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A DECLARATION OF RIGHTS LOST: THE DIMINUTION OF TENNESSEANS' CIVIL RIGHTS

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INTRODUCTION

The Constitution of the State of Tennessee, in its current form, offers to the citizens of the Volunteer State a "Declaration of Rights" that prevents abuses by those in power against the governed.[1] To paraphrase late Associate United States Supreme Court Justice Antonin Scalia, the Tennessee Constitution, which was adopted following the state's secession from and eventual return to the United States during the Civil War, continues to serve as the charter of Tennesseans' liberties.[2] Indeed, the Tennessee Constitution's Declaration of Rights proclaims in the very first section, "[A]ll power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety,

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[1] TENN. CONST. art. I.

[2] *See* TENN. CONST. pmbl.; Maryland v. King, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting) (Justice Scalia, in dissent, referenced the United States Constitution as "the charter of our liberties"). For more on Tennessee's role in the United States Civil War, see Stanley F. Horn, *Nashville During the Civil War*, 4 TENN. HIST. Q. 3 (1945); James B. Jones, Jr., *The Civil War in Tennessee: New Perspectives on Familiar Materials*, 62 TENN. HIST. Q. 166 (2003); James L. McDonough, *Tennessee and the Civil War*, 54 TENN. HIST. Q. 190 (1995).

and happiness . . . ."[3] Even still, over the last decade, the rights so loftily enshrined in the Tennessee Constitution for the "peace, safety, and happiness" of Tennesseans have slowly been stripped away and weakened by the Tennessee Supreme Court acting hand-in-hand with the Tennessee General Assembly.[4]

In the culmination of the Republican Party of Tennessee's takeover of all branches of the Volunteer State's government, Governor Bill Haslam appointed Court of Criminal Appeals Judge Roger A. Page to the Tennessee Supreme Court.[5] The Tennessee General Assembly unanimously confirmed Justice Page to the State's high court.[6] Justice Page's confirmation was also the first under the constitutional amendment ratified by Tennessee voters in 2014, which changed the process of appointing appellate judges in the State by requiring the General Assembly to approve the Governor's nominee within sixty days.[7] With Justice Page's addition to the Tennessee Supreme Court, Republican-appointed jurists constituted a majority on the court.[8]

This Article argues that since Justice Page's confirmation, the Tennessee Supreme Court, working in concert with the Republican-controlled General Assembly, has stripped and weakened Tennesseans' rights under the State

[3] TENN. CONST. art. I, § 1.
[4] *Id.*
[5] *See* Stacey Barchenger, *Bill Haslam Names Roger Page to Tennessee Supreme Court*, TENNESSEAN (Jan. 7, 2016, 12:53), https://www.tennessean.com/story/news/2016/01/07/haslam-names-page-tn-supreme-court/78417156/; *Haslam Appoints Court of Criminal Appeals Judge Roger Amos Page to State Supreme Court*, TN REPORT (Jan. 7, 2016), https://tnreport.com/2016/01/07/haslam-appoints-court-criminal-appeals-judge-roger-amos-page-state-supreme-court/; *Haslam Appoints Roger Page to Tennessee Supreme Court*, KNOX NEWS (Jan. 7, 2016, 10:27 AM), https://www.knoxnews.com/story/news/local/2016/01/07/haslam-appoints-roger-page-to-tennessee-supreme-court/90810358/.
[6] *See* Richard Locker, *Roger Page of Jackson Confirmed as New Tennessee Supreme Court Justice*, COM. APPEAL (Feb. 22, 2016), http://archive.commercialappeal.com/news/government/state/roger-page-of-jackson-confirmed-as-new-tennessee-supreme-court-justice-2c64ae1f-1e4d-5043-e053-01000-369734881.html; Press Release, TNCourts, Roger Page Confirmed to Tennessee Supreme (Feb. 23, 2016), https://tncourts.gov/news/2016/02/23/roger-page-confirmed-tennessee-supreme-court; Tyler Whetstone, *'Local Boy' Roger Page Sworn In as Justice*, JACKSON SUN (Apr. 25, 2016, 7:05 PM), https://www.jacksonsun.com/story/news/local/government/2016/04/25/local-boy-roger-page-sworn-justice/83434686/.
[7] *See* Bobby Allyn, *What Tennessee Voters Should Know About Amendment 2: Judicial Selection*, WPLN NEWS (Oct. 17, 2014), https://wpln.org/post/tennessee-voters-choose-tweaking-judicial-selection-setting-stage-radical-reform/; Ashley Crockett, *How Amendment 2 Would Affect Judicial Selection in Tennessee*, WREG (Oct. 6, 2014, 4:45 PM), https://wreg.com/news/your-voice-your-vote/how-amendment-2-would-affect-judicial-selection/.
[8] *See* TNCOURTS, SUPREME COURT, SUPREME COURT JUSTICES, https://www.tncourts.gov/courts/supreme-court/justices.

Constitution's Declaration of Rights.[9] Relying on policy justifications such as the advancement of law and order and creating a welcoming business climate, Tennessee's government has promoted the interests of government actors and corporate entities over those Tennesseans whose "peace, safety, and happiness" the government was formed to protect.[10] The competing policy arguments are rather clearly delineated. On one hand, the State can encourage law enforcement to act aggressively to ferret out crime consistent with the obligations of the United States Constitution alone, and the government can incentivize business investment in the State through tort reform that is favorable to corporate defendants.[11] On the other hand, the State can protect Tennesseans' rights, as expressed in the Declaration of Rights, by requiring the police and prosecutors to jump through additional hoops to investigate and interact with citizens, and by holding the right to a jury sacrosanct for Tennesseans' who are injured and seek a remedy in the State's courts.[12] This Article demonstrates that the former argument is currently winning the day in the Volunteer State, both in the General Assembly and at the Supreme Court.

This Article does not, however, seek to determine which of these positions is better for Tennessee on balance. Rather, this Article offers the simple fact that, based on a review of the record of cases considered by the Tennessee Supreme Court since Justice Page's confirmation, Tennesseans' rights that have traditionally been protected are no longer receiving the same deference. This is not an opinion; it is a fact. Through disregarding long-standing precedent of the State's high court, the modern court has weakened the Declaration of Rights.

The Tennessee Supreme Court has accomplished this in two ways. Both methods involve disregarding the court's own prior precedent. In one specific case,

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[9] Invariably, Tennesseans' rights under the Declaration of Rights in the State's Constitution have not changed by their very text, which would require a constitutional amendment. Rather, the claim advanced by this Article is that the Tennessee Supreme Court has altered the Declaration of Rights as it has traditionally been understood and interpretated by that court.

[10] *See* TENN. CONST. art. I, § 1; Bill Haslam, Governor of the State of Tennessee, State of the State Address 2011: Transforming the Way We Do Business (Mar. 14, 2011), https://www.tn.gov/content/dam/tn/governorsoffice-documents/governorsoffice-documents/2011_State_of_the_State_Address.pdf; Press Release, Tennessee Office of the Governor, Haslam Signs Tennessee Civil Justice Act to Improve Business Climate (June 16, 2011, 5:15 AM), https://www.tn.gov/former-governor-haslam/news/2011/6/16/haslam-signs-tennessee-civil-justice-act-to-improve-business-climate.html; Michael Adams, *Tennessee Approves Caps on Lawsuit Damages*, INS. J. (May 25, 2011), https://www.insurancejournal.com/news/southeast/2011/05/25/199910.htm; Bobby Allyn, *Tennessee Lawsuit Echoes Renowned Hot Coffee Case*, USA TODAY (Dec. 9, 2012, 1:09 AM), https://www.usatoday.com/story/news/nation/2012/12/08/lawsuit-echoes-hot-coffee-case/1755959/.

[11] *See* Press Release, *supra* note 10.

[12] *See* Adams, *supra* note 10.

that is exactly what the court did.[13] Nevertheless, in other cases the court has decided that the Tennessee Constitution offers no further protections than those of the United States Constitution as interpreted by the United States Supreme Court. Consequently, the court has overruled its prior cases that have held to the contrary.[14] In state constitutional law theory, this latter process is known as lockstep jurisprudence.[15] Essentially, the United States Constitution's protections of rights are considered the floor of those liberties secured under the Constitution's authority.[16] Accordingly, the high courts of individual states are permitted to interpret state constitutions to provide additional safeguards of liberty to those within their borders.[17] While some courts choose this independent path, and

[13] *See* McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686 (Tenn. 2020) (holding that the caps on non-economic compensatory damages in the Tennessee Civil Justice Act of 2011 did not violate the jury right provision of the Tennessee Constitution).

[14] *See* Howard v. State, 604 S.W.3d 53 (Tenn. 2020) (overruling precedent that offered additional protections to a defendant whose counsel failed to timely file a motion for new trial and bringing Tennessee in lockstep with the United States Supreme Court precedent); State v. Tuttle, 515 S.W.3d 282 (Tenn. 2017) (overturning precedent and holding Tennessee to be in lockstep with the United States Constitution in determining the evidence necessary to issue a warrant); State v. Pruitt, 510 S.W.3d 398 (Tenn. 2016) (holding that nearly-four decade old precedent that provided added protections against *ex post facto* laws was wrongly decided and bringing Tennessee in lockstep with United States Supreme Court jurisprudence).

[15] *See* Michael E. Solimine & James L. Walker, *Federalism, Liberty and State Constitutional Law*, 23 OHIO N.U. L. REV. 1457, 1461 (1997) (citing James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992)). The lockstep approach to state constitutional interpretation has generated considerable scholarly criticism. *See generally* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 20, 174–78 (2018) (arguing that lockstepping hampers the development of constitutional law in the United States and calls on state high courts to disregard lockstepping in the hopes that the United States Supreme Court can rely on state experiences in developing federal constitutional jurisprudence); John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 LOY. U. CHI. L.J. 965 (2013) (acknowledging the debates on both sides regarding the lockstep theory); James K. Leven, *A Roadmap to State Judicial Independence under the Illinois Limited Lockstep Doctrine Predicated on the Intent of the Framers of the 1970 Illinois Constitution and Illinois Tradition*, 62 DEPAUL L. REV. 63 (2012) (noting recent Illinois Supreme Court decisions modifying the lockstep approach and advocating for a complete discontinuation of lockstep theory in favor of trusting state judges to interpret individual state constitutions); Timothy P. O'Neill, *Escape from Freedom: Why "Limited Lockstep" Betrays Our System of Federalism*, 48 J. MARSHALL L. REV. 325 (2014) (asserting that the lockstep theory violates principles of federalism by rendering state constitutions void and preventing states from serving as laboratories of democracy).

