THE MICHIGAN CONSTITUTION, JUDICIAL RULEMAKING, AND *ERIE*-EFFECTS ON STATE GOVERNANCE

HELEN HERSHKOFF[†]

Table of Contents

The fiftieth anniversary of the Michigan Constitution gives us an occasion to celebrate. Known as a managerial constitution because of its emphasis on executive power and administrative centralization, the Michigan Constitution has proven to be durable in significant ways.[1] Yet every anniversary also marks a time to reflect, providing an occasion to look back at past accomplishments and defeats, and to look forward to

---

† Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties, New York University School of Law. A.B., Radcliffe-Harvard College; B.A., M.A., Oxford University; J.D., Harvard Law School. This paper was prepared for the 2013 *Wayne Law Review* Symposium, "A Wave of Change: Celebrating the 50th Anniversary of Michigan's Constitution and the Evolution of State Constitutionalism," October 1, 2013, at Wayne State University Law School. I thank Sophia Cinel, Sean Petterson, Isaac Sasson, and Melissa Siegel, students at NYU School of Law, for research assistance; Gretchen Feltes and Jessica Freeman for library support; and Robert Anselmi for administrative assistance. As always, I benefited from conversation with Stephen Loffredo; I also am grateful to Oscar G. Chase, Lawrence Friedman, James Gardner, Justin Robert Long, Troy McKenzie, Linda Silberman, Steven Steinglass, G. Alan Tarr, and Robert Williams for helpful comments. Support for this project came from The Filomen D'Agostino and Max E. Greenberg Research Fund and is gratefully acknowledged. The title owes a debt to Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1785-86 (1997) (coining the term "*Erie*-effect" to refer to legal developments that significantly alter institutional understandings).

1. *See* SUSAN P. FINO, THE MICHIGAN STATE CONSTITUTION 28 (2011) (referring to Michigan's "rich and unique constitutional heritage").

future challenges. In that spirit, this essay reflects upon a provision of the Michigan Constitution that may seem quite distant from managerialism and gubernatorial power. Specifically, I look at Article VI, Section 5, which provides that the state's supreme court shall create rules of practice and procedure for the courts of the state.[2] Like many structural features of a state constitution, Section 5 has no analogue in the federal Constitution;[3] to the contrary, the power of Congress over federal rules of procedure is well accepted.[4] In Michigan, by contrast, the state constitution assigns procedural rulemaking to the court system—a conferral of authority that long preceded the 1963 Constitution and has served as a model to other states.[5]

Looking back, I examine the evolution of the state judicial rulemaking power. In particular, I argue that the Michigan Supreme Court's lack of institutional capacity before the 1963 Constitution created space for the legislature to adopt statutory rules of procedure that the judiciary accepted and enforced.[6] Even before 1963, the Michigan Constitution consistently assigned exclusive rulemaking authority to the court.[7] Nevertheless, in practice a system of inter-branch concurrency developed: judicially devised rules of procedure coexisted with statutory procedure, but if the two came into conflict, court rules took precedence.[8] The 1963 Constitution strengthened the court's supervisory power,

2. *See* JACK B. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 3 (1977) (defining rulemaking as "court control of court practice and related matters through court-promulgated rules," and distinguishing it from the appellate practice of "significant reformulation of decisional law").

3. *See* Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1171 (1993) (observing that "many state constitutional provisions dealing with government structure have no federal analogues . . .").

4. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941) (stating that "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States . . .") (footnotes omitted). *But cf.* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1706 (2004) (stating "We know that Congress holds the cards—that it has virtually plenary power over federal procedure," but explaining the tensions that accompany use of that power).

5. 1 CITIZENS RESEARCH COUNCIL OF MICHIGAN, A COMPARATIVE ANALYSIS OF THE MICHIGAN CONSTITUTION, ARTICLES I-VII (Report No. 208, Oct. 1961); *see also id.* at VII-10 (observing that the Michigan Constitution's rulemaking provision "has been used as the model for provisions in other constitutions").

6. *Cf.* Adrian Vermeule, *The Judiciary is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 583 (2005) (positing that "[i]deal theory must always be translated through supplemental non-ideal premises about institutional capacities and performance . . .").

7. 1 MICH. PLEADING & PRACTICE § 1.3 (2d ed. 2013).

8. *Id.*

bolstering its rulemaking capacity, and in the process effectively returned primary and exclusive responsibility for rules of procedure back to the judiciary.[9] In the generation that followed adoption of the new constitution, the Michigan justices divided in their views of the scope of the judicial power vis-à-vis the other branches.[10] Moreover, the practice of rulemaking under Section 5 became embroiled with political debates concerning tort reform.[11] Despite the state's long-standing constitutional commitment to court-created procedure, the Michigan Supreme Court eventually subordinated judicially devised rules of procedure to legislative rules of procedure on the theory that the latter entails policymaking, and so substantive rules of decision take precedence.[12]

Looking forward, I explore the challenges that the court's Section 5 power might face. Consistent with my prior writings, I look at challenges that federal doctrine might indirectly pose to the independent interpretation of a state constitutional provision even when it lacks any federal analogue. In earlier articles, I have discussed the ways in which federal doctrine inadvertently and unnecessarily constrains state courts to underutilize state constitutional authority involving socio-economic rights[13] and the judicial power.[14] Arguably, the Michigan Supreme Court's increased deference to legislative procedure already reflects the pervasive influence of federal doctrine which long has questioned the legitimacy of federal common law procedure and requires an explicit statutory delegation of rulemaking authority to the judiciary. In this Article, I consider a related but somewhat different question: whether the *Erie/Hanna* doctrine[15]—the federal doctrine governing when state law governs in a federal lawsuit, and when in this setting a federal procedural rule displaces a state procedural rule—might influence the apportionment

---

9. *See id.*

10. *See* Cynthia Person & Susan Jezewski Evans, *Constitutional Law*, 52 WAYNE L. REV. 435, 436 (2006) (referring to a "deep division" within the Michigan Supreme Court manifesting during the survey period 2004-2005 "over the scope of its judicial power").

11. *See, e.g.*, Steve Fox, Note, *Constitutional Roadblocks to Michigan's Cap on Non-Economic Damages in Product Liability Suits*, 47 WAYNE L. REV. 1385, 1401-02 (2002) (discussing disagreements about statutory damage caps, separation of powers, and judicial control over procedure).

12. *See* MICH. PLEADING AND PRACTICE, *supra* note 7.

13. Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923 (2011); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

14. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001).

15. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Hanna v. Plumer, 380 U.S. 460 (1965).

of rulemaking power among the different branches of government in Michigan. My hunch is that decisions in federal diversity suits preempting Michigan procedural rules in favor of federal rules will further "federalize" procedural rulemaking in Michigan by encouraging a more thoroughgoing shift in rulemaking power from the judiciary to the legislature.[16] By changing the boundary between state judicial and state legislative authority, the federal court's application of the *Erie/Hanna* doctrine also indirectly could reshape substantive decision-making and the content of state policy. Although my focus is Michigan, the analysis applies to any state in which the state constitution assigns procedural rulemaking authority to the court and not to the legislature; indeed, the analysis may even have broader implications. In contributing this reflection, my goal is to raise issues pertinent to state constitutions that so far have been ignored in the literature. I acknowledge that I raise more questions than I answer.

I. THE MICHIGAN CONSTITUTION AND EXCLUSIVE JUDICIAL RULEMAKING

Article VI of the 1963 Michigan Constitution governs the state judicial branch, one of the three branches of government recognized by the state constitution.[17] The article includes thirty sections, covering such topics as a unified court system,[18] legislative control over jurisdiction,[19] selection of Michigan Supreme Court justices by election,[20] and the qualifications of judges.[21] Section 4 grants the supreme court power of "general superintending control over all courts," excluding only the power to remove judges and justices from office.[22] Relatedly, Section 5 provides that the supreme court "shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of" the state.[23]

---

16. *See generally Erie*, 304 U.S. at 77.

17. MICH. CONST. art. IV (legislative branch); MICH. CONST. art. V (executive branch).

18. *Id.* at art. VI, § 1 (providing that "[t]he judicial power of the state is vested exclusively in one court of justice . . .").

19. *Id.* (providing that the legislature "may establish" courts of limited jurisdiction by a two-thirds vote).

20. *Id.* at art. VI, § 19 (providing that justices and judges of courts of records must be licensed to practice law in the state).

21. *Id.* at art. VI, § 2 ("The supreme court shall consist of seven justices elected at non-partisan elections as provided by law.").

22. *Id.* at art. VI, § 4.

23. MICH. CONST. art. IV, § 5.

Writing in 1968 about the adoption of the 1963 Constitution, Albert L. Sturm observed, "No set of issues in the constitutional convention received more attention in plenary debate than those involved in rewriting the judicial article."[24] The major questions concerned judicial selection methods and court organization, including jurisdiction and unification of a highly disparate judicial system.[25] The vigor of debate among the twenty-one members of the judiciary committee ran along party lines, with the Republicans in the majority and the Democrats in the minority.[26] Partisanship and interest-group politics were rife at the convention,[27] and although revision of the judicial article was less salient than that of taxation and legislative apportionment, discussion about court organization was not immune from factional disagreement.[28] The

---

24. ALBERT L. STURM & MARGARET WHITAKER, IMPLEMENTING A NEW CONSTITUTION: THE MICHIGAN EXPERIENCE 132 (1968).

25. *See* ALBERT LEE STURM, CONSTITUTION-MAKING IN MICHIGAN, 1961-1962, at 23 (1963) (stating that in the 1950s, "[w]ith respect to the judiciary, the most controversial problem was the method of selecting judges; other judicial issues of magnitude involved organization, jurisdiction and unification of courts").

26. *See* JAMES K. POLLOCK, MAKING MICHIGAN'S NEW CONSTITUTION 1961-1962, at 20 (1962). Professor Pollock criticized the composition of the judiciary committee, which included twenty lawyers and one pharmacist; in his view, intra-committee disagreements produced an "inability to ever agree" on substantive reform. He also expressed the view that the pharmacist was on the committee "to provide aspirin to the others!" *Id.* For a discussion of inter- and intra-party disagreements at the convention, see STURM, *supra* note 25, at 103-12. Sturm recounts the following from the convention:

> After several hours of debate on the judicial article, principally by the lawyer delegates, delegate Koeze made this suggestion: "Let's lock up the lawyers here tonight until they decide on the judicial article. If they can't agree, then let's lock them out and let the laymen decide." The idea was greeted with applause.

Id. at 202 n.85 (citing THE ANN ARBOR NEWS, 12 (Feb. 24, 1962)).

27. *See* STURM, *supra* note 25, at 127 (stating that "the fact of the political nature of constitution-making in the 1961-62 Michigan constitutional convention bears repetition and emphasis").

28. *See id.* at 154-56 (stating, based on responses to a preconvention questionnaire, that Republican delegates "assigned more importance to judicial issues" than did Democratic delegates, but for both, "these changes were clearly of less potential importance than apportionment and financial matters."). Republican delegates favored the establishment of a unitary court system; Democratic delegates opposed the ban on executive appointments to fill judicial vacancies and also efforts to make the selection process in general one of appointment rather than election. *See* POLLOCK, *supra* note 26, at 55 (attributing the "failure to achieve an appointed judiciary" to the refusal of "Democratic delegates to support the moderate Republicans"). The State Bar of Michigan took no official position on the new constitution, but its committee on judicial selection and tenure nevertheless endorsed the new judicial article. *See* STURM & WHITAKER, *supra* note 24, at 8-9. It appears that no group questioned the assignment of rulemaking power to the court system.

constitution that emerged from the convention has been called a "conservative measure";[29] the term aptly describes the new constitution's judicial article in the sense of its retaining features of the court system that had existed under earlier constitutions.[30] The selection of supreme court justices by election, introduced into Michigan law by the 1850 Constitution, remained in place.[31] The assignment of rulemaking authority to the Michigan Supreme Court, which also dated to 1850, likewise remained,[32] and the language of the 1963 version of Section 5 is virtually the same as that of the state's earlier constitutions.[33]

Nevertheless, the new rulemaking power was no mere carbon copy of earlier editions. Significantly, Section 5 was now coupled with constitutional provisions that strengthened the Michigan Supreme Court's supervisory power over subordinate courts and integrated those courts into a unified system with a new intermediate appellate court.[34] Moreover, although the new constitution made no major change to the powers of the courts, it gave the supreme court authority over the judicial budget and control of the statutorily-created State Court Administrative Office.[35] The new Article VI of which Section 5 is a part thus reflects many features of the managerial model described by Daniel J. Elazar in

29. *See* STURM, *supra* note 25, at 279 (calling the new constitution "a conservative instrument, although it also introduces new concepts in Michigan government."); *see also* POLLOCK, *supra* note 26, at 70 ("The committee members were unable to agree among themselves . . . . We have essentially the same kind of a court system that we have had.").

