




12-31-2017

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Recommended Citation

Richard S. Walinski and Mark D. Wagoner Jr., *Ohio's Modern Courts Amendment Must Be Amended: Why and How*, 66 Clev. St. L. Rev. 69 (2017)
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OHIO'S MODERN COURTS AMENDMENT MUST BE AMENDED: WHY AND HOW*

RICHARD S. WALINSKI** & MARK D. WAGONER, JR.***

ABSTRACT

A 1968 amendment to the Ohio Constitution granted the Supreme Court of Ohio the authority to promulgate “rules governing practice and procedure” for Ohio courts. The amendment also provided that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect” and that no rule may “abridge, enlarge, or modify any substantive right.”

Although the amendment was explicit about automatic repeal of existing laws, it says nothing about whether the General Assembly may legislate on a procedural matter after a court rule takes effect. That silence has caused enduring confusion. Since 1968, the Supreme Court of Ohio has considered dozens of cases in which a court-promulgated rule appears to conflict with a subsequently enacted statute.

The court has reached two views on whether later-enacted statutes that conflict with existing court rules are constitutional. One holds that, because the constitution grants rulemaking authority exclusively to the court, the General Assembly has no authority once the court promulgates a procedural rule. It has also held the opposite: the General Assembly may legislate on a procedural matter already addressed in a court rule if the legislature intends to remake that “matter of practice or procedure” into a “substantive right.”

These contradictory interpretations cannot both be right. Yet each remains controlling precedent in Ohio.

Neither of the court’s contradictory rulings rests on a cogent textual analysis of the 1968 amendment. This failing, however, is no reflection on the court. A definitive resolution of the conflicting interpretations is impossible because the sparse language

* Editor’s Note: A substantial portion of this Article was previously published as a memorandum entitled *Proposal to Amend § 5 of the Ohio Constitution* submitted by Richard Walinski to The Judicial Branch and Administration of Justice Committee, Ohio Constitution Modernization Commission. The Ohio General Assembly repealed the statutes creating this Commission as of July 1, 2017. *Cleveland State Law Review* publishes this expanded Article with the permission of both authors. For the original presentation and accompanying proposal, see Richard S. Walinski, *Proposal to Amend Article IV, § 5(B) of the Ohio Constitution* 1–31 (2016).

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of the amendment simply does not contain enough textual foundation from which to derive a compelling, permanent answer—one way or the other.

The authors propose an amendment that would add language to the 1968 amendment. By providing a textual basis for the court's second interpretive ruling, it would make clear and permanent the legislature's authority to share in the process of forming court rules. It would align Ohio's rulemaking process with Congress's participation in rulemaking for federal courts and with the large majority of states that preserve for their legislatures at least some participation in forming the content of rules of practice and procedure.

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I. INTRODUCTION

A void has existed in the Ohio Constitution since adoption of the Modern Courts Amendment in 1968. It exists in what is now Art. IV, § 5(B). This provision gives the Supreme Court of Ohio the power to promulgate “rules governing practice and procedure” in all Ohio courts.¹ This authority previously resided in the General Assembly under Art.

¹ OHIO CONST. art. IV, § 5(B) (“The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”).

II, § 1²—since the adoption of the 1851 Constitution.³

Although Art. IV, § 5(B) now grants rulemaking authority to the court, the Amendment is silent on what authority, if any, the General Assembly retains after the Supreme Court of Ohio exercises its authority allocated under the Amendment. This silence has produced lingering uncertainties in Ohio law. This Article proposes an amendment to Art. IV, § 5(B) that would fill the void.

II. SUMMARY OF A CURRENT PROBLEM

The Modern Courts Amendment addressed several matters affecting Ohio's court system. Like many provisions in the Ohio Constitution, the portion of the Amendment that addresses rulemaking—and that became Art. IV, § 5(B)—is sparsely written.⁴ In addition to granting rulemaking power to the state supreme court, Art. IV, § 5(B) prescribes one consequence that flows from the court's exercise of the authority and adds one limitation on the scope of that authority.⁵ The consequence is that a court-promulgated rule supersedes all laws then in effect that conflict with it; it states, “[a]ll laws in conflict . . . shall be of no further force or effect after such rules have taken effect.”⁶ The limitation is that a court-promulgated rule may not “abridge, enlarge, or modify a substantive right.”⁷ Beyond these two features of the court's rulemaking authority, Art. IV, § 5(B) is silent.⁸

² *Id.* art. II, § 1 (“The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives . . .”).

³ See Josiah H. Blackmore II, *Not from Zeus's Head Full-Blown: The Story of Civil Procedure in Ohio*, in 1 THE HISTORY OF OHIO LAW 441–57, 457 (Michael Les Benedict & John F. Winkler eds., 2004) (“In 1850 Ohioans . . . made the legislature responsible for reforming judicial procedure. The Modern Courts Amendment transferred that authority to the supreme court, leaving the legislature only the minimal authority to disapprove the court's propositions. . .”). Adopted in 1850 and as amended in 1953, the Ohio Constitution, article II, section 1 states in pertinent part:

The legislative power of the state shall be vested in a General Assembly consisting of a Senate and House of Representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided.

OHIO CONST. art. II, § 1 (amended 1953). By various statutes enacted between 1803 and 1959, the General Assembly addressed the topic of the Supreme Court of Ohio's rulemaking authority over matters of practice and procedure, sometimes delegating authority to the courts, sometimes expanding it, sometimes narrowing it, and sometimes rescinding it. See Jeffrey A. Parness & Christopher C. Manthey, *Public Process and Supreme Court of Ohio Rulemaking*, 28 CLEV. ST. L. REV. 249, 250–55 (1979). See also JAMES L. YOUNG, OHIO LEGAL CENTER INSTITUTE, PUB. NO. 105 1 EVIDENCE IN OHIO 2.13–2.17 (1978).

⁴ OHIO CONST. art. IV, § 5(B).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

The most important omission in Art. IV, § 5(B) is any reference to whether the General Assembly may legislate on issues of “practice and procedure” after a court-promulgated rule takes effect.⁹ That question is important because—as a direct result of Art. IV, § 5(B)’s silence—the Supreme Court of Ohio has considered dozens of cases in which it attempted to divine the answer.¹⁰ Divining it, however, has been difficult.

The court has answered this question in two ways that directly contradict each other. The court’s first answer was that the Modern Courts Amendment barred the General Assembly from legislating on a matter of practice or procedure once the court successfully promulgated a rule on the matter.¹¹ A more recent line of cases, however, held that the General Assembly may change the content of a court-promulgated rule of practice or procedure, but only if the legislature intended to convert the procedural matter addressed in the rule into a “substantive right.”¹² In announcing this second interpretation of Art. IV, § 5(B), however, the court did not overrule or modify its ruling in the first interpretation.¹³ Moreover, the court has yet to do so when applying its second interpretation in later cases.¹⁴

The two interpretations cannot both be correct. The court cannot bar the General Assembly from legislating on a matter of practice or procedure and simultaneously recognize that the General Assembly retained the power to do so.

The mere existence of inconsistent interpretations does not itself justify amending the constitution. But this inconsistency relating to practice and procedure is a rare instance that does require such amendment.

If Art. IV, § 5(B)’s few clauses were statutory rather than constitutional, the provision giving authority to the supreme court might easily be harmonized with the General Assembly’s plenary legislative authority under Art. II, §1.¹⁵ A court applying common-law rules of statutory interpretation might reason that a statute worded like Art. IV, § 5(B) leaves legislative authority in the General Assembly, except to the extent that the Amendment clearly places authority in the court.¹⁶ This interpretive

⁹ *Id.*

¹⁰ *See, e.g., State ex rel. Loyd v. Lovelady*, 840 N.E.2d 1062 (Ohio 2006); *Rockey v. 84 Lumber Co.*, 611 N.E.2d 789 (Ohio 1993).

¹¹ *Rockey*, 611 N.E.2d 791–92 (“The Ohio Rules of Civil Procedure, which were promulgated by the Supreme Court pursuant to *Section 5(B), Article IV of the Ohio Constitution*, must control over subsequently enacted inconsistent statutes purporting to govern procedural matters”) (internal footnote omitted), *aff’d*, *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999).

¹² *Havel v. Villa St. Joseph*, 963 N.E.2d 1270 (Ohio 2012); *Lovelady*, 840 N.E.2d at 1064 (“If the legislature intended the enactment to be substantive, then no intrusion on this court’s exclusive authority over procedural matters has occurred. . . . Thus, although [the statute is] . . . necessarily packaged in procedural wrapping, it is clear to us that the General Assembly intended to create a substantive right to address potential injustice”) (emphasis added).

¹³ *Lovelady*, 840 N.E.2d. at 1063–65.

¹⁴ *Havel*, 963 N.E.2d at 1277–79.

¹⁵ Compare OHIO CONST. art. IV, § 5(B), with *id.* art. II § 1.

¹⁶ *See id.* art. IV, § 5(B).

technique for filling the void in a statute is not available when interpreting a constitution¹⁷—at least not in a way that would have a permanent effect on the meaning of the constitution.

First, common-law rules for interpretation and construction stand on a different footing when used to interpret statutes than when used to interpret constitutions.¹⁸ The common-law rules work well when applied to legislation—or similar forms of positive law—because the rules rest ultimately upon the recognition that the enacting body has the power to amend the legislation and, thus, to correct it or to otherwise respond to judicial interpretations.¹⁹ That ease of correction is not present when changing a constitution.²⁰ Because amending the constitution requires statewide voter approval, the process—even in Ohio—is arduous and expensive.²¹ As a result, rules of interpretation premised on ease of correction have little applicability to the interpretation of constitutional texts.²²

Even if common-law rules for construing constitutions were the same as the rules for construing statutes, the rules themselves are numerous and often produce conflicting interpretations.²³ Any attempt to fill the void in Art. IV, § 5(B) solely

¹⁷ See BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* (2016).

¹⁸ See *id.* at 352 (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)) (“The doctrine of *stare decisis* applies less rigidly in constitutional cases than it does in statutory cases *Stare decisis* is flexible in constitutional cases because ‘correction through legislative action is practically impossible.’”); see also *Rocky River v. State Emp’t Relations Bd.*, 539 N.E.2d 103, 106 (Ohio 1989) (“The doctrine [of *stare decisis*] . . . concerns . . . the construction of statutes, ordinances, rules and regulations. The doctrine does not apply with the same force and effect when constitutional interpretation is at issue.”); *United States v. Scott*, 437 U.S. 82, 101 (1978) (Brandeis, J., dissenting) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–08 (1932)) (“[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.”).

¹⁹ GARNER ET AL., *supra* note 17, at 352.

²⁰ *Id.*

²¹ See OHIO CONST. art XVI, §1.

²² *Id.*

²³ Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950); cf. CARLETON K. ALLEN, *LAW IN THE MAKING* 578 (7th ed. 1964) (echoing Llewellyn by saying that “[t]here is scarcely a rule of statutory interpretation, however orthodox, which is not qualified by large exceptions, some of which so nearly approach flat contradictions that the rule itself seems to totter on its base”); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596 (1992) (“We agree that the malleability of the canons prevents them from constraining the Court or forcing certain results in statutory interpretation through deductive reasoning from first canonical principles. Yet we also think that the substantive canons are connected in an important way with the results the Court reaches in statutory cases The canons are one means by which the Court expresses the value choices that it is making or strategies it is taking when it interprets statutes (thus, results produce canons). . . . The precise way in which a Court deploys

through judicial application of a common-law rules of interpretation or construction would endure only until the court—perhaps when differently aligned politically—focuses on a different rule of interpretation that supports some other reading of the constitution.

Exacerbating the inadequacy of these common-law rules of interpretation is the Amendment's sparse language. There was simply not enough firm ground—i.e. not enough in textual content—in the Amendment for the Supreme Court of Ohio to build a compelling answer to where Art. IV, § 5(B) leaves the full breadth of authority to prescribe the content of court rules.

The amendment proposed in this Article would fill the void permanently by interlineating language that would answer this question. The amendment would do so by inserting language that reflects the court's second interpretation.

Selecting the second interpretation, rather than the first, is not arbitrary. This proposal rejects the court's first interpretation—holding the General Assembly to be disenfranchised once a court-promulgated rule of practice or procedure becomes effective under Art. IV, § 5(B).²⁴ There are two reasons. First, that interpretation suffers from a fundamental, structural flaw. Its allocation of mutually exclusive spheres of legislative authority between the court and legislature turns on a false and irredeemably blurred distinction between substance and procedure. Second, the court's first interpretation of its lawmaking authority recognized no veto authority in the Governor, but only in the transient and demonstrably fragile authority that Art. IV, § 5(B) currently affords the General Assembly to review a proposed Rule.²⁵ If the first interpretation resurfaced as the prevailing law of Ohio, the court would again act effectively as the only governmental check on the exercise of its own rulemaking activity.

The path we propose reflects the Modern Courts Amendment's ancestry. The rulemaking provisions of the Modern Courts Amendment were modeled after the federal Rules Enabling Act of 1934.²⁶ The Supreme Court of Ohio's second interpretation recognizes a relationship between the General Assembly and the court that allows for shared authority in court rulemaking; this sharing resembles what the Rules Enabling Act created between Congress and the Supreme Court of the United States.²⁷

substantive canons of statutory construction reflects an underlying 'ideology,' or mix of values and strategies that the Court brings to statutory interpretation.").

²⁴ *Rockey v. 84 Lumber Co.*, 611 N.E.2d 789 (Ohio 1993).

²⁵ *Id.*

²⁶ Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2071 (2017)).

²⁷ The Honorable Jeffrey S. Sutton of the United States Court of Appeals for the Sixth Circuit has long urged state courts to recognize that their state constitutions need not be interpreted in the same way that federal courts interpret the U.S. Constitution, even when provisions of the federal constitutions are worded similarly. *See, e.g.*, Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 710 (2011) ("There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed the same. Still less is there reason to think that a highly generalized guarantee, such as a prohibition on 'unreasonable' searches, would have just one meaning for a range of differently situated

This Article proposes that the legislature amend Art. IV, § 5(B) by adding the italicized language:

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. *The general assembly may change rules promulgated hereunder by introducing a bill (1) that states in its preamble specifically that it is the legislature's purpose to create a substantive right and (2) that is enacted into law as provided in Article II, Section 16.*

III. THE MODERN COURTS AMENDMENT AND THE FEDERAL RULES ENABLING ACT

Congress enacted the federal Rules Enabling Act in 1934.²⁸ It authorizes the United States Supreme Court “to prescribe, by general rules, . . . the practice and procedure of the district courts of the United States”²⁹ In the decades that followed its enactment, the Enabling Act was the fountainhead for a deluge of court rulemaking, both federally and in the states.³⁰ The Supreme Court of the United States, exercising its authority granted under the Act, began the flow by promulgating Rules of Civil

sovereigns.”); *see also* William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

By proposing to amend Art. IV, § 5(B) in a manner that would create an effect similar to that created by the federal Rules Enabling Act, this proposed amendment does not conflict with Judge Sutton’s view of states’ autonomy. This proposal is driven, not by any reflexive deference to the federal approach to rulemaking, but rather by the fact that shared authority in prescribing the content of court rules is the only workable way to approach any allocation of rulemaking that separates the authority between court and legislature based on the false dichotomy between substance and procedure.

