to Rule 9,¹⁶ the disciplinary rules that were originally proposed by the bar. We substantially changed them. There was a period of time for discussion, but by the time we were ready to hear oral argument on those rules, the bar broke the different sections of the rules down and had individual members of the bar explaining publicly why they were a good idea. Part of the job is to understand that you can rule by decree, but sometimes it is going to be much easier to rule by consensus.

16. Tenn. Sup. Ct. Rule 9.

Judge Daughtrey: Of course, over on our side, we have to deal with Congress. [Laughter.]

Justice Koch: That was actually another thing I was going to mention, too. Everything we have talked about are matters that are entrusted to the Judicial Branch of government. And so whether it is the licensing of lawyers, the education of lawyers, the rules of procedure that the courts follow, these have traditionally been matters that have been viewed as the court's prerogative. Now there have been instances historically in Tennessee and other states when the Legislature has passed laws that affect some of these things. And our Court, like other State Supreme Courts, has acquiesced in those laws because they fit comfortably in the direction of where our rules were going, and so there was no need to raise the specter of separation of powers.

I think what we are seeing in this day and time, not just in Tennessee, but in other states and in the federal government, is that the issues of separation of powers are becoming very blurred. We have members of our General Assembly now who want to decide whether law school education ought to be two years or three years, they want to decide what the rules of criminal and civil procedure ought to say. It is going to present a very challenging period of our evolution here as the Judicial Branch, the Executive Branch, and the Legislative Branch to find a civil, professional way to approach these issues. But at the end of the day, our Constitution is really quite clear in Article 2, Sections 1 and 2, that we do recognize the separation of powers, and it is our job in a polite, civil, appropriate way to draw that line when that line has to be drawn.¹⁷

Justice Clark: One other thing I want to say about rulemaking. I run into lawyers now who say, "I never got a chance to comment on X," "I did not know that you were proposing changes," or "I just read about it somewhere." And I recognize that we are not a unified bar. We have more than twenty thousand people licensed to practice and practicing law in Tennessee now. And we do not have a magic pushbutton where the Supreme Court can send out an email or a letter automatically to everybody, though some of our entities do. But I think today there is more opportunity to know what is going on and comment than there has ever been, because so much is done electronically. So every single proposed rule is put out for public comment. It is always posted on the website. You may submit comments back by the website, or by letter, or by any other method, and they can be easily circulated. We rely a great deal on bar associations, both local and state bar associations, and we are grateful to them for helping spread the word among their members. If you simply want to get up every

17. See TENN. CONST. art. II, §§ 1–2.

day and look on the website to see what is there, there is always going to be a reasonable chance to know about it and to comment on it. And that is a significant change from 1976 when the Board of Professional Responsibility was first created and even from the middle 1980s.

Moderator: Judge Daughtrey, how should a Justice navigate these separation of powers concerns that are confronting the Court?

Judge Daughtrey: Well, sometimes you just have to stick your neck out there and say, “This is ours to do and not yours.” And there are those opinions you can find. One of the things that the federal courts have tried to do is to come up with a system of contacting Congress to say, “When you passed this statute, you left some gaps. Here, for example, is an opinion that we wrote in this case, and if you look at it, you will see that we are having difficulty interpreting this terminology, or something was left out of the section on definitions, or there is an ambiguity here that we think you probably did not intend.” It is an interesting way to go about trying to get the message back to the Judiciary Committee or to the various committees that have oversight over these statutes, that maybe they should look at something. I know how that works, but I do not know the success rate, and I do not know what would happen if the Tennessee Supreme Court implemented a similar procedure with the General Assembly. I am just not sure how that would go. But that is a level of cooperation. Instead of saying, “You are just out of your element over there. That is ours to do and not yours.” There are ways in which courts can develop really good relationships with the Legislature, and they are very valuable. That is particularly common in the state courts. We do not get a lot of chance to deal with Congress, although we have people in Washington who do.