30. POLLOCK, *supra* note 26, at 70.

31. *See* Robert A. Sedler, *The Selection of Judges in Michigan: The Constitutional Perspective*, 56 WAYNE L. REV. 667 (2010) (discussing the history of judicial selection in Michigan); *see also* STURM, *supra* note 25, at 4 (calling the election of supreme court justices "[o]ne of the most significant innovations" of the 1850 Constitution).

32. FINO, *supra* note 1, at 132 (stating that judicial rulemaking authority was included in the 1850 Michigan Constitution).

33. Earlier versions of the rulemaking power are set out in: MICH. CONST. art. VI, § 5 (1850) ("The supreme court shall, by general rules, establish, modify, and amend the practice in such court and in the circuit courts, and simplify the same."); MICH. CONST. art. VI, § 5 (1867) ("The Supreme Court shall, by general rules, establish, modify and amend its practice, and may also make all rules that may be necessary for the exercise of its appellate jurisdiction."); MICH. CONST. art. VII, § 5 (1908) ("The supreme court shall by general rules establish, modify and amend the practice in such court and in all other courts of record, and simplify the same.").

34. *See* POLLOCK, *supra* note 26, at 53 (emphasizing the extent to which the new judicial article "greatly strengthened the supervisory and superintending power of the Supreme Court and . . . made our court system a distinctly integrated system"). The supreme court's power to supervise inferior courts is set out in a separate section. *See* MICH. CONST. art. VI, § 4.

35. MICH. CONST. art. VI, § 3.

his canonical article about the varieties of state constitutional tradition.[36] Associated with Alexander Hamilton's conception of a strong executive with centralized authority,[37] the managerial model emphasizes what Elazar called "rational administration within a hierarchical system."[38] The new constitution's reorganization of the executive branch marked a partial victory for this approach,[39] and a similar quality of managerialism informs Article VI.[40]

When the 1963 Constitution was adopted, the unified court system was still a procedural innovation; at the time of the convention, only the constitutions of Alaska and Puerto Rico and the then-proposed constitution of New York specified a unitary court.[41] By contrast to the court system established under the 1908 Constitution, the new Article VI established a five-tier unitary judiciary with the supreme court at the top, an intermediate court of appeals, a trial court of general jurisdiction, a probate court, and limited-jurisdiction courts that the legislature had authority to establish; justices of the peace were abolished as courts of

---

36. Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS: J. OF FEDERALISM 11, 13 (1982) (identifying a Whig, Federalist, and managerial model of state constitution).

37. ROBERT S. FRIEDMAN, THE MICHIGAN CONSTITUTIONAL CONVENTION AND ADMINISTRATIVE ORGANIZATION: A CASE STUDY IN THE POLITICS OF CONSTITUTION-MAKING 8 (1963) (describing the "Hamiltonian approach" and its significance for constitutional revision of the executive branch in Michigan).

38. Elazar, *supra* note 36, at 13.

39. FRIEDMAN, *supra* note 37, at 133 (positing that the 1963 Constitution marked "the partial victory of the strong responsible executive, rather than total victory or total defeat"). Candidates for delegates to the convention were asked to rank particular issues relative to their relationship to executive reorganization. A unified judicial organization and administration ranked eighth, with elected Republicans ranking the issue fifth and elected Democrats ranking the issue tenth. By contrast, legislative reapportionment ranked first in all categories. *See id.* at 23 (Table 1: "Ranking of Importance of Selected Issues in Con-Con").

40. The Citizens' Advisory Committee's Report to the Governor, which proposed a revised judicial article, urged unifying the courts, strengthening the supreme court's supervisory authority, and retaining in the legislature power to control jurisdiction. The advisory report informed the governor that it anticipated "long-range benefits" from judicially superintended unification in terms of prompt adjudication, attention to specialized concerns such as juvenile affairs, and flexibility. *See* CITIZENS' ADVISORY COMMITTEE REPORT: THE JUDICIAL DEPARTMENT, CITIZEN'S ADVISORY COMMITTEE PREPARED FOR THE GOVERNOR, JOHN B. SWAINSON, STATE OF MICHIGAN 1 (1961), *available at* http://www.hathitrust.org/access_use#pd-google; *see also* POLLOCK, *supra* note 26, at 75 (emphasizing that the new constitution "preserved and strengthened" the superintending power of the supreme court, "thus further insuring judicial independence"); *id.* at 53 (observing that with respect to judicial supervisory power, "Michigan has always been above most states in this regard, but this Constitution goes further to strengthen this supervisory power").

41. CITIZENS ADVISORY COMMITTEE REPORT, *supra* note 40, at 2.

record.[42] The revised article abolished the fee system, and instead required uniform compensation within a district.[43] Retaining past practice, the 1963 Constitution authorized the legislature to regulate jurisdiction, but added a new provision permitting the supreme court to render advisory opinions.[44] The supreme court's authority over procedure extended not only to rules of practice, but also to intra-court rules (pertaining to such matters as judicial terms and sittings).[45] Overall, reform strengthened judicial capacity with an eye toward improving the administration of justice and securing judicial independence.[46]

Michigan's constitutional tradition of judicial rulemaking placed it in a minority of the states but in the vanguard of procedural reform.[47] The history of judicial rulemaking and the important debates that accompany this topic mark one of the great issues of civil justice,[48] discussed by legal giants[49] such as John Henry Wigmore,[50] Roscoe Pound,[51] Benjamin Kaplan,[52] and of course Michigan's favorite son Edson R. Sunderland.[53] When the convention leading to the 1963 Constitution opened, the constitutions of only a handful of states other than Michigan provided for judicial rulemaking, and Michigan's constitutional provision was among

---

42. Adam D. Pavlik, *Concurrent Jurisdiction and 50 Years of Michigan's "One Court of Justice,"* 92-JUL MICH. B.J. 16, 16-17 (2013) (discussing the establishment of a unitary court system under the 1963 Constitution).

43. *Id.*

44. MICH. CONST. art. III, § 8.

45. *See* STURM, *supra* note 25, at 201-10 (summarizing amended Article VI).

46. POLLOCK, *supra* note 26, at 75.

47. For a bibliography that antedates adoption of the Federal Rules of Civil Procedure, see Tyrrell Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U. L.Q. 459, 467 (1936-1937).

48. *Id.* at 464, 505 n.159.

49. *See* Richard L. Marcus, *Reform Through Rulemaking?*, 80 WASH. U. L.Q. 901, 901 (2002) (referring to Jeremy Bentham, David Dudley Field, and Roscoe Pound as "giants [who] trod the soil of rulemaking"); *see also* Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The Views of Two Co-Authors*, 78 GEO. WASH. L. REV. 9, 25-29 (2009) (discussing the "giant" theory of rulemaking).

50. John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928-1929).

51. Roscoe Pound, *Regulating Procedural Details by Rules of Court*, 13 A.B.A. J. 12 (1927); *see also* Roscoe Pound, *Regulation of Judicial Procedures by Rules of Court*, 10 ILL. L.R. 163 (1915-1916).

52. Benjamin Kaplan & Warren J. Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234 (1951-1952).

53. Jason L. Honigman, *Edson R. Sunderland's Role in Michigan Procedure*, 58 MICH. L. REV. 13 (1959-1960).

the longest standing.[54] By contrast to rulemaking provisions in other state constitutions,[55] the Section 5 power is subject to no explicit constitutional restriction.[56] Unlike the constitution of Virginia, for example, the Michigan Constitution textually does not mandate that court rules "not be in conflict with the general law";[57] unlike the constitution of South Carolina, the Michigan Constitution textually does not make the rulemaking power "[s]ubject to the statutory law."[58] The closest textual analogue to the Michigan provision may be that of New Jersey, characterized by Professor Leo Levin and the young Anthony Amsterdam as "uncontrolled and uncontrollable rule-making power."[59]

---

54. Commentators differ on how many state constitutions historically have provided for judicial rulemaking. *See* Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 625 n.13 (1957) (referencing Maryland, Missouri, and New Jersey); A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 5 (1958) (stating that since 1945, new constitutions in "Alaska, Florida, Georgia, Missouri, New Jersey and Puerto Rico" have "expressly granted" rulemaking power to the highest court in the state). A 1973 article states that only two states, New Jersey and Florida, constitutionally conferred rulemaking authority on the state supreme court. *See* James P. Harvey, *Michigan Constitutional Law—Power of the Supreme Court to Modify Substantive Law by Rule-Making Authority*, 20 WAYNE L. REV. 233, 234 n.8 (1973). *See generally* James R. Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U. MIAMI L. REV. 507, 512 (2002) ("Since at least 1945, the overwhelming trend has been to grant specific constitutional authority for rulemaking to the judiciary."); Abraham Gertner, *The Inherent Power of Courts to Make Rules*, 10 U. CIN. L. REV. 32 (1936) (including an appendix of constitutional provisions related to judicial rulemaking).

55. Amanda G. Ray, *The Supreme Court of North Carolina's Rulemaking Authority and the Struggle for Power:* State v. Tutt, 84 N.C. L. REV. 2100, 2105 (2006) (observing that many state constitutions specify that court rules "must not conflict with any state legislative provision"); *see also* Levin & Amsterdam, *supra* note 54, at 36-42 (identifying possible legislative restrictions on court rulemaking authority).

56. *See* Harvey, *supra* note 54, at 236 ("In Michigan there is absolutely no check on the judicial rule-making power."); *see also* Charles W. Joiner, *The Judicial System of Michigan*, 38 U. DET. L.J. 505, 521 (1960-1961) (referring to the pre-1963 rulemaking power of the Michigan court as "the broadest possible" power). *But see* Joiner & Miller, *supra* note 54, at 634 (discussing the Michigan Constitution and stating that "[i]t is fundamental that court rules cannot contravene constitutional provisions, extend or abridge jurisdiction of the court over the subject matter, abrogate or modify substantive law").

57. VA. CONST. art. VI, § 5.

58. S.C. CONST. art. V, § 4.

59. Levin & Amsterdam, *supra* note 54, at 24 (stating that "Wigmore, Pound and Vanderbilt, an imposing triumvirate, can be credited with placing that jurisdiction in the class of those which grant rule-making power to the supreme court without the possibility of legislative veto"). *See* Roscoe Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952) (commending the New Jersey approach as "in the lead among American jurisdictions"). *But see* State v. Byrd, 967 A.2d 285 (N.J. 2009)

Convention delegates also specifically considered and rejected a provision that would have subordinated judicial evidence rules to statutes.[60] Michigan's broad constitutional grant is further bolstered by a theory of inherent authority that the Michigan Supreme Court articulated early in its history.[61]

II. JUDICIAL RULEMAKING AND THE PRACTICE OF LEGISLATIVE CONCURRENCY

The Michigan Supreme Court's rulemaking power under Section 5 theoretically has been capacious dating back to the 1850 Constitution. In practice, however, the court's early rulemaking activity was limited and generally thought to be inadequate.[62] The supreme court was established in 1835, and initially the legislature conferred rulemaking power on it.[63] The source of the court's authority changed, however, with the 1850 Constitution, which revised the judicial article and assigned rulemaking

---

(declining in criminal appeal to announce a forfeiture-by-wrongdoing rule and instead deferring to the procedures set forth in the State Evidence Act for enactment of evidentiary rules).