²⁸ Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2071 (2017)).

²⁹ Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106 (1982).

³⁰ The reasons why the Rules Enabling Act of 1934 spawned this rush of court-promulgated rules are beyond the scope of this Article. The United States Supreme Court had been authorized since at least 1842 “to regulate the whole practice [in the district and circuit courts of the United States], so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.” Act of August 23, 1842, ch. 188, § 6, 5 Stat. 516, 518 (1842). For the evolution of the Supreme Court’s rulemaking authority before enactment of the Rules Enabling Act, *see* Burbank, *supra* note 29, at 1034–98. A very small number of state legislatures had already passed bills authorizing courts to promulgate rules of procedure. *See, e.g., Rulemaking Principle Enacted in Delaware and Washington*, 9 J. AM. JUDICATURE SOC’Y 134 (1925).

Procedure in 1938.³¹ Under parallel legislation, the Court eventually issued rules covering, among others, criminal³² and appellate procedure.³³ Many states have since come to accept rulemaking authority in their highest courts, whether shared with the state legislature³⁴—as the great majority of states do³⁵—or held exclusively by the court.³⁶ Most states have allocated this authority by statutory delegation or by variously worded constitutional amendments.³⁷

With adoption of the Modern Courts Amendment in 1968, Ohio joined—albeit belatedly³⁸—the movement toward court-promulgated rules.³⁹ The Amendment was

³¹ Burbank, *supra* note 29, at 1028.

³² Effective March 21, 1946. *See* 327 U.S. 821; CONG. REC., vol. 91, pt. 1, p. 17, Exec. Comm. 4; H. Doc. 12, 79th Cong.

³³ Effective July 1, 1968. *See* 389 U.S. 1063; CONG. REC., vol. 114, pt. 1, p. 113, Exec. Comm. 1361; H. Doc. 204, 90th Cong.

³⁴ *See, e.g.*, MD. CONST. art. IV, pt. I, § 18(a) (“The Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations adopted by the Court of Appeals or otherwise by law.”).

³⁵ *See infra* notes 219–23 and accompanying text.

³⁶ *See, e.g.*, MICH. CONST. art. VI, § 5 (“The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state. . . .”); *McDougall v. Schanz*, 597 N.W.2d 148, 154 (Mich. 1999) (“It is beyond question that the authority to determine rules of practice and procedure rests exclusively with this Court.”).

³⁷ *See infra* notes 219–23 and accompanying text.

³⁸ By 1968, the Supreme Court of the United States had already recognized that the distinction between substance and procedure, which lies at the heart of the Modern Courts Amendment’s allocation of rulemaking authority, is a false dichotomy. *See* *Hanna v. Plumer*, 380 U.S. 460, 465 (1965); discussion *infra* Parts III–IV.

A fundamental rethinking about the relationship between substance and procedure in the rulemaking context had already begun. *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 877, 900 (1999) (“The professional romance with court rulemaking and the Federal Rules began to sour in the early 1970s. Critics attacked the notion that there was an ideal procedure embedded in existing practice and codified in the Federal Rules. As a result, the boundary between procedure and substance blurred, and the case for expert rulemaking weakened. During the 1960s and early 1970s, new substantive rights were created in response to growing public concern about civil rights, consumer welfare, and environmental protection. At the same time, public interest groups and lawyers inspired by the successes of the civil rights movement began to view litigation as a vehicle for social reform. The resulting changes in the character of federal litigation gave rise to concerns about the adequacy of the existing procedural system to promote substantive values. Many of the new public interest cases . . . focused attention on the close relationship between procedure and substantive law.”) (internal citations omitted).

³⁹ *See* Blackmore II, *supra* note 3, at 457.

“the most significant change in the judiciary since ratification of the Ohio Constitution of 1850.”⁴⁰

The kinship between the Modern Courts Amendment and the federal Rules Enabling Act is evident in their striking similarities.⁴¹ One similar provision is the clause authorizing the Supreme Court of Ohio to “prescribe rules governing practice and procedure in all courts of the state.”⁴² That clause is now Art. IV, § 5(B).⁴³ Besides using nearly identical language to grant authority to prescribe laws “governing practice and procedure in all courts,” the Ohio amendment uses identical language prohibiting the court from promulgating a rule that would “abridge, enlarge, or modify any substantive right.”⁴⁴ Art. IV, § 5(B) also has a supersession clause like the one in the Rule Enabling Act.⁴⁵ Both state that, if an existing statute conflicts with a duly

⁴⁰ *Id.*

⁴¹ Compare OHIO CONST. art. IV, § 5(B) with 28 U.S.C. § 2072 (1966). From 1966 until the Modern Courts Amendment was adopted, the federal Rules Enabling Act, 28 U.S.C. § 2072, stated:

Rules of civil procedure for district courts.

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Attorney General at the beginning of a regular session and until after the close of such session.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

28 U.S.C. § 2072 (1966). For the succession of amendments to the 1934 Act before the enactment of the Modern Courts Amendment, see Stuart M. Lockman, *Congressional Discretion in Dealing with the Federal Rules of Evidence*, 6 U. MICH. J.L. REFORM 798, 799 n.9 (1973). For more historical background of the Rules Enabling Act of 1934, see 4 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE*, CIVIL § 1001 (2005); Charles E. Clark & James W.M. Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387 (1935); George H. Jaffin, *Federal Procedural Revision*, 21 VA. L. REV. 504 (1935); Edson R. Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116 (1934).

⁴² Another provision of the Modern Courts Amendment gave the supreme court authority over all matters regarding the admission to the bar and the discipline of lawyers and judges. OHIO CONST. art. IV, § 2(B)(1)(g).

⁴³ OHIO CONST. art. IV, § 5(B).

⁴⁴ *Id.*

⁴⁵ *Id.*

promulgated court rule, the statute will no longer have any force or effect after the rule takes effect.⁴⁶

The process for promulgating rules is also similar. Each court may propose a rule of practice or procedure only once a year.⁴⁷ The legislature then has a defined period in which to consider the proposed rule.⁴⁸ Unless the legislature takes action by a designated date to disapprove the proposed rule, the court's proposal becomes law by default.⁴⁹

Even more important than what the Rules Enabling Act and the Modern Courts Amendment say is what the two texts leave unsaid. Both are silent on two crucial questions. First, neither defines how "a rule of practice and procedure" is to be distinguished from "a substantive right."⁵⁰ As discussed *infra*, this silence remains a vexing problem.⁵¹ Second, even though both the Enabling Act and Art. IV, § 5(B) contain supersession clauses stating that existing statutory law inconsistent with a newly promulgated court rule is deemed repealed, neither addresses whether or to what extent Congress or the General Assembly may legislate on a matter of "practice and procedure" after a court-promulgated rule takes effect.⁵² The Ohio Constitution's

⁴⁶ Compare OHIO CONST. art. IV, § 5(B) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.") with Rules Enabling Act, 28 U.S.C. § 723(b) (1934) ("All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.").

⁴⁷ Compare OHIO CONST. art. IV, § 5(B) ("Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof") with 28 U.S.C. § 2072 (1950) (corresponds to the version amended by the Act of May 10, 1950, ch. 174, § 2, 64 Stat. 158 (stating that proposed rules must be "reported to Congress by the Attorney General at the beginning of a regular session").

⁴⁸ Compare OHIO CONST. art. IV, § 5(B) ("Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval") with 28 U.S.C. § 2072 (2017) ("Such rules shall not take effect . . . until after the close of such session").

⁴⁹ See OHIO CONST. art. IV, § 5(B).

⁵⁰ Paul D. Carrington, 'Substance' and 'Procedure' in the Rules Enabling Act, 1989 DUKE L.J. 281, 284 (1989).

⁵¹ *Id.* ("The interpretive problem [with the Rules Enabling Act] lay in the mystic terms 'substance' and 'procedure' as used in the Act."). Specifically addressing Art. IV, § 5(B), James L. Young described the substance/procedural dichotomy as the central source of uncertainty in the Modern Courts Amendment. He wrote:

Historically, the responsibility for procedural rules has been within the legislative prerogative and also within the judicial prerogative. The approach has varied with the times. The Modern Courts Amendment resolves a part of the problem by placing a duty for procedural rules on the Supreme Court. It leaves the underlying question unanswered. That question is the distinction between substance and procedure . . .

Young, *supra* note 3, at 2.17.

⁵² *Id.* at 322.

silence on this point also implicates an elementary part of the separation-of-powers doctrine.⁵³

As discussed below, the silence about Congress's authority has caused little disruption under the federal Rules Enabling Act. And the silence about the General Assembly's authority presented only a theoretical problem in 1968 when Ohio ratified the Modern Courts Amendment. But the omission has become a recurring problem in Ohio because the Ohio legislature often enacts legislation that conflicts with court-promulgated, apparently procedural rules.⁵⁴

One might naturally assume that two similar pieces of positive law, the Rules Enabling Act and Art. IV, § 5(B), would generate similar judicial interpretations. They have not. Instead, the federal and Ohio experiences have substantial differences. Since 1934, the United States Supreme Court never has held that a court-promulgated rule abridged, enlarged, or modified a substantive right. In fact, the Court has rarely faced this question.⁵⁵

This is quite different from the Ohio experience. Since 1968, the Supreme Court of Ohio has considered more than three dozen cases involving potential conflicts between statutes and court rules.⁵⁶ Finding conflicts in at least thirty-two of those cases, the court was obliged to determine whether it was the statute or the rule that was unconstitutional under Art. IV, § 5(B).⁵⁷

Why the difference between the federal experience and Ohio's? The difference stems from one vastly important distinction between the federal Rules Enabling Act and Ohio's Modern Courts Amendment. The Enabling Act is an act of Congress; it is legislation.⁵⁸ In it, Congress delegated rulemaking authority to the Supreme Court.⁵⁹ The Modern Courts Amendment, however, is a constitutional provision.⁶⁰ It lodges the authority to prescribe "rules governing practice and procedure"—an area over which the General Assembly theretofore had legislative authority⁶¹—in the Supreme Court of Ohio as a matter of constitutional allocation, not by delegation through legislative

⁵³ *See id.* at 326.

⁵⁴ *Cf.* William W. Milligan & James E. Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST. L.J. 811, 829 (1968).

⁵⁵ *See generally* Carrington, note 50, at 322–26.

⁵⁶ *See infra* note 81 and accompanying text.

⁵⁷ *Id.*

⁵⁸ Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2071 (2017)).

⁵⁹ *Id.*

⁶⁰ OHIO CONST. art. IV, § 5(B).

⁶¹ Milligan & Pohlman, *supra* note 54, at 829 ("Prior to this constitutional amendment, practice and procedure in Ohio have been governed by statute"); *see also* Blackmore II, *supra* note 3; *cf.* Morrison v. Steiner, 290 N.E.2d 841, 843 (Ohio 1972) ("Venue is a procedural matter. Although once the private domain of the General Assembly, it is now properly within the rule-making power of the [Ohio] Supreme Court under Section 5(B), Article IV of the Constitution of Ohio").

authority.⁶² Constitutional allocation implicates the checks-and-balances aspect of the separation-of-powers doctrine; delegation does not.⁶³

Unfortunately for Ohio, the presumed dichotomy between substance and procedure provides little analytical assistance in defining the difference in areas of legislative and court rulemaking authority.⁶⁴ Moreover, the distinction between delegated authority and constitutional allocation was not fully appreciated when Ohio adopted the Modern Courts Amendment.⁶⁵ These combined facts make the silence in Art. IV, § 5(B) far more significant in Ohio than the same silence in the federal system.

⁶² See generally STEPHEN H. STEINGLASS & GINO J. SCARSELLI, *THE OHIO STATE CONSTITUTION* 65 (2011) (stating that the Modern Courts Amendment's grant of authority to the court "differs from the federal system in which the U.S. Supreme Court derives its rule-making authority from . . . the Rules Enabling Act, rather than directly from the federal constitution").

⁶³ See *id.*

⁶⁴ Leslie M. Kelleher, *Taking 'Substantive Rights' (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 69–70 (1998) ("The precise boundaries of purely procedural matters are . . . of little practical significance for a separation of powers analysis."). See also Young, *supra* note 3, at 2.16–2.17.

⁶⁵ Cf. Milligan & Pohlman, *supra* note 54. A study of law reviews published since 1969 that discussed adoption of the Modern Courts Amendment revealed no discussion of the dissimilar sources of the court's rulemaking power.

Ohio's selection of the Rules Enabling Act as the model on which to ground its venture into court lawmaking may not have been the wisest. The Enabling Act model brought with it interpretive problems that have remained intractable.

To this day, no real consensus has developed as to how the Act should be interpreted.

....

The principal reason why construction of the Rules Enabling Act has eluded anything approaching consensus lies in the two key sections of the Act. One section requires the rulemakers "to prescribe general rules of practice and procedure The other operative provision specifies that rulemaking under the Act "shall not abridge, enlarge or modify any substantive right." The question is, how should the two sections be construed when taken together? What distinguishes a permissible rule from an impermissible one?

....

[T]he last seventy years of doctrine and scholarship have failed to produce a generally accepted construction of the procedural-substantive interplay of the Act's two key provisions.

Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 27–31 (2008).

On a more fundamental level, the context in which the federal Rules Enabling Act was enacted was fundamentally different from the context to which the drafters of the Modern Courts Amendment wished to apply the structure and content that they lifted from the federal Rules Enabling Act. The federal Act arose out of a decades-long movement to create a uniform set of rules applicable in all federal district courts across the country. The most potent and fundamental problem that the movement faced was achieving a uniformity that was workable in all cases that were controlled by the Rules of Decision Act of 1789, i.e., in both federal-question cases and

IV. "SUBSTANTIVE RIGHT" VERSUS "PRACTICE AND PROCEDURE"

In both the federal and Ohio systems for allocating rulemaking authority, the allocation between court and legislature turns on the distinction between a "substantive right" and "practice and procedure."⁶⁶ The distinction is inherently vague,⁶⁷ notoriously difficult to define in the abstract, and even harder to apply.⁶⁸ As a result, its utility as the sole criterion for marking the constitutional boundary between legislative and judicial domains is functionally nil.