[16] *See* SUTTON, *supra* note 15, at 16–18.

[17] *See id.*; Darren Allen, Note, *The Constitutional Floor Doctrine and the Right to a Speedy Trial*, 26 CAMPBELL L. REV. 101, 105–06 (2004); Yvonne Kauger, *Reflections on Federalism: Protections Afforded by State Constitutions*, 27 GONZ. L. REV. 1, 1 (1991); Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Limits*, 50 ARIZ. L. REV. 227, 228 (2008); Ilya Somin, *A Floor, Not a Ceiling: Federalism and Remedies for Violations of*

scholars have advocated for the development of constitutional law through this process, some states choose instead to interpret their respective constitutions in accordance with the federal constitution.[18] Over the last few years, the Tennessee Supreme Court has taken the lockstep approach, at the expense of long-held precedent, on multiple occasions.[19]

Four specific rights are considered in this Article. First, this Article considers the right to a jury in all cases to determine the factual issues presented by the litigants as provided in article I, section 6 of the Tennessee Constitution.[20] Second, this Article details the right to be free from unreasonable searches and seizures and the proscription of the State's use of general warrants, as enshrined in article I, section 7 of the State's Constitution.[21] Third, this Article examines the right to effective assistance of counsel in defending against criminal accusations brought by the State, as specified in article I, section 9 of the Tennessee

Constitutional Rights in Danforth v. Minnesota, 102 NW. U. L. REV. COLLOQUY 365, 365 (2008); Solimine & Walker, *supra* note 15, at 1458; Edmund B. Spaeth, Jr., *Toward a New Partnership: The Future Relationship of Federal and State Constitutional Law*, 49 U. PITT. L. REV. 729, 738–40 (1988); Robert F. Williams, *Shedding Tiers "Above and Beyond" the Federal Floor: Loving State Constitutional Equality Rights to Death in Louisiana*, 63 LA. L. REV. 917, 920–21 (2003).

[18] *See* Anderson, *supra* note 15, at 968–69.

[19] *See supra* note 14 and accompanying text.

[20] *See* TENN. CONST. art. I, § 6 ("[T]he right of trial by jury shall remain inviolate . . . ."); *McClay*, 596 S.W.3d 686; *see also* Bailey D. Barnes, *Divided Tennessee Supreme Court Upholds Constitutionality of Noneconomic Damage Caps, Focuses on Right to Jury Trial*, 56 TENN. B.J. 12 (2020) (describing the court's holding in *McClay* and recognizing that the court's decision was contrary to Tennessee Supreme Court precedent). Though not covered extensively in this Article, and not a Supreme Court decision or necessarily overturning long-standing precedent, the Tennessee Court of Appeals has held that the pre-suit notice requirements of the Healthcare Liability Act, which hamper many injured plaintiffs' claims, do not violate the Open Courts provision of the State's Constitution. For more on the Open Courts provision and its seemingly weak interpretation in Tennessee, see TENN. CONST. art. 1, § 17 ("That all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay."); J.A.C. *ex rel.* Carter v. Methodist Healthcare Memphis Hosp., 542 S.W.3d 502 (Tenn. Ct. App. 2016), *perm. app. denied* (Tenn. Mar. 9, 2017).

[21] *See* TENN. CONST. art I, § 7 ("[T]he people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants . . . without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not be granted."); *Tuttle*, 515 S.W.3d 282.

Constitution.[22] Finally, this Article scrutinizes the prohibition on the enactment of *ex post facto* laws expressed in article I, section 11 of the State Constitution.[23]

As Part III of this Article articulates, the Tennessee Supreme Court has not acted alone on some of these rights.[24] The General Assembly has pushed the envelope in reshaping Tennesseans' protections.[25] By passing sweeping legislation that previously would have been held unconstitutional by the State's court of last resort, the General Assembly has essentially instigated litigation to give the court the opportunity to reconsider its precedent.[26] Presented with this opportunity to change Tennessee jurisprudence, the justices of the Tennessee Supreme Court have obliged by granting immense deference to the General Assembly.[27]

This Article proceeds in four Parts in addition to this introduction. The second of those divisions very briefly surveys three key developments in Tennessee's judicial history: the carryover of North Carolina's common law, the ascendance of the Republic Party to power in the early-twenty-first century, and the adoption of a constitutional amendment on judicial selection. Meanwhile, Part III details the specific cases and circumstances in which the Tennessee Supreme Court has weakened the Declaration of Rights. Part IV then considers the consequences and potential reasoning of the court's recent decisions. Finally, Part V concludes.

I. IMPORTANT HISTORICAL DEVELOPMENTS

Two key historical considerations are relevant to this analysis. First, the successful rise of the Republican Party to control of the state government in Tennessee during the second decade of the twenty-first century. Second, the ratification by voters of the Volunteer State of a constitutional amendment altering the process by which appellate judges are selected, confirmed, and retained or replaced. Both developments have helped to create the environment suitable for the Tennessee Supreme Court, in concert with the General Assembly, to weaken the Declaration of Rights as it has traditionally been interpreted by the court. These

[22] *See* TENN. CONST. art. I, § 9 ("That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel . . . ."); *Howard*, 604 S.W.3d 53.
[23] *See* TENN. CONST. art. I, § 11 ("That laws made for the punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free government; wherefore no *ex post facto* law shall be made."); *Pruitt*, 510 S.W.3d 398.
[24] *See infra* Part III.
[25] *See infra* Part III.
[26] *See infra* Part III. One such piece of legislation that would have been held unconstitutional under prior precedent, but that the court has nevertheless declared constitutional, is the Tennessee Civil Justice Act of 2011, which arbitrarily capped non-economic compensatory damages. *See* McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686 (Tenn. 2020); Barnes, *supra* note 20.
[27] *See infra* Part III.

historical events are both very briefly considered here to provide context to the loss of rights felt by Tennesseans.

In 2016, the Republican Party took complete control of the Tennessee government when Justice Page joined the Tennessee Supreme Court.[28] This was the culmination of a concerted effort started in the 1960s by the Grand Ole Party of the Volunteer State, to reclaim Republican control of the State's government.[29] Prior to the mid-twentieth century, the Democratic Party of Tennessee had controlled the State's government since Reconstruction.[30] Though the Republican Party made modest gains in the twentieth century, including winning gubernatorial and United States Senate statewide campaigns and taking control of the State House of Representatives for a period of time, the real success for the GOP occurred in the early-twenty-first century.[31] In 2005, the Tennessee State Senate flipped to Republican control, though the Speaker of the Senate remained a Democrat until 2006 when Ron Ramsey replaced Speaker John S. Wilder, who had served in that position for thirty-six years.[32] Then, in 2007, Republicans took slim control of the State's House of Representatives, thereby taking complete control of the General Assembly.[33] Finally, in 2011, former Knoxville Mayor Bill Haslam was sworn in as Tennessee's Governor.[34] With control of both the General Assembly and the Governor's Office, Tennessee Republicans faced only one more hurdle before assuming complete authority over the State's government—the Supreme Court.

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[28] *See supra* text accompanying notes 5–6.

[29] PAUL H. BERGERON ET AL., TENNESSEANS AND THEIR HISTORY 323–32 (1999); *see also* Seth Blumenthal, *Bill Brock Was the Forgotten Father of the Modern GOP*, WASH. POST (Mar. 26, 2021, 9:54 AM), https://www.washingtonpost.com/outlook/2021/03/26/returning-ideas-bill-brock-may-save-republican-party/ (surveying former Tennessee Republican United States Senator Bill Brock's rise in politics and role as a pioneer in Tennessee Republican politics).

[30] *Id.* For more on political partisanship in the United States South following the Civil War and Reconstruction, see John Marshall Dickey, The Decline of Agriculture and the Rise of Republican Party Strength in the South (Dec. 2016) (unpublished Ph.D. dissertation, The University of Tennessee, Knoxville) (on file with TRACE: Tennessee Research and Creative Exchange).

[31] *See* Corey Dade, *Tennessee Resists Obama Wave*, WALL ST. J., Nov. 22, 2008, at A2; Theo Emory, *In the Tennessee Senate, A Historic Shift of Power*, N.Y. TIMES (Jan. 27, 2007), https://www.nytimes.com/2007/01/27/us/27tennessee.html; Ken Whitehouse et al., *Tennessee Republicans Win Slim Majority in State House*, NASHVILLEPOST (Nov. 4, 2008), https://www.nashvillepost.com/home/article/20402527/tennessee-republicans-win-slim-majority-in-state-house. *See generally* Dewey W. Grantham, *Tennessee and Twentieth-Century American Politics*, 54 TENN. HIST. Q. 210 (1995) (surveying the history of Tennessee's political positions from Reconstruction through most of the twentieth century); Michael Nelson, *Tennessee: Once a Bluish State, Now a Reddish One*, 65 TENN. HIST. Q. 162 (2006) (describing Tennessee's slow transition from being largely Democratically-controlled to Republican).

[32] *See* Emory, *supra* note 31.

[33] *See* Whitehouse et al., *supra* note 31.

[34] *See* Ted Rayburn, *Tennessee's New Governor Takes Charge*, TENNESSEAN, Jan. 16, 2011; Chas Sisk, *Haslam Sworn in As TN's 49th Governor*, TENNESSEAN, Jan. 15, 2011.