Justice Clark: It should be easier in the state courts because you should know more of the people. I am somebody who believes that it is appropriate and perhaps even necessary to try to cultivate and maintain good and respectful relationships among the branches of government. The fact that we tiptoe up to this separation of powers issue—and there comes a point where each one of us may need to say, “You are overstepping. You are stepping over the line. You are usurping my authority”—does not mean that there should not be conversations. I look around and I know in this audience right now there are at least two former committee chairs from the Legislature that I have known and with whom I have worked. Both as AOC Director and for the two years I served as Chief Justice, I thought it was appropriate at the beginning of every session to go over and sit down with key committee chairs, talk about what they thought was going to come up, what we thought was going to come up, and to have conversations as needed in between. For the most part, those folks were always welcoming. That did not mean they always agreed, but they were willing to listen and to

engage in the discussion, and I think that's important. To the extent that we are, or that we feel we are, losing that ability to have those good conversations, then I worry about it, because our government works best when we work together.

Justice Koch: And here is an example, perhaps, of one of the more recent successes. You heard a presentation before lunch about tort reform. One of the parts of that legislation included a very interesting way to instruct the juries on how to calculate damages. And dare I say it would be impossible for a layperson or a lawyer to understand those instructions. And some of our trial judges took hold of that issue and realized that it was a problem after getting consensus with their colleagues that everyone shared a concern that this was perhaps not set up the way it should be, initiated discussions with the sponsors of the bill, and were able to get that provision adjusted.

So those sorts of conversations work. Justice Clark is exactly right. Conversations with legislative leaders or individual legislators who take a particular interest in an issue can be helpful. My experience over the last forty years has been the judiciary is always ready to talk, explain, or listen to the input of members of the General Assembly and the Executive Branch. But I just have to be honest with you: There are a growing number of persons who have not served in government roles before they were elected to the Legislature. Without naming any of them, I can think of one that both Justice Clark and I made an appointment and went over to the office to talk about a particular issue, and the response was, "You are judges. Get out of here. It is unconstitutional for me to talk to you." And so it is kind of hard to initiate the dialogue [Laughter.] until you have people working from the same point of view.

So, of course, we do not rush over to talk to that legislator a lot. It is a gradual process of educating public servants, both judges and representatives of the Executive and Legislative Branches, that separation of powers does not equate to being hermetically sealed from each branch of government, that there are appropriate ways to do that. And what professionals need to do, whether we are professional judges or professional legislators, we need to find ways to do that, because it really does minimize the difficulties.

Justice Clark: One thing I have come to understand while being on this Court is that most of the cases we hear do not deal with the constitutionality of legislative actions. We are not ruling anything unconstitutional; that happens very rarely. We are called upon under a specific set of facts to interpret a law. And sometimes we find out very literally that whether it has a comma or semicolon, an "and" or an "or," can make a difference, and it may have been nothing more than a typographical error that leads to an

outcome that legislators who voted for it think is unusual. Sometimes, the language is different or, I can think of a case recently where we have had to say, “You have established a standard that governs *this*, but nobody ever thought factually about this second set of facts, and now we’re confronted with this second set of facts, so we have to interpret as best we can.”

From our point of view, because we speak through our opinions, it is not personal. We understand that once we have said this is our best judgment about what you meant when you said this, if the Legislature disagrees, the next time they go into session they have an absolute right to change the language. I released another case recently that emphasizes just that.¹⁸ There was this statute, and our courts began interpreting it this way, and in 2004 the Legislature changed that statute. They must have meant for us to go in a different direction. It is our obligation, under all those circumstances, to follow where they are leading us.

And so we do not take it personally if they change the law in response to our interpretation because it may not be what they intended. But I sometimes run into people who do tend to take it personally if we have interpreted a statute in a way that they did not intend. That is not intended as a criticism. It is sometimes taken as a criticism, I think.

Moderator: Judge Daughtrey, as part of this conversation both with the public and with the Legislature about legal reform, a pressing issue in Tennessee right now involves changes with regard to judicial selection. What is the role of the Court, in terms of speaking to those issues, and what is the role of judges in speaking out on what they believe to be the most appropriate method?

Judge Daughtrey: Well, I could start off by saying something innocuous like, “I am the only person in the room, probably, who has been put on the bench by appointment, by retention election, by an open partisan election, and by, again, appointment in the end to a position that carries life tenure.” So I have seen it all. I got a little teed off the other morning when the *Tennessean* announced that only two women in history had been elected to statewide office. [Laughter.]