For the purpose of defining the Court's rulemaking authority under the federal Rules Enabling Act, the United States Supreme Court has essentially given up trying to ascribe any predictive, consistent distinction between substance and procedure. In *Hanna v. Plumer*,⁶⁹ the Court acknowledged that substance and procedure sometimes mean different things in different contexts and that they sometimes overlap.⁷⁰ Faced with having to determine whether a court-promulgated rule is procedural for purposes of the Rules Enabling Act, the Court devised a way to avoid the issue.⁷¹ The Court created a presumption that every rule that it successfully promulgates is procedural because, to have become effective, the rule had to pass through the process established by Congress in the Rules Enabling Act. This process included Congress's review and,

diversity cases. *See, e.g.*, Burbank, *supra* note 29, at 1159 n.620; Carrington, *supra* note 50, *passim*; John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 *passim* (1974); Kelleher, *supra* note 64, *passim*.

In Ohio, by contrast, the fundamental problem was to lay out a workable reallocation of lawmaking between the supreme court and the General Assembly, i.e., separation of powers. The fact that Ohio's model was fashioned for a distinctly different problem has made more difficult Ohio's effort to make sense of cases decided since 1934 under the federal Act.

⁶⁶ Redish & Murashko, *supra* note 65, at 27.

⁶⁷ "A word or phrase is . . . vague when the concept to which it unquestionably refers has uncertain application to various factual situations." ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 32 (2012) (citing E. Allan Farnsworth, *Some Considerations in the Drafting of Agreements*, in *DRAFTING CONTRACTS AND COMMERCIAL INSTRUMENTS* 145, 146–47 (1971) ("A word that may or may not be applicable to marginal objects is vague")); *see also* REED DICKERSON, *THE INTERPRETATION OF STATUTES* 48–49 (1975) ("[V]agueness refers to the degree to which, independently of equivocation, language is uncertain in its respective applications to a number of particulars"); LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 70 (2008) (noting that although "ambiguity is not the same as generalness, . . . judges routinely say that language is ambiguous when it is merely vague, broad, or general").

⁶⁸ Walter Wheeler Cook's transformative article on the nonpredictive quality of the terms "substance" and "procedure" in legal analysis was published in 1933. Walter Wheeler Cook, *'Substance' and 'Procedure' in the Conflict of Laws*, 42 YALE L.J. 333, 336 n.10 (1933) ("The distinction between substantive and procedural law is artificial and illusory. In essence, there is none."). For the importance of Cook's work and its role in the debates over the appropriateness of specific Rules proposed by the United States Supreme Court, see Burbank, *supra* note 29, at 1159 n.620.

⁶⁹ *Hanna v. Plumer*, 380 U.S. 460 (1965).

⁷⁰ *Id.* at 471.

⁷¹ *Id.* at 461.

eventually, its rejection of the rule or acquiescence in its adoption.⁷² As the Court later explained in *Burlington Northern v. Woods*,⁷³

the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect . . . give the Rules presumptive validity under both the constitutional and statutory constraints.⁷⁴

The presumption allows the Court to pass over the mystic distinction between substance and procedure as the determinant of whether authority to address a matter is judicial or legislative.⁷⁵ By focusing on the process for promulgating a rule rather than on the nature of the matter addressed in it, a rule sometimes satisfies muster under *Hanna* even though, for some purposes, the rule is substantive, not procedural.⁷⁶ The factors that, according to the Supreme Court, give rise to the presumption will be discussed further *infra*.⁷⁷

Soon after the Modern Courts Amendment was adopted, the Supreme Court of Ohio itself recognized that the supposed substance/procedure dichotomy is bankrupt. In *Gregory v. Flowers*, the court observed that:

[t]he distinction between substantive and procedural law is artificial and illusory. In essence, there is none. The remedy and the predetermined machinery, so far as the litigant has a recognized claim to use it, are legally speaking, part of the right itself. A right without a remedy for its violation is a command without a sanction . . . i.e., no law at all. While it may be convenient to distinguish between the right or liability, the remedy or penalty by which it is enforced, on the one hand, and the machinery by which the remedy is applied to the right, on the other, i.e., between substantive law and procedural law, it should not be forgotten that so far as either is law at all, it is the litigant's right to insist upon it, i.e., it is part of his right. In other words, it is substantive law.⁷⁸

Despite recognizing the futility of trying to ascribe any mutually exclusive distinction between “substantive” and “procedural”—even though the United States Supreme Court gave up attempting to separate substance and procedure into mutually exclusive

⁷² *Id.*

⁷³ *Burlington Northern v. Woods*, 480 U.S. 1 (1987) (citing *Hanna*, 380 U.S. at 471).

⁷⁴ *Id.* at 6.

⁷⁵ *Id.*

⁷⁶ *Hanna*, 380 U.S. at 468 (“The difference between the conclusion that the Massachusetts rule is applicable, and the conclusion that it is not, is of course at this point ‘outcome-determinative’ in the sense that if we hold the state rule to apply, respondent prevails, whereas if we hold that Rule 4 (d)(1) governs, the litigation will continue. But in this sense every procedural variation is ‘outcome-determinative.’”).

⁷⁷ See *infra* Part V.

⁷⁸ *Gregory v. Flowers*, 290 N.E.2d 181, 186 (Ohio 1972) (quoting 1 CHARLES FREDERIC CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE 217 (1911)).

categories for purposes of allocating lawmaking authority—the Supreme Court of Ohio routinely struggles with this dichotomy.⁷⁹ The issue arises whenever the court is asked to decide which branch of Ohio government has the constitutionally allocated authority to prescribe rules affecting practice or procedure in instances where both have attempted to do so.⁸⁰

Since 1968, the Supreme Court of Ohio has been faced with explicating the allocation of legislative authority no less than thirty-six times.⁸¹ As will be discussed

⁷⁹ See *infra* note 81.

⁸⁰ *Id.*

⁸¹ Each of the cases decided by the supreme court addresses—to a greater or lesser extent—the same two fundamental components of the lawmaking authority under OHIO CONST. art. IV, § 5(B): (1) whether the statute and rule conflict and (2) whether the subject matter of the statute and court rule substantive or procedural. The court's handling of the substance-procedure issue in those cases falls into roughly five categories:

(1) Court found no conflict between a court-promulgated rule and a statute. See *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 889 N.E.2d 500 (Ohio 2008); *State ex rel. Boylen v. Harmon*, 839 N.E.2d 934 (Ohio 2006); *State ex rel. Thompson v. Spon*, 700 N.E.2d 1281 (Ohio 1998); *State ex rel. Steckman v. Jackson*, 639 N.E.2d 83 (Ohio 1994); *State ex rel. Beacon J. Publ'g Co. v. Waters*, 617 N.E.2d 1110 (Ohio 1993); *Ky. Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 559 N.E.2d 477 (Ohio 1990); *State v. Brown*, 528 N.E.2d 523 (Ohio 1988); *State v. Slatter*, 423 N.E.2d 100 (Ohio 1981).

(2) Court found a conflict between a rule and a statute, and resolved in favor of one or the other, but did not attempt to explicate the difference between “practice and procedure” and a “substantive right” as applied to the case. See *Proctor v. Kardassilaris*, 873 N.E.2d 872 (Ohio 2007); *Hiatt v. S. Health Facilities*, 626 N.E.2d 71 (Ohio 1994); *In re Coy*, 616 N.E.2d 1105 (Ohio 1993); *State ex rel. Hurt v. Kistler*, 587 N.E.2d 298 (Ohio 1992); *State v. Smorgala*, 553 N.E.2d 672 (Ohio 1990); *State ex rel. Clark v. Toledo*, 560 N.E.2d 1313 (Ohio 1990); *State v. Rahman*, 492 N.E.2d 401 (Ohio 1986); *Alexander v. Buckeye Pipe Line Co.*, 359 N.E.2d 702 (Ohio 1977); *Boyer v. Boyer*, 346 N.E.2d 286 (Ohio 1976); *City of Cuyahoga Falls v. Bowers*, 459 N.E.2d 532 (Ohio 1979).

(3) Court found a conflict between a rule and a statute, attempted to define the difference between “practice and procedure” and a “substantive right” as applied to the case, and ruled that the statute prevails because a court-promulgated Rule cannot modify a substantive right. See *Havel v. Villa St. Joseph*, 963 N.E.2d 1270 (Ohio 2012); *Erwin v. Bryan*, 929 N.E.2d 1019 (Ohio 2010); *State ex rel. Loyd v. Lovelady*, 840 N.E.2d 1062 (Ohio 2006); *Hartsock v. Chrysler Corp.*, 541 N.E.2d 1037 (Ohio 1989) (jurisdictional case); *Malloy v. Westlake*, 370 N.E.2d 457 (Ohio 1977) (jurisdictional case); *State v. Hughes*, 324 N.E.2d 731 (Ohio 1975) (jurisdictional case); *Krause v. State*, 285 N.E.2d 736 (Ohio 1972) (no statute at issue in the case).

(4) Court found a conflict, attempted to define the difference between a rule and a statute, attempted to define the difference between “practice and procedure” and a “substantive right” as applied to the case, and ruled that the court-promulgated rule prevails because the statute is procedural and, therefore, either was repealed by Art. IV, § 5(B) or violates it. See *Rockey v. 84 Lumber Co.*, 611 N.E.2d 789 (Ohio 1993); *State ex rel. Silcott v. Spahr*, 552 N.E.2d 926 (Ohio 1990); *State v. Greer*, 530 N.E.2d 382 (Ohio 1988); *State v. Rahman*, 492 N.E.2d 401 (Ohio 1986); *Johnson v. Porter*, 471 N.E.2d 484 (Ohio 1984); *State ex rel. Columbus v. Boyland*, 391 N.E.2d 324 (Ohio 1979).

in section VI, the Supreme Court of Ohio does not have the option to bypass the substance/procedure dichotomy the way the United States Supreme Court did in *Hanna* and *Burlington Northern*. Ohio cannot rely on the presumption that, if a matter is addressed in a court-promulgated rule, the matter is procedural.

V. CONGRESS AND THE UNITED STATES SUPREME COURT

“Nothing could be clearer from the pre-1934 history of the Rules Enabling Act than that the procedure/substance dichotomy . . . was intended to allocate lawmaking power between the Supreme Court as rulemaker and Congress.”⁸² The United States Supreme Court has consistently recognized that its power to promulgate rules of practice and procedure is a power that Congress delegated to it through the federal Rules Enabling Act of 1934 and various parallel legislation.⁸³ The United States Supreme Court has authority to promulgate rules, therefore, only to the extent that and only so long as it possesses the authority that Congress delegated to it.⁸⁴

If Congress and the Supreme Court disagree about a proposed rule of practice and procedure, Congress has several ways of addressing the disagreement. Congress can postpone the effective date of the proposed rule.⁸⁵ Or Congress can rescind or modify

(5) The court, without further defining the difference between “practice and procedure” and a “substantive right,” applied the ruling of a case listed in (2) or (3) above. *See* *Flynn v. Fairview Vill. Ret. Cmty. Ltd.*, 970 N.E.2d 927 (Ohio 2012); *Myers v. Brown*, 967 N.E.2d 1212 (Ohio 2012); *Seeger v. For Women, Inc.*, 854 N.E.2d 188 (Ohio 2006); *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999); *State ex rel. Bohlman v. O’Donnell*, 628 N.E.2d 1367 (Ohio 1994); *Stark v. Arn*, 613 N.E.2d 167 (Ohio 1993).

⁸² Burbank, *supra* note 29, at 1106.

⁸³ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10, 15 (1941) (“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 The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. Evidently the Congress felt the rule was within the ambit of the statute as no effort was made to eliminate it from the proposed body of rules”) (internal citations omitted); *see also* *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 406–07 (2010) (“In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U.S.C. § 2072(a)”); *Hanna v. Plumer*, 380 U.S. 460, 471–74 (1965) (“In the Rules Enabling Act, Congress authorized this Court to prescribe uniform Rules to govern the ‘practice and procedure’ of the federal district courts and courts of appeals.”).

⁸⁴ *Hanna*, 380 U.S. at 473.

⁸⁵ *See, e.g.*, Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9. The title of the Act, an “Act to promote the separation of constitutional powers,” indicates Congress’s concern that the Court had overstepped its constitutional and statutory rulemaking authority. Kelleher, *supra* note 64.

By 1979, the tactic of postponing the effective date of proposed amendments to Federal Rules had ceased to be “a novel procedure.” 125 CONG. REC. H6376 (daily ed. July 23, 1979) (statement of Rep. Drinan); *see generally* Arthur J. Goldberg, *The Constitutional Doctrine of Separation of Powers*, 5 SETON HALL L. REV. 667, 668 (1973) (“[T]he rules enabling acts have

the Rules Enabling Act by which Congress delegated rulemaking authority to the Court. Or Congress can amend the rule that the Court submitted to Congress.⁸⁶ Or Congress can assume legislative authority over the subject and enact legislation in substitution for the proposed rule.⁸⁷ Finally, even after a rule proposed by the Supreme Court becomes law, Congress can pass legislation changing what the Supreme Court promulgated through its rulemaking authority.⁸⁸ Congress has exercised each of these options at one time or another regarding the Federal Rules of Civil Procedure⁸⁹ and Criminal Procedure.⁹⁰

Congress's most assertive action against rules that the United States Supreme Court proposed, however, involved the Federal Rules of Evidence, which the Court first proposed in 1972.⁹¹ Both houses of Congress introduced bills to postpone the effective date that the Supreme Court had set for the proposed Rules, thereby giving Congress time to examine the Court's view of its claimed authority to promulgate evidence rules.⁹² As the postponed effective date approached, Congress enacted a bill that prohibited the Supreme Court's proposed rules from taking effect. Declaring that rules of evidence were not matters of "practice and procedure" and, thus, not a proper subject for court rulemaking, Congress prohibited adoption of rules of evidence except and until they might be "expressly approved by Act of Congress."⁹³ Ultimately, the

been construed by both Congress and the Supreme Court to mean that Congress has the power to amend or veto rules transmitted by the Chief Justice.”).

⁸⁶ See *Shady Grove*, 559 U.S. at 400 (“Congress . . . has ultimate authority over the Federal Rules of Civil Procedure; it can create exceptions to an individual rule as it sees fit—either by directly amending the rule or by enacting a separate statute overriding it in certain instances”); cf. *Henderson v. United States*, 517 U.S. 654, 668 (1996).