After taking control of the State's two political branches, the Tennessee Republican Party embarked on a course of action to secure conservative control of the State's judiciary through a constitutional amendment.[35] In 2014, the General Assembly sent a constitutional amendment on judicial selection to the voters of the Volunteer State.[36] The voters approved the amendment to the Tennessee Constitution on November 4, 2014.[37] The amendment modified, marginally, the Tennessee Plan for judicial selection, which had been in effect since 1971.[38] Under the Tennessee Plan, in varying forms over the years of the Plan's existence, state appellate judges were appointed by the Governor of Tennessee out of three names sent to the Governor by non-partisan nominating commission.[39] Following the Governor's appointment, the appellate judge stood for retention election by the voters of Tennessee.[40] Moreover, starting in 1994, appellate judges up for retention election were evaluated by a panel of "court personnel, lawyers, and other judges,"

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[35] *See Amendment 2 Seeks to Clarify How Judges Are Appointed in State*, COLUMBIA DAILY HERALD (Oct. 8, 2014), https://www.columbiadailyherald.com/article/20141008/NEWS/310089949?template=ampart; William H. Neal, III & Jarrod B. Casteel, *Amendment II: A Consideration of the History, Passage & Potential Effects of the Latest Judicial Selection Process in Tennessee*, 2 FORUM 1, 4 (2015). Notably, there was some bipartisan support for the constitutional amendment. *See* Marian Galbraith, *Amendment 2 on Judicial Selection Has Bipartisan Support*, TULLAHOMA NEWS (Oct. 9, 2014), https://www.tullahomanews.com/news/local/amendment-2-on-judicial-selection-has-bipartisan-support/article_f2031146-71b3-574e-b9ae-aef9ac5af910.html; Bill Haslam & Phil Bredesen, Opinion, *Haslam, Bredesen Give Reasons to Vote Yes on Amendment 2*, KNOX NEWS (Oct. 26, 2014), https://archive.knoxnews.com/opinion/columnists/bill-haslam-and-phil-bredesen-haslam-bredesen-give-reasons-to-vote-yes-on-amendment-2-ep-700907438-354055901.html/.

[36] *Frequently Asked Questions About the Judicial Selection Amendment*, TBA L. BLOG (Apr. 29, 2014), https://www.tba.org/index.cfm?pg=LawBlog&blAction=showEntry&blogEntry=17481.

[37] *All 4 Tennessee Constitutional Amendments Pass*, WBIR (Nov. 4, 2014, 11:35 PM), https://www.wbir.com/article/news/politics/all-4-tenn-constitutional-amendments-pass/51-312177397.

[38] *See* Neal & Casteel, *supra* note 35, at 2.

[39] *See* Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473, 482–83 (2008); Penny J. White & Malia Reddick, *A Response to Professor Fitzpatrick: The Rest of the Story*, 75 TENN. L. REV. 501, 509–20 (2008). For more on judicial selection in Tennessee, see Margaret L. Behm & Candi Henry, *Judicial Selection in Tennessee: Deciding "The Decider,"* 1 BELMONT L. REV. 143 (2013) (surveying the history of judicial selection in the Volunteer State and arguing for a merit-based selection system). For more on the Tennessee Plan and the debate surrounding it, see Buck Lewis, *What's All the Fuss About the Tennessee Plan?*, 44 TENN. B.J. 3 (2008). It is important to note that intermediate appellate judges in Tennessee had been subject to retention election since 1971, but Tennessee Supreme Court Justices only started being subject to retention election in 1994. White & Reddick, *supra* note 38, at 519 ("When the legislature revised the Tennessee Plan, it not only *reinstated retention elections for supreme court justices*, it also fashioned a merit election system that was unique to Tennessee.") (emphasis added).

[40] *See* Neal & Casteel, *supra* note 35, at 2.

and completed a self-evaluation of their own judicial performance.[41] In sum, the Tennessee Plan attempted to keep the process of appointing Tennessee's appellate judges mostly free from partisan influence.[42]

In place of the Tennessee Plan, which focused on keeping partisanship out of the judiciary, the Republican-controlled Tennessee General Assembly, supported by Governor Haslam, submitted a judicial selection constitutional amendment to the ballot in 2014.[43] There are three primary differences between the Tennessee Plan and the constitutional amendment adopted by the voters in 2014.[44] First, the Governor is free to appoint any eligible person to serve as an intermediate appellate judge or Supreme Court justice without deference to the nominating commission.[45] Second, the constitutional amendment gives the General Assembly a role in selecting appellate judges by providing them the right to reject the Governor's appointment.[46] Third, the amendment does away with the evaluation provisions of the Tennessee Plan.[47] Thus, the modern constitutional provision calls for the Governor to use their discretion to appoint an appellate judge to fill a

[41] *See* White & Reddick, *supra* note 39, at 519.
[42] *See* White & Reddick, *supra* note 39, at 520. Despite the Tennessee Plan's function in keeping partisanship out of Tennessee judicial selection, some opponents of the Plan argued that it frustrated the text of the State's constitution because that founding charter, by its plain text, required judges to seek popular election. *See* Hooker v. Haslam, 437 S.W.3d 409 (Tenn. 2014).
[43] *See* Neal & Casteel, *supra* note 35, at 4–5. For arguments on the potential evils of electing state appellate judges and needlessly subjecting them to the partisan process, see Penny J. White, *The Other Costs of Judicial Elections*, 67 DEPAUL L. REV. 369 (2018); Penny J. White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120 (2009).
[44] *See* Neal & Casteel, *supra* note 35, at 4–5. For a discussion of the ramifications of Tennessee's abandonment of the Tennessee Plan in favor of the constitutional amendment adopted in 2014, see Penny J. White, *If It Ain't Broke, Break It – How the Tennessee General Assembly Dismantled and Destroyed Tennessee's Uniquely Excellent Judicial System*, 10 TENN. J.L. & POL'Y 329 (2015) (detailing Tennessee's historical judicial selection practices and claiming that the 2014 constitutional amendment on judicial selection emboldened the General Assembly to have control over the state's judiciary).
[45] *See* Neal & Casteel, *supra* note 35, at 4–5. The Governor's discretion is somewhat narrowed, however slightly, by the Tennessee Constitution's requirements for the eligibility of judges in the Volunteer State. Of course, these edibility standards are not built to prevent political influence from entering the judicial selection process. For instance, Tennessee Supreme Court Justices have certain residency requirements. TENN. CONST. art. VI, § 2 ("The Supreme Court shall consist of five judges, of whom not more than two shall reside in any one of the grand divisions of the state."). Likewise, for inferior court judges, the Tennessee Constitution imposes both residency and age requirements. Tenn. Const. art. VI, § 4 ("The Judges of the Circuit and Chancery Courts, and of other Inferior Courts, shall be elected by the qualified voters of the district or circuit to which they are to be assigned. Every judge of such courts shall be thirty years of age, and shall before his election, have been a resident of the state for five years, and of the circuit or district one year.").
[46] *See* Neal & Casteel, *supra* note 35, at 4–5.
[47] *See id.*

vacancy, gives the General Assembly the right to accept or reject the Governor's nominee, and then places approved nominees on the ballot for a retention election.[48] In so doing, the primary loss of the new process for appointing Tennessee's appellate judges is the nominating commission.[49]

Interestingly, shortly after the people of Tennessee voted to amend the State's constitution on judicial selection, Governor Haslam issued an executive order creating a process for selecting a nominee in cases of vacancies.[50] Under Executive Order 54—which has remained in effect during the administration of Governor Bill Lee, Haslam's successor—an eleven-member judicial nominating commission was created.[51] All members of the new judicial nominating commission are appointed by the Governor and serve at the Governor's pleasure.[52] Though this is a stride toward keeping politics out of the judicial selection process in Tennessee, it is only a half-measure. Because the members of the judicial nominating commission are all appointed by and serve at the hand of the Governor, who is a partisan with political motives and interests, the commission cannot be said to truly be non-partisan.[53] Likewise, executive orders are intrinsically flawed as a means of curbing executive discretion.[54] Governor Lee, or any one of his successors to the Governor's Office, is free to disregard or rescind Governor Haslam's executive order at his whim, and he is further at liberty to appoint blatant partisans to the nominating commission.[55] Thus, the process created by Governor Haslam's executive order, while better than an explicitly partisan selection procedure, is non-binding and does not offer Tennesseans any shield from having appellate judges appointed based on political ideology rather than qualification and merit.[56]

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[48] *See* White, *supra* note 44, at 371.
[49] *See* Neal & Casteel, *supra* note 35, at 9; White, *supra* note 44, at 366–72.
[50] *See* Exec. Order No. 54 (2014); *Haslam Outlines New Judicial Selection Body*, NASHVILLE POST (Nov. 7, 2014), https://www.nashvillepost.com/home/article/20479937/haslam-outlines-new-judicial-selection-body.
[51] Exec. Order No. 54.
[52] *Id.*
[53] *See id.*
[54] It is well-settled that governmental chief executive officers, such as the President of the United States and governors of the respective states of the United States, are permitted to make and rescind their executive orders, and those issued by their predecessors and their whim and caprice. For more on the executive's authority to rescind executive orders, see Ron Beal, *Power of the Governor: Did the Court Unconstitutionally Tell the Governor to Shut Up?*, 62 BAYLOR L. REV. 72, 106 (2010); Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1179 (2020); Rhonda R. Rivera, *Our Straight-Laced Judges: Twenty Years Later*, 50 HASTINGS L.J. 1179, 1193 (1999).
[55] *See supra* note 54 and accompanying text.
[56] There is significant scholarly debate on the benefits and drawbacks associated with merit selection of judges. For some of that scholarly debate, both for and against merit selection, see James Bopp, Jr., *The Perils of Merit Selection*, 46 IND. L. REV. 87 (2013); Anthony Champagne,

Overall, the rise of the Republican Party to take control of Tennessee's General Assembly and Governor's Office in 2009 and 2011 respectively, combined with the adoption of the constitutional amendment on judicial selection in 2014, created fertile ground for stripping rights from Tennesseans. After 2014, the stage was set for the Republican Party to take a majority of the Tennessee Supreme Court upon the next vacancy.[57] It was against this backdrop that Justice Page joined the bench, and the court commenced its reconsideration of Tennessee Constitution's Declaration of Rights. In the five years since, Tennesseans have lost rights they held prior to Justice Page's confirmation under the new judicial selection scheme. As this Article has demonstrated thus far, the assault on the Declaration of Rights did not occur by happenstance; rather, it was the culmination of a concerted effort to alter the balance of power in the Volunteer State.