60. *See* STATE OF MICHIGAN CONSTITUTIONAL CONVENTION, 1 OFFICIAL RECORD 1259 (Austin C. Knapp ed., 1961) (rejecting amendment to Section 5 that would have added at the end of the provision, "it being provided that where there is a conflict between supreme court rule and a statute concerning evidence of substantive law the statute shall prevail"). Delegates rejected the amendment by a vote of seventy-five to thirty-two. *See* Allen L. Lanstra, Jr., McDougall v. Schanz: *Distinguishing the Authorities of the Michigan Legislature and the Michigan Supreme Court to Establish Rules of Evidence*, 2000 L. REV. MICH. ST. U. DET. C.L. 857, 860 (2000). *But see* McDougall v. Schanz, 597 N.W.2d 148, 157 (Mich. 1999) (construing the convention debate and the delegates' rejection of a textual limit upon the Section 5 power as evidence that Section 5 conforms to the rejected limitation).

61. Joiner & Miller, *supra* note 54, at 626 (discussing the twin bases of judicial rulemaking power in Michigan such that "there is no need for enabling legislation granting rule-making power to that court"). Thus, in Jones v. E. Mich. Motorbuses, 283 N.W. 710, 719 (Mich. 1939), the Michigan Supreme Court emphasized: "While courts are very generally authorized by statute to make their own rules for the regulation of their practice and the conduct of their business, a court has, even in the absence of any statutory provision or regulation in reference thereto, inherent power to make such rules." The court went on, however, to articulate a principle of self-restraint: "This power is, however, not absolute but subject to limitations based on reasonableness and conformity to constitutional and statutory provisions." Tomlinson v. Tomlinson, 61 N.W.2d 102, 103 (1953) (upholding pretrial discovery rules as a matter of "inherent as well as constitutional rulemaking power" to similar effect).

62. Historical material in this section largely draws from Joiner, *supra* note 56; SCOTT A. NOTO, MICHIGAN SUPREME COURT HISTORICAL SOCIETY, A BRIEF HISTORY OF THE MICHIGAN SUPREME COURT (1999) (accessed by Internet Archive WAYBACK MACHINE on August 9, 2013) [hereinafter *A Brief History*].

63. *See A Brief History*, *supra* note 62.

power to the supreme court. However, until 1857 the supreme court existed only as an ad hoc tribunal staffed by eight judges of the circuit courts and was not institutionally equipped to attend to procedural rulemaking.[64] In 1858, the legislature reorganized the court, and it grew institutionally stronger under the leadership of "the Big Four," Randolph Manning, Isaac P. Christiancy, James V. Campbell, and Thomas M. Cooley, who sat together from 1868-1875.[65] Nevertheless, rulemaking during this period remained a judicial afterthought, with commentators viewing the court's efforts as "sporadic, piecemeal, and incomplete."[66] Following the legislature's enactment of the Judicature Act of 1915, the state supreme court adopted the 1916 Court Rules, drafted by the Committee of the Michigan State Bar of which Edson R. Sunderland was a member.[67] The statute admonished the court to revise its procedural rules every two years to promote "improvements in the practice," but the mandate—perhaps lacking a firm constitutional basis—was honored in the breach.[68]

Throughout its first century of existence, the Michigan Supreme Court is acknowledged to have suffered from institutional defects that impeded its ability to develop comprehensive rules for the dispersed court system that existed.[69] This position of weakness appears to have created an administrative vacuum that the legislature in part filled; in practice the legislature exercised concurrent but interstitial authority over court procedure.[70] Indeed, interstitial does not truly describe the scope of legislative rulemaking; beginning with the 1837 Fletcher Code and at least until 1930, the legislature enacted the majority of rules for court

64. FINO, *supra* note 1, at 13.

65. *See A Brief History*, *supra* note 62, at 7-8 (referring to Justices Christiancy, Campbell, Cooley, and Graves as the "Big Four" who "sat on the bench together" from 1868-1875). *See generally* Paul D. Carrington, *Laws as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 Stan. L. Rev. 495, 495 (1997) (stating that "Cooley, a close contemporary of Dean Langdell, was in his time the premier judge, law teacher, and legal scholar in America, overshadowing not only Langdell, but his somewhat younger associate, Oliver Wendell Holmes").

66. Joiner & Miller, *supra* note 54, at 639.

67. *See* Honigman, *supra* note 53, at 16.

68. *See* Joiner & Miller, *supra* note 54, at 627, 639.

69. *Id.* at 628.

70. Writing in 1894 about the sources of rules of practice for the Michigan Circuit Court, the author stated without criticism that they derived from "statutes and rules of court." C. L. Collins, *Some Practical Suggestions for the Impovement* [sic] *of Michigan Circuit Court Practice*, 3 MICH. L.J. 187 (1894). A generation later, Edson R. Sunderland referred to "[t]he anomaly presented by this dual system of control," which "by customary observance" had become "an integral part of the procedural system." Edson R. Sunderland, *The New Michigan Court Rules*, 29 MICH. L. REV. 586, 587 (1930-1931).

practice.[71] As Professor Sunderland explained in 1931, "Since the primary and most pressing business of the supreme court was the decision of cases brought up for review, the making of rules was crowded to one side."[72] Beginning in the 1930s, the Michigan Supreme Court exercised its rulemaking power with more vigor, but its efforts by all accounts remained incomplete.[73]

The division of power between the court and legislature conventionally forms a critical feature of separation of powers, and the branches are theorized as guarding their powers with jealousy and care.[74] The Michigan Constitution since 1850 not only has demarked the state government into three branches,[75] but also bars any "person belonging to one department" from exercising "the powers properly belonging to another, except in the cases expressly provided in this constitution."[76] It might seem, therefore, that the legislature's enactment of rules of procedure fell outside constitutional limits. This conclusion, however, rests on incomplete assumptions. Admittedly, since 1850 the Michigan Constitution has treated procedural rulemaking as a judicial function.[77] But the judicial article before the 1963 Constitution also mandated the legislature to abolish the distinction between law and equity: this power, as in other states, arguably provided a constitutional wedge for aspects of the legislature's rulemaking activity.[78] In a history worthy of Charles

71. *See* Silas A. Harris, *The Rule-Making Power*, 2 F.R.D. 67, 67-68 (1943) (casting the 1850 constitutional assignment of rulemaking power to the court as an effort to block legislative innovation, but acknowledging that "for many years in Michigan whatever changes were made in procedure were made by legislative act and not by court rule in spite of this constitutional provision"); *see also* Joiner, *supra* note 56, at 526.

72. Sunderland, *supra* note 70, at 586.

73. Joiner, *supra* note 56, at 527 (referring to the court's rules as "piecemeal").

74. *See* Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 359 (2000) ("State courts have long been vigorous defenders of the constitutionally vested 'judicial power' against perceived legislative encroachments.").

75. MICH. CONST. art. III, § 1 (1850) ("The powers of government are divided into three departments: The Legislative, Executive and Judicial.").

76. *Id.* at art. III, § 2 (1850) ("No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.").

77. *Id.*

78. *See, e.g.*, MICH. CONST. art. VII, § 5 (1850) ("The legislature shall, as far as practicable, abolish distinctions between laws and equity proceedings."). Equity refers here not to principles of natural law, but to the law that developed in the courts of equity as distinct from the common law courts. *See* Wesley Newcomb Hohfeld, *The Relations Between Equity and Law*, 11 MICH. L. REV. 537, 546 (1913) (discussing the position of equity in the legal system and emphasizing that it is "not to be confused with equity in the sense of natural justice").

Dickens's *Bleak House*,[79] the 1835 Constitution established the court of law and a parallel court of chancery, from which an appeal could be taken to the supreme court. Eleven years later, the Revised Statutes almost eliminated the separate equity court, but instead merely eliminated the office of chancellor, allowing the equity court to continue its work rather than transferring its cases to the law side of the judiciary. Chief Justice Whipple of the Michigan Supreme Court, writing in 1848, pronounced that "our whole judicial system has become so complex, and the laws establishing the system so inartificially drawn, as to produce almost inextricable confusion."[80] The 1850 Constitution ended the separate court and no longer characterized a court as one of law or chancery, but the equity-law distinction carried residual and important procedural and substantive effects.[81] The 1850 judicial article made the legislature responsible for abolishing the distinction, and convention debates suggest that the delegates conferred this authority in order to safeguard against judicial inactivity; Professors Joiner and Miller called the legislature's power in this area concurrent with that of the judiciary, and "to be utilized in case the supreme court did not act."[82] This history suggests that statutory rulemaking, particularly as it related to pleading, did not usurp judicial power, but rather fit comfortably within the constitution's mandate that the legislature work to merge law and equity as they related to jurisdiction and practice.[83]

Yet even during this early period the Michigan Supreme Court did not give the legislature carte blanche over procedural rules. To the contrary, the court resisted applying legislative procedure that it regarded as encroaching upon judicial independence, as interfering with judicial administration, or as curtailing the judge's power in the individual case. Famously, in *In the Matter of Head Notes to Opinions*, the justices of the Michigan Supreme Court—Marston, Campbell, Graves, and Cooley—wrote to the Governor to explain why a statute requiring them "to prepare and file a syllabus to each and every opinion by them delivered"

---

79. CHARLES DICKENS, BLEAK HOUSE 19 (Signet 1964) (1853) (stating with respect to the High Court of Chancery, "Suffer any wrong that can be done you rather than come here!").

80. Joiner, *supra* note 56, at 510 (quoting Hiney v. Cade, 1 Mich. 163, 165 (1848)).

81. *See A Brief History*, *supra* note 62, at 3-7.

82. Joiner & Miller, *supra* note 54, at 638.

83. *See, e.g.*, Sunderland, *supra* note 70, at 589 (discussing incorporation of equity pleading to actions at law). *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 931 (1987) ("The nineteenth century found legislators in both England and American [sic] playing an increasing role in law making, including the passage of laws regulating court procedures . . . .").

was unconstitutional and would not be enforced.[84] The justices stated that the statute was inconsistent with Article VI, Section 10 of the state constitution, granting the supreme court power to appoint a reporter.[85] Although the legislature had power to define the reporter's responsibilities, the justices wrote, the legislature lacked power to abolish the reporter's position indirectly by eliminating the office's "essential duties."[86] The 1925 opinion *Stepanian v. Moskovitz*,[87] a litigated suit involving a breach of vendor contract, was to similar effect. Here, the Michigan Supreme Court held that a judge's failure to file a decision within sixty days after a motion, as required by the Judicature Act,[88] did not divest the court of jurisdiction; at most, the statutory rule was "'directory merely'" upon judicial proceedings and not mandatory.[89] The supreme court also limited the power of inferior courts to devise local rules that encroached upon the legislature's authority over substantive law.[90] When, in 1931, the Michigan Supreme Court adopted more wide-ranging court rules,[91] the court codified the pragmatic position that legislative rules "not in conflict" with court rules would be "deemed to be in effect until superseded by rules adopted by the supreme

---

84. 8 N.W. 552 (Mich. 1881).

85. *Id.* at 552.

86. *Id.* at 552. For a critical comment, see W. F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137, 162 (1919) (stating that Cooley's "reputation as a judge would be not nearly so great as it deservedly is, were he to be judged by . . . the communication [in] *In the Matter of Head Notes*").

87. 206 N.W. 359 (Mich. 1925).