⁸⁷ *Shady Grove*, 559 U.S. at 400. Congress did precisely this when the U.S. Supreme Court attempted to propose the Federal Rules of Evidence as rules of practice and procedure under the federal Rules Enabling Act. See Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926; see generally 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, EVIDENCE § 5006 (2005).

⁸⁸ *Shady Grove*, 559 U.S. at 400.

⁸⁹ For example, in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, Congress established pleading standards in private securities litigation that differed from FED. R. CIV. P. 8(a). See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313–14 (2007) (“As a check against abusive litigation by private parties, Congress enacted the Private Securities Litigation Reform Act of 1995 . . . (PSLRA), 109 Stat. 737. . . . As set out in § 21D(b)(2) of the PSLRA, plaintiffs must ‘state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.’”).

⁹⁰ For example, Congress amended Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure in the Homeland Security Act of 2002. See *Homeland Security Act of 2002*, Pub. L. No. 107-296, 116 Stat. 2135, tit. VIII, § 895 (2002) (amending FED. R. CRIM. P. 6(e)(3)(C)).

⁹¹ Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, 125 (1973).

⁹² 119 CONG. REC. 2395–96 (1973) (Senate); 119 CONG. REC. 3739, 3749 (1973) (House of Representatives).

⁹³ Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (“*Be it enacted* . . . [t]hat notwithstanding any other provisions of law, the Rules of Evidence for United States Courts

Federal Rules of Evidence became law as a statute enacted through an Act of Congress, not as rules of practice and procedure promulgated by the Supreme Court under its authority in the federal Rules Enabling Act.⁹⁴

The number and extent of Congress's various options for dealing with proposed rules exist as attributes that flow from the foundational fact that Congress delegated the authority the Court exercises.⁹⁵

VI. GENERAL ASSEMBLY AND THE SUPREME COURT OF OHIO

In contrast to Congress's ranging authority to participate in the process of court rulemaking, the sole function that Art. IV, § 5(B) recognizes for the General Assembly regarding the court's rulemaking authority is the power to disapprove rules of practice or procedure within a prescribed period after they are proposed.⁹⁶ If the General Assembly is to act at all regarding a proposed rule, it must do so by adopting a concurrent resolution of disapproval by June 30 of the year in which the court submitted the proposal to the legislature for review.⁹⁷ Unless both houses of the General Assembly concur in the resolution, the proposed rule becomes law by default.⁹⁸

The surprising history of the Ohio Rules of Evidence demonstrates how fleeting and fragile the power to disapprove can be, lodged as it is in a multi-layered, intentionally slow-acting, and easily stalled General Assembly.

A. *The Strange and Revealing History of the Ohio Rules of Evidence*

As discussed above, the proposed Federal Rules of Evidence became the reagent for analyzing the respective roles of Congress and the United States Supreme Court in rulemaking. The Supreme Court of Ohio's proposed Ohio Rules of Evidence had a similar effect. The debates that erupted over the proposed Ohio Rules of Evidence—which are remembered as the Ohio Evidence War—brought into high relief the uncertainty inherent in the false dichotomy between substance and procedure and, thus, the confusion over what is properly within the legislative domains of court and legislature.⁹⁹ The conflict that ensued also demonstrated the impotence of a concurrent resolution as the only check on the Supreme Court of Ohio's rulemaking power.¹⁰⁰

and Magistrates . . . shall have no force or effect except to the extent, and with such amendments, as they may be expressly approved by Act of Congress.”).

⁹⁴ Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926. For a summary of Congress's unusually assertive involvement in the eventual Federal Rules of Evidence, see 21 WRIGHT & GRAHAM, JR., *supra* note 87.

⁹⁵ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941).

⁹⁶ OHIO CONST. art IV, § 5(B).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat 1926.

¹⁰⁰ *Id.*

The first version of the Proposed Ohio Rules of Evidence was published for review and public comment on February 21, 1977.¹⁰¹ A substantially different version eventually became law three years later on July 1, 1980. During the intervening years, however, the General Assembly acted as assertively in reacting to the proposed Ohio Rules of Evidence as Congress had acted in response to the proposed Federal Rules of Evidence.

As originally proposed, the Ohio Rules of Evidence were modeled very closely after the Federal Rules.¹⁰² They were so closely modeled that, for example, they would have made evidence law in Ohio subject to change by Congress.¹⁰³ The Office of Ohio Attorney General William J. Brown was the only party to publicly urge rejection of the proposed Rules.¹⁰⁴ Nevertheless, on recommendation from the Joint Committee of the House and Senate Judiciary Committees,¹⁰⁵ the General Assembly by unanimous votes in both houses adopted a Concurrent Resolution of Disapproval.¹⁰⁶ Among several reasons for its opposition, the General Assembly was concerned that codified evidence rules—at least those patterned after the Federal Rules—would affect substantive rights and, to that extent, were not properly within the court's constitutional authority to prescribe rules under Art. IV, § 5(B).¹⁰⁷

Shortly after rejecting the Rules of Evidence, the General Assembly adopted another resolution, Amended Senate Joint Resolution 25.¹⁰⁸ The resolution created a joint select committee that was to study the proposed Ohio Rules of Evidence and

¹⁰¹ *Proposed Ohio Rules of Evidence*, 50 OHIO B. 231 (1977).

¹⁰² *Id.*

¹⁰³ For example, Proposed Ohio Evidence Rule 402 stated, “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by Act of Congress, by statute enacted by the General Assembly not in conflict with an existing rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio. Evidence which is not relevant is not admissible.” *Id.* at 235–36 (emphasis added). Also, Proposed Ohio Evidence Rule 802 stated, “[h]earsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by Act of Congress.” *Id.* at 246 (emphasis added).

¹⁰⁴ *See Proposed Ohio Rules of Evidence*, *supra* note 101, at 231–57.

¹⁰⁵ JOINT SUBCOMM. TO THE HOUSE AND SENATE JUDICIARY COMMS., REPORT ON THE PROPOSED OHIO RULES OF EVIDENCE, 112th Gen. Assemb., Reg. Sess. 1 (1977-78), reprinted in Richard S. Walinski & Howard Abramoff, *Proposed Ohio Rules of Evidence: The Case Against*, 28 CASE W. RES. L. REV. 344, 393 app. C (1978). Members of the Joint Subcommittee were Senators Anthony J. Celebrezze, Jr. (D.–Cleveland); Michael Schwarzwald (D.–Columbus), Stanley J. Aronoff (R.–Cincinnati); and Representatives Paul Leonard (D.–Dayton); Terry Tranter (D.–Cincinnati); and William Batchelder (R.–Medina). *Id.* at 348 n.21; *see also Proposed Ohio Rules of Evidence*, *supra* note 101, at 231.

¹⁰⁶ Am. H. Con. Res. 14, 112th Gen. Assemb., Reg. Sess. (1977-78), reprinted in Walinski & Abramoff, *supra* note 105, at 388 app. A [hereinafter Resolution 14].

¹⁰⁷ *Id.*; *see also* Walinski & Abramoff, *supra* note 105, at 347–49, 388 app. A, 393 app. C.

¹⁰⁸ Am. S.J. Res. 25, 112th Gen. Assemb., Reg. Sess. (1977-78), reprinted in Walinski & Abramoff, *supra* note 105, at 390 app. B; *see also* Walinski & Abramoff, *supra* note 105, at 349, 355.

evidence-reform generally.¹⁰⁹ The General Assembly's Concurrent Resolution stated: "Congress of the United States has already considered the subject of codification of the law of evidence and determined that . . . codification is the proper function of the legislative rather than the judicial branch of government."¹¹⁰

In 1978, the court proposed an identical version of the Ohio Rules of Evidence.¹¹¹ The result in 1978 was the same as in 1977: unanimous disapproval in both houses.¹¹² In 1978, however, wide opposition to court-adopted evidence rules patterned after the federal rules emerged.¹¹³ In addition to the Attorney General's Office, opposition to the Proposed Ohio Rules of Evidence came from the Ohio Association of Prosecuting Attorneys, the Ohio Public Defenders Association, the Ohio Academy of Trial Lawyers, the Ohio Defense Association, the Ohio State Bar Association's Negligence Law Committee, as well as various major law firms and individual practitioners in the state.¹¹⁴

In 1979, the court submitted nothing.¹¹⁵ But the House took the initiative by introducing H.B. 684.¹¹⁶ The bill proposed a statutory code of evidence that, as introduced, was identical in all material respects to what the supreme court had proposed in 1977 and 1978.¹¹⁷ Representative Terry M. Tranter's purpose in introducing the bill was to stake out for the General Assembly the same legislative authority over the eventual Ohio Rules of Evidence that Congress had preserved for itself by enacting the Federal Rules of Evidence by statute.¹¹⁸

In 1980, the Supreme Court of Ohio forced the constitutional issue that had first emerged in 1977: whether it or the General Assembly had authority to write evidence

¹⁰⁹ Walinski & Abramoff, *supra* note 105, at 390 app. B.

¹¹⁰ *Id.* Highly respected sources in Ohio warned of the uncertainty that surrounded the Supreme Court of Ohio's claimed authority to promulgate rules of evidence under the Modern Courts Amendment. In 1978, James L. Young wrote that, because the court's authority to promulgate rules turned on the distinction between substance and procedure, the Modern Courts Amendment, could not answer whether rules of evidence were in the province of the General Assembly or the supreme court. He said that Art. IV, § 5(B) leaves unanswered where rulemaking authority ultimately lies because "that question is the distinction between procedure and substance and in the law of evidence it is a question not easily answered." Young, *supra* note 3, at 2.17.

¹¹¹ *Proposed Ohio Rules of Evidence*, 51 OHIO B. 181 (1978).

¹¹² H. Con. Res. 43, 112th Gen. Assemb., Reg. Sess. (1977-78).

¹¹³ Hon. William J. Brown & Richard S. Walinski, *Ohio Rules of Evidence: An Open Letter to the Bar of Ohio*, 51 OHIO B. 1637 (1978).

¹¹⁴ For additional information about the process that produced the 1977 and 1978 Proposed Ohio Rules of Evidence as well as about the legislature's disapproval of both proposals, see Parness & Manthey, *supra* note 3. See also PAUL C. GIANNELLI, EVIDENCE 4-5 (2010).

¹¹⁵ GIANNELLI, *supra* note 114, at 5.

¹¹⁶ H.B. 684, 113th Gen. Assemb., Reg. Sess. (1979-80) ("To enact sections 2318.01 to 2318.58 of the Revised Code to establish comprehensive statutory rules of evidence.").

¹¹⁷ Walinski & Abramoff, *supra* note 105, at 389.

¹¹⁸ Letter from Richard S. Walinski to A. Michael Knapp, Chair, Ohio B. Comm. on Judicial Admin. & Legal Reform (July 27, 1979) (on file with authors).

law.¹¹⁹ The Court again filed a set of proposed evidence rules.¹²⁰ The 1980 version was partially rewritten¹²¹ to address some of the objections previously voiced against the Rules proposed in 1977 and 1978.¹²²

A joint committee of the House and Senate altered its schedule and began lengthy hearings on the court's 1980 proposal, enlisting a group of consultants to assist in the study.¹²³ As the joint committee completed its review of an article in the court's proposed rules, the committee sent the court requests for revisions of specific rules.¹²⁴ Initially, the court approved the requested changes.¹²⁵ It accepted, for example, a change in Rule 102 that affected how all of the Ohio Rules of Evidence are to be interpreted.¹²⁶ The court accepted the General Assembly's suggestion that the Ohio Rules be interpreted in a way diametrically opposite from the way the federal counterpart to Rule 102 establishes for interpretation of the federal evidence rules.¹²⁷

As May 1st approached, however, the court stopped accepting changes recommended by the legislature.¹²⁸ By mid-April, members of the select committee recognized that their review of the proposed rules could not be completed by May 1, the final date set in Art. IV, § 5(B) for the court to submit amendments to proposed rules.¹²⁹ The committee had not, for example, begun its review of Article VII (Lay and

¹¹⁹ *Proposed Ohio Rules of Evidence*, 53 OHIO B. 203 (1980).

¹²⁰ *Id.* at 203–27.

¹²¹ See Walter J. Blakely, *A Short Introduction to the Ohio Rules of Evidence*, 10 CAP. U. L. REV. 237, 242 (1980) (noting that the Supreme Court of Ohio filed a substantially revised draft of proposed Rules of Evidence in 1980).

¹²² See *id.* (stating that the revisions were made to meet criticisms of the initially proposed drafts that appeared in publications and that were voiced at previous hearings before the General Assembly). See, e.g., 'LEGIS-letter': *State House Matters*, 52 OHIO B. 1904 (1979).

¹²³ Consultants in favor of the proposed Rules included James L. Young, Executive Director of the Ohio Legal Center Institute, and Paul C. Giannelli, professor at Case-Western Reserve School of Law. Consultants opposing the proposed Rules included John E. Martindale of Arter & Hadden and Richard S. Walinski of Cooper & Walinski. 'LEGIS-letter': *State House Matters*, *supra* note 118, at 1904.

¹²⁴ *Id.*

¹²⁵ *Amendments to Proposed Ohio Rules of Evidence*, 53 OHIO B. 856–57 (1980). See also Blakely, *supra* note 121 (noting that the court accepted the General Assembly's recommendations to change portions of the rules proposed in 1980).

¹²⁶ Blakely, *supra* note 121, at 245.