II. THE ASSAULT ON TENNESSEAN'S RIGHTS

Since 2016, and Justice Page's confirmation to the Tennessee Supreme Court alongside other conservative Justices Jeffrey S. Bivens and Holly Kirby, the court has disregarded *stare decisis* and interpreted the Tennessee Constitution differently than it had previously. The four rights that have been weakened, to varying degrees, in the last half-decade are the prohibition on *ex post facto* laws,

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Parties, Interest Groups, and Systemic Change, 74 MO. L. REV. 555 (2009); J. Andrew Crompton, *Commentary: Pennsylvanian's Should Adopt A Merit Selection System for State Appellate Court Judges*, 106 DICK. L. REV. 755 (2002); Norman Krivosha, *Acquiring Judges by the Merit Selection Method: The Case for Adopting Such A Method*, 40 SW. L.J. 15 (1986); K.O. Myers, *Merit Selection and Diversity on the Bench*, 46 IND. L. REV. 43 (2013); Matthew Schneider, *Why Merit Selection of State Court Judges Lacks Merit*, 56 WAYNE L. REV. 609 (2010); Joel M. Schumm, *Reflecting on Forty Years of Merit Selection in Indiana: An Introduction*, 46 IND. L. REV. 1 (2013); William E. Smith, *Reflections on Judicial Merit Selection, the Rhode Island Experience, and Some Modest Proposals for Reform and Improvement*, 15 ROGER WILLIAMS U. L. REV. 664 (2010).

[57] Noteworthily, Republicans in Tennessee waged a campaign against three Democratically appointed Supreme Court Justices in 2014: Chief Justice Gary Wade, Justice Cornelia A. Clark, and Justice Sharon G. Lee. Despite conservative efforts to replace the three jurists, Tennessee voters retained all three while also ratifying the constitutional amendment on judicial selection. *See* Bill Dries, *Supreme Court Retention Clash Likely to Continue*, MEMPHIS DAILY NEWS (Aug. 12, 2014), https://www.memphisdailynews.com/news/2014/aug/12/supreme-court-retention-clash-likely-to-continue/; John Huotari, *Supreme Court Justices Campaign to Stay on Bench*, OAK RIDGE TODAY (Aug. 6, 2014, 2:29 AM), https://oakridgetoday.com/2014/08/06/supreme-court-justices-campaign-stay-bench/; *Justices Step Up Campaign Efforts in State*, COLUMBIA DAILY HERALD (July 19, 2014, 9:22 AM), https://www.columbiadailyherald.com/article/20140719/NEWS/307199968; Richard Locker, *Voters Retain Supreme Court Justices*, COMMERCIAL APPEAL (Aug. 8, 2014), http://archive.commercialappeal.com/news/government/voters-retain-tennessee-supreme-court-justices-ep-542169503-324353931.html/.

the right to be free from unreasonable searches and seizures as well as the prohibition on general warrants, the right to a trial by jury, and the right to effective assistance of counsel.[58] Each of these rights, and the cases that have shaped them since 2016, are considered seriatim here. Some of the Tennessee Supreme Court's holdings only touched a very limited portion of a constitutional right; thus, the cases receive varying levels of attention here in proportion to the modification of the right at issue.

A. Prohibition on *Ex Post Facto* Laws

The Tennessee Constitution proclaims in article I, section 11, "[L]aws made for the punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free government; wherefore no *ex post facto* law shall be made."[59] Since 1979, the Tennessee Supreme Court has held that the State Constitution's *ex post facto* proscription is broader than that in the United States Constitution.[60] However, that changed in 2016 following Justice Page's confirmation to the Tennessee Supreme Court.[61]

In *State v. Pruitt*, the court determined that the Tennessee and United States constitutional protections against *ex post facto* laws are in lockstep.[62] Writing for the court, Justice Page surveyed the State's historical interpretation of the *ex post facto* clause of the State's Declaration of Rights.[63] Justice Page first noted the United States Supreme Court's *ex post facto* law jurisprudence.[64] The most important decision on this prohibition is *Calder v. Bull*, which dates back to 1798.[65] In *Calder*, Justice Samuel Chase promulgated four types of laws that violate the United States Constitution's *ex post facto* clause:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it

[58] *See supra* notes 20–23 and accompanying text.
[59] TENN. CONST. art. I, § 11. Meanwhile, the United States Constitution contains two *ex post facto* clauses. The first constrains the federal government and states, in regard to the powers of the Congress enumerated in Article I, "No bill of attainder or ex post facto Law shall be passed." U.S. CONST. art. I, § 9. The second *ex post facto* clause, speaking of the powers of the respective states, declares, "No state shall . . . pass any . . . ex post facto law." U.S. CONST. art. I, § 10.

[60] *See* State v. Pruitt, 510 S.W.3d 398, 414 (Tenn. 2016) (citing Miller v. State, 584 S.W.2d 758 (Tenn. 1979)).
[61] *See* Pruitt, 510 S.W.3d at 416.
[62] *Id.*
[63] *Id.* at 410–16.
[64] *Id.* at 411.
[65] *Id.*

> greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.[66]

The next significant development, according to the Tennessee Supreme Court, was in 1883 when the United States Supreme Court decided *Kring v. Missouri*.[67] In that case, the Court held that in addition to the four categories of *ex post facto* laws that violate the Constitution as identified by Justice Chase, any law "which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage" also qualified as a proscribed *ex post facto* law.[68] The United States Court abided by this view, to varying degrees, until 1990.[69] In *Collins v. Youngblood*, the Court expressly abrogated and overturned its previous decision in *Kring*, and noted that only the four categories of *ex post facto* laws expounded by Justice Chase are prohibited by the United States Constitution.[70]

However, as Justice Page noted in *Pruitt*, the Tennessee Supreme Court implicitly adopted the *Kring* view of *ex post facto* laws in the time between *Kring* and *Collins*.[71] In 1979, the Tennessee Supreme Court declared, without direct reference to *Kring*, "Every law which, in relation to the offense or its consequences, alters the situation of a person to his disadvantage" also constituted an *ex post facto* law.[72] Thus, from 1990, when the United States Supreme Court overruled *Kring* in *Collins*, forward, Tennessee's Constitution, as interpreted by the Tennessee

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[66] Calder v. Bull, 3 U.S. 386, 390 (1798) (opinion of Chase, J.).
[67] 107 U.S. 221 (1883); *Pruitt*, 510 S.W.3d at 411.
[68] *Pruitt*, 510 S.W.3d at 411 (quoting *Kring*, 107 U.S. at 228–30).
[69] *Id.* at 412; *see also* Collins v. Youngblood, 497 U.S. 37 (1990) (overruling the holding in *Kring v. Missouri*).
[70] *Collins*, 497 U.S. at 50 ("The holding in *Kring* can only be justified if the *Ex Post Facto* Clause is thought to include not merely the *Calder* categories, but any change which "alters the situation of a party to his disadvantage." We think such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases. We accordingly overrule *Kring*.").
[71] *Pruitt*, 510 S.W.3d at 414. Importantly, Justice Page stated in *Pruitt* that the Tennessee Supreme Court was in lockstep with the United States Supreme Court's interpretation of the *ex post facto* clause until 1979 when the court adopted the *Kring* additional category; however, this is a slight mischaracterization given that the United States Supreme Court did not expressly overrule *Kring* until 1990. Justice Page said, specifically, "Until 1979, Tennessee followed federal precedent with regard to ex post facto analysis." *Id.* at 413 (citing Stinson v. State, 344 S.W.2d 369, 372 (Tenn. 1961); Davis v. Beeler, 207 S.W.2d 343, 349–50 (Tenn. 1947)).
[72] Miller v. State, 584 S.W.2d 758, 761 (Tenn. 1979) (quoting State v. Rowe, 181 A. 706, 710 (N.J. 1935)).

Supreme Court, offered greater *ex post facto* protections to Tennesseans than did the United States Constitution.[73]

Nevertheless, the court in *Pruitt*, found that *Miller* was wrongly decided.[74] To make this determination, the *Pruitt* court relied on two justifications.[75] According to Justice Page, it is long-standing practice for the Tennessee Supreme Court not to adopt a broader reading of similar clauses of the Tennessee Constitution than the United States Constitution "unless there are sufficient textual or historical differences, or other grounds for doing so."[76] In the court's opinion, neither sufficient textual nor historical differences supported *Miller*'s expansion of Tennessee's *ex post facto* clause protection.[77] As to textual differences, the court in *Pruitt* found that the Tennessee Declaration of Rights' version of the *ex post facto* clause, if anything, could be read more narrowly than its counterpart in the United States Constitution.[78] Furthermore, the *Miller* court's failure to even analyze the issue indicated that the foundation of the *Miller* decision was not strong.[79] As to historical differences, Justice Page stated that the federal *ex post facto* clauses were premised largely on the state constitutions in existence at the time of the federal constitutional convention in 1796.[80] This included the State Constitution of North Carolina, which had already defined *ex post facto* laws.[81] Tennessee, in the court's view, adopted the same definition of *ex post facto* laws as used in North Carolina's Constitution.[82] Accordingly, because the United States Constitution, as interpreted by the United States Supreme Court, incorporated state *ex post fact* law definitions,

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[73] *See Collins*, 497 U.S. at 50; *Miller*, 584 S.W.2d at 761.
[74] *Pruitt*, 510 S.W.3d at 416.
[75] *Id.* at 415–16.
[76] *Id.* at 415 (quoting Phillips v. Montgomery Cty., 442 S.W.3d 233, 243 (Tenn. 2014)).
[77] *Id.*
[78] *Id.* This finding appears somewhat unfounded given that there are significant textual differences between the Tennessee and United States Constitutional prohibitions on *ex post facto* laws. For instance, the United States Constitution's *ex post facto* clauses are very brief stating only, "No bill of attainder or ex post facto Law shall be passed" while speaking of the powers of Congress, and "No state shall . . . pass any . . . ex post facto law." U.S. CONST. art. I, § 9, 10. Meanwhile, the Tennessee Constitution's *ex post facto* clause offers a policy justification for the proscription on *ex post facto* laws before declaring the rule that these laws "shall not be made." TENN. CONST. art. I, § 11 ("[L]aws made for the punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free government; wherefore no *ex post facto* law shall be made."). Consequently, it is difficult to maintain that the textual differences between these provisions indicates that Tennessee's *ex post facto* clause is, in fact, narrower than the United States Constitution's *ex post facto* provisions. *Pruitt*, 510 S.W.3d at 415.
[79] *Pruitt*, 510 S.W.3d at 415.
[80] *Id.* at 415–16.
[81] *Id.*
[82] *Id.*

such as that in North Carolina, the court reasoned that there is no historical difference between the United States and Tennessee provisions.[83]

Therefore, from 1990 to 2016, Tennesseans enjoyed greater *ex post facto* law protections than those they received under the United States Constitution.[84] Yet, after Justice Page joined the Tennessee Supreme Court in 2016, the court abandoned the long-held view that such added protection for those shielded by the Tennessee Constitution was justified.[85] Rather than continue to give criminal defendants an argument that their conviction or sentence was based on a law that disadvantaged them and that was passed after they allegedly committed the crime, the court chose to restrict the arguments available to defendants.[86]

B. Right Against Unreasonable Searches and Seizures and Prohibition on General Warrants

The Tennessee Constitution states in article I, section 7:

> [T]he people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offences are not particularly described and supported by evidence, are dangerous to liberty and ought not be granted.[87]

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[83] *Id.* at 416.
[84] *See supra* note 73 and accompanying text.
[85] *See Pruitt*, 510 S.W.3d at 416.
[86] *Id.*
[87] TENN. CONST. art. I, § 7. The United States Constitution contains a similar, though more succinct, prohibition on unreasonable searches and seizures, as well as a prohibition on general warrants. The Fourth Amendment to the United States Constitution declares, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). *See also* U.S. CONST. amend. IV. The Fourth Amendment to the United States Constitution has been incorporated against the states through the Fourteenth Amendment. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) ("Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.").