88. Pub. Act No. 314, Reg. Sess. (Mich. 1915) (repealed 1961).

89. *Stepanian*, 206 N.W. at 361-62 (citing Rawson v. Parsons, 6 Mich. 401, 406 (1859)). A concurring opinion went further and questioned the legislature's authority, notwithstanding its power over jurisdiction, to impose time limits upon judicial activity:

> A spurring to prompt decision may be praiseworthy, but spurs can only be applied by a rider, and the Legislature does not occupy the judicial saddle.
>
> The statute expresses a commendable ideal, and spends its whole force in the utterance thereof. It does not punish litigants for delay excusable or inexcusable by the judge, and does not and could not provide departure of judicial power from the judge.
>
> It is a legislative intimation of a promptness most desirable, entitled to respect as such, but in no sense a mandate regulating rights and remedies.

Stepanian, 206 N.W. at 362 (Wiest, J., concurring).

90. *See* Shannon v. Cross, 222 N.W. 168 (Mich. 1928) (concerning a mandamus action against circuit judge to bar enforcement of court rule barring contingent fee contracts when litigant was unable to give security for costs).

91. *See* Edwin C. Goddard, THE UNIVERSITY OF MICHIGAN AN ENCYCLOPEDIC SURVEY IN NINE PARTS, PART V: THE MEDICAL SCHOOL, THE UNIVERSITY HOSPITAL, THE LAW SCHOOL 1850-1940, at 1032-33 (Wilfred B. Shaw ed., 1951) (discussing the history of the 1931 court rules and Sunderland's role in their development and promulgation).

court."[92] This position became settled doctrine around mid-century.[93] The arrangement allowed the legislature to fill in procedural gaps in court rules; however, statutory procedure remained subject to judicial review and the court was assumed to have constitutional superiority.[94]

The 1963 Constitution, by strengthening the judiciary, was understood to shift primary responsibility over rulemaking back to the Michigan Supreme Court—not only as a formal constitutional mandate, but also in practice.[95] A study paper prepared in 1957 for the Committee on Michigan Procedural Revision, created jointly by the Michigan Legislature, the Michigan Supreme Court, and the Michigan State Bar, commended the legislature's earlier practice of adopting procedural rules as an excellent example of inter-branch cooperation even as the authors proposed continued constitutional assignment—and exclusive assignment—of rulemaking authority to the supreme court.[96] The Committee's final report contained a draft set of court rules for judicial promulgation,[97] and in the run-up to the 1963 Constitution, the supreme court in 1961 adopted the Michigan General Court Rules of 1963 (revised the next year to add rules for the new court of appeals).[98] Writing in 1968 about efforts to implement the new constitution, Albert L. Sturm observed that although "the legislature was assigned certain responsibilities for filling in the basic court structure, establishing jurisdiction, and providing other standards and guidelines," the supreme court now had "a major role in implementing the judicial article," and that its principal duties included "promulgation of rules of practice and

92. MICH. CT. R. 1, § 3 (1931).

93. *See, e.g.*, Love v. Wilson, 78 N.W.2d 245, 247 (Mich. 1956) (finding that the statutory equity rule pertaining to party-status of bank was an "effective rule of practice" because it was "not in conflict with any rule of court").

94. MICH. CT. R. 1, § 3 (1931).

95. For example, Article VI, Section 5 continued to call for the abolition "as far as practicable" of the distinction between law and equity proceedings, but it omitted any reference to the legislature. *See* MICH. CONST. art. VI, § 5.

96. Joiner & Miller, *supra* note 54, at 623 n.†; *see also* Joiner, *supra* note 56, at 520 (explaining that "rules made by the [Michigan] legislature are often piecemeal in nature and are enacted as a result of political pressure without an over-all consideration of the problem of judicial administration").

97. *See* Joiner, *supra* note 56, at 531 (citing JOINT COMMITTEE ON MICHIGAN PROCEDURAL REVISION, FINAL REPORT (1960)).

98. *See* Joiner & Miller, *supra* note 54, at 639 (discussing judicial promulgation of court rules in different years since the 1850 Constitution); *see also* Richard S. Miller, *Civil Procedure*, 9 WAYNE L. REV. 9, 9 (1962-1963) (describing the rules as "an extensive revision and modernization of Michigan practice and procedure").

procedure for all courts."[99] Court Rule 16 reaffirmed that statutory court rules would be applied unless in conflict with judicial rules.[100]

III. PROCEDURAL CONFLICT AFTER THE 1963 CONSTITUTION AND THE FEDERALIZATION OF SECTION 5

On the heels of the new constitution's ratification, the Michigan Supreme Court confronted whether a statutory rule of evidence was applicable under Court Rule 16 or rather preempted as inconsistent with judicial rules. *Perin v. Peuler*,[101] an automobile accident case, pitted a provision of the Michigan Vehicle Code—that barred the admissibility in a later civil suit of a prior vehicular conviction—against a common law rule of evidence.[102] The court implicitly acknowledged its earlier passive acceptance of legislative procedure: "Not until recent years," recited the majority opinion, "has this Court paused for reflection upon its constitutional position vis-à-vis the legislative branch . . . when that branch assumes to enact rules of practice and procedure, which rules include, of course, the rules of evidence."[103] By contrast, the court now made clear that statutory procedure by definition encroaches upon the judicial power, and would be treated as presumptively unconstitutional absent judicial consent—which the court had provided through its enactment of Court Rule 16.[104] As the court explained, the "function of enacting and amending judicial rules of practice and procedure has been committed exclusively to this Court [by the Constitution]"; it "is a function with which the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will."[105] In this case, although the statutory evidence rule formed part of the substantive Vehicle Code, procedurally it applied to issues of impeachment and credibility in all civil actions and to all parties and

99. STURM & WHITAKER, *supra* note 24, at 30.

100. *See* MICH. GEN. CT. R. 16 (1963) ("Rules of practice set forth in any statute, not in conflict with any of these rules, shall be deemed to be in effect until superseded by rules adopted by the Supreme Court."). Partisan disagreement erupted when the Supreme Court promulgated a rule requiring the appointment of free legal counsel to indigents accused of misdemeanors facing ninety-day or more jail terms, and the court repealed the rule. *See* STURM & WHITAKER, *supra* note 24, at 68.

101. 130 N.W.2d 4 (Mich. 1964).

102. MICH. COMP. LAWS ANN. § 257.731 (Supp. 1956) ("No evidence of the conviction of any person for any violation of this chapter or of a local ordinance pertaining to the use of motor vehicles shall be admissible in any court in any civil action.").

103. *Perin*, 130 N.W.2d at 13.

104. *Id.* at 9-10 (stating that "if it were not for protective and adoptive Rule 16, said section 731 would be vulnerable to constitutional attack").

105. *Id.* at 10.

witnesses.[106] As such, the statute was said to have "effectively 'repealed,' in substantial part" one of the court's "oldest and most valuable rules of evidence" and so marked a "bold dictation to the judicial branch" that overreached legislative authority.[107] Holding that the statutory evidence rule was entitled to no effect, the court announced that it would exercise its rulemaking power to clarify prospectively the preemptive force of its decision.[108] At the time of its decision, *Perin* drew some academic fire: Professors Joiner and Miller earlier had raised questions about the Michigan court's authority to enact rules of evidence; their argument drew a distinction between rules that affect judicial administration and those that implicate public policy.[109] Building on that distinction, Roger A. Needham, writing in the *Wayne Law Review*, challenged whether the court's constitutional rulemaking power extends to rules of evidence.[110] Notwithstanding these criticisms, the Michigan Supreme Court went on to promulgate Court Rule 607 dealing specifically with the admissibility of vehicular convictions.[111]

Little more than a decade later the court considered whether Court Rule 607 preempted a statutory evidence rule that barred admissibility of a vehicular criminal conviction in a later civil suit.[112] In *Kirby v. Larson*,[113] famous in Michigan for its adoption of the doctrine of comparative negligence, the court somewhat refined its approach to

106. *See id.*

107. *Id.*

108. *Id.* at 10-11. The court announced its intent to take "corrective action" to amend its court rules to provide: "During the trial of civil actions the rules of evidence, including the right of cross-examination for credibility, shall remain in full force and effect, section 731 of the Michigan vehicle code . . . to the contrary notwithstanding." *Id.* at 11 n.6.

109. *See* Joiner & Miller, *supra* note 54, at 635.

110. Roger A. Needham, *Civil Procedure*, 12 WAYNE L. REV. 40, 57 (1965-1966) (treating evidence rules as substantive and urging the court to respect legislative policy judgments even if they lack "sagacity").

111. Court Rule 607 provided:

> During the trial of civil actions the rules of evidence approved in Van Goosen v. Barlum, 214 Mich. 595; Zimmerman v. Goldberg, 77 Mich. 134; Zimmerman v. Goldberg, 277 Mich. 134, [268 N.W. 837]; Socony Vacuum Oil Co. v. Marvin, 313 Mich. 528, [21 N.W.2d 841]; Socony Vacuum Oil Co. v. Marvin, 313 Mich. 528; Cebulak v. Lewis, 320 Mich. 710 [32 N.W.2d 21], and re-enacted by PA 1961, No 236, § 600.2158, shall prevail, anything in section 731 of the Michigan Vehicle Code (CLS 1961, § 257.731) to the contrary notwithstanding. (Added Feb. 2, 1965.)

112. The statutory rule at the time codified as MICH. COMP. LAWS. ANN. § 257.731, provided that: "No evidence of the conviction of any person for any violation of this chapter or of a local ordinance pertaining to the use of motor vehicles shall be admissible in any court in any civil action." Kirby v. Larson, 256 N.W.2d 400, 406 (Mich. 1977) (quoting MICH. COMP. LAWS ANN. § 257.731 (Mich. Stat. Ann. § 9.2431)).

113. 256 N.W.2d 400 (Mich. 1977).

when a court rule displaces statutory procedure. The trial court had excluded evidence of a traffic ticket as immaterial, but permitted cross-examination about other traffic convictions.[114] On appeal, the supreme court found that Court Rule 607, adopted in response to *Perin*, was in conflict with the statutory evidence rule, and that the latter had to yield to the former.[115] In so holding, the court emphasized that its rulemaking power is "constitutionally supreme in matters of practice and procedure," and that "since admissibility of a traffic ticket is an evidentiary question, the court rule supersedes the statute."[116] Central to this analysis was the fact that the court was unable to discern any "clear legislative policy" in the statute other than considerations involving "judicial dispatch of litigation,"[117] which it characterized as the hallmark of a "statutory rule of practice."[118] In a footnote, the court acknowledged that commentary had associated the statutory rule with substantive policies pertaining to credibility and prejudice and to the encouragement of guilty pleas in traffic court.[119] Nevertheless, because the statutory rule "as drafted" related only to the admissibility of evidence, "a matter which is clearly within the [rulemaking] competence of the courts," the court concluded that the court rule supersedes the statute when the two conflict.[120] The court's approach appeared to rely on a clear-statement rule: if the legislature drafted a rule in procedural terms, then the court would treat the rule as procedural, even if it promoted important policy goals and was part of a substantive statute.

The same year as *Kirby*, the supreme court faced another statute that it also viewed as encroaching upon the judicial power—this time, the state's Open Government Law, which, as applied to the judiciary, would have altered court practice in significant ways. As the justices did in *In the Matter of Head Notes to Opinions*,[121] they wrote to the governor explaining their view that the statute was unconstitutional as applied to the judiciary.[122] The letter stated:

> The judicial powers derived from the Constitution include rule-making, supervisory and other administrative powers as well as

---

114. *Id.* at 406.
115. *Id.* at 406-07.
116. *Id.*
117. *Id.* (quoting 3 JASON L. HONIGMAN & CARL S. HAWKINS, MICHIGAN COURT RULES ANNOTATED 404 (2d ed. 1962)).
118. *Id.* at 407.
119. *Kirby*, 256 N.W.2d at 406 n.7.
120. *Id.* at 406.
121. 8 N.W. 552 (Mich. 1881).
122. *See In re* the "SUNSHINE LAW," 1976 PA 267, 255 N.W.2d 635 (Mich. 1977).