¹²⁷ At the request of the General Assembly in 1980, the Supreme Court of Ohio changed OHIO EVID. R. 102 to provide "that the rules shall be construed to state the common law of Ohio unless the rules clearly indicate that a change is intended." *Ohio Rules of Evidence*, 53 OHIO B. 1197, 1198 (1980). In accepting the requested change, the court deleted from its proposed Rule language that still appears in FED. R. EVID. 102: "These rules should be construed so as to . . . promote the development of evidence law . . ." *Id.*

¹²⁸ See *id.*

¹²⁹ *Id.*

Expert Opinions) or Article VIII (Hearsay).¹³⁰ The Senate, therefore, introduced yet another concurrent resolution of disapproval.¹³¹ Once again, the Senate passed the Resolution unanimously.¹³²

The Resolution was sent to the House for concurrence and was referred to the House Judiciary Committee.¹³³ Chairman Harry J. Lehman refused, however, to place the Resolution on the committee's agenda.¹³⁴

As June 30th approached, a group of representatives attempted to force the Senate Resolution out of the Judiciary Committee.¹³⁵ For parliamentary reasons, the effort failed.¹³⁶ Because the Senate Resolution remained stuck in the House Judiciary Committee, the House failed to concur in the Senate's unanimous disapproval of the court's evidence rules.¹³⁷

The unfinished revision of the Ohio Rules of Evidence became law on July 1, 1980 for want of the House of Representatives' concurrence in the Senate's unanimously adopted Resolution of Disapproval.¹³⁸ The Rules of Evidence had not received a single legislator's vote of approval in either house of the General Assembly in the four year after their first promulgation.¹³⁹ Moreover, the successive, unanimous disapprovals were clear statements that the General Assembly agreed with Congress about the nature of evidence law; rules of evidence were not matters of "practice and procedure" and thus are not within the supreme court's power under Art. IV, § 5(B) to address in court-made rules.¹⁴⁰

B. The Role of the General Assembly on Matters of "Practice and Procedure"

The General Assembly's options beyond adopting a concurrent resolution of disapproval are far from clear. As noted previously, Art. IV, § 5(B) itself is silent about whether the General Assembly may, to any extent, continue to legislate on a matter "governing practice and procedure" once the court promulgates a rule on the matter.¹⁴¹

Despite the Ohio Constitution's silence, the General Assembly has continued to enact statutes that purport to alter procedures that have already been addressed in court-promulgated rules.¹⁴² Because of this persistent legislative activity, dozens of

¹³⁰ *Id.*

¹³¹ S.J. Res. 22, 113th Gen. Assemb., Sess. 2 (1979-80).

¹³² *See* S.J. Res. 22, 1980 Ohio Legis. Bull. 148 (1980).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *See* OHIO CONST. art. IV, § 5(B).

¹⁴² *See id.* art. II, § 1.

cases came before the Supreme Court of Ohio in which it had to decide (a) whether a statute and a court-promulgated rule were in conflict and (b) if so, whether the point of conflict was a matter of substance or procedure.¹⁴³ Although the court has been confronted with the substance/procedure dualism many times, the court has shed very little light on what precisely the distinction denotes.¹⁴⁴ Except in cases involving a few topics that settled Ohio law considers substantive—*viz.*, subject-matter jurisdiction, statutes of limitation, evidentiary privileges, constitutionally protected rights, etc.—the court has attempted in only a few cases to explain the difference between “a substantive right” and a rule of “practice and procedure.”¹⁴⁵

Beginning in 1979, two distinct rules of law have emerged from these few cases. They provide diametrically opposite interpretations of the General Assembly’s power under Art. IV, § 5(B). One line holds that, after the court has promulgated a rule on the matter, Art. IV, § 5(B) prohibits the General Assembly from thereafter legislating on the matter.¹⁴⁶ The other holds precisely the opposite: the General Assembly may legislate on a matter of practice or procedure even after the court has promulgated a rule on the matter.¹⁴⁷

The rules of law established and followed in these two lines cannot both be correct. Both lines of cases, however, remain definitive holdings by the Supreme Court of Ohio according to its own rules regarding the precedential value of its opinions.¹⁴⁸

¹⁴³ See, e.g., *State ex rel. Loyd v. Lovelady*, 840 N.E.2d 1062 (Ohio 2006); *Rockey v. 84 Lumber Co.*, 611 N.E.2d 789 (Ohio 1993).

¹⁴⁴ See GIANNELLI *supra* note 114, at 47 (“The Ohio cases interpreting the terms ‘substance’ and ‘procedure’ in the context of the Ohio Constitution, Article IV, § 5(B) provided little guidance. Most of these cases simply categorize a rule or statute as substantive or procedural, giving little or no explanation for the choice of label”).

¹⁴⁵ *Havel v. Villa St. Joseph*, 963 N.E.2d 1270 (Ohio 2012); *Lovelady*, 840 N.E.2d at 1062; *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999); *Rockey*, 611 N.E.2d at 789; *State v. Greer*, 530 N.E.2d 382 (Ohio 1988); *State v. Rahman*, 492 N.E.2d 401 (Ohio 1986); *Johnson v. Porter*, 471 N.E.2d 484 (Ohio 1984); *State ex rel. Columbus v. Boyland*, 391 N.E.2d 324 (Ohio 1979).

¹⁴⁶ See e.g., *Rockey*, 611 N.E.2d at 789.

¹⁴⁷ See e.g., *Havel*, 963 N.E.2d at 1270; *Lovelady*, 840 N.E.2d at 1062.

¹⁴⁸ Opinions that the Supreme Court of Ohio issued from 1858 until May 1, 2002 had varying precedential value, depending on whether the opinion was per curiam or signed and, if signed, whether the court authored a syllabus in the decision. If the majority opinion was signed, the precedential value of the signed opinion depended on whether the court issued a syllabus to the opinion. If the court authored a syllabus, it was the syllabus—not the signed opinion—that stated the points of law established by the ruling. Unless and until the syllabus has been overruled, the proposition remains controlling law in Ohio. *Compare State v. Wilson*, 388 N.E.2d 745, 751 (Ohio 1979) (“The law in Ohio since 1858 has been that it is the syllabus of the Supreme Court decisions which states the law, i.e., the points of law decided in a case are to be found in the syllabus. Therefore, where the justice assigned to write the opinion discusses matters or expresses his opinion on questions not in the syllabus, the language is merely the personal opinion of the writer.”) with SUPREME COURT OF OHIO, SUPREME COURT RULES FOR THE REPORTING OF OPINIONS § 2.0, Rule 1(B) (2002) (stating that the law announced in an opinion of the Supreme Court of Ohio appears on the syllabus, text, and footnotes of the opinion). Furthermore, in the Sixth Circuit, the court held that “[a] per curiam opinion is entitled to the same weight as a syllabus in stating the law.” *Truesdale v. Dallman*, 690 F.2d 76, 77 n.1

C. Rockey v. 84 Lumber

The Supreme Court of Ohio gave its clearest statement of the rule recognized in the first line of cases in *Rockey v. 84 Lumber*.¹⁴⁹ In that case, the court considered a conflict between Civil Rule 8(A), which required a plaintiff to plead the amount of actual damages sought, and a statute that the General Assembly enacted after adoption of that rule.¹⁵⁰ The statute prohibited a plaintiff from alleging the amount of actual damages if it exceeded a specified dollar amount.¹⁵¹

The court accepted its obligation to decide the case as one turning in the first instance on whether the subject matter that both Rule 8(A) and the statute addressed was substantive or procedural.¹⁵² Years earlier, in *Krause v. State*, the first case decided after the Modern Courts Amendment was adopted, the court stated that “substantive” and “procedural” in law are antonyms, albeit imperfectly so.¹⁵³ The court said,

[t]he word “substantive,” as used in Section 5(B) of Article IV, is in contradistinction to the words “adjective” or “procedural” which pertain to the method of enforcing rights or obtaining redress. “Substantive” means that body of law which creates, defines and regulates the rights of the parties. (See Black’s Law Dictionary.) The word substantive refers to common law, statutory and constitutionally recognized rights [A]djective [i.e., procedural] and substantive law are not always mutually exclusive¹⁵⁴

In *Rockey*, the court declared, without explanation, that the rule and statute were procedural.¹⁵⁵ It did so, however, without explaining how a procedural matter is to be distinguished from a substantive matter.

The court then passed directly to the central question about which § 5(B) is silent. In the body of the opinion, the court stated that, because Rule 8(A) was promulgated under the authority of Art. IV, § 5(B), the statute left the General Assembly without

(6th Cir. 1982) (citing *State ex rel. Canada v. Phillips*, 151 N.E.2d 722, 722 syllabus ¶ 6 (Ohio 1958)) (“Only what is stated in a syllabus or in an opinion per curiam or by the court represents a pronouncement of law by this court.”).

¹⁴⁹ *Rockey*, 611 N.E.2d, *aff’d*, *Ohio Acad. of Trial Lawyers*, 715 N.E.2d at 1087–88 (“The Ohio Rules of Civil Procedure, which were promulgated by the Supreme Court pursuant to Section 5(B), Article IV of the Ohio Constitution, must control over subsequently enacted inconsistent statutes purporting to govern procedural matters. . . . [Citations to lower court rulings omitted.] This interpretation is the only one consistent with the original reason for adopting Section 5(B), Article IV of the Ohio Constitution—that of constitutionally granting rule-making power to the Supreme Court.”).

¹⁵⁰ *Rockey*, 611 N.E.2d at 791.

¹⁵¹ *Id.* at 791–92.

¹⁵² *Id.*

¹⁵³ *Krause v. State*, 285 N.E.2d 736 (Ohio 1972).

¹⁵⁴ *Id.* at 744.

¹⁵⁵ *Rockey*, 611 N.E.2d at 791–92.

constitutional authority to legislate in conflict with the rule.¹⁵⁶ Without explanation, the court simply declared that

[t]his interpretation is the only one consistent with the original reason for adopting Section 5(B), Article IV of the Ohio Constitution—that of constitutionally granting rule-making power to the Supreme Court.¹⁵⁷

Syllabus two of the opinion states:

The Ohio Rules of Civil Procedure, which were promulgated by the Supreme Court pursuant to *Section 5(B), Article IV of the Ohio Constitution*, must control over subsequently enacted inconsistent statutes purporting to govern procedural matters.¹⁵⁸

In holding the General Assembly disenfranchised once a procedural rule takes effect, the court expanded the effect of its own lawmaking authority beyond the plain language of Art. IV, § 5(B).¹⁵⁹ The court offered no textual, historical, or principled analysis of Art. IV, § 5(B) to support disenfranchisement.¹⁶⁰ Instead, the court ignored the plainly discernible meaning of the pivotal sentence discussing the effect of court-

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 789.

¹⁵⁹ *Id.* at 791–92.

¹⁶⁰ The court cited four lower court decisions—two as direct authorities and two as additional authorities—for the proposition that Art. IV, § 5(B) must necessarily be read as providing to the supreme court such exclusive authority over matters of “practice and procedure”; and that, once the court has duly promulgated a rule of practice and procedure, the General Assembly is thereby no longer allowed to legislate on that matter. The two decisions cited as direct authority were common-pleas cases. The two cited as additional authorities were court-of-appeals cases. One of the four cases did not stand for the proposition for which it was cited. *Jacobs v. Shelly & Sands, Inc.* involved previously, not subsequently, enacted legislation—the statute was effective January 1, 1975; the court-promulgated rule was effective July 1, 1975. *Jacobs v. Shelly & Sands, Inc.*, 365 N.E.2d 1259 (Ohio 1975).

The other three cases simply begged the question about whether Art. IV, § 5(B) affects the constitutionality of legislation on procedural matters enacted after the court had duly promulgated a rule. They merely assumed the legal proposition they were asked to decide. They all began their analyses by stating that court-promulgated rules of practice and procedure prevail over statutes regardless of whether the statute existed at the time the court rule took effect or was enacted after the rules had been promulgated. *See In re Vickers Children*, 470 N.E.2d 438, 442 (Ohio Ct. App. 1983) (stating that without legal or historical analysis that “[i]t is clear that the Juvenile Rules . . . must control over subsequently enacted inconsistent statutes purporting to govern procedural matters. Any other interpretation would gut Section 5(B), Article IV, of its essential purpose, that of constitutionally granting rule-making power to the Supreme Court.”); *Simon v. St. Elizabeth Med. Ctr.*, 355 N.E.2d 903, 905 (Ohio Ct. App. 1976) (citing *Graley v. Satayatham*, 343 N.E.2d 832 (Ohio Ct. App. 1976)) (“[T]he Civil Rules are to take precedence over any other conflicting laws”); *Graley v. Satayatham*, 343 N.E.2d at 832 (“[A]ll laws while [*sic*] are attempted to be adopted thereafter and which are in conflict with the Rules shall ‘be of no [further] force or effect’”). None of the cases, therefore, provide analytical support for the holding in *Rockey*.

promulgated rules: “All laws in conflict with such rules [of practice and procedure] shall be of *no further force or effect* after such rules have taken effect.”¹⁶¹

This text describes a constitutional mandate under which a successfully promulgated court rule supersedes certain laws. As described in Art. IV, § 5(B), three characteristics identify the kinds of laws that will be superseded—laws that (1) affect matters of practice or procedure; (2) conflict with a court rule pertaining to matters of practice or procedure; and (3) cease their efficacy after a court-promulgated rule of practice or procedure takes effect.¹⁶² It is this last characteristic that establishes a temporal limitation on supersession.

“Further” modifies “force and effect.” As a modifier, the phrase *no further* denotes *no longer*; the phrase serves to narrow the laws that might otherwise be superseded. It necessarily limits the mandated supersession to only those laws that already have some “force or effect” because, in ordinary parlance, only laws already in force and effect can be said to, at some point, “be of no further force or effect.” The text of Art. IV, § 5(B) says nothing about whether the force or effect of laws may be enacted after a rule is promulgated, and, thus, says nothing about whether the General Assembly may enact them.¹⁶³

The supersession clause of Art. IV, § 5(B) would read differently if the adjective *further* were not included in the phrase “no further force or effect.” If the sentence said all laws “in conflict . . . shall be of no force or effect after such rules have taken effect,” it would convey a far broader meaning. Without the temporal implication of *further*, the third characteristic of Art. IV, § 5(B)’s mandate would address all laws that conflict with a court rule, thereby mandating that they have “no force or effect,” regardless of when the laws were enacted. Only by ignoring the temporal limitation in the supersession clause can one imagine that Art. IV, § 5(B) addresses whether the General Assembly may legislate on a matter of practice or procedure after a court rule on the matter becomes effective.

That, however, is exactly what the *Rockey* court imagined. In holding that the General Assembly is forever barred from legislating on a matter of practice or procedure once a rule on that matter has been promulgated, the court read Art. IV, § 5(B) as if the adjective *further*—and the temporal restriction it denotes—were not a part of the constitution.¹⁶⁴

The exclusive authority over rulemaking, which *Rockey* established for the court, had notable consequences. First, by eliminating any further role for the General Assembly in writing law that affects practice or procedure, the court set Ohio apart from the large majority of other states. On the question of whether rulemaking is exclusively within the courts’ domain, over eighty percent of those states reserve, either by constitution or statute, at least some authority in the legislatures to author content in the rules of governing practice and procedure in their courts.¹⁶⁵

Second, when the General Assembly lost its ability to legislate on matters affecting rules of practice and procedure, the only remaining check on the court’s authority over

¹⁶¹ *Rockey*, 611 N.E.2d at 792.

¹⁶² See OHIO CONST. art. IV, § 5(B).

¹⁶³ *Id.*

¹⁶⁴ *Rockey*, 611 N.E.2d at 791–92.