In 2017, the Tennessee Supreme Court removed protections against general warrants that had shielded Tennesseans from potential government abuses.[88] Writing for the court in *State v. Tuttle,* Justice Cornelia A. Clark first reviewed the United States Supreme Court's interpretation of the federal prohibition on general

[88] *See* State v. Tuttle, 515 S.W.3d 282 (Tenn. 2017); State v. Jacumin, 778 S.W.2d 430 (Tenn. 1989). For more on Tennessee's previous protection against general warrants, see Rebecca Adelman & Amanda Haynes Young, *Judicial Activism: Just Do It*, 24 MEM. ST. U. L. REV. 267, 270–72 (1994) ("The *Jacumin* court focused on Justice White's analysis and concluded that the *Aguilar-Spinelli* test, 'if not applied hyper[-]technically, provide[s] a more appropriate structure for probable cause inquiries' incident to the issuance of a search warrant than does *Gates.* The court found "that the *Aguilar-Spinelli* standard, or test, is more in keeping with the specific requirement of Article 1, Section 7 of the Tennessee Constitution that a search warrant not issue 'without evidence of the fact committed.' The court thus refused to adopt *Gates* relying on the different wording of the Tennessee Constitution as its basis."); Catherine Albisa, *The Last Line of Defense: The Tennessee Constitution and the Right to Privacy*, 25 U. MEM. L. REV. 3, 30 n. 155, 32 n. 167 (1994); Louis D. Bilionis, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1809 n. 22 (1992); Mary Nicol Bowman, *Truth or Consequences: Self-Incriminating Statements and Informant Veracity*, 40 N.M. L. REV. 225, 231 (2010) ("Although the analysis proposed in this article applies in jurisdictions that use the 'totality of the circumstances' approach from *Gates*, it is particularly crucial for those states that have reaffirmed use of *Aguilar-Spinelli* on state law grounds. Most of the state courts that have rejected the *Gates* approach have stressed the critical importance of showing an informant's veracity."); Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 672 n. 144 (1997); Tiffany A. Dunn, *Constitutional Law–Fourth Amendment–Using an Informant as the Basis of a Search or Seizure*, 66 TENN. L. REV. 531, 544–45 (1999) ("Ultimately, the Tennessee Supreme Court in *Jacumin* decided that the *Aguilar-Spinelli* two-pronged test, 'if not applied hyper[-]technically,' provides 'a more appropriate structure for probable cause inquiries incident to a search warrant' than the totality-of-the-circumstances test. The Court explained that the two-pronged test operates more consistently 'with the specific requirement of Article 1, Section 7 of the Tennessee Constitution that a search warrant will not issue "without evidence of the fact committed."'"); Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417, 456–57 (2007) ("Tennessee rejects the totality of the circumstances test articulated in *Illinois v. Gates*, using instead the *Aguilar v. Texas* and *Spinelli v. United States* tests as a matter of state constitutional law."); Otis H. Stephens, Jr., *The Tennessee Constitution and the Dynamics of American Federalism*, 61 TENN. L. REV. 707, 719–20 (1994) ("Six years later in *State v. Jacumin* the Tennessee Supreme Court specifically rejected the *Gates* totality-of-the-circumstances approach and adopted the *Aguilar-Spinelli* test. Writing for a unanimous court, Justice Cooper focused on the linguistic differences between the search and seizure provisions of the Tennessee and Federal Constitutions. He noted that although Tennessee courts had often regarded the two provisions as identical in intent and purpose, these tribunals had been "somewhat more restrictive" in applying Fourth Amendment standards than had the federal courts. Following several other states that had addressed the issue on independent state grounds, Justice Cooper rejected the *Gates* Court's interpretation of the Fourth Amendment and adopted the more rigorous *Aguilar-Spinelli* standard.").

warrants.[89] In 1964, the United States Supreme Court held that when a neutral and disinterested magistrate is deciding whether to issue a warrant supported by an officer's affidavit based on information from a confidential informant, the magistrate "must be informed of some of the underlying circumstances from which the informant concluded that the [evidence was] where he claimed . . . and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed . . . was 'credible' or his information 'reliable.'"[90] Then, the Court supplemented that requirement by noting that either the "credible" or "reliable" prong may be established through corroborating evidence if the magistrate is otherwise unpersuaded about the underlying circumstances and reliability of the information.[91]

Thus, the two-pronged *Aguilar*/*Spinelli* test for informant evidence sufficient to support probable cause for the issuance of a warrant was (1) information sufficient to show the basis of the informant's knowledge and (2) indicia that the informant's knowledge is reliable or credible.[92] Then, if there are gaps in the informant's knowledge, the magistrate can look to other corroborating evidence to support the probable cause for the warrant.[93] The United States Supreme Court in *Illinois v. Gates*, however, overruled the *Aguilar*/*Spinelli* framework in favor of a "totality of the circumstances" standard.[94]

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[89] *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."); Illinois v. Gates, 462 U.S. 213 (1983); Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); *Tuttle*, 515 S.W.3d at 299–302.

[90] *Tuttle*, 515 S.W.3d at 302 (citing *Aguilar*, 378 U.S. at 114).

[91] *Tuttle*, 515 S.W.3d at 302 (citing *Spinelli*, 393 U.S. at 415–16).

[92] *Tuttle*, 515 S.W.3d at 302 (citing *Aguilar*, 378 U.S. at 114; *Spinelli*, 393 U.S. at 415–16). For more on the *Aguilar*/*Spinelli* standard, see generally Jodi Levine Avergun, Note, *The Impact of* Illinois v. Gates*: The States Consider the Totality of the Circumstances Test*, 52 BROOK. L. REV. 1127 (1987) (arguing that the *Gates* standard does not sufficiently protect the rights of defendants and advocating that the Supreme Court adopt a more stringent test); Paul G. Hawthorne, Note, *Tips, Returning to and Improving Upon* Aguilar-Spinelli*: A Departure from the* Gates *"Totality of the Circumstances"*, 46 HOW. L.J. 327 (2003) (asserting that the *Gates* standard is inadequate to properly fulfill the safeguards of the Fourth Amendment and advocating a return to a test similar to that in *Aguilar* and *Spinelli* with some additional factors for magistrates to consider before issuing warrants based on confidential informant tips).

[93] *Tuttle*, 515 S.W.3d at 302 (citing *Spinelli*, 393 U.S. at 415–16).

[94] *See Gates*, 462 U.S. at 238–39. For more on *Gates*, see Laura J. Buckland, *Informants' Tips and Probable Cause: The Demise of* Aguilar-Spinelli*—Illinois v. Gates*, 103 S. Ct. 2317 (1983), 59 WASH. L. REV. 635 (1984) (claiming that *Gates*' abrogation of the *Aguilar*/*Spinelli* test was unjustified because the prior formula correctly channeled the discretion of magistrates in issuing warrants); Yale Kamisar, Gates*, 'Probable Cause,' 'Good Faith,' and Beyond*, 69 IOWA L. REV. 551 (1984) (arguing that the *Gates* holding abrogates the need for a "reasonable belief" or "good faith" exception to the Fourth Amendment exclusionary rule); Alexander Penelas, Illinois v.

Nonetheless, the Tennessee Supreme Court rejected the United States Supreme Court's decision to move away from the *Aguilar*/*Spinelli* test.[95] The Tennessee Supreme Court held, in 1989, following the United States Supreme Court's decision in *Gates*, that the *Aguilar*/*Spinelli* standard still applied to warrant affidavits based on informant tips in Tennessee.[96] Then, in 2017, the Tennessee Supreme Court reversed course.[97] In doing so, the court noted three reasons.[98] First, the courts of Tennessee, in the Tennessee Supreme Court's view, applied the *Aguilar*/*Spinelli* test too rigidly and too often invalidated warrants.[99] Second, the court found that the *Gates* totality of the circumstances formula, which still takes into account the informant's basis of knowledge and veracity, is superior in application to the more rigid *Aguilar*/*Spinelli* test.[100] Specifically, trial courts can more easily apply a totality of the circumstances standard, because they already do so in other contexts.[101] Finally, the *Jacumin* court did not identify sufficient differences between the scope and intent of the warrant provisions of the United States and Tennessee Constitutions. As such, the sounder policy is to adhere to the United States Supreme Court's interpretation of the federal Fourth Amendment rather than to offer a different understanding under Tennessee's Constitution.[102]

Consequently, for nearly three decades, Tennesseans had the added protection of forcing officers who relied on confidential informant tips to procure warrants to ensure the informant's tip was based on a proper basis of knowledge and was reliable to demonstrate probable cause.[103] In 2017, however, the Tennessee Supreme Court decided to remove those additional protections for Tennesseans and instead chose to rely on the totality of the circumstances.[104] The *Aguilar/Spinelli* test offered more security for those suspected of criminal activity by narrowing the magistrate's discretion and clarifying what warrants based on confidential

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Gates*: Will* Aguilar *and* Spinelli *Rest in Peace?*, 38 U. MIAMI L. REV. 875 (1984) (asserting that the *Gates* decision was part of a broader pattern of compromising the Fourth Amendment); Alexander P. Woollcott, *Abandonment of the Two-Pronged* Aguilar-Spinelli *Test:* Illinois v. Gates, 70 CORNELL L. REV. 316 (1985) (arguing that the *Gates* totality of the circumstances approach does not properly balance the interests at stake in confidential informant cases and the Court should have sought to clarify the two-pronged test rather than abandon it in its entirety).