Justice Clark: There are at least three of us sitting on the Supreme Court right now who thought we had. [Laughter.]

Judge Daughtrey: And I did, too. Now, those two women, who were on the public safety commission, both were involved in, I think, contested elections. But the partisan election of the Supreme Court in 1990, we

18. See *Armbrister v. Armbrister*, 414 S.W.3d 685 (Tenn. 2013).

thought running right up to the last minute that there were going to be nominees put up by the other party, and that we would have contested elections. It just so happened that in the end the Republicans did not put up a slate. And so we ran unopposed. But it does not mean I am not a statewide elected official. I have not called the editor yet to say anything about it, but I think I may in our defense before the week is over.

You know, it has gotten really bad out there since the United States Supreme Court more or less did away with the rules that the judges had come up with and the lawyers had come up with about campaigns and financial contributions to campaigns. What is happening in some of the states in these open elections, even the non-partisan ones, is just shocking, actually. The negative ads on TV and the special interest groups coming in and offering to back candidates on the assumption that those judges are going to vote the way they want them to vote. That whole scene I find so troubling, so that whenever anybody starts talking about judges should be elected officials just like all other officials—the point is that judges do not represent anybody. It is not a political office that they are holding. And there has got to be a better way.

So far, it seems to me that the better way is merit selection and retention. People say, “Well, there are politics in that process, too.” And sure there are, and we have seen it go back and forth here in Tennessee. And that process does not always produce the best person for the office. But what it does do for the most part, in my experience and in my opinion, is prevent people who are unqualified from getting on the bench, so that you have to come through enough screening that people who are just patently unqualified to sit as judges do not, in fact, end up getting the appointments.

There are bugs in the system. I think we are about to experience some of the bugs in the system in Tennessee. Obviously, some of the provisions that are now in place need to be rethought, in my judgment. But I am looking at that now from the very enviable position of having life tenure, and it is a nice place to be. [Laughter.] And I would not trade it for almost anything or any other suggestion you could come up with.

Moderator: There is dissatisfaction out there right now from consumers in the legal market, from corporations, from individuals, from people who are trying to access the judicial system. What is the role of the judiciary in trying to respond to those dissatisfied customers of the legal system, Justice Koch?

Justice Koch: Well, I can only speak for myself, but I candidly have to say that the customers have a right to be dissatisfied. Here in the 21st century, we are delivering law about the same way we did in the 19th

century. And it is too expensive. It takes too much time. It is simply not efficient. I think all of us that are lawyers and judges are going to have to take a piece of that blame and figure out a way to fix it.

Now the role of the courts—it gets back to “A leader without followers is just out for a walk”—I think that the courts need to be more candid in their recognition that we need to give litigants, both on the criminal and the civil side, quicker justice in an affordable way. We need to make sure that jury trials can be reasonably available to people with small cases, not just big cases. And we see a real significant disconnect in terms of how court is available to people in the state right now. For example, in Davidson County, if someone files for a divorce in November, Davidson County Circuit Court will give them a trial in February. You go out of Davidson County, not too far away from here, it is two years. This is something that we all have to collectively address. The Supreme Court certainly has adopted Access to Justice as its primary policy initiative. I am seeing this question as a subset of Access to Justice. I think it may be a matter of the court finding followers and leading those followers into some structural changes in how we do business.

Moderator: Justice Clark?

Justice Clark: Well, I agree with all of that. It is both simple and very difficult. We need to deliver quality service, faster and less expensively. If ninety percent of success is just showing up, I am going to suggest to you that most of the judges I know do that. They come to work on time every day. They open their courts as they are scheduled. Many of them stay late. They have read briefs before motion days. They listen carefully. And they are prepared to rule at the conclusion of proceedings or very soon thereafter.

Those people do not get any attention, and the people who get the attention are the ones who do not quite do that. They do not show up every day, or they do not schedule court as many days as they should, or perhaps they come unprepared to listen to the proceedings, whether it is trial or appellate. It is a privilege to have the jobs that we have. And I, too, have been appointed, and I have been through a partisan election, and I have won a retention election. But however you got here and are permitted to stay here, it is a privilege every day.