¹⁶⁵ See *infra* notes 219–23 and accompanying text.

the content of the rules became the limitation clause in Art. IV, § 5(B): rules of practice and procedure may “not abridge, enlarge, or modify any substantive right.”¹⁶⁶ That limitation is juxtaposed in Art. IV, § 5(B) against the court’s authority over rulemaking.¹⁶⁷ This clause, juxtaposed against the authority granted to the court, is the source of the competing and enduring claims between the legislature’s constitutionally exclusive authority over substantive matters and the court’s dominion over practice and procedure, which according to *Rockey* is also exclusive.¹⁶⁸

The court’s reading of Art. IV, § 5(B)—in a way that made the constitutional allocation of lawmaking authority turn on the substance/procedure distinction—reflects the court’s implicit trust in the distinction. The court trusted that the distinction provides a workable standard for deciding whether, when statute and rule conflict, the constitutional authority over the matter lies with the General Assembly or with the court.¹⁶⁹ By the time the court decided *Rockey*, however, it was broadly accepted that the dichotomy cannot bear that weight.¹⁷⁰ Scholarly analyses of the distinction had already rejected substance/procedure duality as a meaningful standard in the rulemaking context.¹⁷¹ The court’s faith was also plainly at odds with what the United States Supreme Court had concluded about the same distinction used in the federal Rules Enabling Act.¹⁷²

Nevertheless, acting on its discredited faith in the functionality of a false dichotomy, the court created a unique role for itself in Ohio’s system of lawmaking. The exclusivity that it found under Art. IV, § 5(B) allowed the court to operate in near-perfect autonomy to promulgate law without any offsetting balance from another branch of government and with only the most flimsy and fleeting check—the concurrent resolution of disapproval—on its power. According to *Rockey*, Art. IV, § 5(B) transferred to the court the sole authority to make positive law on matters of practice and procedure and, yet, left to the court alone the authority to decide whether its exercise of that authority was constitutional, i.e., truly a matter of “practice or procedure” and not the abridgment, expansion, or modifying of “a substantive right.”¹⁷³ As Alexander Hamilton observed in the *Federalist* papers, this joinder of the legislative and judicial functions in a single branch of government is a prescription for “arbitrary control.”¹⁷⁴

¹⁶⁶ *Rockey*, 611 N.E.2d at 791–92.

¹⁶⁷ OHIO CONST. art. IV, § 5(B).

¹⁶⁸ *Rockey*, 611 N.E.2d at 791–92.

¹⁶⁹ *Id.*

¹⁷⁰ Burbank, *supra* note 29, at 1136.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Rockey*, 611 N.E.2d at 791–92.

¹⁷⁴ THE FEDERALIST NO. 47 (Alexander Hamilton) (quoting Charles-Louis de Secondat, Baron de La Brède et de Montesquieu) (“Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*.”) (emphasis added); THE FEDERALIST NO. 51 (Alexander Hamilton) (“If men were angels, no government would be necessary In framing a government which is to be administered by men over men, a great difficulty lies in this: you must first enable the

D. The Lovelady/Havel Line of Cases

The other, comparably seminal, cases began with *State ex rel. Loyd v. Lovelady*,¹⁷⁵ which the Supreme Court of Ohio decided in 2006. There, the issue was similar to that in *Rockey*: an apparent conflict between a civil rule and a subsequently enacted statute.¹⁷⁶ Civil Rule 60(B) allowed only a limited amount of time for a party to seek relief from the judgment because of newly discovered evidence.¹⁷⁷ The statute, however, allowed a longer period in that particular kind of case.¹⁷⁸

The court held—this time, attempting some textual analysis—that the statute prevailed over the rule because the statute was “substantive.”¹⁷⁹ Despite repeating that Art. IV, § 5(B) gave the court “the exclusive authority”—a phrase that does not appear in Art. IV, § 5(B)—over matters of practice and procedure, the court ruled that the General Assembly may nevertheless legislate on matters of practice and procedure.¹⁸⁰ The court stated:

Section 5(B), Article IV of the Ohio Constitution states that the Supreme Court is vested with exclusive authority to “prescribe rules governing practice and procedure” *If the legislature intended the enactment to be substantive, then no intrusion on this court’s exclusive authority over procedural matters has occurred.*¹⁸¹

This, of course, is a novel definition of the substantive/procedure dualism. It makes the distinction turn, not on the meaning of the words *substantive* and *procedure* themselves, but on whether the legislature intended that the procedural matter addressed in the statute should become “a substantive right.” Before reaching for this novel definition, the court did not consider whether Art. IV, § 5(B), because it refers to the concept of “a substantive right,” might be read to imply the existence of the contradistinctive concept, “a procedural right.”¹⁸² After all, the plain language of the Amendment limits the court’s authority to promulgate procedural rules only to the extent that they interfere with, not all rights, but only “substantive” rights.¹⁸³ Instead of parsing out the significance of the adjective *substantive* modifying *right*, the court

government to control the governed; and in the next place oblige it to control itself. . . . [E]xperience has taught mankind the necessity of auxiliary precautions).

¹⁷⁵ *State ex rel. Loyd v. Lovelady*, 840 N.E.2d 1062 (Ohio 2006).

¹⁷⁶ *Id.* at 1063.

¹⁷⁷ *Id.* at 1064.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 1064–65.

¹⁸⁰ *Id.* at 1064.

¹⁸¹ *Id.* (emphasis added).

¹⁸² *Id.* at 1063.

¹⁸³ *Id.*

said that “a statute may create a substantive right despite being ‘packaged in procedural wrapping.’”¹⁸⁴

In determining whether the General Assembly intended to create a right that supersedes a procedural rule, the court in *Lovelady* accepted a declaration that the legislature included in the preamble accompanying the original legislation.¹⁸⁵ The court took that declaration as establishing the legislative intent that disposes of the constitutional question. The court said:

Fortunately, we have a clear and unambiguous statement from the General Assembly that is directly on point. . . . [The House Bill] . . . provided that “[t]he General Assembly hereby declares that it is a person’s . . . substantive right to obtain relief from a final judgment, court order, or administrative determination or order that . . . requires the person . . . to pay child support for a child.” . . . Thus, although [the statute is] . . . necessarily packaged in procedural wrapping, it is clear to us that the General Assembly intended to create a substantive right to address potential injustice.¹⁸⁶

The court decided *Lovelady* several years after it changed the rules for ranking the precedential value of its decisions.¹⁸⁷ Before 2002, it was the court’s syllabus, not the signed opinion, that stated definitively the points of law established in the case.¹⁸⁸ Yet, in holding that the statute prevailed over the court-promulgated rule, the court in *Lovelady* did not overrule syllabus 2 of *Rockey*, which held that the “Ohio Rules of Civil Procedure . . . must control over subsequently enacted inconsistent statutes purporting to govern procedural matters.”¹⁸⁹

Even though *Lovelady* repeats, without citation, *Rockey*’s holding that “practice and procedure” are the court’s exclusive domain, the reasoning in *Lovelady* nevertheless contradicts the holding in *Rockey*. *Rockey* stands for the proposition that once the court promulgates a rule on a procedural matter, the General Assembly is disenfranchised regarding that matter.¹⁹⁰ *Lovelady*, however, stands for the proposition that the General Assembly may legislate on matters of practice and procedure if, in doing so, the legislature intends to create a “substantive” right regarding the procedural matter.¹⁹¹

¹⁸⁴ *Havel v. Villa St. Joseph*, 963 N.E.2d 1270, 1277–78 (Ohio 2012) (quoting *Lovelady*, 840 N.E.2d at 1064–65).

¹⁸⁵ *Lovelady*, 840 N.E.2d at 1064–65.

¹⁸⁶ *Id.*

¹⁸⁷ See SUPREME COURT OF OHIO, SUPREME COURT RULES FOR THE REPORTING OF OPINIONS § 2.0, Rule 1(B) (2012).

¹⁸⁸ *Id.*

¹⁸⁹ *Rockey v. 84 Lumber Co.*, 611 N.E.2d 789, 791–92 (Ohio 1993).

¹⁹⁰ *Id.*

¹⁹¹ *Lovelady*, 840 N.E.2d at 1064–65.

The court's 2012 decision in *Havel v. Villa St. Joseph*¹⁹² may be slightly more important than *Lovelady*—if only because the court attempted to lay a firmer foundation for its holding in *Lovelady*. The *Havel* decision provided a different rationale for *Lovelady*'s holding that the General Assembly may override a court-promulgated procedural rule if it enacts a statute converting the procedural matter into a procedural right.¹⁹³ Once again, the court attempted to achieve that end without overruling *Rockey*'s syllabus 2.¹⁹⁴ The rationale the court adopted in *Havel* is even more novel than *Lovelady*'s.

In *Havel*, the issue was similar to those in both *Rockey* and *Lovelady*. A court rule conflicted with a subsequently enacted statute.¹⁹⁵ Civil Rule 42(B) gave the trial court discretion whether to bifurcate the trial of a claim for punitive damages from the trial of the underlying liability.¹⁹⁶ The statute, however, made bifurcation mandatory upon the request of any party.¹⁹⁷

Although the General Assembly had not declared explicitly (as had happened in *Lovelady*) an intention to create a substantive right, the court in *Havel* nevertheless held that the statute was substantive.¹⁹⁸ The court gave three reasons. The first is pivotal. The court attempted there to explain why the term “substantive right” encompasses “rules governing . . . procedure.”¹⁹⁹ The court ultimately said that every right created by statute is, by definition, a “substantive right.”

The court's reasoning began with a commonly cited definition of *substantive*. In the two pivotal paragraphs of the decision, the court said:

[A] statute's constitutionality depends upon whether it is a substantive or procedural law. In *Krause v. State*, . . . we defined “substantive” in the context of the constitutional amendment to mean “that body of law which creates, defines and regulates the rights of the parties. * * * The word substantive refers to common law, statutory and constitutionally recognized rights.” . . . By contrast, procedural law “prescribes methods of enforcement of rights or obtaining redress.”

A right is defined as “[a] power, privilege, or immunity secured to a person by law,” as well as “[a] legally enforceable claim that another will do or will not do a given act.” *Black's Law Dictionary* 1436 (9th Ed. 2009). Compare *R.C. 2505.02(A)(1)* (defining a “substantial right” for the purpose of defining a final order as a “right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect”). Thus, *classification of R.C. 2315.21(B) as*

¹⁹² *Havel v. Villa St. Joseph*, 963 N.E.2d 1270 (Ohio 2012).

¹⁹³ *Id.* at 1277–78.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1272.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 1278.

*a substantive or procedural law depends upon whether the statute creates a right.*²⁰⁰

Notice how in the brief span of this passage a “substantive right,” which begins as a concept distinct from matters procedural, sheds the adjective *substantive* and, then, becomes *any* right that is created by statute, even one that might pertain to procedural law.

To rationalize this transformation, the court relied on a fallacious equivocation. In construing the phrase “substantive right” as used in Art. IV, § 5(B), the court resorted to a statutory definition for the term *substantial* right—a phrase that does not appear in Art. IV, § 5(B).²⁰¹ Next, the court demonstrated that the term *substantial right*, as used elsewhere in Ohio law, encompasses procedural matters.²⁰² Then, without explaining the relationship, if any, between substantive rights and substantial rights, the court used the definition of *substantial right* to explicate the meaning of “substantive right,” finding that as used in Art. IV, § 5(B) the term “a substantive right” subsumes procedural matters.²⁰³ The court’s conflating of *substantive* with *substantial* as equivalents violates the plain meaning of the two words.²⁰⁴

Nothing in the plain language of Art. IV § 5(B) and nothing in the court’s prior opinions suggests that Art. IV, § 5(B) uses the term “a substantive right” in a sense that makes procedural matters merely a subset of substantive rights.²⁰⁵ Instead, the Supreme Court of Ohio made precisely the opposite point in *Krause v. State*, the first case in which the court was required to interpret the Modern Courts Amendment.²⁰⁶ The court said that “[t]he word ‘substantive,’ as used in Section 5(B) of Article IV, contradicts the words ‘adjective’ or ‘procedural’”²⁰⁷ In other words, the terms substantive and procedure, as used in Art. IV, § 5(B), are distinct. They are juxtaposed, meaning that they are set off against each other. One is not a subset of the other. Rather, the terms “substantive” and “procedure” are used in their usual and customary—but nonetheless irremediably vague—senses as antonyms, not in a sense suggesting that one is subordinated to the other. This is precisely the binary, bright-line sense in which the *Rockey* court understood “substantive right.”²⁰⁸

²⁰⁰ *Id.* at 1275 (emphasis added).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 1279.

²⁰⁴ See BRYAN A. GARNER GARNER’S MODERN ENGLISH USAGE 873 (4th ed. 2016) (“substantive . . . B. For *substantial*. . . . *Substantive* is more specialized [than *substantial*], appearing most often . . . in law (in which it serves as the adjective corresponding to *substantive* and as the antonym of *procedural* <substantial rights>). Some writers misuse *substantive* for *substantial*”). According to Garner, this misuse is to be rejected as nonstandard American usage. *Id.* (“LANGUAGE-USAGE INDEX *substantive* misused for *substantial*: Stage 1 . . . Rejected.”).

²⁰⁵ See OHIO CONST. art. IV, § 5(B).

²⁰⁶ See *Krause v. State*, 285 N.E.2d 736 (Ohio 1972).

²⁰⁷ *Id.* at 744.

²⁰⁸ *Rockey v. 84 Lumber Co.*, 611 N.E.2d 789, 789 (Ohio 1993).

A close reading of Art. IV, § 5(B) confirms the antithetical relationship. In the phrase “substantive right, the adjective *substantive* qualifies and limits the noun *right*. That qualification indicates that not all rights are beyond the court’s power to “abridge, enlarge, or modify”; only “substantive” rights are off limits for the court’s rulemaking.²⁰⁹ The presence of this qualification suggests that Art. IV, § 5(B) implicitly recognizes the existence of a class of rights distinct from substantive rights. Because in legal parlance *procedural* is the most natural antonym of *substantive*, the probable meaning is that procedural rights are within the court’s power to “abridge, enlarge, or modify.”²¹⁰ If Art. IV, § 5(B) does indeed imply for its limited purposes the existence of procedural rights, a court-promulgated rule establishing a procedural right would not offend Art. IV, § 5(B) and might, therefore, be enforceable.

