OSBORNE V. NEBLETT AND THE SEPARATION OF POWERS: DOES THE LEGISLATIVE POWER TO MAKE LAW INCLUDE THE POWER TO DECLARE THAT RIGHTS UNDER THE LAW CANNOT BE WAIVED?

*Michael J. Bentley**

I. INTRODUCTION

A first principle of Mississippi law is that the three branches of government are separate and equal in their constitutional spheres. The legislature makes the law, the executive enforces the law, and the judiciary applies the law in cases and controversies. Each branch has core powers, necessary to fulfill its constitutional duties, that the others may not encroach upon. Among the core powers of the judiciary is the power to set procedures for the efficient resolution of cases. Legislative enactments that conflict with those procedures are unconstitutional.

The Mississippi Court of Appeals' decision in *Osborne v. Neblett*, however, calls this principle into doubt.[1] In *Osborne*, a divided court held that the judicial waiver doctrine does not apply to claims that a foreclosure sale was void due to a violation of the publication requirements in Mississippi Code section 89-1-55. If *Osborne* was correctly decided, the court of appeals has identified an exception to the rule against legislative interference with judicial procedure—the legislative power to declare certain acts null and void as a matter of substantive law *includes* the power to prevent a court from applying the judicial waiver doctrine to a litigant's claim for relief from the void act.

In this Article, I argue that *Osborne* was not correctly decided. The power to say when a litigant has waived an argument or claim—even a meritorious one—is a judicial power reserved to the courts; it may not be exercised or limited by the legislature. The court of appeals construed section 89-1-55 in an unconstitutional manner even though this construction was not mandated by the statutory language and should have been avoided. If permitted to stand, *Osborne*'s anti-waiver rule would preclude the application of the waiver doctrine in both the trial and appellate courts, and even prevent a court from declaring a dispute res judicata, so long as one of the litigants can invoke a statute that declares something to be a legal nullity. Given its potential to disrupt the orderly and efficient disposition of judicial business, I suggest that *Osborne* should be overruled when the opportunity is presented.

* Michael J. Bentley is an associate in the Jackson Office of Bradley Arant Boult Cummings LLP, where his practice focuses on commercial litigation and appeals.

1. 65 So. 3d 311 (Miss. Ct. App. 2011).

II. Separation of Powers and the "Core Powers" Doctrine

Mississippi's 1890 Constitution establishes three branches of government and forbids encroachment by any one upon the powers of the other:

> The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.[2]
> No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others.[3]

Earlier versions of the state constitution, including the original one, adopted in 1817, contained similar separation-of-powers provisions.[4]

For many years after the adoption of the 1890 Constitution, the judiciary was content to follow legislatively-enacted procedural and evidentiary rules.[5] But in 1975, in *Newell v. State*, the Mississippi Supreme Court asserted broad authority over court procedure, striking down a statute that prohibited a trial judge from instructing the jury on his own initiative.[6] The *Newell* court declared that there was "no room for a division of authority between the judiciary and the legislature as to the power to promulgate rules necessary to accomplish the judiciary's constitutional purpose."[7] That power belonged to the judiciary alone.[8] While *Newell*'s broad assertion of judicial power had its detractors initially,[9] it is now settled law that "[a]ny legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional."[10]

To guide judges and, no doubt, legislators as to the proper application of the separation-of-powers principle, the Mississippi Supreme Court developed the "core powers" doctrine: no branch of state government may exercise any of the "core powers" belonging to the other two.[11] The core

2. Miss. Const. art. I, § 1.

3. *Id*. § 2.

4. Alexander v. State ex rel. Allain, 441 So. 2d 1329, 1335 (Miss. 1983). Judge Leslie H. Southwick provides an excellent and exhaustive analysis of the separation of powers doctrine under the Mississippi Constitution in his two-part article for the Mississippi Law Journal. *See* Leslie H. Southwick, *Separation of Powers at the State Level: Interpretations and Challenges in Mississippi*, 72 Miss. L.J. 927 (2003); Leslie H. Southwick, *Separation of Powers at the State Level, Part II: Service in Civilian Public Office and in the National Guard*, 74 Miss. L.J. 47 (2004).

5. *See* Lenore L. Prather, *A Century of Judicial History*, 69 Miss. L.J. 1013, 1043–44 (2000); Hall v. State, 539 So. 2d 1338, 1351–52 (Miss. 1989) (Hawkins, P.J., dissenting).