[95] State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989).

[96] *Id.*

[97] *Tuttle*, 515 S.W.3d at 305.

[98] *Id.* at 305–07.

[99] *Id.* at 305–06.

[100] *Id.* at 306.

[101] *Id.*

[102] *Id.* at 307.

[103] *See* State v. Tuttle, 515 S.W.3d 282, 308 (Tenn. 2017); State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989).

[104] *Tuttle*, 515 S.W.3d at 308.

informant information required.[105] Now, magistrates considering warrants based on confidential informant tips can decide whether to issue warrants on factors other than the informant's basis of knowledge and reliability or veracity, making it easier for officers to procure warrants, because they are not being held to a specific standard.[106] Thus, the Declaration of Rights rings more hollow in this area than it did previously.[107]

C. Right to a Jury Trial in Civil Cases

The Tennessee Constitution declares in article I, section 6, "[T]he right of trial by jury shall remain inviolate . . . ."[108] In ascertaining the meaning of the constitutional right to a jury in Tennessee, the State's Supreme Court has traditionally looked to the nature of the right as it existed at the time the constitution was adopted.[109] To determine the scope of the right at the founding of the State, the court construes the right, "[A]s it existed and was in force and use according to the course of the common laws and constitution of North Carolina at the time of the adoption of the Tennessee Constitution in 1796."[110] Historically, the Tennessee Supreme Court has held that right to include, "[T]he indisputable right of every litigant, upon seasonable and appropriate request, to have every material issue of fact on which he has introduced material testimony submitted to the consideration of the jury, with proper legal directions in respect of the verdict to be returned . . . ."[111] In noting its role in protecting the right, the court has declared, "[W]hile the legislature has a broad discretion in regulating the mode of asking jury trials, and

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[105] *See* Illinois v. Gates, 462 U.S. 213 (1983); Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964).
[106] *Gates*, 462 U.S. at 238–39; *Spinelli*, 393 U.S. at 415–16; *Aguilar*, 378 U.S. at 114; *Tuttle*, 515 S.W.3d at 308; *Jacumin*, 778 S.W.2d at 436.
[107] *Tuttle*, 515 S.W.3d at 308; *Jacumin*, 778 S.W.2d at 436.
[108] TENN. CONST. art. I, § 6. For more on the right to a jury in Tennessee, see Barnes, *supra* note 20; Bailey D. Barnes, *A State-Circuit Split: Reconciling Tennessee Damage Caps after* Lindenberg *and* McClay, 2 CTS. & JUST. L.J. 201 (2020) (noting that the Sixth Circuit has declared Tennessee's punitive damage caps to be unconstitutional under Tennessee's constitutional guarantee of the right to a civil jury and the Tennessee Supreme Court's failure to address this question).
[109] Trigally v. City of Memphis, 46 Tenn. 382, 385 (1869).
[110] Patten v. State, 426 S.W.2d 503, 506 (Tenn. 1968); *see also* Newport Hous. Auth. v. Ballard, 839 S.W.2d 86, 88 (Tenn. 1992) ("The right . . . sanctioned and secured by this constitutional provision is the right . . . as it existed at common law and was in force and use under the laws and Constitution of North Carolina at the time of the formation and adoption of our Constitution in 1796.").
[111] Harbison v. Briggs Bros. Paint Mfg. Co., 354 S.W.2d 464, 469 (Tenn. 1962) (quoting Memphis Street Ry. Co. v. Newman, 108 Tenn. 666, 669 (1902)).

the like, it cannot unreasonably hamper or impair the right of trial by jury."[112] In civil cases, the court has traditionally held that the amount of damages is a factual issue within the jury's purview.[113]

Despite this precedential background, the Tennessee Supreme Court held in February of 2020 that a statutory cap on non-economic compensatory damages does not infringe the right to a jury.[114] This arose from the 2011 Tennessee Civil Justice Act passed by the Republican-controlled General Assembly, at Governor Haslam's prodding.[115] With limited exceptions, the Tennessee Civil Justice Act of 2011 capped non-economic compensatory damages at $750,000.[116] Because the Tennessee Supreme Court has historically held that the determination of damages is within the province of a civil jury, litigants challenged the constitutionality of the damage cap statute.[117] The court, disregarding its own precedent, held that the availability of damages as a remedy for a wrong is a matter of law that can be modified at the General Assembly's whim.[118] Thus, in the conservative three-justice majority's view, the General Assembly is empowered to modify or abrogate the State's common law, even when doing so removes from the jury's purview determinations that have historically been held to be within jury's province.[119] The majority further found that because the jury is not informed of the statutory cap on non-economic damages, Tennesseans' right to a jury remains inviolate.[120]

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[112] Warren v. Scudder-Gale Grocery Co., 36 S.W. 383, 384 (Tenn. 1896).

[113] Boyers v. Pratt, 20 Tenn. 90, 93 (1839). Likewise, demonstrating the importance of the jury in Tennessee's history, for most of the State's existence, "the jury, not the judge, imposed the [criminal] sentence. Tennessee's system of jury sentencing was altered in 1982 and more definitively in 1989." David L. Raybin, *Sentencing Lockdown*, 40 TENN. B.J. 12, 16 (2004). Additionally, prior to 1998, the Tennessee Supreme Court had consistently held that criminal defendants possessed the constitutional right to have the jury instructed on lesser-included offenses. *See* State v. Williams, 977 S.W.2d 101, 105 (Tenn. 1998) ("[T]hough sometimes described as a constitutional right, in this State the right to instructions on lesser offenses actually derives from a statute."); State v. Boyce, 920 S.W.2d 224, 227 (Tenn. 1995) ("By failing to charge the jury on the lesser included offense of Criminal Trespass, the trial court deprived the defendant of his right to have the jury determine his guilt.")Thus, suffice it to say that Tennessee has traditionally held the jury's function in both civil and criminal trials in high esteem and granted the jury great deference in its determinations. *Boyce*, 920 S.W.2d at 227; *Barnes*, *supra* note 20, at 15; Raybin, *supra* note 113, at 1515.

[114] *See* McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 696 (Tenn. 2020).

[115] *See* Barnes, *supra* note 20, at 13.

[116] *See* TENN. CODE ANN. § 29-39-102; Barnes, *supra* note 20, at 13.

[117] *See McClay*, 596 S.W.3d at 688; *Boyers*, 20 Tenn. at 93.

[118] *McClay*, 596 S.W.3d at 691 (citing Hopkins v. Nashville, C. & St. L. R.R., 34 S.W. 1029, 1040 (Tenn. 1896)).

[119] *McClay*, 596 S.W.3d at 691; *see also* Barnes, *supra* note 20, at 16 ("Strikingly, under [the majority's] view, the legislature may feel empowered to alter an additional common law right, even one enshrined in the state's constitution, with very little restriction.").

[120] *McClay*, 596 S.W.3d at 692.

According to the majority's postulation, the right to a jury is preserved so long as the jury is permitted to make all factual determinations, including the measure of all damages, and then the statutory limit on non-economic damages is implemented by the court as a matter of law—thereby substituting the General Assembly's judgment for that of the jury comprised of regular Tennesseans.[121]

Writing in dissent, Justice Sharon G. Lee decried the majority's "fact-law" distinction as nothing more than "smoke and mirrors."[122] In Justice Lee's opinion, if "[a] jury's award of damages that exceeds the damages cap is ignored; the jury might as well have not deliberated and made its award."[123] Justice Lee added, "[U]nder the damages cap statute, the jury's decision about the amount of damages is an empty exercise because of the arbitrary limitation on the jury's award of noneconomic damages."[124] Finally, Justice Lee contended, "By usurping the jury's role . . . the General Assembly has, in effect, amended Article I, section 6 of the Tennessee Constitution to dilute the right to trial by jury . . . [b]ut the General Assembly may only propose a constitutional amendment; it is up to the voters to amend the Constitution . . . ."[125]

Additionally, Justice Cornelia A. Clark dissented.[126] Similar to Justice Lee, Justice Clark found that the Tennessee General Assembly had, in essence, amended the State's Constitution rather than just modifying the State's common law.[127] According to Justice Clark, "The Tennessee General Assembly unquestionably has the authority to alter the common law. But, the General Assembly *cannot* modify the Tennessee Constitution, and that is what [the non-economic damage cap statute] does."[128]Because the right to a jury as it existed in North Carolina at the time of the Tennessee Constitution's adoption was merged from common law to constitutional law, the General Assembly has no power to modify the right to a civil jury.[129] Justice Clark thus concluded that the non-economic damage cap statute "constitutes far more than a slight deviation from the established mode and function of the jury. It amounts to a legislative usurpation of the jury's constitutionally protected fact-

[121] *Id.*
[122] *Id.* at 707 (Lee, J., dissenting).
[123] *Id.*
[124] *Id.* at 702.
[125] *Id.* at 703.
[126] *Id.* at 696 (Clark, J., dissenting).
[127] *Id.* at 699.
[128] *Id.* (emphasis original).
[129] *Id.* at 696–976, 699–700. Justice Clark also took issue, as did Justice Lee, with the majority's claim that a jury's function is discharged when it renders a verdict and the trial court then, as a matter of law, is permitted to substitute the jury's determination of damages with that of the legislature. *Id.* at 700 ("The fact-law dichotomy exalts form over substance. It serves as a means of obfuscating the true effect of statutes capping damages, which is to render a jury's constitutionally protected fact-finding function an exercise in futility-a façade, a sham, and a pretense.").

finding function. As such, it should be 'instantly put down' as a violation of article I, section 6."[130]

Notably, just shortly over a year before the Tennessee Supreme Court "diluted the right to trial by jury," the United States Court of Appeals for the Sixth Circuit considered a similar question under the Volunteer State's Constitution.[131] Particularly noteworthy was the Sixth Circuit panel's discussion of the Tennessee General Assembly's authority to modify or abridge the State's common law remedies. Again, this was the main argument the *McClay* majority advanced as the justification for holding the non-economic damages cap constitutional.[132] The Sixth Circuit declared:

> To argue that the General Assembly may cap punitive damages based on its power to modify the common law is akin to arguing that parents may drive as fast as they wish because parents make the rules. Each argument ignores a key constraint on the rulemaker's authority. In this case, of course, the preexisting constraint is the constitution right to submit factual questions for determination by a jury.[133]