It is not surprising that Art. IV, § 5(B) would rely on the existence of the concept of procedural right that is contradistinct from a substantive right. The individuals who proposed the Modern Courts Amendment had full confidence that the substance/procedure dichotomy was an adequately functional analytic device for dividing judicial and legislative domains.²¹¹

All that said, a court-promulgated rule establishing a procedural right would, of course, be enforceable only if the rule were in fact procedural, not substantive.²¹² So, even a more nuanced reading of Art. IV, § 5(B) that preserves the antithetical denotation of the terms *substance* and *procedure* does not—and cannot—avoid the inevitable unworkability of the substance/procedure dualism.

Havel’s failure as a persuasive explication of Art. IV, § 5(B) stems from the court’s ignoring that procedure and substance, as the terms are used in Art. IV, § 5(B), are juxtaposed in their usual and customary senses as antonyms, not in a sense that makes one a subset of the other. In the end, *Havel* leaves unanswered the same central question that *Rockey* left unanswered: How does a procedural matter differ from a substantive matter?²¹³ Simply no principled answer to that question exists. The context of Art. IV, § 5(B) can no more plausibly support the equivocation the court attempted in *Havel* than it can plausibly support the attempt in *Rockey* to read the temporal limitation in the supersession clause out of the Amendment.

One final statement must be made about the rule announced in *Lovelady* and *Havel*. Despite the absence of a textual foundation, the rule announced in *Lovelady* and *Havel* recognizing shared rulemaking authority.²¹⁴ In doing so, those cases placed Ohio into the majority of states on that issue. Of the other forty-nine states, forty preserve for state legislatures the entire, or at least some, authority in forming the content of court rules.²¹⁵ Of these, seventeen states preserve authority the same way the federal system

²⁰⁹ OHIO CONST. art. IV, § 5(B).

²¹⁰ *Rockey*, 611 N.E.2d at 791–92.

²¹¹ *Cf.* Milligan & Pohlman, *supra* note 54, at 832 (noting that Art. IV, § 5(B) “itself states that the ‘rules shall not abridge, enlarge, or modify any substantive right. . . .’ [Although grey areas may exist,] this provides a limit to the scope of the rule-making authority. . . .”).

²¹² *Rockey*, 611 N.E.2d at 791–92.

²¹³ *Havel v. Villa St. Joseph*, 963 N.E.2d 1270 (Ohio 2012).

²¹⁴ *Id.* at 1272; *State ex rel. Loyd v. Lovelady*, 840 N.E.2d 1062, 1064–65 (Ohio 2006).

²¹⁵ *See infra* note 217 and accompanying text.

does, by legislative delegation of constitutional authority to the court.²¹⁶ Analytically, therefore, these seventeen delegating legislatures have available to them the same variety of options as those open to Congress.

Delegation is not, of course, the only way states maintain shared authority over the content of court rules. Of the remaining twenty-three states, twenty explicitly guarantee a say for the legislature in forming the content of rules.²¹⁷ Of these twenty states, ten do so by allowing the legislature to change or annul court rules after they become effective,²¹⁸ six by prohibiting the court from promulgating rules that conflict with a statute,²¹⁹ three simply by ordaining only the legislature to prescribe matters of

²¹⁶ *E.g.*, N.C. CONST. art. IV, § 13(2) (stating the legislature may delegate to supreme court the authority to make rules for trial courts); WYO. CONST. art. V, § 2 (stating the court has “superintending control over all inferior courts, under such rules and regulations as may be prescribed by law”); CONN. GEN. STAT. § 51-14 (2017) (delegating rulemaking authority to court by statute); GA. CODE ANN. § 15-2-18 (2017) (delegating rulemaking authority by statute); IDAHO CODE § 1-213 (2017) (delegating rulemaking authority to court by statute); ILL. COMP. STAT. 5 / 1-104 (2017) (delegating rulemaking authority to court by statute); ME. STAT. tit. 4, §§ 8, 9A (2017) (delegating rulemaking by statute); MASS. GEN. LAWS ch. 30A, § 16 (2017) (delegating rulemaking authority to court by statute); MINN. STAT. § 480.051 (2017) (delegating rulemaking authority to court by statute); MISS. CODE ANN. § 9-3-61 (2017) (delegating rulemaking authority to court by statute); N.M. STAT. ANN. § 38-1-1 (2017) (delegating rulemaking authority to court by statute); N.D. CENT. CODE §§ 27-02-08, 27-02-10 (2017) (delegating rulemaking authority to court by statute); OR. REV. STAT. §§ 1.002(1)(a), 1.735 (2017) (delegating rulemaking authority to court by statute with legislative power to override); 8 R.I. GEN. LAWS § 8-6-2 (2017) (delegating rulemaking authority to court by statute); TENN. CODE ANN. §§ 16-3-401, 408 (2017) (delegating rulemaking authority to court by statute); WASH. REV. CODE § 2.04.109 (2017) (delegating rulemaking authority to court by statute); WIS. STAT. § 751.12(4) (2017) (delegating rulemaking authority to court by statute); WYO. STAT. ANN. § 5-2-113 (2017) (delegating rulemaking authority to court by statute); *cf.* Petersen v. State, 594 P.2d 978 (Wyo. 1979).

²¹⁷ *See infra* notes 219–23 and accompanying text.

²¹⁸ *E.g.*, ALA. CONST. amend. 328, § 6.11 (1973) (stating rules of practice and procedure promulgated by the supreme court “may be changed by a general act of statewide application”); ALASKA CONST. art. IV, § 15 (stating rules of practice and procedure promulgated by the supreme court “may be changed by the legislature by two-thirds vote of the members elected to each house”); FLA. CONST. art. V, § 2(a) (“Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.”); MD. CONST. art. IV, § 18 (stating court rules are law “until rescinded, changed or modified . . . by law”); MO. CONST. art. V5, § 5 (“Any rule may be annulled or amended in whole or in part by a law limited to the purpose.”); N.J. CONST. art. VI, §§ 2, 3 (1947) (“The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts.”); S.C. CONST. art. V, § 4 (“Subject to the statutory law, the Supreme Court shall make rules governing the practice and procedure in all such courts.”); S.D. CONST. art. V, § 12 (“The Supreme Court shall have general superintending powers over all courts and may make rules of practice and procedure and rules governing . . . all courts. . . . These rules may be changed by the Legislature.”); UTAH CONST. art. VIII, § 4 (stating the legislature may amend court rule “upon a vote of two-thirds of all members of both houses of the Legislature”); VT. CONST. § 37 (“Any rule adopted by the Supreme Court may be revised by the General Assembly.”).

²¹⁹ *E.g.*, LA. CONST. art. V, § 5 (stating the court may “may establish procedural . . . rules not in conflict with law”); NEB. CONST. art. V, § 25 (“[T]he supreme court may promulgate rules

practice or procedure,²²⁰ and one by leaving it to the legislature to restrict court rulemaking as it sees fit.²²¹ The remaining three preserve legislative involvement, but do so in idiosyncratic ways or by preserving only limited authority.²²²

VII. OUR PROPOSAL AND HOW IT WOULD RESOLVE THE PROBLEM IN ART. IV, § 5(B)

The difference between *Rockey* and the *Lovelady/Havel* line of cases is enormous. Under *Rockey*, once the court promulgates a rule pertaining to a matter of procedure, the General Assembly loses all authority thereafter to legislate in conflict with that rule.²²³ Under *Lovelady/Havel*, however, both the court and the General Assembly have roles in prescribing the content of rules of practice for Ohio courts.²²⁴ Although the difference between holdings in *Rockey* and in *Lovelady/Havel* could not be more starkly contradictory, both lines remain authoritative decisions of the Supreme Court of Ohio.

Although the court has not yet explained why it hesitates to overrule or modify *Rockey*'s syllabus 2,²²⁵ it may now recognize that *Rockey*'s disenfranchisement of the General Assembly is an unworkable, if not indefensible, concept. The exclusivity over rulemaking that the court announced for itself in *Rockey* simply cannot be supported by a textual analysis of Art. IV, § 5(B). But neither can the interpretation of Art. IV, §

. . . not in conflict with laws governing such matters"); TEX. CONST. art. V, § 31(b) (stating the supreme court shall "promulgate rules of administration not inconsistent with the laws of the state"); VA. CONST. art. VI, § 5 (stating court "rules shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly."); NEV. REV. STAT. § 2.120(1) (2017) ("The Supreme Court may make rules not inconsistent with the . . . laws of the State for . . . the government of the district courts"); N.Y. JUD. LAW § 51 (McKinney 2017) (stating the court may adopt rules "not inconsistent with . . . statutes of the state").

²²⁰ *E.g.*, CAL. CONST. art. VI, § 6 (stating rules of practice and procedure are statutory; the court may annually recommend rules of procedure to legislature); KAN. STAT. ANN. § 60-201 (2017) (stating that rules of procedure are statutory); OKLA. STAT. tit. 12, § 1 (2017) (stating that civil rules of practice and procedure are statutory); OKLA. STAT. tit. 22, § 1 (2017) (stating that criminal rules of practice and procedure are statutory).

²²¹ *E.g.*, IOWA CONST. art. V, § 4 (stating that the court's authority is exercised "under such restrictions as the General Assembly may, by law, prescribe").

²²² *E.g.*, PA. CONST. art. V, § 10 (stating that the court has authority to prescribe rules, but with narrowly limited authority reserved to the legislature); IND. CODE § 34-8-2-1 (2017) ("[T]he power of the supreme court to adopt, amend, and rescind rules of court does not preclude the creation, by statute, of alternatives to the change of venue"); *Foster v. Overstreet*, 905 S.W.2d 504, 507 (Ky. 1995) (holding that the court has exclusive rulemaking authority but when a rule conflicted with statute, the supreme court "extends comity to the legislature and upholds the statute").

²²³ *Rockey v. 84 Lumber Co.*, 611 N.E.2d 789, 791–92 (Ohio 1993).

²²⁴ *See, e.g.*, *State ex rel. Loyd v. Lovelady*, 840 N.E.2d 1062 (Ohio 2006).

²²⁵ The court's decisions in *Lovelady/Havel* did not overrule or modify *Rockey*'s syllabus 2 by implication. In *Lovelady*, the court cited *Rockey* with approval for the proposition that the court's constitutional authority over matters of "practice and procedure" is "exclusive." Indeed, for a discussion of whether the court currently may have designs on reviving the rule in *Rockey*, see discussion *infra* Section VIII.

5(B) that *Lovelady* and *Havel* advanced. Neither *Rockey* nor the *Lovelady/Havel* line of cases rests on a close textual analysis of the Modern Courts Amendment.²²⁶

The court can hardly be faulted, of course, for failing to discover persuasive guidance in the current language of the Amendment. The allocation of lawmaking authority in Art. IV, § 5(B) turns on the false dichotomy between substance and procedure. Ohio does not have available to it the same detour that the United States Supreme Court found in *Hanna* and *Burlington Northern* for sidestepping the substance/procedure enigma.²²⁷

The cause of Ohio's unique futility lies in the very structure of Art. IV, § 5(B). The present text can never support an unassailable, judicially created patch over the void that exists in it. At present, Art. IV, § 5(B) states only,

- that the supreme court has authority to promulgate rules of practice and procedure;
- that “a substantive right” is something different in kind from a matter of practice or procedure and something that a court-promulgated rule may not alter; and
- that every statute that is in effect at the time a court rule is duly promulgated is superseded if the statute conflicts with the rule.²²⁸

None of these propositions, either individually or in sum, provides a premise from which to deduce that the General Assembly has or does not have the authority to legislate after the court promulgates a rule. The void in Art. IV, § 5(B) similarly is unanswerable through the common-law process of interpretation and construction.²²⁹

Only momentary reflection on *Lovelady* and *Havel*, the court's current reading of Art. IV, § 5(B), reveals that in those cases the court envisions a constitutional allocation in which the General Assembly has a role that resembles the shared authority in rulemaking that exists under the federal Rules Enabling Act.²³⁰ The proposed amendment would resolve the conflicting rulings in *Rockey* and *Lovelady/Havel* by amending Art. IV, § 5(B) to reflect shared rulemaking authority that the court itself first recognized in *Lovelady* and later reaffirmed in *Havel*.

To repeat, it is rarely wise to pursue a constitutional amendment simply to resolve inconsistent rulings from the court. But in the instance of Art. IV, § 5(B), the cause of the inconsistency—and, thus, of the danger that shifting majorities will adopt conflicting interpretations of Art. IV, § 5(B)—lies in the constitution itself. The flaw is in the void in the Modern Courts Amendment on the issue that neither *Rockey* nor *Lovelady/Havel* could fill.

²²⁶ See *Havel v. Villa St. Joseph*, 963 N.E.2d 1270 (Ohio 2012); *Lovelady*, 840 N.E.2d 1062; *Rockey*, 611 N.E.2d 789.

²²⁷ *Burlington Northern v. Woods*, 480 U.S. 1, 6 (1987); *Hanna v. Plumer*, 380 U.S. 460, 473 (1965).

²²⁸ OHIO CONST. art. IV, § 5(B).

²²⁹ See *id.*; see also sources cited *supra* notes 23–24.

²³⁰ See 28 U.S.C. § 2071 (2017); *Havel*, 963 N.E.2d at 1270; *Lovelady*, 840 N.E.2d at 1062; *Rockey*, 611 N.E.2d at 789.

The proposal this Article advances avoids trying to resolve the hopelessly vague substance/procedure distinction. Rather, the proposal addresses directly the void in Art. IV, § 5(B) regarding where rulemaking authority resides after a duly promulgated court rule takes effect and after, therefore, existing laws in conflict with the rule are deemed repealed.

The proposal accepts the allocation of lawmaking authority that was recognized in *Lovelady/Havel*, making that allocation explicit in the constitution in order to provide textual support for a conclusion that—as both the *Rockey* and *Lovelady/Havel* lines of cases amply demonstrate—the present text cannot provide.²³¹

Specifically, the proposal does through interlineation what the *Rockey* and *Lovelady/Havel* were unable to do through interpretation. The proposal would add the following language:

(B) . . . The general assembly may change rules promulgated hereunder by introducing a bill (1) that states specifically in its preamble that it is the legislature’s purpose to create a substantive right and (2) that is enacted into law as provided in Article II, Section 16.

This recognition of shared rulemaking authority would immediately mitigate the perpetual uncertainty about the proper rulemaking domains for the legislature and the court. Coincidentally, the proposed language embodies the approach taken in those ten states that expressly allow their legislatures to change or annul court rules after they become effective.²³²

Note, finally, that the proposed language distinguishes between a bill and an act. The distinction would make clear that the declared General Assembly’s intent to change an existing rule of practice or procedure need not be stated in the enactment itself; instead, the declaration may appear in the act’s preamble—as was the case in *Lovelady*.²³³ The proposal is more specific, however, regarding the General Assembly’s declaration than what *Havel* might permit. In that case, the court found a committee’s “statement of findings and intent,” which appeared in an uncodified portion of the bill, to be a sufficient declaration of the General Assembly’s intent.²³⁴ The proposal specifies that the purpose must be stated in the preamble, thus excluding expressions of individual legislators or committees that might never have been before either house.