6. Newell v. State, 308 So. 2d 71, 75–78 (Miss. 1975); *see* Justin L. Matheny, *Inherent Judicial Rule Making Authority and the Right to Appeal: Time for Clarification*, 22 Miss. C. L. Rev. 57, 57–60 (2002).

7. 308 So. 2d at 77.

8. *Id.* at 77–78.

9. *See Hall*, 539 So. 2d at 1349–66 (Hawkins, P.J., dissenting).

10. Jones v. City of Ridgeland, 48 So. 3d 530, 536 (Miss. 2010).

11. Dye v. State ex rel. Hale, 507 So. 2d 332, 343 (Miss. 1987); Alexander v. State ex rel. Allain, 441 So. 2d 1329, 1338, 1345–46 (Miss. 1983).

power of the executive is "the power to administer and enforce the laws as enacted by the legislature and as interpreted by the courts."[12] The "legislative power . . . is the authority to make laws, but not to enforce them . . . ."[13] Those laws represent policy choices that, presumably, reflect the will of the people and serve the public interest.[14] The legislative policy-making power includes the authority to impose preconditions for filing a lawsuit.[15] But that authority yields to the supreme court's rule-making power "when the suit is filed."[16] Substantive laws enacted by the legislature must be enforced by the courts, so long as they are constitutional, even if they are impractical, unwise, or unfair.[17]

Once a suit is filed, the judicial power controls and that power "ha[s] been broadly declared" by the constitution.[18] In general terms, " 'the judicial power' . . . includes the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business."[19] The court has identified a number of specific powers within the judiciary's general power to conduct "judicial business," including the powers to promulgate rules of civil and appellate procedure,[20] establish rules of evidence,[21] develop and apply common law,[22] and determine whether a case or controversy has been abated.[23] These authorities fall within the "core powers" of the judiciary because they require the exercise of "judicial discretion [and] judgment that is vested in the courts."[24] The legislature may not take away or interfere with any of these core judicial powers.[25]

The supreme court has recognized one exception to the judiciary's absolute authority over matters of court procedure. In *Claypool v. Mladineo*, the court affirmed a statute that precluded the records of a medical peer review committee from being discovered or introduced as evidence in a judicial proceeding.[26] The statute declared that it would control the use of

12. *Alexander*, 441 So. 2d at 1338.

13. *Id.*

14. *See* Wells by Wells v. Panola Cnty. Bd. of Educ., 645 So. 2d 883, 889 (Miss. 1994).

15. Thomas v. Warden, 999 So. 2d 842, 846–47 (Miss. 2008).

16. *Id.* at 847 ("The Legislature's authority to make law gives way to this Court's rule-making authority when the suit is filed, not before."). The supreme court has identified one exception to this general rule. *See* Claypool v. Mladineo, 724 So. 2d 373 (Miss. 1998) (affirming legislative enactment controlling the introduction of medical peer review evidence in court proceedings). That exception is discussed later in this Article.

17. *Thomas*, 999 So. 2d at 846; *Wells*, 645 So. 2d at 889.

18. Hall v. State, 539 So. 2d 1338, 1345 (Miss. 1989).

19. Southern Pac. Lumber Co. v. Reynolds, 206 So. 2d 334, 335 (Miss. 1968) (citing MISS. CONST. art. VI, § 144).

20. Newell v. State, 308 So. 2d 71, 76–78 (Miss. 1975) (rules of civil procedure); Jones v. City of Ridgeland, 48 So. 3d 530, 535–38 (Miss. 2010) (rules of appellate procedure).

21. *Hall*, 539 So. 2d at 1345–46; *but see Claypool*, 724 So. 2d at 377–81.

22. Presley v. Miss. State Highway Comm'n, 608 So. 2d 1288, 1294–96 (Miss. 1992).

23. Miller v. Hay, 109 So. 16, 17 (Miss. 1926).

24. *Jones*, 48 So. 3d at 537.

25. *Presley*, 608 So. 2d at 1294–95; *see Jones*, 48 So. 3d at 537.