In other words, the Sixth Circuit held that the argument that the General Assembly only modified the common law remedy available to injured plaintiffs through the statutory cap on non-economic compensatory damages, accepted later by the Tennessee Supreme Court in *McClay*, did not hold water.[134] The reason for the Sixth Circuit's rejection of this contention was that Tennesseans possess the inviolable right to submit all factual issues, including damages, to a jury because that was the scope of the jury right in North Carolina when the Volunteer State's Constitution was adopted. North Carolina's common law jury right was merged into the Tennessee Constitution, and the Tennessee General Assembly cannot now seek to change the common law as a path around the constitutional right to a jury.[135]

The Sixth Circuit also rejected the second justification for the statutory damages limit, which the Tennessee Supreme Court accepted in *McClay*, that the jury right is preserved so long as it is the court imposing the damages cap after the

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[130] *Id.* at 701 (quoting Garner v. State, 13 Tenn. 160, 179 (1833)).
[131] *Id.* at 703 (Lee, J., dissenting); *see also* Lindenberg v. Jackson Nat'l Life Ins. Co., 912 F.3d 348 (6th Cir. 2018) (holding that the punitive damages cap provision of the Tennessee Civil Justice Act of 2011 violated the right to a jury in the Tennessee Constitution).
[132] *Lindenberg*, 912 F.3d at 367–68; McClay v. Airport Mgmt. Servs., LLC, 596 S.W.3d 686, 690–92 (Tenn. 2020).
[133] *Lindenberg*, 912 F.3d at 367–68.
[134] *Id.*
[135] *Id.* at 364, 367–68.

jury has discharged its duty in assessing damages.[136] The flaw with this assertion, according to the Sixth Circuit, is that "[t]he right to a trial by jury . . . is held by a litigant, not the jury members."[137] Thus, it is not tenable to maintain that the jury's lack of knowledge of the damage caps that will be imposed against their determination of damages by the court following the verdict does not interfere with a litigant's rights.[138] The litigant is entitled to have the jury determine all factual issues and have those determinations respected, not substituted for the General Assembly's judgment.[139]

Overall, the right to a jury in Tennessee, which the Tennessee Constitution holds out as "inviolate," has been diluted by the State's Supreme Court.[140] The court's precedent, acknowledged by Justice Lee in dissent in *McClay* and the Sixth Circuit majority in *Lindenberg*, has traditionally been that the jury's role in determination all factual issues in a civil trial, including damages, is sacrosanct.[141] Now, in the interest of business investment in the Volunteer State, the Tennessee Supreme Court, with assistance from the General Assembly, has rendered the "inviolate" jury right largely powerless.[142]

D. Right to Effective Assistance of Counsel

The most recent right of Tennesseans weakened by the Tennessee Supreme Court is the right to effective assistance of counsel.[143] The Tennessee Constitution, in article I, section 9 declares, "in all criminal prosecutions, the accused hath the

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[136] *Id.* at 369; *McClay*, 596 S.W.3d at 692–93.
[137] *Lindenberg*, 912 F.3d at 369.
[138] *Id.*
[139] *Id.*
[140] *See* TENN. CONST. art. I, § 6; *McClay*, 596 S.W.3d at 696.
[141] *McClay*, 596 S.W.3d at 702 (Lee, J., dissenting) ("The majority's ruling is inconsistent with this Court's previous decisions."); *Lindenberg*, 912 F.3d at 364–66.
[142] Justice Lee's dissent in *McClay* discussed some of the legislative history of the Tennessee Civil Justice Act of 2011 with a particular note of the comments of Representative Gerald McCormick, who stated that, after the passage of the Act, businesses "can run their numbers and say . . . if we really mess up or one of our employees really makes a mistake, well, we're gonna pay for it, but at least we know how much we're gonna have to pay, we don't think it'll bankrupt us. We can plan for it." *McClay*, 596 S.W.3d at 704 n. 5 (Lee, J., dissenting) (quoting *Tennessee Civil Justice Act of 2011: Hearings on H.B. 2008 Before the H. Comm. on the Judiciary*, 107th Gen. Assemb. (Tenn. 2011) (statement of Representative Gerald McCormick). *See also* Bill Haslam, Governor of the State of Tennessee, State of the State Address 2011: Transforming the Way We Do Business (Mar. 14, 2011), https://www.tn.gov/content/dam/tn/governorsoffice-documents/governorsoffice-documents/2011_State_of_the_State_Address.pdf. ("Let me add, I hope that the changes we have proposed in tort reform will make our state even more competitive with our surrounding states in attracting and landing more high quality jobs.").
[143] Howard v. State, 604 S.W.3d 53 (Tenn. 2020); Wallace v. State, 121 S.W.3d 652 (Tenn. 2003).

right to be heard by himself and his counsel."[144] In 2020, the Tennessee Supreme Court made it harder for a convicted defendant to prevail on an ineffective assistance of counsel claim where trial counsel fails to timely file a motion for new trial, thereby waiving issues on appeal.[145]

The court, with Justice Page writing, noted that the United States Supreme Court's assistance of counsel test under *Strickland v. Washington* requires the defendant to prove two prongs to make a cognizable ineffective assistance of counsel claim.[146] First, the defendant most show that their counsel's performance was deficient.[147] Second, the defendant must demonstrate that they were prejudiced by their counsel's substandard performance.[148] Despite this United States Supreme Court ruling, the Tennessee Supreme Court found in 2003, in *Wallace v. State*, that the failure of defense counsel to timely file a motion for new trial was presumptively prejudicial to a defendant in Tennessee.[149] Specifically, the *Wallace* court declared that for a defendant to avail themselves of the presumption, a petitioner in a post-conviction proceeding must establish that they intended to file a motion for new trial and that but for the deficient representation of counsel, a motion for new trial would have been filed raising issues in addition to sufficiency of the evidence."[150]

The court in *Howard*, however, held that the *Wallace* presumption of prejudice was unwarranted by the Tennessee Constitution.[151] In overruling *Wallace*, the *Howard* court offered three reasons.[152] First, a defense counsel's failure to timely file a motion for new trial only forecloses certain issues for appeal, thereby not proscribing the defendant's chance for appeal in its entirety.[153] Second, counsel's failure to file a timely motion for new trial does not entirely deprive the defendant of the right to counsel or "entirely fail to subject the prosecution's case

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[144] TENN. CONST. art. I, § 9. The United States Constitution's grant of the right to counsel states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have assistance of counsel for his defense." U.S. CONST. amend. VI. The Sixth Amendment right to effective assistance of counsel has been incorporated to the states through the Fourteenth Amendment. *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963) ("We accept Betts v. Brady's assumption, based as it was in our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of those fundamental rights.").
[145] *Howard*, 604 S.W.3d at 63.
[146] *Id.* at 57–58 (citing Strickland v. Washington, 466 U.S. 668 (1983)).
[147] *Id.* at 57 (citing *Strickland*, 466 U.S. at 687).
[148] *Id.* (citing *Strickland*, 466 U.S. at 687).
[149] Wallace v. State, 121 S.W.3d 652, 659 (Tenn. 2003).
[150] *Id.*
[151] *Howard*, 604 S.W.3d at 63.
[152] *Id.* at 62–63.
[153] *Id.* at 62.

to meaningful adversarial testing."[154] Finally, under existing Tennessee law, counsel for a criminal defendant following a conviction is not required to raise all issues on a motion for new trial that the defendant wants raised; accordingly, failure to file a motion for new trial that results in waiver of some issues is analogous and does not equate to a defendant being deprived of the right to effective assistance of counsel.[155] For these three reasons, the court determined that there was no need to create a presumption of prejudice based on counsel's failure to file a timely motion for new trial following a defendant's conviction.[156] Therefore, the Tennessee Supreme Court has diluted yet another right enshrined in the State Constitution's Declaration of Rights.[157]

III. REQUIEM FOR RIGHTS LOST

As this Article has demonstrated, over the last half-decade, Tennesseans have lost some of the rights they possessed prior to 2016.[158] This deprivation has been the result of the Tennessee Supreme Court disregarding its own precedent, either in favor of a new policy position, or to be in lockstep with the United States Supreme Court's interpretation of the United States Constitution.[159] These developments raise two important questions. First, why is the Tennessee Supreme Court abdicating its responsibility—steeped in notions of federalism and states' rights—as defender of the Tennessee Declaration of Rights, in favor of the federal government's interpretation of the federal constitution? Second, as most of these cases garnered the support of Democratically appointed justices along with their conservative counterparts, what can explain the more liberal justices' thinking on these issues? In addition to those questions, this survey of recent decisions has made clear that Tennesseans are slowly but surely losing their rights. It is up to each individual to determine whether the arguments in favor of these changes in constitutional interpretation are sufficient to justify the loss of rights. However, it cannot rationally be maintained that Tennesseans are as protected from government abuses and corporate exploitation as they were just over five years ago. Moreover, it is worthy to note that Tennessee jurists are willing to turn over the interpretation of the Tennessee Constitution to the federal government.

There are two apparent policy justifications for the Tennessee Supreme Court's deliberate actions in compromising the Declaration of Rights. One is encouraging aggressive law enforcement and ensuring the finality of convictions.

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[154] *Id.* (citing United States v. Cronic, 466 U.S. 648, 659 (1984)).
[155] *Id.* at 62–63 (citing Carpenter v. State, 126 S.W.3d 879, 887 (Tenn. 2004)).
[156] *Id.* at 63.
[157] *Id.*
[158] *See infra* Part III.
[159] *See supra* notes 14–15 and accompanying text.

The other is promoting business investment in the Volunteer State by supporting the General Assembly and the Governor in their efforts to limit the recovery available to injured Tennesseans in tort actions. By lowering Tennesseans' shields against official abuses in the criminal justice system, it is now easier for the government to procure warrants, prosecute or enhance sentences based on *ex post facto* laws, and ensure the finality of convictions by preventing successful claims for ineffective assistance of counsel. Moreover, businesses can presently make riskier decisions in pursuit of profits because tort liability is limited in Tennessee and the jury cannot override the General Assembly's damage award. Thus, deference to police, law and order, and interest in business investment, have won the public policy debate at the Tennessee Supreme Court.