> traditional adjudicative ones. They have been exclusively entrusted to the judiciary by the Constitution and may not be diminished, exercised by, nor interfered with by the other branches of government without constitutional authorization . . . . It is our opinion that [the "Sunshine Law"] . . . is an impermissible intrusion into the most basic day-to-day exercise of the constitutionally derived judicial powers.[123]

Notably, the Michigan Supreme Court did not search for a direct conflict between the statute and court rule; instead, the analysis drew from a core notion of independence based upon the structure of the judiciary under the state constitution as a separate and autonomous branch of government. In this context, when the statute was perceived as invading the court's independence as a self-governing branch, the supreme court retained a broad conception of its rulemaking power that permitted invalidation of legislative procedure even when it did not directly conflict with a court rule.

The next year, 1978, the supreme court adopted Rules of Evidence.[124] Those rules, as well as court procedure generally, increasingly became embroiled in divisive and continuing debates about tort litigation and its presumed effects on economic productivity and civil justice. In particular, in 1985, a specially convened senate committee was tasked with studying medical-malpractice, government-liability, and dram laws.[125] Rather than amend the substantive law in these areas, the committee instead recommended significant changes to the state's judicial rules of practice pertaining to such matters as pre-trial screening

---

123. *Id.* at 636.

124. MICH. R. EVID. *See* Thomas A. Bishop, *Evidence Rulemaking: Balancing the Separation of Powers*, 43 CONN. L. REV. 265, 297 n.109 (2010) (discussing the adoption of evidence rules in Michigan and retention of common-law authority to revise rules); *see also* Elliot B. Glicksman, *Separation of Powers Conflict: Legislative Versus Judicial Roles in Evidence Law Development*, 17 T. M. COOLEY L. REV. 443, 445 (2000) ("Unlike the Michigan Rules of Evidence . . . which generally remain judicially promulgated in format, the Federal Rules of Evidence are legislatively imposed, in final form.").

125. *See* S. SELECT COMM. ON CIVIL JUSTICE REFORM, REP. ON CIVIL JUSTICE IN MICHIGAN (Comm. Print. 1985). For a summary of statutory developments, see generally Karen Chopra, *The Conundrum of Expert Witness Qualifications in Michigan: Will the Legislature's Attempts to Close Pandora's Box Succeed?*, 4 MICH. ST. U.J. MED. & L. 1, 8-11 (1999) (discussing malpractice revisions adopted in 1986 and 1993); Jeanne M. Scherlinck, Note,. *Medical Malpractice, Tort Reform, and the Separation of Powers Doctrine in Michigan*, 44 WAYNE L. REV. 313, 315-19 (1998) (discussing legislative changes to medical malpractice rules in 1975, 1986, 1993, and 1995, pertaining to arbitration, damage caps, affidavits of merit, expert witnesses, jury trials, statute of limitations, joint and several liability, venue, and other topics).

panels, sanctions for frivolous actions, and expert witnesses.[126] The legislature's procedural changes made it predictably more difficult for an injured party to prevail, even in a meritorious suit.[127] *McDougall v. Schanz*,[128] a medical-malpractice suit, presented the inevitable collision between a statutory evidence rule—enacted to tighten standards for qualifying as a testifying expert[129]—with the court's general rule on expert testimony.[130] The trial court found the legislative and judicial rules to be "complementary;"[131] the intermediate appeals court found a conflict between the two rules and held that the statute was an unconstitutional violation of the court's rulemaking authority;[132] and the Michigan

126. *See* Scherlinck, *supra* note 125, at 315-19.

127. In an email communication, Professor G. Alan Tarr questioned why the Michigan Legislature would "use changes in procedure rather than directly address substantive law?" Email from G. Alan Tarr to Helen Hershkoff, dated Dec. 26, 2013 (on file with author). It is not unusual for legislatures to rewrite procedure in order to recalibrate substance. As Professor Thomas O. Main has written:

> The substantive implications of procedural law are well understood. Procedure is an instrument of power that can, in a very practical sense, generate or undermine substantive rights. For example, there is no need to change the substantive contours of employment discrimination law when modifications to pleading rules and motion practice can bypass the more arduous substantive law-making process and deliver similar results.

Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801, 802 (2010). Moreover, procedure can be designed to promote or facilitate substantive outcomes. As Rep. John Dingell (D-Mich.) famously said of congressional rulemaking, "I'll let you write the substance and you let me write the procedure, and I'll . . . [beat] you every time." *Regulatory Reform Act: Hearing on H.R. 2327 Before the H. App. Comm., Before the Subcomm. on Admin. Law and Governmental Regulations of the H. Comm. on the Judiciary*, 98th Cong. 312 (1983) (criticizing the manipulation of procedure to change substantive results); *see also* KARL N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 11 (Tentative Printing for the Use of Students at Columbia University School of Law New York, 1930) ("For what substantive law says should be means nothing except in terms of what procedure says that you can make real.").

128. 597 N.W.2d 148 (Mich. 1999).

129. *See* MICH. COMP. LAWS ANN. § 600.2169 (West 2013) (limiting expert testimony to persons able to demonstrate "the same specialty" and "majority of his or her professional time" dedicated to "active clinical practice" in the same specialty as the specialist who is the defendant in the medical-malpractice action).

130. MICH. R. EVID. 702, which provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise . . . .

131. *McDougall*, 597 N.W.2d at 151.

132. *Id.* at 152 (citing McDougall v. Eliuk, 554 N.W.2d 56 (Mich. Ct. App. 1996), *rev'd in part, aff'd in part*, 597 N.W.2d 148 (Mich. 1999)).

Supreme Court granted leave to appeal to determine whether the statutory rule impermissibly infringed upon the court's exclusive authority to promulgate rules of practice.[133] The supreme court reversed the court of appeals, finding the statutory rule to be "a valid exercise of the Legislature's public policy-making prerogative," and held that the statutory evidence rule displaced the judicial procedural rule that otherwise would have applied to the suit.[134]

In reaching this result, the Michigan Supreme Court asked and answered two questions. First, it considered whether the statutory and judicial rules were in conflict, and answered this question in the affirmative.[135] Both rules pertained to when a witness would qualify to testify as an expert.[136] In some cases, the court explained, a witness could be qualified as an expert under the judicial rule but not under the statutory rule; indeed, the court favorably observed that in enacting the expert rule the legislature's intent was to "compel different qualification determinations" than would be reached under the court's rule of evidence.[137] In particular, the statutory rule was aimed directly at curtailing "the manner in which some courts were exercising their discretion regarding expert testimony . . . ."[138] Framed in this way, the statutory evidence rule would appear to cut into the heart of the judicial function: although it did not change the substantive law, its goal was to direct the court's decision-making on a procedural issue that predictably tilted the merits in favor of the alleged tortfeasor and against the injured party. The Michigan Supreme Court acknowledged that the state constitution assigns procedural power over rulemaking exclusively to the judiciary,[139] but nevertheless insisted that most of its earlier decisions had erroneously "overstated" the reach of the Section 5 power.[140] The court then took an even bolder turn, and announced that going forward it would no longer deem statutory evidence rules that were in conflict with court rules to be procedural rules subject to judicial preemption:

---

133. MICH. CONST. art VI, § 5.

134. *See McDougall*, 597 N.W.2d at 150.

135. *Id.* at 153-54.

136. *See id.* at 153.

137. *Id.*

138. *Id.* at 153 (citing *McDougall*, 554 N.W.2d 56 (Taylor, J., dissenting)).

139. *Id.* at 154.

140. *McDougall*, 597 N.W.2d at 155. The court favorably cited the *Shannon* decision concerning the rulemaking power of an inferior court and decided before the 1963 Constitution, as support for its narrowed construction of Section 5. *See id.* at 154 (citing Shannon v. Cross, 222 N.W. 168 (Mich. 1928)).

> We will not continue mechanically to characterize all statutes that resemble "rules of evidence" as relating solely to practice and procedure . . . . We instead adopt a more thoughtful analysis that takes into account the undeniable distinction "between *procedural* rules of evidence and evidentiary rules of substantive law . . . ."[141]

Bolstering its analysis with selected references to the convention history of Section 5,[142] the supreme court fixed a blanket principle that a statutory rule of evidence is unconstitutional "only when 'no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified.'"[143] A statutory rule reflecting any policy basis thus no longer was seen as procedural but rather as a substantive rule of decision and so preemptive of a judicial rule when the two are in conflict.[144] A vigorous dissent challenged the majority's reading of the constitution and its enactment history, and criticized the court for redrawing the traditional boundaries of separation of powers.[145]

McDougall clearly set forth a different approach to resolving conflicts between the court's rules of procedure and those of the legislature. Faced with such a conflict, the dispositive issue had become whether the latter has any discernible policy basis. If it does, the court deems the statutory rule to be substantive, and the court then determines if its own rule of procedure is at odds with the legislature's definition of substantive rights.[146] Although the Michigan Supreme Court disavowed the adoption of a mechanical test, the court's approach—given the hypothetical presence of a policy basis in almost any rule of procedure[147]—effectively establishes an irrebuttable presumption that statutory procedure is substantive and therefore superior to judicial procedure. *McDougall* thus stood *Perin* on its head, subordinating court procedure to statutory procedure and giving supremacy to the legislature

---

141. *Id.* at 155 (quoting Golden v. Baghdoian, 564 N.W.2d 505, 508 (1997)). *See generally* M. Bryan Schneider, *Evidence*, 52 WAYNE L. REV. 661, 663 (2006) (for the observation that *McDougall* rejected a "'mechanical' approach under which all statutes relating to evidence constitute rules of practice or procedure").

142. *See McDougall*, 597 N.W.2d at 157-58.

143. *Id.* at 156 (quoting Kirby v. Larson, 256 N.W.2d 400, 406-07 (Mich. 1977)).

144. *See id.* at 156 (citing Joiner & Miller, *supra* note 54, at 635).

145. *Id.* at 159 (Cavanagh, J., dissenting).

146. *Id.* at 148.

147. The literature on the substantive/procedure boundary is vast. *See, e.g.*, Williams, *supra* note 47, at 459-70 (commenting that between legislative power modifying substantive law and judicial power to decide lawsuits by applying substantive law "there is a border-land, like a wilderness, through which the theoretical boundary line runs without being definitely marked").

in an area that the Michigan Constitution by its terms assigns to the judiciary.[148]

By so holding, the court in *McDougall* arguably treated Section 5 as if it were a statutory delegation of authority to the court to devise procedural rules, or perhaps simply as an expression of the judiciary's inherent authority to develop procedure, and not as a constitutional grant of exclusive authority that by its terms contains no words of limitation. The *McDougall* court nowhere cited to federal precedent in reaching this result.[149] Yet the conception of judicial power informing the opinion would seem to be more in the spirit of the federal, and not the Michigan, constitution. The history of the federal Rules Enabling Act[150] and the serious questions about federal judicial power to enact rules of procedure are well known;[151] Congress's authority over federal court procedure is well settled;[152] and although federal courts undoubtedly possess some measure of inherent authority,[153] their non-codified power is limited.[154]

---

148. *See* Perin v. Peuler, 130 N.W.2d 4 (Mich. 1964).

149. *Compare* Quinton v. Gen. Motors Corp., 551 N.W.2d 677, 686 (Mich. 1996), in which the separation of powers analysis draws explicit guidance from Justice Scalia's opinion in Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995). *See generally* Michigan v. Long, 463 U.S. 1032 (1983) (stating that the Supreme Court of the United States will not review a state court judgment that "clearly and expressly" rests on state and not federal grounds of decision). On remand, the Michigan Supreme Court concluded that the search was invalid under the federal Constitution and did not address the state constitutional question. Justice Kavanagh wrote separately to set forth state constitutional grounds for reversal of the conviction. *See* People v. Long, 359 N.W.2d 194 (Mich. 1984).

150. 28 U.S.C.A. § 2072 (West 2013).

151. *See, e.g.*, Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (addressing federal judicial power to enact rules of judicial procedure).

152. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106-12 (1982) (arguing that the Rules Enabling Act was designed to limit federal judicial rulemaking power); *see also* Richard Marcus, *Procedure in a Time of Austerity*, 3 INT'L J. PROC. L. 133, 138 (2013) (stating that in the federal court system, the judiciary has been assigned "very considerable latitude in designing procedures that will not usually be altered by Congress. But when they seem to wander near the dividing line [between procedure and substance], Congress may raise serious questions, or even overrule the procedural rulemakers.").

153. *See* Joseph J. Anclien, *Broader Is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 37-41 (2008) (positing that federal courts may exercise inherent authority only in "cases of indispensable necessity"); *see, e.g.*, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) (recognizing a non-codified power of ancillary jurisdiction).

154. *See* Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *and* Gasperini, 46 U. KAN. L. REV. 751, 759 n.69 (1998) ("Absent statutory authority, Article III may grant limited inherent power over procedure to the federal courts."); Finley v. United States, 490 U.S. 545 (1989) (disavowing jurisdiction over parties to related claims under the Federal Tort Claims

Moreover, the judiciary's structural relation to the legislature differs significantly in the federal system from that in Michigan: the lower federal courts are creatures of Congress, whereas the courts in Michigan, other than courts of limited jurisdiction, are creatures of the Michigan Constitution, and cannot be abolished or diminished by the legislature.[155] There is nothing inherently unattractive about the rulemaking regime that *McDougall* contemplates, but it seems more compatible with the federal Constitution than the Michigan constitution, and state courts are not obliged to follow federal precedent in cases involving separation of powers within state government.[156]

On the other hand, one need not turn to federal law for the common understanding that judicial power in all of its iterations—decision-making, rulemaking, administration, and so forth—is limited by substantive law. Arguably, *McDougall* simply manifests that principle. Indeed, Michigan constitutional doctrine has embraced a rule of common understanding since Justice Cooley's tenure on the bench.[157] Yet, there is a leap from that general principle to the view set forth in *McDougall* that any evidence rule with a policymaking purpose constitutionally displaces a judicially devised procedural rule with which there is an apparent conflict. We equally could say that by common understanding the Michigan Constitution's apportionment of rulemaking power to the court

---

Act), *abrogated by* 28 U.S.C.A. § 1367 (West 2013). For a defense of federal judicial inherent power, see Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735 (2001).

155. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). *See generally* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 275-323 (6th ed. 2009) (discussing congressional control over federal jurisdiction). On the Michigan judiciary, see MICH. CONST. art. VI, § 1 ("The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-third vote of the members elected to and serving in each house.").

156. *See* Hershkoff, *supra* note 14, at 1882-91 (explaining that state courts are not required to conform to federal notions of separation of powers); *but cf.* Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 80 (1998) (arguing that "the community model of state constitutional interpretation helps to explain the appeal of federal doctrine" with respect to separation of powers).

157. *See, e.g.*, Macomb Cnty. Taxpayers Ass'n v. L'Anse Creuse Pub. Sch., 564 N.W.2d 457, 460 (Mich. 1997) (citing Livingston Co. v. Dep't of Mgmt. & Budget, 425 N.W.2d 65 (1988)) (referring to "two basic rules of constitutional construction," namely that of "common understanding" and circumstances of adoption and purpose to be achieved). *See* Bishop, *supra* note 124, at 280 (stating that the Michigan court generally has treated its authority as excluding the right to "abridge or modify substantive rights").

established a principle of judicial supremacy but permitted statutory procedure as a practical accommodation.[158]

The Michigan Supreme Court's shift in approach from *Perin* to *McDougall* might be seen as part of a trend chronicled in the *Wayne Law Review*'s annual round-up of Michigan constitutional law: the federalization of Michigan constitutional law and the absence—"even reversal"—"of independent Michigan constitutional law when a federal constitutional counterpart exists."[159] Later decisions of the Michigan Supreme Court have followed suit and likewise favor statutory procedure over court rules despite earlier rulings to the contrary.[160] Although a lockstep approach to state constitutional interpretation sometimes may be appropriate,[161] federal influence seems less appropriate when a state constitutional provision—as with Section 5—lacks a federal analogue, runs structurally counter to federal law, and omits the words of limitation that characterize the federal text.[162] At the least, we can say that the analysis and result in *McDougall* deviated from past practice,[163] and the

158. The phrase "practical accommodation" is drawn, to different effect, from WEINSTEIN, *supra* note 2, at 77 (referring to the history of federal rulemaking as demonstrating "a practical accommodation between the legislature and the courts" as an ideal for rulemaking).

159. Michael Warren, *Constitutional Law*, 57 WAYNE L. REV. 779, 780 (2011). For the view that the federalization of Michigan state constitutionalism coincided with shifts in the composition of the Michigan Supreme Court, see Robert A. Sedler, *The Michigan Supreme Court, Stare Decisis, and Overruling the Overrulings*, 55 WAYNE L. REV. 1911, 1929 n.79 (2009).

160. *Compare* Buscaino v. Rhodes, 189 N.W.2d 202 (Mich. 1971), *with* Gladych v. New Family Homes, Inc., 664 N.W.2d 705 (Mich. 2003) (overruling *Buscaino* on whether statute of limitations is tolled upon filing of complaint).

161. *See, e.g.*, James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1058-59 (2003) (arguing that state judges may choose to interpret their state's constitution in lockstep with decisions of the Supreme Court of the United States "because they like it and think that it does a perfectly adequate job of protecting the liberty in question").

162. *See* 28 U.S.C.A. § 2072(b) (West 2013); *see also* ALA. CONST. art. VI, § 150; ARK. CONST. amend. LXXX, § 3; N.C. CONST. art. IV, § 13(2); OHIO CONST. art. IV, § 5(B); PA. CONST. art. V, § 10(c).

163. *See* M. Bryan Schneider & Jody Sturtz Schaffer, *Constitutional Law*, 47 WAYNE L. REV. 423, 430 (2001) (stating that the *McDougall* court "reached a result which conflicts with the court's own principles of constitutional adjudication . . ."); *see also id.* at 435-36 (discussing the *McDougall* court's use of convention history in analyzing Section 5, despite traditional reliance in Michigan on the "plain meaning" of those who ratified the constitution); Warren, *supra* note 159, at 782 (observing that currently "there is no pretense of separately interpreting or evaluating Michigan constitutional provisions").

court offered no exceptional reason to depart from the strictures of stare decisis.[164]

At the same time, it is important not to overstate the federalization of Section 5. In other decisions pertaining to the scope of judicial power, the Michigan Supreme Court has given Article VI a quite different interpretation than corresponding federal doctrine under Article III of the U.S. Constitution.[165] Moreover, the Section 5 power remains robust as applied to internal judicial administration and to regulation of the legal profession. The court has enacted rules setting out the responsibilities of the state court administrator;[166] general duties of clerks;[167] duties and certification of court reporters and recorders;[168] selection of a chief judge of each trial court;[169] and professional matters that include courtroom decorum,[170] participation of legal aid clinics and law students,[171] and contingent fee arrangements.[172] In addition, the Michigan Supreme Court has promulgated rules for Professional Disciplinary Proceedings, which cover standards of conduct for attorneys, proceedings before the Attorney Grievance Commission, and regulation of judicial tenure.[173]

---

164. *See generally* Sedler, *supra* note 159, at 1911 (reporting that from 1999-2008, a new majority on the Michigan Supreme Court overruled thirty-eight cases, of which thirty-four "were clearly ideological"); Trent B. Collier & Phillip J. DeRosier, *Understanding the Overrulings: A Response to Robert Sedler*, 56 WAYNE L. REV. 1761, 1802 (2010) (questioning aspects of Professor Sedler's study, and stating that the evidentiary rule in *McDougall* "is content-neutral: its impact is left up to the Legislature").

165. *See, e.g.*, Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ., 792 N.W.2d 686 (Mich. 2010), *abrogating* Lee v. Macomb Co. Bd. of Comm'rs, 629 N.W.2d 900 (Mich. 2001) (rejecting incorporation of federal standing doctrine in Michigan law as inconsistent with the state constitutional text, the powers of state courts, and unique state constitutional history). For a criticism of the *Lansing* decision, see Kenneth Charette, *Standing Alone?: The Michigan Supreme Court, the* Lansing *Decision, and the Liberalization of the Standing Doctrine*, 116 PENN ST. L. REV. 199, 207-11 (2011) (observing that the approach adopted in the *Lansing* decision reflects a minority position among state courts which generally adhere to federal justiciability doctrine even when the state constitutional text differs from the federal).

166. MICH. CT. R. 8.103.

167. MICH. CT. R. 8.105.

168. MICH. CT. R. 8.108.

169. MICH. CT. R. 8.110.

170. MICH. CT. R. 8.115.

171. MICH. CT. R. 8.120.

172. MICH. CT. R. 8.121.

173. MICH. CT. R. ch. 9. In 1971, Michigan adopted the Michigan Code of Professional Responsibility, based upon the Code of Professional Responsibility promulgated by the American Bar Association in 1969. Seventeen years later the Michigan Supreme Court ordered adoption of the Michigan Rules of Professional Conduct, which modified the law in this area. *See* Michael Alan Schwartz & Lawrence A. Dubin, *Michigan Rules of Professional Conduct v. Michigan Code of Professional Responsibility*, 35 WAYNE L.

Administrative orders on specific topics also have improved the administration of justice throughout the state.[174] Section 5 plays an important role in Michigan with respect to intra-judicial affairs, professional administration, and the conduct of judicial proceedings, and these aspects of state governance could be impaired, or at the least, distorted, if the Section 5 power falls unconsciously into the orbit of federal doctrine.[175]

IV. *ERIE*-EFFECTS ON PROCEDURAL RULEMAKING AND THE SECTION 5 POWER

A constitution's grant of rulemaking power marks one boundary of inter-branch relations. Looking back at the development of the Section 5 power, I have suggested that the Michigan court has ceded some measure of authority to the state legislature by according significant deference to statutory procedure when it conflicts with a court rule. Remapping the boundary between the court and the legislature is not an academic exercise, but rather—as the case law pertaining to medical-malpractice liability shows—a legal act that carries substantive effects. I have argued that the court's current deferential stance to statutory procedure appears to be in tension with the Michigan Constitution's text and perhaps reflects the unconscious influence of federal doctrine. In this section, I look forward and consider additional challenges that federal law might create for the Michigan court's Section 5 power. In particular, I consider whether the federal judiciary's application of *Erie*[176] and its first-cousin *Hanna*[177] might reshape intra-state relations by influencing how Michigan apportions rulemaking authority among its branches of government.

REV. 197, 257 (1989) (discussing the Michigan court's order promulgating the rules, but questioning whether "this major change in the substantive law was worth the effort"); *see also* John Soave, *Highlights of Changes in Practice Under the New Michigan Rules of Professional Conduct,* MICH. B.J. 868 (Sept. 1988) (emphasizing "that the Rules adopted by the Supreme Court are not precisely the same as the A.B.A. Model Rules").

174. *See, e.g.*, Administrative Order No. 2003-3. Appointment of Counsel for Indigent Criminal Defendants.

175. *Cf.* Lawrence Friedman, *Unexamined Reliance on Federal Precedent in State Constitutional Interpretation: The Potential Intra-State Effect*, 33 RUTGERS L.J. 1031, 1056 (2002) (referring to the danger of unconscious reliance on federal doctrine without a state court's considering "the underlying lattice of institutional arrangements within which courts seek to develop constitutional rules or principles—including, of course, allocations of authority between and among governmental entities").

176. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

177. Hanna v. Plumer, 380 U.S. 460 (1965).

The *Erie/Hanna* doctrine of course governs when state law is to be applied in a federal lawsuit and, relatedly, when a state procedural rule will be displaced in federal court by a Federal Rule of Civil Procedure or by other federal procedural rules. My question is whether the federal court's application of the *Erie/Hanna* doctrine in a diversity suit involving Michigan state procedure could unintentionally enlarge the powers of the state legislature at the expense of the state court, thereby further federalizing the Section 5 power.[178] Although I focus on Michigan, the analysis is relevant to any state in which the state constitution assigns power for procedural rulemaking to the state court rather than to the state legislature. I also consider the implications of a federal court indirectly shifting rulemaking authority from one branch of state government to another in light of the Rules Enabling Act's constraint that federal rules not "abridge, enlarge or modify" substantive rights.[179]

The basic contours of the *Erie/Hanna* doctrine are familiar: as Justice Ginsburg succinctly has stated, "[F]ederal courts sitting in diversity apply state substantive law and federal procedural law."[180] Variations in the application of the doctrine have arisen when there is a Federal Rule of Civil Procedure seemingly pertinent to the dispute,[181] when there is a federal statute apparently on point,[182] and when there is a federal judicial rule or practice intuitively governing the situation.[183] The Court applies a somewhat different test in each setting, reflecting the Rules Enabling Act's conceptual muddle regarding the propriety of federal procedural rules and the abridgement or modification of substantive rights.[184] Difficulties in application of the doctrine are

178. State-federal rule conflict also can arise outside the context of diversity jurisdiction. *See* Michael Steven Green, *The Twin Aims of* Erie, 88 NOTRE DAME L. REV. 1865, 1865 (2013) (identifying four "jurisdictional scenarios" involving state-federal rule conflict).

179. 28 U.S.C.A § 2072(b) (West 2013).

180. Gasperini v. Ctr. for Humanities Inc., 518 U.S. 415, 416 (1996); *see* Adam N. Steinman, *Magic Words and the* Erie *Doctrine*, 65 FLA. L. REV. FORUM 1, 1 (2013) (referring to "a core of truth to the oft-stated rule of thumb that federal courts should apply state substantive law and federal procedural law").

181. *See, e.g.*, Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) (involving FED. R. CIV. P. 23).

182. *See, e.g.*, Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22 (1988) (involving transfer under 28 U.S.C. § 1404).

183. *See, e.g.*, Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508, 513 (2d Cir. 1960) (stating that service, venue, and personal jurisdiction doctrine "evince[] a deliberate and long-avowed federal practice . . .").

184. *See* Green, *supra* note 178, at 1874 (stating that "the scope of the substantive right limitation [in the Rules Enabling Act] remains something of a mystery").

notorious: the Court still has not explained how to resolve a conflict—described by the *Hanna* Court almost fifty years ago—between federal and state law when state law involves "matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."[185]

Shady Grove,[186] the Court's latest pronouncement on the Rules Enabling Act and limits on federal procedure, failed to generate a majority opinion,[187] did not clarify the governing standard,[188] and is sufficiently obscure as to make it unclear which opinion of the divided Court is the narrowest grounds of decision for lower court guidance.[189] *Shady Grove* involved a breach of contract suit against an insurance company that was alleged to have failed to pay benefits and mandatory interest on overdue benefits.[190] Plaintiff invoked the federal court's diversity jurisdiction and filed suit as representative of a class, thus increasing defendant's exposure from an individual damages claim of five hundred dollars to class wide damages of five million dollars.[191] From the *Erie/Hanna* perspective, the suit presented an apparent conflict between Federal Rule of Civil Procedure 23, governing class actions, and New York Civil Practice Law and Rules 901(b), providing that "an action to recover a penalty . . . may not be maintained as a class action."[192] A majority of the Court held that the federal diversity court was required to apply Federal Rule 23, but divided in its analysis. According to the plurality opinion authored by Justice Scalia, resolution of the conflict came down to a single question: whether a federal rule that is pertinent to a dispute is valid under the Rules Enabling Act as

185. Hanna v. Plummer, 380 U.S. 460, 472 (1965).

186. *Shady Grove*, 559 U.S. 393.

187. Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The* Shady Grove *Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041, 1041 (2011) (stating that *Shady Grove* is marked by a "disagreement" between Justices Scalia and Stevens, and "[n]either alternative enjoyed a majority . . .").

188. *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 20 (2010) (observing that *Shady Grove* "shed little light").

189. *See* Andrew J. Kazakes, *Relatively Unguided: Examining the Precedential Value of the Plurality Decision in* Shady Grove Orthopedic Associates v. Allstate Insurance Co. *and Its Effects on Class Action Litigation*, 44 LOY. L.A. L. REV. 1049 (2011) (discussing disagreements about the precedential value of *Shady Grove* under the *Marks* doctrine).

190. *Shady Grove*, 559 U.S. at 393.

191. *Id.* at 436-37 (Ginsburg, J., dissenting).

192. For the statute under which the penalty was being sought, see N.Y. Insurance Law § 5106 (McKinney 2014).

interpreted by the *Sibbach* "really regulates procedure" test;[193] if the answer to this question is yes, Justice Scalia wrote, "the substantive nature" of the state rule "or its substantive purpose, *makes no difference*"[194]—the federal rule trumps the state rule.[195] The concurring opinion authored by Justice Stevens shifted focus to the state substantive policy entailed in the state procedural rule in conflict with the federal rule.[196] On this view, a state procedural rule that was "sufficiently interwoven" with state substantive law would displace a valid and pertinent federal procedural rule; in determining whether the state rule was substantive, the fact that the state rule was designed in the "form" of a procedural rule would not be dispositive, but presumptively would suggest that it "reflects a judgment about how state courts ought to operate," and not a definition of rights and remedies.[197] As Justice Stevens explained, in determining how to apportion rulemaking authority between the states and the federal system, "it is necessary to distinguish between procedural rules adopted for *some* policy reason and seemingly procedural rules that are intimately bound up in the scope of a substantive right or remedy."[198]

In *Shady Grove*, the state entity responsible for enacting the no-penalty class rule[199]—the New York legislature—had power to promulgate substantive rules of decision as well as procedural rules. The New York Constitution assigns rulemaking authority to the legislature, which in turn can delegate rulemaking authority "in whole or in part" to the state supreme court.[200] This apportionment of authority between the

193. *Shady Grove*, 559 U.S. at 410-11 (citing Sibbach v Wilson & Co., 312 U.S. 1, 14 (1941)).

194. *Id.* at 409.

195. *See id.* at 409-10.

196. *Id.* at 416-17 (Stevens, J., concurring) (stating "there are some state procedural rules that federal courts must apply in diversity cases because they function as a part of the [s]tate's definition of substantive rights and remedies").

197. *Id.* at 419, 429, 432 (Stevens, J., concurring) (stating that the congressional balance under the Rules Enabling Act "does not necessarily turn on whether the state law at issue takes the *form* of what is traditionally described as substantive or procedural" and "[t]he mere fact that a state law is designed as a procedural rule suggests it reflects a judgment about how state courts ought to operate and not a judgment about the scope of state-created rights and remedies").

198. *Id.* at 433 (Stevens, J., concurring).

199. N.Y. CPLR § 901 (McKinney 2014).

200. *See* N.Y. CONST. art. VI, § 30, which provides:

> [Legislative power over jurisdiction and proceedings; delegation of power to regulate practice and procedure]
>
> The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised. The legislature may, on such terms as it shall provide and subject to subsequent

legislature and the judiciary of course differs from the institutional division in Michigan, where, we have seen, the state constitution assigns exclusive procedural rulemaking authority to the court, but withholds authority to make substantive rules of decision.[201] None of the Justices in *Shady Grove*—whether among the plurality, concurrence, or dissent—paid attention to whether the state's apportionment of rulemaking authority affects the *Erie/Hanna* analysis. Rather, the Court seemed to take for granted that the responsible state entity possessed authority to enact substantive rules of decision, an assumption that presumes legislative enactment of procedural rules: arguably, the Justices simply overlooked intra-state governance patterns, a blind spot that Professor Roderick M. Hills, Jr. says is typical of the Court's federalism doctrine.[202]

Whatever the reason for the Court's assumption, the practice raises a pair of questions: first, whether a state's apportionment of procedural rulemaking authority might affect the federal court's application of the *Erie/Hanna* doctrine; and second, whether application of the *Erie/Hanna* doctrine might affect how a state chooses to apportion such rulemaking power. My hunch is that the federal court's preemption of Michigan procedural rules in diversity cases could cause the state to rethink state governance structures in ways that shift authority from the state judiciary

---

modification, delegate, in whole or in part, to a court, including the appellate division of the supreme court, or to the chief administrator of the courts, any power possessed by the legislature to regulate practice and procedure in the courts. The chief administrator of the courts shall exercise any such power delegated to him with the advice and consent of the administrative board of the courts. Nothing herein contained shall prevent the adoption of regulations by individual courts consistent with the general practice and procedure as provided by statute or general rules.

201. *See* MICH. CONST. art VI, § 5. Precisely how this division affects the scope of the Michigan court's common-law lawmaking authority is not clear; a basic insight from *Erie* concerns the legal and binding status of common law decisions issued by state courts. I raise but do not address this question.

202. *See* Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1201 (1999) (explaining that contrary to federal federalism doctrine, a state is not a "black box" but rather "a bundle of different subdivisions, branches, and agencies controlled by politicians who often compete with each other . . ."). Commentators frequently assume that state judicial power takes the same shape and content as that conferred by Article III of the federal Constitution. *See* Hershkoff, *supra* note 14, at 1836 (discussing the tendency to treat federal judicial power in "universal or essential terms"); *see also* Marcia L. McCormick, *When Worlds Collide: Federal Construction of State Institutional Competence*, 9 U. PA. J. CONST. L. 1167, 1168 (2007) (asserting that an expansion of national power has resulted from "the Court's imposition of federal separation of powers principles on state governments," although this approach requires differentiation "between the branches of government at the state level").

to the state legislature. Professor Henry Hart famously said that "federal law takes the state courts as it finds them"[203]—but he did not consider the feedback effects of federal doctrine on the states. At least in Michigan, and other states where rulemaking authority is assigned to the court, the federal system's application of the *Erie/Hanna* doctrine indirectly could impact the structure and content of state governance by diminishing state court power in favor of the state legislature.

Consider this possibility in context. Assume for the moment that the Michigan court's procedural rules on class actions, developed through the Section 5 power, include a no-penalty provision similar to the one at issue in *Shady Grove*.[204] Under the *Shady Grove* plurality and concurrence, if Federal Rule of Civil Procedure 23 is pertinent to the dispute at hand, a federal diversity court will apply the federal rule instead of the state rule. For the plurality, Federal Rule 23 is valid, and no further analysis is needed. For the concurrence, the fact that the court has classified the no-penalty rule as procedural creates a strong presumption that the rule is indeed procedural. Moreover, if the concurrence were to look deeper into state law, it would be clear that the rulemaking entity responsible for enactment of the no-penalty provision lacks authority to create a substantive rule pertaining to class action damages, and so as a matter of state law the judicially-devised rule can only be procedural. Put to the side, for the minute, whether the state court's characterization of the rule as procedural or substantive is or ought to be dispositive of that issue when a federal diversity court considers the question, or whether the state court's characterization provides merely persuasive guidance. For now, assume a counter factual: the Michigan legislature enacts the same no-penalty provision as a rule of procedure. In this situation, under Justice Scalia's plurality opinion, the provenance of the state procedure would still be irrelevant, because the substantive implications of the state procedural rule are likewise irrelevant when a state procedural rule conflicts with a pertinent and valid Federal Rule of Civil Procedure. By contrast, under Justice Stevens's concurrence, interpretive space exists for the federal diversity court to apply a state procedural rule that is bound up with rights and remedies even if the state provision is denominated a procedural rule.

Now change the hypothetical and assume that the legislature enacts the same no-penalty class-action rule as part of a substantive statute, rather than as a procedural reform. Arguably, the *Shady Grove* plurality

203. Henry M. Hart Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954); see also Johnson v. Fankell, 520 U.S. 911, 919 (1997), for a reference to Professor Hart's statement and support for its validity.