26. 724 So. 2d 373, 377–81 (Miss. 1998) (discussing MISS. CODE ANN. § 41-63-9 & § 41-63-23 (Supp. 1997)).

such peer review evidence "[n]otwithstanding any conflicting . . . court rule."[27] Departing from its general rule, the supreme court held that "[t]he [l]egislature was within its constitutional authority when it enacted" this evidentiary statute.[28] The court reasoned that the public had a significant interest in quality health care and the legislature had the authority, under its police power, to promote self-policing of the health care industry in order to serve that public interest.[29] In this narrow instance, the evidentiary statutes preventing the discovery and use of peer review records "were necessary additions to the substantive law" and, therefore, constitutional.[30]

Although no published opinion has addressed the point, determining when a legal claim has been lost pursuant to the doctrines of waiver and res judicata falls within the core judicial power. The "waiver doctrine" prevents a party from recovering on claims that were not adequately pled or presented to the trial court prior to the entry of a final judgment.[31] The doctrine of res judicata prevents the subsequent litigation of claims that were actually litigated and that *could have been* litigated in a previous suit.[32] Both of these procedural doctrines are judicial creations and both are fundamental to the orderly and efficient disposition of cases before the court.[33]

If the legislature enacted a statute barring the application of the waiver and res judicata doctrines in certain cases, the statute would surely be declared unconstitutional because it would directly abridge a court's power to manage judicial proceedings. Unlike the narrow evidentiary statute that was approved in *Claypool*, which simply limited the type of evidence that a party could bring into court to support its claims, an "anti-waiver" or "anti-res judicata" statute would seriously disrupt the orderly progression of litigation. Litigants would be permitted to raise claims and arguments for the first time in post-trial motions, on appeal, or even in a subsequent lawsuit after the first suit has been completed. Because of the disruptive effect that such a rule could have on court proceedings, the judiciary has traditionally controlled how and when a litigant must present his arguments or risk losing them.

27. MISS. CODE ANN. § 41-63-9 (2011).

28. *Claypool*, 724 So. 2d at 381.

29. *Id.* at 380–81.

30. *Id.* at 381.

31. Brown v. Miss. Dep't of Emp't Sec., 29 So. 3d 766, 771–73 (Miss. 2010); Touart v. Johnston, 656 So. 2d 318, 321 (Miss. 1995); *see* LUTHER T. MUNFORD, MISSISSIPPI APPELLATE PRACTICE §§ 3.1–3.7 (MLI Press 2006).

32. Hill v. Carroll Cnty., 17 So. 3d 1081, 1084–85 (Miss. 2009); *see* JEFFREY JACKSON, MISSISSIPPI CIVIL PROCEDURE § 16.1 (Lawyers Coop. Publ'g 1996).

33. Harrison v. Chandler-Sampson Ins., Inc., 891 So. 2d 224, 232 (Miss. 2005) (noting that "[r]es judicata is fundamental to the equitable and efficient operation of the judiciary"); City of Jackson v. McAllister, 475 So. 2d 432, 433 (Miss. 1985) ("The doctrine of res judicata is a judicial creation and does not apply to legislative acts."); Meadows v. Blake, 36 So. 3d 1225, 1233–34 (Miss. 2010) (Waller, C.J., concurring) (explaining the rationale for deeming an argument waived); United States v. Vontsteen, 950 F.2d 1086, 1089–90 (5th Cir. 1992) (discussing origin and purposes of waiver doctrine).

III. *OSBORNE V. NEBLETT* DEPARTS FROM THE CORE POWERS DOCTRINE

Osborne arrived at the court of appeals as a routine waiver case, or so it appeared. Perry Osborne executed a promissory note to G. Rives Neblett for the purchase of land in Alligator, Mississippi.[34] To secure payment, Osborne granted Neblett a deed of trust on the land.[35] Osborne later defaulted and Neblett began the foreclosure process.[36] On the day of the foreclosure sale, Osborne sued in chancery court to enjoin the foreclosure.[37]

Osborne, proceeding pro se, asserted numerous reasons why the foreclosure should be enjoined and generally questioned Neblett's right to foreclose against the property.[38] Importantly, Osborne *did not allege* that Neblett had violated the publication requirements of Mississippi Code section 89-1-55, which requires all foreclosure sales to be advertised for three consecutive weeks prior to the sale.[39] The statute requires strict compliance, declaring that "[n]o sale of lands under a deed of trust or mortgage, shall be valid unless such sale shall have been advertised as herein provided for."[40] After a hearing, the chancellor found against Osborne in all respects, confirmed the foreclosure sale, and ordered Osborne to vacate the property.[41] The chancellor did not address the publication issue because Osborne did not raise it.[42] Osborne did not appeal the decision.[43]