Interestingly, in all cases except for *McClay*, Justices Cornelia A. Clark and Sharon G. Lee, both of whom were appointed by Democratic Governor Phil Bredesen, joined the conservative jurists in weakening Tennesseans rights. There are three potential reasons. First, it could be simply that those specific justices agreed with the analysis of the conservatives on the court. Second, it is possible that by joining the conservatives these justices were able to limit the compromise of rights suffered by Tennesseans.[160] Or, third, concerned about potential campaign

[160] Appellate judges use a process of negotiation and compromise to reach their opinions; thus, it is entirely possible that justices who do not necessarily agree with the majority's holding in its entirety will join the majority to have some of their personal thoughts included so as to limit the compromise of certain rights. *See, e.g.*, Pamela C. Corley, *Bargaining and Accommodation on the United States Supreme Court*, 90 JUDICATURE 157, 157 ("The opinion writing process on the United States Supreme Court is a collaborative enterprise among the justices. For most cases, the majority coalition must consist of at least five justices; thus, "court opinions reflect the need to accommodate other justices through bargaining and compromise as well as each justice's pursuit of an individual policy agenda." In other words, justices behave strategically. They pursue their own policy preferences, but they are constrained by their colleagues. Bargaining on the merits typically begins after the opinion writer sends the first draft to the full Court. From there, the justices who voted with the majority at the initial conference may attempt to bargain over the language of the opinion, including the rationale it invokes and the policy it adopts. The content of opinions is important to the justices and they frequently make concerted efforts to shape the final version."); Ellen E. Deason, *Perspectives on Decision making from the Blackmun Papers: The Cases on Arbitrability of Statutory Claims*, 70 MO. L. REV. 1133, 1139 (2005) ("The published decisions that resulted were thus a complex combination of individual judgments that were distilled through a negotiation process into a decision of the court as a whole."). Some may argue that because conservatives have a three-two advantage on the Tennessee Supreme Court, they have no incentive to incorporate the opinions of the progressives on the court. However, as Professors Stuart Minor Benjamin and Bruce A. Desmarais explain, "[n]ot only do Justices prefer to render an opinion that reflects their preferences; they want their rulings to have staying power. Thus, an opinion author will prefer a ruling that is some distance away from [their] ideal holding if the moving distance increases the chance that precedent established by the opinion will survive the test of time and scrutiny." Stuart Minor Benjamin & Bruce A. Desmarais, *Standing the Test of*

talking points and losing their retention elections, Justices Clark and Lee accepted some of these minor setbacks to the Declaration of Rights.[161] Nevertheless, both vociferously dissented in *McClay*, and in so doing made clear that despite their willingness to go along with some of the weakening of the Declaration of Rights, they were not prepared to go along with dwindling the jury's role.

Regardless of the reasoning behind these developments, Tennesseans are not as protected today as they were in 2015. Through a deliberate course to take control of the State's government, the Republican Party has achieved significant policy victories in all three branches of government. It is up to each individual to determine if this is a good or bad change for the Volunteer State. Perhaps there are many who believe that preventing crime and incentivizing economic development are significant enough justifications for diminishing the Declaration of Rights. Still, there will undoubtedly be many others who believe that the rights of individual Tennesseans outweigh the government's interest in convictions and business growth.

Finally, considering that the Tennessee Supreme Court has decided to delegate the interpretation of Tennessee's Constitution to the United States Supreme Court through its reading of similar provisions of the United States Constitution, it is notable that Tennessee state rights have been lost. Typically, conservatives are concerned about the federal government reaching into the affairs of the states.[162] However, the conservatives in the Tennessee Supreme Court seem

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Time: The Breadth of Majority Coalitions and the Fate of U.S. Supreme Court Precedents, 4 J. LEGAL ANALYSIS 445, 447 (2012).

[161] Considerable scholarly research supports the conclusion that judges subject to retention or popular election are more likely to side with the majoritarian views of the electorate in the court's opinions to attempt to avoid electoral defeat. Most of these studies focus primarily on death penalty decisions, but the reasoning is likely to apply to other salient issues as well. *See* Brandice Canes-Wrone et al., *Judicial Selection and Death Penalty Decisions*, 108 AM. POL. SCI. REV. 23, 37 (2014) ("The analysis shows that the rise of expensive, policy-oriented judicial campaigns has created incentives for judges in the most low-information election environments to cater to majority sentiment . . . ."); Corrina Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 77–78 (2007) ("The point is that sociopolitical context . . . generally pushes the Justices' decision making in a majoritarian direction. The strength of that push will vary from case to case . . . ."). This theory is further buttressed by the difficult retention campaigns that both Justices Clark and Lee faced in 2014. Tyler Whetstone, *Tenn. Supreme Court Justices Face Retention Opposition*, JACKSON SUN (July 11, 2014, 12:11 AM), https://www.jacksonsun.com/story/news/local/2014/07/11/tenn-supreme-court-justices-face-retention-opposition/12512137/.

[162] *See* J.M. Balkin, *Federalism and the Conservative Ideology*, 19 URB. LAW. 459, 459–60 (1987) ("The commonly received wisdom is that states' rights are favored by conservatives, so that it was natural that the conservative Justices would be willing to scrutinize any threat to those rights carefully."). Others have observed, though, that many conservatives only seem to favor states' rights when it is convenient for their social politics. *See* David French, *Trump's Intervention in Portland Shows that the Republican Party Has Lost Its Way on States' Rights*, TIME (July 23,

eager to suppress the State's Constitution in favor of the United States Constitution. One would think that conservative jurists would push back against the relegation of Tennessee's independent Constitution to a mere formality meant to be interpreted by nine elites in Washington, D.C. Nevertheless, that is what has occurred as Tennessee is now more in lockstep with United States Constitutional interpretation.

CONCLUSION

In sum, Tennesseans are losing their rights as they have traditionally been read by the Tennessee Supreme Court. This has been a steady progression since 2016; indeed, as this Article has shown, the court has stripped or diminished four separate rights of Tennesseans in less than half a decade. The trend of a more limited state constitutional interpretation by the Tennessee Supreme Court unfortunately has been followed in other areas of Tennessee law.[163] For example, in a three-to-two decision in 2019, the court held that authorities may search the person, residence, and belongings of people on probation in the State without reasonable suspicion, or any suspicion whatsoever, solely because those individuals have waived their right to privacy as a condition of their probation.[164] Similarly, the court has continued to restrict the rights of allegedly injured Tennesseans in the context of healthcare liability by fortifying stringent pre-suit notice requirements to file medical malpractice actions and permitting doctors who fail to abide by the pre-suit notice statute themselves to avoid liability.[165] Overall, the Tennessee Supreme

2020, 4:45 PM), https://time.com/5870943/republicans-lost-states-rights/; Albert R. Hunt, *States' Rights, Depending on the Issue*, N.Y. TIMES (June 28, 2015), https://www.nytimes.com/2015/06/29/us/politics/states-rights-depending-on-the-issue.html.

[163] *See* Bidwell *ex rel.* Bidwell v. Strait, 618 S.W.3d 309 (Tenn. 2021); Martin v. Rolling Hills Hosp., LLC, 600 S.W.3d 322 (Tenn. 2020); State v. Hamm, 589 S.W.3d 765 (Tenn. 2019).

[164] *Hamm*, 589 S.W.3d at 777 ("Accordingly, a probation condition of which a defendant unquestionably is aware, coupled with the slight intrusion upon her privacy, weigh in favor of the State's interests. Therefore, we hold that probation search conditions that permit a search, without warrant, of a probationer's person, vehicle, property, or place of residence by any Probation/Parole Officer or law enforcement officer, at any time, do not require law enforcement to have reasonable suspicion.").

[165] *Bidwell*, 618 S.W.3d at 322 ("Therefore, although we conclude that the physician Defendants failed to comply with [the pre-suit notice statute], because the Plaintiff has not established extraordinary cause sufficient to excuse compliance with the pre-suit notice requirements, and in the absence of a remedy of penalty for noncompliance . . . the trial court did not abuse its discretion when it denied the Plaintiff's motions to amend based on futility."); *Martin*, 600 S.W.3d at 333, 335 (holding that prejudice to a defendant is part of the consideration of substantial compliance with the pre-suit notice statute by the plaintiffs, and finding plaintiffs failed to substantially comply when they did not satisfy every core element of a valid HIPAA authorization and thereby dismissing the injured plaintiff's case with prejudice).

Court appears content, based on its recent opinions, to support governmental and corporate interests over those of Tennesseans.

Nevertheless, it remains to be seen how the Tennessee Supreme Court will continue to interpret the State's Declaration of Rights and other protections traditionally afforded to Tennesseans. If recent history is any guide, it is probably safe to assume that Tennessee will continue to be more in lockstep with the United States Constitution and the Tennessee Supreme Court will disregard its own precedent in favor of pro-government and pro-business public policies.

Notably, near the end of the Tennessee Constitution, the framers appended a provision observing the incredible importance of the Declaration of Rights.[166] Article XI, section 16 of Tennessee's Constitution rather eloquently proclaims:

> The declaration of rights hereto prefixed is declared to be a part of the Constitution of the state, and *shall never be violated on any pretense whatever*. And to guard against transgression of the high powers we have delegated, *we declare that everything in the bill of rights contained, is excepted out of the general powers of the government, and shall forever remain inviolate*.[167]

Each reader is entitled to their own conclusion about whether the Tennessee Supreme Court's recent constitutional jurisprudence has remained faithful to the lofty ideal expressed in article XI, section 16. Yet, it is difficult to imagine that the proud individuals who drafted and ratified the Volunteer State's Constitution would have permitted the Declaration of Rights enshrined in article I to be subjugated to public policy interests like attracting corporate investment. Indeed, the framers appeared to take such policy considerations entirely out of the State Government's hands by declaring any decision—or "pretense"—that infringes on the Declaration of Rights "excepted out of the general powers of the government."[168] Even still, the Tennessee Supreme Court has undeniably weakened the Declaration of Rights over the last half decade. For many Tennesseans and observers in Washington and elsewhere, this may be a welcome modification of Tennessee constitutional law. For others, it may be a resounding alarm that Tennesseans are more susceptible to government abuses and corporate exploitation than ever before. At any rate, it can hardly be said that the protections decreed by the Declaration of Rights have remained "inviolate."[169]

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[166] TENN. CONST. art. XI, § 16.
[167] *Id.* (emphasis added).
[168] *Id.*
[169] *Id.*