And I understand that with that privilege comes the responsibility to do justice. The Tennessee Supreme Court has addressed that by internally adopting procedures that say you must circulate your opinions within a certain period of time. And if, ultimately, there is time to discuss and decide if there is going to be a dissent, then you must circulate that within the

period of time because timeliness often is justice. Taking too much time, sometimes, denies justice. We have to require trial courts to do that. We have to require general sessions courts to do that. The Chief Justice is taking on more responsibility and looking around the state at post-conviction cases and certain other kinds of cases that are taking longer than they should, having conversations with judges. We are more actively using our senior judges now and sending them out into the communities to handle dockets of judges who are sick, or who may have retired or resigned and their cases are not coming along. But all of us together have to do whatever it takes to be sure that cases can be heard timely, that, whether you show up with or without any attorney, you are going to at least get a chance to present your point of view and your case. We have to prevent the few lawyers who try to take advantage of others or who try to abuse the discovery process. Those things are easy to say and hard to live, but if we are going to have any hope of providing access to justice, each of us is responsible for that every single day.

Moderator: Judge Daughtrey?

Judge Daughtrey: I know there are some controversies out there. We could probably get a good little debate going in this room right now. I am hearing trial lawyers saying that there is too much summary judgment and there are not enough cases going to trial. You know, as somebody who reviews those summary judgment orders, I have to say those of you that are strong on trial should come sit in my seat and see how pitiful some cases that are filed are, and how little they need a trial, and how lucky we are to have the availability of summary judgment in many cases.

It also seems to me that the movement to take some of the legal work out of the courts has been successful. Maybe in some instances there has been too much. When we ran for the Tennessee Supreme Court in 1990, we were going all over the state trying to get support. One of the other judges who was running, and who actually was on the Court of Appeals at the time, ran into me in Nashville and said, "I am talking to some of the people you have talked to after you have talked to them, and what I need to know is: What is this thing called ADR?" [Laughter.] Now, that is where we were in 1990: There were people out there who had never heard the phrase "ADR." We have gotten into it. We have a commission on ADR now, and that was one of my campaign principles.

So, it seems to me there are ways to deal with this. The federal courts are in trouble because there simply are not enough judges, and we have to depend on Congress to create them. And there is a lack of flexibility with these Article III judges. We have a huge number of District Court judges in Detroit right now with not much to do other than bankruptcy. It would be

extremely useful, for example, if those judges could somehow be assigned to other districts. It just apparently cannot be done. Then there are judicial emergencies, and what we have got is Congress stalling, so that you could go two or three years from the time you are nominated to become a federal judge to the time you finally get confirmed, or you have to walk away. You all might be interested in what is going on in Congress right now. There is the argument that they do not need to fill vacancies on the D.C. Circuit because the statistics show that those judges do not have a full caseload as compared to the judges down in Florida who have a million drug cases. What the judges in the D.C. Circuit do have is the venue for the filing of all the administrative cases in this country. So it is not an assembly line of drug cases; they have big cases that take a long time to deal with.

I do not have all the answers. But I do think we have to stay flexible, and invite the innovators in to give us some ideas, and not be set in our ways. I was invited to a seminar one time, a program on looking into the future. I think it was called "Looking Over the Rim: 2020." Of course, 2020 sounded like 1984 used to sound when some of us were young. And here it is, almost 2020! In any event, it was thirty years away at that point, and the question was: "What do we need to think about for the courts at that time?" There was a judge from some place, I think it was Chesterfield County, Virginia, who said, "You know, if Patrick Henry came back today and went to the county seat of Chesterfield County, and if he went down the street he would be amazed at the changes. I mean, there is no livery person any more; there is a car dealership. There is no alchemy shop any more; there is this incredible drug store that is not just drugs but everything else you can think of." And he went on and on, and finally he got down to the courthouse and he said, "Patrick Henry would walk into the courthouse and, 'Blimey! It's exactly the way it was!' [Laughter.] They are keeping the books and doing the same things they have been doing all that time."

Well, I am going to bet that that courthouse now has electronic filing, so in that sense we have made a little progress. But the law is often thought of as being hidebound. It does behoove us in terms of your theme here, reform, to remember that we do need to be flexible enough to make some changes when changes are necessary.

Moderator: Our panelists have been extraordinarily generous in sharing their time. Please join me in thanking them for giving so generously of their time this afternoon. [Applause.]