After the time for an appeal had expired, an attorney appeared for Osborne in the chancery court and filed a motion under Rule 60(b) of the

34. Osborne v. Neblett, 65 So. 3d 311, 312 (Miss. Ct. App. 2011).
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*; *see id.* at 314 (Griffis, P.J., dissenting).
39. *Id.* at 312–13 (citing MISS. CODE ANN. § 89-1-55 (2011)). Section 89-1-55 provides as follows:

> All lands comprising a single tract, and wholly described by the subdivisions of the governmental surveys, sold under mortgages and deeds of trust, shall be sold in the manner provided by section one hundred eleven of the constitution for the sale of lands in pursuance of a decree of court, or under execution. All lands sold at public outcry under deeds of trust or other contracts shall be sold in the county in which the land is located, or in the county of the residence of the grantor, or one of the grantors in the trust deed, provided that where the land is situated in two or more counties, the parties may contract for a sale of the whole in any of the counties in which any part of the land lies. *Sale of said lands shall be advertised for three consecutive weeks preceding such sale*, in a newspaper published in the county, or, if none is so published, in some paper having a general circulation therein, and by posting one notice at the courthouse of the county where the land is situated, for said time, and such notice and advertisement shall disclose the name of the original mortgagor or mortgagors in said deed of trust or other contract. *No sale of lands under a deed of trust or mortgage, shall be valid unless such sale shall have been advertised as herein provided for, regardless of any contract to the contrary*. An error in the mode of sale such as makes the sale void will not be cured by any statute of limitations, except as to the ten-year statute of adverse possession.

§ 89-1-55 (emphasis added).

40. MISS. CODE ANN. § 89-1-55 (2011).
41. *Osborne*, 65 So. 3d at 312. The chancellor's written order is set forth in its entirety in the dissenting opinion. *Id.* at 316–17 (Griffis, P.J., dissenting).
42. *See id.* at 318 (Griffis, P.J., dissenting).
43. *Id.* at 312.

Mississippi Rules of Civil Procedure for relief from the judgment confirming the foreclosure sale.[44] Osborne's attorney raised the deficient publication argument for the first time in this post-trial motion.[45] The chancellor denied the motion, holding that Osborne had waived the deficient publication argument by failing to raise it in his complaint, during proceedings in the chancery court, or at any other point prior to the entry of final judgment.[46] Osborne appealed.

Osborne's appeal was assigned to the Mississippi Court of Appeals,[47] where Osborne again found himself without an attorney.[48] Osborne's brief argued the merits—the foreclosure sale was invalid, an absolute nullity, because Neblett had not advertised the sale for three consecutive weeks, as required by section 89-1-55; Osborne ignored the waiver issue.[49] Neblett's brief argued only the procedural point—Osborne's deficient publication argument had been waived and could not be addressed by the court of appeals; Neblett ignored the merits.[50] Confronted with these divergent arguments, the judges of the court of appeals split.

A. The Majority Declares the Waiver Doctrine "Irrelevant" to Claims that a Foreclosure Sale Was Void

Writing for a majority of five judges, Judge Tyree Irving reversed the chancery court's decision and declared the foreclosure sale invalid.[51] On the merits, the majority held that the foreclosure sale of Osborne's property was void because Neblett did not comply with the publication requirements of section 89-1-55.[52] Turning to Neblett's waiver argument, the majority held that Osborne could not waive his deficient publication argument under the statute: "[A]s the statute clearly states, foreclosure sales that do not comply with section 89-1-55 are void, and Osborne's failure to raise the issue is irrelevant because the sale is a nullity and unenforceable under the law."[53] The majority also cited Mississippi Supreme Court precedent holding that the publication requirements of a foreclosure sale may not be waived by parties to the deed of trust.[54]

44. *Id.*; *see id.* at 314–18 (Griffis, P.J., dissenting) (recounting the procedural history of the case in detail). Rule 60(b) provides that a "court may relieve a party or his legal representative from a final judgment, order, or proceeding" for certain, enumerated reasons. MISS. R. CIV. P. 60(b).

45. *Osborne*, 65 So. 3d at 312.

46. *Id.*

47. Under Mississippi's appeal procedure, all appeals are taken to the supreme court. The supreme court assigns cases to the court of appeals as appropriate. *See* MISS. R. APP. P. 16.

48. *See generally*, Brief of Appellant, Osborne v. Neblett, No. 2009-CP-01312 (Miss. Ct. App. June 7, 2011).