204. N.Y. CPLR § 901 (McKinney 2014).

and concurrence would treat the statutory rule as substantive given its location in state substantive law.[205] Indeed, Justice Stevens's concurrence has been read to support imposition of a clear-statement requirement on state legislatures that wish to insulate procedural rules from federal displacement.[206] Depending on the importance of the state procedural rule to state policymaking, a state legislature, confronted by the federal court's preemption of a state procedural rule—whether devised by the court or legislature—could respond strategically and reenact the rule as part of a substantive statute.[207] The doctrine's incentivizing effects on legislative opportunism of this sort is seen by some commentators as democratic-enhancing,[208] on the theory that it will promote transparency by encouraging candid discussion of policy choices that typically are obscured by procedural rulemaking.[209]

Possibly, a Michigan state court will not care whether the federal court applies one of its state procedural rules when it sits in diversity.[210]

---

205. *See* Helen Hershkoff, Shady Grove: *Duck-Rabbits, Clear Statements, and Federalism*, 74 ALB. L. REV. 1703, 1719-20 (2010-2011) (arguing that under the *Shady Grove* concurrence, a state legislature could displace a federal rule "merely by clearly categorizing a state procedure as substantive"); *see also* Jeffrey W. Stempel, Shady Grove *and the Potential Democracy-Enhancing Benefits of* Erie *Formalism*, 44 AKRON L. REV. 907, 972 (2011) (arguing that the New York legislature could overcome *Shady Grove* and make the no-penalty class-action rule "impregnable" by reenacting it as substantive law).

206. This approach has received strong support as an information-forcing device in Sergio J. Campos, Erie *as a Choice of Enforcement Defaults*, 64 FLA. L. REV. 1573, 1579 (2012) (arguing that federal courts are ill-placed "to determine what defaults to set and when to limit (or permit) their alteration").

207. *Cf.* Hills, *supra* note 202, at 1206-07 ("It is conceivable that the principle of state supremacy might lead to greater centralization of the state, thereby increasing the state government's capacity to engage in strategic behavior when bargaining with the federal government.").

208. *See* Stempel, *supra* note 205, at 974 (discussing the *Shady Grove* plurality's capacity for "forcing greater democratic deliberation in the states—at least if they want their substantive policies to resist displacement by federal rules in federal courts"); Jennifer S. Hendricks, *In Defense of the Substance-Procedure Dichotomy*, 89 WASH. U. L. REV. 103, 138 (2011) (discussing "the potential to improve state lawmaking by forcing state lawmakers to be more open and transparent with respect to substantive goals").

209. *See* Richard Marcus, *Bomb Throwing, Democratic Theory, and Basic Values—A New Path to Procedural Harmonization?*, 107 NW. U. L. REV. 475, 490 (2013) (observing that "conventional procedural issues hardly seem likely to stimulate public interest . . .").

210. *See* Green, *supra* note 178, at 1867 (raising the possibility that a state "might not care if its statute of limitations is used by federal courts, even if the difference between federal and . . . [state law] leads to forum shopping and litigant inequity"); see also Michael Steven Green, Erie's *Suppressed Premise*, 95 MINN. L. REV. 1111, 1112 (2011), for an exploration of what it would mean for the *Erie* doctrine if a state court "did not want deference" from a federal diversity court with respect to its common law decisions.

After all, the federal court's characterization of a state procedural rule as procedural or substantive will not bind the state court should a dispute arise with the legislature about the scope of the Section 5 power.[211] On the other hand, the literature on inter-jurisdictional competition suggests that states take seriously how the federal system treats state laws in disputes that have intra-state effects.[212] Moreover, discussions about diversity jurisdiction assume that federal decisions involving state law can generate friction with the state, especially the state court, and that tensions can result "from both obvious and subtle disagreements in interpreting state law."[213] Former Supreme Court Justice Sandra Day O'Connor, while still a judge on the Arizona Court of Appeals, thus spoke about the "confusion and confrontation" that can result when federal courts apply or preempt state procedures in diversity suits.[214] If we accept the view that procedure calibrates substantive norms,[215] then displacing state procedural rules potentially affects not only the state judiciary's power and prestige vis-à-vis other branches of government, but also the shape and content of state policy. Even if a state court is indifferent to a federal court's application of state procedure in a suit involving state law, the state court might not be similarly indifferent if it believes that the state legislature is encroaching upon its rulemaking authority—and this reaction might be particularly salient in a state in which the court and legislature stand for election, and the judges and representatives are from different political parties. Faced with a legislature's indirect grab for power—reinforced by federal diversity litigation—a state court might itself act strategically to recover some of its rulemaking authority. In Michigan, a court wanting to resist

211. *See* Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 104 (1990) ("[T]he opinion of a federal court sitting in diversity does not constitute precedent within the state system.").

212. *See generally* William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201 (1997).

213. Kramer, *supra* note 211, at 105.

214. Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 808 (1981).

215. *See generally* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112-13 ("Substance and process are intimately related. The procedures one uses determine how much substance is achieved, and by whom. Procedural rules usually are just a measure of how much the substantive entitlements are worth, of what we are willing to sacrifice to see a given goal attained."); *see also* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1303 (2006) (stating that "many of the Federal Rules have a dramatic impact on fundamental socio-political and economic concerns").

legislative aggrandizement has at least three different options: the justices could write a letter to the Governor (as in *In re* Sunshine LAW[216]); the court could review a procedural rule in a litigated dispute (as in *Kirby*[217]); or the court could answer a certified question in a litigated federal court case.[218] The first two options operate *ex post*, after the federal court has displaced a state rule; the third option operates *ex ante*, before the federal court has done so and is still deciding whether federal preemption is appropriate. In a federal diversity suit, certification of the unclear state law question to the state high court—rather than having the federal court make an independent assessment of the state law based on available state sources—generally is viewed as a respectful way to elicit information about the meaning of state law.[219] Although a state court's characterization of a state rule as procedural or substantive in non-*Erie* contexts is not binding for purposes of the *Erie* doctrine,[220] a diversity court that has certified a question pertaining to a specific procedural conflict typically will treat the answer as binding.[221] In that

---

216. *In re* "SUNSHINE LAW," 1976 PA 267, 255 N.W.2d 635 (Mich. 1977).

217. Kirby v. Larson, 256 N.W.2d 400 (Mich. 1977).

218. *See* Hershkoff, *supra* note 205, at 1720 (discussing certification as an alternative to the federal court's use of a clear-statement requirement).

219. If the federal court does not certify the question, presumably it will undertake its own review of state law, a process that is intended to mimic state interpretation but in practice leaves the federal court with greater latitude of interpretive freedom. *See generally* Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation:* Erie *for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 780-85 (2013) (discussing the implications of methods of statutory interpretation for diversity jurisdiction and the *Erie* doctrine).

220. *E.g.*, Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 109 (1945) (stating that it is "immaterial whether statutes of limitation are characterized as 'substantive' or 'procedural' in [s]tate court opinions . . . unrelated to the specific issue" before the Court); *see also* Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988) ("*Guaranty Trust* . . . rejects the notion that there is an equivalence between what is substantive under the *Erie* doctrine and what is substantive for purposes of conflict of laws.").

221. *See* Green, *supra* note 178, at 1867 (stating that "[a]ccording to *Erie*, federal courts must defer to state supreme courts concerning the content and scope of state law"). Turning to Michigan, it is not clear that the state court's test for whether a rule is substantive or procedural under Section 5—the "judicial dispatch of litigation" test—answers the question of whether a procedural rule is "bound up in the scope of a substantive right or remedy," a necessary predicate for finding a rule to be substantive under Justice Stevens's concurrence. *Compare* McDougall v. Schanz, 597 N.W.2d 148, 156 (2007) ("We conclude that a statutory rule of evidence violates Const 1963, art. 6, § 5 only when "'no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified . . . .'"") (citations omitted), *with* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 433 (2010) (Stevens, J., concurring) ("[I]t is necessary to distinguish between procedural rules adopted for *some* policy reason and seemingly procedural rules that are intimately bound up in the scope of a substantive right or remedy.").

context, to borrow from Michael Steven Green, the state rule will govern "only if the relevant state supreme court wants it to."[222] The use of certification to discern the meaning of state law assumes that the state judiciary is the branch of state government best situated to speak to the meaning of a statute,[223] and undoubtedly this view draws strong support from convention.[224] But it ignores indirect effects that certification could have on inter-branch relations.

Again consider this problem in context. Let us assume that the Michigan legislature adopts the no-penalty class-action rule as part of an all-purpose effort at tort reform that seeks to place a cap on aggregated damages. Further, assume that the Michigan state court does not share the state legislature's approach to tort reform, and does not wish to place a procedural cap on aggregated damages. Strategically, the state court could undermine the legislative bargain by answering the certified question in a way that characterizes the rule as procedural and not as substantive, or at least not substantive in the relevant sense, thus leaving it open to the federal court to apply Federal Rule 23 instead.[225]

The point for now is that federal diversity decisions applying the *Erie/Hanna* doctrine might motivate a state to rethink whether to institutionalize rulemaking authority in the legislature, the court, or an executive agency. Faced with this theoretical possibility, a state has a number of strategic options should it decide to shift rulemaking power from one branch of government to another: the state constitution could be amended to assign rulemaking responsibility to one branch or the other; the legislature could enact general or specific procedural rules rather than delegating authority to the court; the court could cede authority or attempt to recapture its authority through its own development of rules through judicial review of legislative rules; and so forth. Each of these shifts in rulemaking authority potentially carries substantive implications; as commentary recognizes, it is impossible to "guarantee a rulemaking process free of interest group politics"[226] or

---

222. Green, *supra* note 178, at 1882.

223. For potential problems with certification, see Hershkoff, *supra* note 205, at 1720.

224. For a criticism of the conventional wisdom, see Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 135-40 (2009) (arguing, among other things, that the federal courts' use of certification encourages state courts to act in an "anti-minimalist" manner that may be inconsistent with the state system's own vision of its authority).

225. *Cf.* Richard Marcus, *The Rulemakers' Laments*, 81 FORDHAM L. REV. 1639, 1643-44 (2013) (discussing judges' resistance to enforcing a procedural rule with which they disagree, "or at least not to embracing its full potential impact").

226. *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 955 (1999).

without policy effects. This is not to suggest greater legitimacy of rulemaking by one branch or the other—only that we can expect different procedural bargains to be struck by different institutional decision makers, and each holds different substantive implications.[227]

These unintended substantive effects sit uneasily with the *Erie* doctrine, which often is justified as protecting state policymaking against overreaching by unelected federal judges.[228] What I have explored is whether federal judicial displacement of state procedure could indirectly distort the structure of state governance, and in the process abridge or modify state rights, although not in ways that the Rules Enabling Act contemplates or forbids. As with the *Erie/Hanna* doctrine generally, more questions are raised than answered.[229]

V. CONCLUSION

We are here to celebrate the 1963 Constitution—a leading example of using constitutional design to enhance the state's managerial capacity in order to meet contemporary and future problems. An important part of the Michigan Constitution's structure is its bolstering of the state supreme court's supervisory authority. Section 5 of the judicial article,[230] assigning procedural rulemaking power to the court, is a vital part of that effort. I have suggested that the trend toward federalization of the Section 5 power, subtle and insidious, runs counter to the state's constitutional text and purpose; moreover, I have signaled concerns that federal judicial practice could shift the boundary between state judicial and state legislative power, distorting state governance structures and generating indeterminate effects on substantive policy. As we mark the fiftieth anniversary of the Michigan Constitution, we are reminded once again of the importance of ensuring that state constitutions receive the unique interpretive respect that they deserve.

---

227. *See id.* at 954-55.

228. *See* Margaret S. Thomas, *Constraining the Federal Rules of Civil Procedure Through the Federalism Canons of Statutory Interpretation*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 187, 190 (2013) (discussing *Erie's* relation to a "form of federalism" concerning federal displacement of state policymaking).

229. The focus on federalism concerns is not meant to detract from the significant separation-of-powers concerns that these issues raise within the federal system. *See* Hendricks, *supra* note 208, at 139 (referring to "the democratic problems created by an over-reaching [federal] judiciary that uses procedure improperly to affect substance . . .").

230. MICH. CONST. art. VI, § 5.