49. *Id.*

50. *See generally*, Brief of Appellee, Osborne v. Neblett, No. 2009-CP-01312 (Miss. Ct App. June 7, 2011).

51. *Osborne*, 65 So. 3d at 313. There are ten judges on the Mississippi Court of Appeals and the court took Osborne's appeal en banc. In this case, however, five judges constituted a majority because newly-appointed Judge Ermea Russell did not participate in the decision. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* (citing Lee v. Magnolia Bank, 48 So. 2d 515, 517 (Miss. 1950)).

B. The Dissent Argues that Osborne Waived his Valid Argument

Four judges dissented. In an opinion by Judge T. Kenneth Griffis, the dissenters argued that the majority had "confused the possibility of a void foreclosure with a void judgment."[55] According to the dissent, the proper question on appeal was not whether the foreclosure sale was valid or invalid as a matter of substantive law, but whether the chancellor erred, as a procedural matter, by holding that Osborne had waived his deficient publication argument.[56] The answer to that question, according to the dissent, was no; the chancellor properly held that Osborne had waived his deficient publication argument by failing to raise it in his complaint or at any point prior to the entry of a final judgment on all of his claims.[57] The dissent cited the settled rule "that issues may not be raised in a post-trial motion if the issue should have been made during the trial but was not."[58]

Despite Judge Griffis's strong dissent, Neblett did not seek a writ of certiorari from the supreme court.[59] Perhaps this was because, as the majority noted, Neblett had a less costly route for enforcing his security agreement—he could simply re-notice the foreclosure sale if Osborne was still in default under the loan agreement.[60] But Neblett's decision not to pursue a discretionary appeal could prove costly to future litigants, who will be left in the unenviable position of not knowing whether their final judgments are really final. The controversy between Neblett and Osborne is over, but the rule in *Osborne* lingers.

IV. *OSBORNE*'S DISRUPTIVE ANTI-WAIVER RULE IS NOT MANDATED BY THE PLAIN LANGUAGE OF SECTION 89-1-55

"Both public policy and the interests of litigants require that there must be an end to litigation. Without this doctrine, it would be endless."[61] The *Osborne* decision threatens to disrupt this doctrine—and undermine the interest of litigants in the orderly and final adjudication of their claims—because it abrogates the rules of waiver and res judicata in cases where a statute declares an act or right to be null and void. Not only does *Osborne* present serious practical problems, it represents a significant (if silent) doctrinal break from the supreme court's separation of powers jurisprudence—when confronted with a conflict between a statute and a procedural rule, *Osborne* followed the statute and disregarded the rule.

Osborne was a "hard case": a pro se litigant arrived in court with a valid legal basis to set aside the foreclosure sale of his property, but failed to present that valid argument and, therefore, lost his property on what

55. *Id.* (Griffis, P.J., dissenting).
56. *Id.*
57. *Id.* at 319.
58. *Id.* (citing Barnett v. State, 725 So. 2d 797, 801 (Miss. 1998)).
59. *See* MISS. R. APP. P. 17 (authorizing discretionary appeals from the Mississippi Court of Appeals to the Mississippi Supreme Court).
60. *Osborne*, 65 So. 3d at 313 (majority op.).
61. Moses v. Weaver, 49 So. 2d 235, 238 (Miss. 1950).

non-lawyers would call a "technicality" (the waiver doctrine). On appeal, the briefs did not assist the court—one argued the merits, the other argued the procedural waiver point, and neither raised the practical and constitutional implications of a reversal in favor of *Osborne*. Unfortunately, this hard case proved the old adage.[62] This Article is not intended to be a retrospective criticism of the court of appeals or the judges that serve on that court; I raise no objections to the result in *Osborne*. This Article is prospective—it addresses the procedural route by which the result in *Osborne* was reached and identifies (what the author believes are) problems that *Osborne*'s procedural holding will create for future litigants. In our system of *stare decisis*, these problems may not be ignored.

A. The Osborne *Rule Will Disrupt Court Proceedings and Undermine the Finality of Judgments Principle*

Osborne gives rise to two practical problems. First, although *Osborne* (in fact) applied its anti-waiver to a trial court waiver, its rule (in theory) extends to all "waiver" doctrines, including the appellate waiver doctrine and res judicata. Under *Osborne*, a litigant may not waive an argument that the foreclosure against his property was invalid due to a violation of section 89-1-55. Such an argument *must* be considered by the trial court even if it is raised for the first time in a post-trial motion. Of course, if the argument may be raised for the first time post-trial, there is no principled reason to say that it cannot be raised for the first time on appeal or even in a subsequent lawsuit after the initial controversy has been fully adjudicated. And nothing in the language of *Osborne* limits its rule to "trial court" waivers. If the waiver doctrine is truly "irrelevant" when a statute declares an act null and void, as *Osborne* held,[63] then it is irrelevant at every stage of the judicial proceeding.

The practical problems created by such an anti-waiver rule are significant. A party may proceed all the way through discovery and trial on one claim or theory and then, after a judgment is entered, switch theories completely if he discovers an applicable statute declaring a relevant act null and void. Because the argument cannot be deemed waived, the parties will be forced to return to square one, re-open discovery and, if necessary, retry the case on the new claim or theory. And this may happen on appeal as well. If the argument is presented for the first time on appeal, the appellate court, without the power to deem the argument waived, may be forced to remand the case to the trial court for further fact-finding on the new claim or argument.

62. "It is an old adage in legal circles that hard cases make bad law." Nat'l Surety Co. v. Miller, 124 So. 251, 257 (Miss. 1929) (Ethridge, J., dissenting). The adage cautions against adopting a legal principle that will bind all future litigants in an attempt to reach a favorable result for a sympathetic party in the particular case before the court. *See id.*; *see also* N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

63. 65 So. 3d at 313.

Perhaps most problematic of all is *Osborne*'s potential to cast uncertainty over disputes that have already been adjudicated and judgments that are presumed to be final. As noted, if the waiver doctrine does not apply under a statute that declares a certain act null and void, then the doctrine of res judicata likely does not apply either. After all, the doctrine's "merger" component is simply a super-waiver doctrine.[64] Under *Osborne*, however, a claim that a certain act was a nullity cannot be barred unless it was *actually litigated* and resolved by a court; until that time, the claim remains extant no matter how many times the parties have litigated other claims. When the anti-waiver rule is carried to its logical ends, even parties whose property was long ago foreclosed upon may file a suit today challenging the foreclosure sale as invalid based on deficient publication (if they did not raise that argument in a previous suit). These suits could upset not only final judgments on the original foreclosure, but subsequent conveyances of the foreclosed property as well. Such suits may also subject the foreclosing party to liability for damages under a wrongful foreclosure theory.[65] *Osborne*'s rule holds the potential to seriously disrupt the finality of judgments in land transactions, an area in which certainty and finality are critical.

The second practical problem under *Osborne* is that its anti-waiver rule arguably extends beyond the foreclosure sale context to any case in which a statute declares a certain act or right to be invalid, null, or void. If the waiver doctrine is "irrelevant" under a statute that declares certain foreclosure sales to be void, there is no principled reason to declare that the waiver doctrine *is relevant* under other statutes that use the null-and-void language. There are many statutes in Mississippi that declare a certain act, right, or thing null and void under certain circumstances.[66] Under *Osborne*, if any of these statutes arguably apply, there

64. Hill v. Carroll Cnty., 17 So. 3d 1081, 1084–85 (Miss. 2009) ("Under the principle known as 'merger,' res judicata prevents the subsequent litigation of any claim that should have been litigated in a previous action.").

65. *See* Nat'l Mortg. Co. v. Williams, 357 So. 2d 934, 936 (Miss. 1978) (discussing mortgagor's "right to elect between (1) having the sale set aside and (2) recovering from the mortgagee the damages suffered as a result of the wrongful foreclosure").

66. *See e.g.*, MISS. CODE ANN. § 7-7-42 (2011) (warrants by the State Fiscal Officer that are not "presented to the State Treasurer for payment within one year . . . shall be null and void"); MISS. CODE ANN. § 19-13-11 (2011) (contracts approved by Board of Supervisors in violation of open session and low bid requirements "shall be void"); MISS. CODE ANN. § 21-13-13 (2011) (ordinances not listed in municipality's ordinance book "shall be void and of no effect"); MISS. CODE ANN. § 27-41-59 (2011) (sale of property for unpaid taxes "shall be void" if "made at the wrong time or at the wrong place"); MISS. CODE ANN. § 27-43-11 (2011) (failure to give notice of tax sale to "lienors shall render the tax title void as to such lienors"); MISS. CODE ANN. § 47-3-3 (2011) (warrants for the removal of prisoners from custody issued without authorization "shall be void"); MISS. CODE ANN. § 75-2-718 (2011) (a commercial contract "fixing unreasonably large liquidated damages is void as a penalty"); MISS. CODE ANN. § 75-67-127 (2011) (small loans made in violation of statutory requirements "shall be void and the [loan maker] shall have no right to collect or receive any principal, charges or recompense whatsoever"); MISS. CODE ANN. § 75-67-325 (2011) (pawn contracts with unlicensed pawn broker are "void"); MISS. CODE ANN. § 75-81-117 (2011) (contracts for dance studio lessons that do not comply with statutory requirements "shall be void and unenforceable"); MISS. CODE ANN.§ 75-83-5 (2011) (health spa contracts that do not comply with statutory requirements "shall be void and unenforceable"); MISS.

can be no "final" judgment until the aggrieved party actually raises the nullity argument.[67]

B. Section 89-1-55 May Be Construed in a Constitutional Manner that Does Not Abridge the Judiciary's Power to Declare an Argument Waived

Although the *Osborne* majority did not undertake a constitutional analysis, its rule represents a plain break with the Mississippi Supreme Court's separation of powers doctrine. As explained above, it seems an uncontroversial proposition that determining whether (and when) to deem an argument "waived" is a quintessential matter of judicial procedure. Mississippi courts have exercised the discretion to establish, adjust, and apply common law waiver rules even before the current Mississippi Constitution was adopted.[68] A court's discretion to deem an argument waived is critical to the orderly and efficient disposition of cases and discourages parties from pursuing piecemeal litigation.[69] It is a "core power" of the judiciary.

The legislature, therefore, may not enact a statute declaring that the doctrine of waiver "shall not apply" in certain cases. This would be no different than enacting a statute to the effect that summary judgment "shall not be granted" in certain cases. Both (hypothetical) statutes would directly conflict with court procedural rules and both would be deemed unconstitutional.[70] But this is, in effect, how *Osborne* construed section 89-1-55. In *Osborne*, the waiver doctrine was "irrelevant" (*i.e.*, it did not apply) because the statute declared Neblett's rights in the property to be null and void as a matter of substantive law.[71] Stated differently, *Osborne* read section 89-1-55 to provide that the procedural waiver doctrine "shall not apply" to bar a claim that a foreclosure sale was null and void on the basis of deficient publication. That claim survives indefinitely even though other claims against the foreclosing party are pursued to a final judgment.

Osborne's reading of section 89-1-55 to implicitly abrogate the waiver doctrine puts the statute in direct conflict with the judiciary's constitutional

CODE ANN. § 81-27-5.402 (2011) (any "act, deed, conveyance, pledge, or contract" of a state trust company is "void" if not in compliance with statutory or regulatory requirements); MISS. CODE ANN. § 87-1-1 (2011) (certain gaming and gambling contracts "shall be utterly void"); MISS. CODE ANN. § 89-1-29 (2011) (real property conveyances that violate state homestead law are "invalid"); MISS. CODE ANN. § 91-9-1 (2011) (a trust that is not in writing and signed by the party making the trust "shall be utterly void").

67. I recognize that this "parade of horribles" may never come to pass. *Osborne*'s rule, however, is stated in general terms and has no readily discernible limitations. There are no guarantees that "ingenious lawyers charged with representing their client's cause" will not seek to stretch the rule to new and unforeseen circumstances. *See* Franks v. Delaware, 438 U.S. 154, 187 (1978) (Rehnquist, J., dissenting).

68. *See* Yeizer v. Burke, 11 Miss. 439 (Miss. Err. & App. 1844) (refusing to consider on appeal issue that was not raised before the trial court).

69. *See* Meadows v. Blake, 36 So. 3d 1225, 1233–34 (Miss. 2010) (Waller, C.J., concurring). Chief Justice Waller's concurring opinion was joined by five justices. *Id.* at 1234.

70. *See* State v. Delaney, 52 So. 3d 348, 351 (Miss. 2011).

71. Osborne v. Neblett, 65 So. 3d 311, 313 (Miss. Ct. App. 2011).

power to control court procedure. If this was the only permissible reading of the statute, it should have been struck down as unconstitutional, not given effect to revive arguments that Osborne had waived.[72] The legislature does not have the power to declare the judiciary's waiver doctrine "irrelevant" or inapplicable. The discretion to deem arguments waived and cases closed is necessary to an efficiently-functioning judiciary. If section 89-1-55 implicitly abrogates the waiver doctrine, such an implicit abrogation would be unconstitutional and, therefore, void.[73]

Osborne's reading of the statute, however, is not the only permissible one. The plain language of section 89-1-55 does not abrogate the waiver rule; it simply declares that a certain act is void as a matter of substantive law. The legislature's declaration that a particular act or right is a nullity under state *substantive law* should not be read as an implicit abrogation of *procedural doctrines*, such as the waiver rule. Instead, this substantive enactment should be construed in harmony with standing procedural rules[74] and "to conform to constitutional requirements"[75] if at all possible.

Section 89-1-55 may be construed in harmony with the waiver doctrine and, therefore, in conformity with the constitutional separation of powers doctrine. Under a fair reading of the statute, the legislature has declared deficiently-published foreclosure sales null and void, but has not made any statement regarding whether or when this "nullity" argument may be deemed waived. Under the statute, a party has a right to petition a court to set aside such an invalid sale and a court is bound to do so. If, however, a party petitions the court to set aside a foreclosure sale on other grounds, and fails to raise the deficient publication argument, the court may deem the party to have waived his nullity argument, like any other meritorious claim or argument, *even if it would have been a winning argument.*

The possibility that a litigant *may* waive a substantive right or claim conferred by statute is not a basis for construing the statute to preclude application of the waiver doctrine. The waiver doctrine bars meritorious claims and arguments, even those that would have carried the day if they had been presented.[76] The legislature is presumed to have understood this application of the waiver doctrine when it enacted section 89-1-55.[77] If the legislature intended to abrogate the waiver doctrine (a procedural rule) for

72. *See Delaney*, 52 So. 3d at 351 ("[W]hen a statute conflicts with [the supreme court's] rules regarding matters of judicial procedure, [the court's] rules control.").

73. *See* Stevens v. Lake, 615 So. 2d 1177, 1183 (1993).

74. When two statutes, or a statute and a procedural rule, appear to be in conflict, the two laws "should if possible be construed in harmony with each other to give effect to each." Miss. Gaming Comm'n v. Imperial Palace of Miss., Inc., 751 So. 2d 1025, 1029 (Miss. 1999); *see also* Syngenta Crop Prot., Inc. v. Monsanto Co., 908 So. 2d 121, 127–28 (Miss. 2005).

75. Miss. State Tax Comm'n v. Brown, 193 So. 794, 796–97 (Miss. 1940); Great Atl. & Pac. Tea Co. v. Davis, 171 So. 550, 551 (Miss. 1937) ("There must be such an interpretation of, and administration under, the statute as will harmonize it with the constitutional principles of the procedural system of which it is a part.").

76. *See* Meadows v. Blake, 36 So. 3d 1225, 1233–34 (Waller, C.J., concurring).

77. Arant v. Hubbard, 824 So. 2d 611, 615 (Miss. 2002) ("First, we presume that the legislature, when it passes a statute, knows the existing laws."); Candate v. State, 18 So. 2d 441, 441–42 (Miss. 1944) (presuming that legislature was familiar with prior decisions establishing court procedure).

claims that a foreclosure sale was invalid, it likely would have done so expressly, not by implication.[78]

Under the fair reading of section 89-1-55, *supra*, the substantive benefits flowing from the proper publication of a foreclosure sale are preserved, but a legal claim to those benefits, like any other claim at common law or under statute, may be waived if not adequately pled or pursued in a lawsuit. The statutory "nullity" argument is not elevated to some special, never-to-be-waived status that other meritorious claims do not enjoy. The statute serves its purpose and the well-established judicial procedures of waiver and res judicata remain undisturbed.

V. Conclusion

The power to deem an argument waived, or a case finally adjudicated, belongs to the judicial branch. If deprived of that core power, the courts cannot dispose of litigation in an orderly and efficient manner and litigants can take no comfort in the "finality" of their judgments. The legislature may not abrogate the waiver doctrine and there is no indication in the language of section 89-1-55 that it intended to do so. *Osborne*'s contrary rule, which threatens to disrupt court proceedings and undo established court procedure, should be overturned when the opportunity is presented.

78. *See Arant*, 824 So. 2d at 615. Of course, if it had done so expressly, the statute would have been unconstitutional.