²³¹ See *Havel*, 963 N.E.2d at 1270; *Lovelady*, 840 N.E.2d at 1062; *Rockey*, 611 N.E.2d at 789.

²³² See *supra* note 219 and accompanying text.

²³³ *Lovelady*, 840 N.E.2d at 1064–65.

²³⁴ *Havel*, 963 N.E.2d at 1278 (“The uncodified language of S.B. 80 includes a ‘statement of findings and intent’ made by the General Assembly. S.B. 80, Section 3, 150 Ohio Laws, Part V, at 8024. In the legislative statement to which the court referred, the General Assembly asserted, ‘The current civil litigation system represents a challenge to the economy of the state of Ohio,’ and recognized that ‘a fair system of civil justice strikes an essential balance between the rights of those who have been legitimately harmed and the rights of those who have been unfairly sued.’ Section 3(A)(1) and (2), *id.* The General Assembly further declared that ‘[r]eform to the punitive damages law in Ohio [was] urgently needed to restore balance, fairness, and predictability to the civil justice system.’ Section 3(A)(4)(a), *id.* at 8025.”).

VIII. HAS THE SUPREME COURT SUGGESTED THAT IT MIGHT OVERRULE *LOVELADY* AND *HAVEL*?

The prospect that the Supreme Court of Ohio may revive *Rockey* is not idle speculation. In fact, the court may currently contemplate overruling *Lovelady/Havel*.

In 2016, this proposal was presented to the Ohio Constitutional Modernization Commission.²³⁵ The Commission received two comments opposing the proposed amendment.²³⁶ The first letter was longer and more fully developed than the second, was written on the Supreme Court of Ohio's stationery, and was signed by the court's Administrative Director.²³⁷ The letter contained no explicit statement indicating whether the director was expressing the court's view or only his own.²³⁸

The letter opposed the proposal because, according to the director, the amendment "would significantly alter the current distribution of judicial rulemaking powers between the Supreme Court of Ohio and the Ohio General Assembly."²³⁹ The letter then presents a wide-ranging and heavily footnoted polemic.²⁴⁰ Yet, the analysis was flawed beyond what the trappings of scholarship could salvage.

The director begins, ominously, by mischaracterizing the proposal.²⁴¹ He contends that "the purpose of [the] new language is to clarify the distinction between substantive right and procedure."²⁴² He misconstrues the proposal. The proposed amendment does not attempt any clarification of these terms. Clarification is impossible.²⁴³ The Supreme Court of the United States and scholars alike have accepted for decades the

²³⁵ Ohio Constitutional Modernization Comm'n, Minutes of the Judicial Branch & Admin. of Justice Comm. Meeting 2 (Jan. 12, 2017), [http://ocmc.ohio.gov/ocmc/uploads/Judicial%20Branch%20and%20Administration%20of%20Justice%20Committee/JBAJ%20-%20Meeting%20Packet%20Part%20I%20\(2017.03.09\).pdf](http://ocmc.ohio.gov/ocmc/uploads/Judicial%20Branch%20and%20Administration%20of%20Justice%20Committee/JBAJ%20-%20Meeting%20Packet%20Part%20I%20(2017.03.09).pdf).

²³⁶ Letter from Michael L. Buenger, Admin. Dir., to Janet Gilligan Abaray, Chair, Judicial Branch & Admin. of Justice Comm. (Jan. 10, 2017), *reprinted in* Ohio Constitutional Modernization Comm'n, Minutes of the Judicial Branch & Admin. of Justice Comm. Meeting 25 (Mar. 9, 2017), [http://ocmc.ohio.gov/ocmc/uploads/Judicial%20Branch%20and%20Administration%20of%20Justice%20Committee/JBAJ%20-%20Meeting%20Packet%20Part%20I%20\(2017.03.09\).pdf](http://ocmc.ohio.gov/ocmc/uploads/Judicial%20Branch%20and%20Administration%20of%20Justice%20Committee/JBAJ%20-%20Meeting%20Packet%20Part%20I%20(2017.03.09).pdf) [hereinafter Buenger Letter]; Letter from Ronald Kopp, President, Ohio B. Ass'n, to Janet Gilligan Abaray, Chair, Judicial Branch & Admin. of Justice Comm. (Mar. 8, 2017), <http://www.ocmc.ohio.gov/ocmc/uploads/Judicial%20Branch%20and%20Administration%20of%20Justice%20Committee/03.08.2017%20OSBA%20letter%20to%20Chair%20Abaray.pdf> [hereinafter Kopp Letter].

²³⁷ Buenger Letter, *supra* note 236, at 25–32; Kopp Letter, *supra* note 236, at 1.

²³⁸ Kopp Letter, *supra* note 236, at 1–2.

²³⁹ Buenger Letter, *supra* note 236, at 25.

²⁴⁰ *See id.*

²⁴¹ *Id.* at 25–26.

²⁴² *Id.*

²⁴³ *Id.* at 25.

futility of relying on the substance/procedure dualism to separate domains of rulemaking authority.²⁴⁴

The director takes better aim when he focuses, not on the substance/procedural duality, but on allocation of rulemaking authority. Although his aim may be better on this issue, the director simply shoots at the wrong target.

The director believes that the authors crafted their proposal for the purpose of subverting the status and prerogative that the Supreme Court of Ohio currently enjoys in promulgating rules of practice and procedure.²⁴⁵ According to the director:

The proposal could effectively shift procedural rulemaking authority from the Supreme Court of Ohio to the Ohio General Assembly. . . . [T]he addition of the new sentence would ultimately render that [court's] power superficial at best. Using the moniker of "substantive right," the General Assembly could effect considerable and largely unreviewable changes to rules of practice and procedure.²⁴⁶

Of course, the proposal would etch into the constitution a role for the legislature in forging the rules that govern procedure in the courts of Ohio.²⁴⁷ But to perceive the proposed amendment is the proximate cause for the emergence of a role is to ignore *Lovelady* and *Havel*.

Ignoring those cases is exactly what the director does—conspicuously. Although *Lovelady* has been the law in Ohio since 2006 and *Havel* since 2012, the director's argument makes no reference to the holdings in either of those cases—namely that the General Assembly may legislate on a matter of procedure if, in doing so, "the General Assembly intended to create a substantive right."²⁴⁸ Nor does his letter suggest that that the proposed amendment somehow distorts the holdings in *Lovelady* or *Havel*.²⁴⁹ Rather, the supreme court's administrative director argues against the proposed amendment on the unspoken premise that the specific rulings recognizing a role of the General Assembly are not already the law of Ohio.²⁵⁰

In the preceding section, the authors have argued that the conflicting holdings in *Rockey* and *Lovelady/Havel* have given rise to the rare instance where merely

²⁴⁴ *Id.* at 26.

²⁴⁵ *Id.* at 25.

²⁴⁶ *Id.* at 25–26.

²⁴⁷ *Id.* at 25.

²⁴⁸ State *ex rel.* Loyd v. Lovelady, 840 N.E.2d 1062, 1064–65 (Ohio 2006).

²⁴⁹ See Buenger Letter, *supra* note 236, at 25. The leading treatise on the Ohio Constitution makes the very same oversight. Discussing the scope of the Supreme Court of Ohio's rulemaking authority under the Modern Courts Amendment, Professors Steinglass and Scarselli state that rules promulgated by the Supreme Court of Ohio "cannot be amended or overridden by the General Assembly." Steinglass and Scarselli, *supra* note 62, at 202. As authority for that proposition, they cite "*Rockey v. 84 Lumber Co.* 1993." *Id.* (citing *Rockey v. 84 Lumber Co.*, 611 N.E.2d 789 (Ohio 1993)). In characterizing the supreme court's rulemaking authority as exclusive, they—like the supreme court's administrative director—take no account of *Lovelady*, although it had been decided five years before their treatise's publication date.

²⁵⁰ Buenger Letter, *supra* note 236, at 25–26.

conflicting interpretations warrant amending the constitution. Unless the sharing of rulemaking authority—which *Lovelady* and *Havel* recognize—is chiseled into the constitution, the court may sometime in the future exercise its common-law prerogative to overrule the authority of those cases. In fact, the director's letter outlines the rubric that the court might use to do away with the holdings in *Lovelady* and *Havel*.²⁵¹

According to the director's argument, state courts differ both constitutionally and pragmatically from trial and appellate courts in the federal system.²⁵² He reminds us that, although Ohio courts of appeals and common pleas are constitutional creatures,

allocation of responsibilities between the Congress and the federal judiciary is not grounded in constitutional design but is framed by the specific language of the Rules Enabling Act and more broadly by Congress's general authority under U.S. Constitution, Article III. . . . All federal courts, other than the U.S. Supreme Court, are creations of statute.²⁵³

The director gives examples why “[s]tate courts are not mirror images of federal courts” because “they can have vastly different and more expansive responsibilities.”²⁵⁴ He concludes that the differences run so deep and so wide that neither Ohio nor any other state can fruitfully look to the federal system's model of shared rulemaking authority.²⁵⁵

To demonstrate that federal-style delegation does not fit judicial rulemaking for state courts, the director offers statistics to demonstrate that most states are like Ohio.²⁵⁶ He points out that other state courts, like the Supreme Court of Ohio, exercise rulemaking authority by constitutional allocation, not by delegation.²⁵⁷

If statistics are to hold any sway on the question of shared rulemaking authority, the relevant statistic is not how many states' constitutions recognize their courts' rulemaking authority. Rather, the relevant statistic is the number of states that preserve a role for the legislature in the rulemaking process, regardless of whether the court possesses rulemaking authority by constitutional allocation or statutory delegation. A lingering authority in the legislature is, after all, what *Lovelady/Havel* recognized and what the director argues against.²⁵⁸ As demonstrated at the conclusion of section VI, the facts do not support the director's argument. Only a distinct minority of Ohio's

²⁵¹ *See id.*

²⁵² *Id.* at 26.

²⁵³ *Id.*

²⁵⁴ *Id.* at 29.

²⁵⁵ *Id.* at 29, 32.

²⁵⁶ *Id.* at 27.

²⁵⁷ *Id.* (“Ohio—as most other states—differ [*sic*] remarkably from the federal model by constitutionally vesting rulemaking authority directly in the state judiciary.”). The director counts 31 states as doing so. *Id.*

²⁵⁸ *Havel v. Villa St. Joseph*, 963 N.E.2d 1270, 1277–78 (Ohio 2012); *State ex rel. Loyd v. Lovelady*, 840 N.E.2d 1062, 1064 (Ohio 2006); Buenger Letter, *supra* note 236, at 25.

sister states—nine²⁵⁹ of forty-nine²⁶⁰—share the director’s view that a state legislature should have no role in forming the content of rules for state courts.

Aside from statistics, the centerpiece of the director’s argument against the proposal is that Ohio’s principal courts—supreme, appellate, and common pleas—are created by the Ohio Constitution, while federal appellate and trial courts are merely statutory creatures.²⁶¹ This distinction between the constitutional versus statutory nature of courts, according to the director, amounts to a difference so “subtle but important” as to make unthinkable the notion that the Ohio legislature might have retained any role that resembles Congress’s role in a rulemaking system.²⁶² This argument, however, flatly ignores history in two important ways.

First, Ohio’s principal courts have existed as entities created by the constitution since 1802.²⁶³ That is to say, since Ohio’s founding, its trial courts and, later, its courts of appeals, have been fixtures in the state constitution.²⁶⁴ Over those years, the General Assembly repeatedly has enacted laws regulating practice and procedure in those courts.²⁶⁵ Never during those 150 years was it thought constitutionally impermissible for the General Assembly to write those rules.²⁶⁶ If the legislature has lost the constitutional authority that it has exercised since 1802, that change occurred only since and because of adoption of the Modern Courts Amendment. More specifically, the change would have occurred despite Art. IV, § 5(B)’s silence on the subject of whether the legislature has any authority after the court adopts a rule of practice or procedure.²⁶⁷ Silence itself is not a mandate for disenfranchisement of an authority that

²⁵⁹ *E.g.*, ARIZ. CONST. art. 6, § 5, cl. 5; ARK. CONST. amend. 80, § 3; COLO. CONST. art. VI, § 21; DEL. CONST. art. IV, § 13; HAW. CONST. art. VI, § 7; MICH. CONST. art. VI, § 5; MONT. CONST. art. VII, § 2(3); N.H. CONST. pt. 2, art. 73-a; W.V. CONST. art. VIII, § 3.

²⁶⁰ *See supra* notes 219–23 and accompanying text.

²⁶¹ Buenger Letter, *supra* note 236, at 26–28.

²⁶² *Id.* at 28–29 (“Given the subtle but important differences regarding the role of federal and state courts, there is a high need to preserve state judicial authority over a wider range of issues affecting the judicial branch if only to ensure access to a judicial forum for the peaceful resolution of virtually any dispute. To understand state court rulemaking through the prism of federal court rulemaking is to improperly conflate America’s dual constitutional system (and by extension its dual court system) into a single system of understandings. . . . That the people of Ohio have decided on a different distribution of governing power does not make that distribution improper or invalid.”).

²⁶³ OHIO CONST. art. III, §§ 2 (supreme court), 3 (common pleas) (1802). The appellate courts in Ohio were not created under the constitution until adoption of the Constitution of 1850. OHIO CONST. art. IV, § 3; Barbara A. Terzian, *Ohio’s Constitutions: An Historical Perspective*, 51 CLEV. ST. L. REV. 357, 365 (2004).

²⁶⁴ OHIO CONST. art. IV, § 5(B).

²⁶⁵ *See* sources cited *supra* note 3.

²⁶⁶ *Id.*; *see* OHIO CONST. art. IV, § 5(B).

²⁶⁷ *See* OHIO CONST. art. IV, § 5(B).

has been exercised continually since the state's founding. In fact, Ohio law has long disapproved the implied repeal of constitutional provisions.²⁶⁸

Second and more pointedly, the court's actions since the Modern Courts Amendment was adopted refutes the argument that federal-style sharing is impossible because Ohio's court system is deeply and widely different from the federal system. A survey of the court's rulemaking activity since it acquired its rulemaking authority reveals that the court itself does not see the same radical difference between the Ohio and federal systems that its administrator director perceives.²⁶⁹

Look at the Ohio Rules of Civil Procedure, the criminal rules, and the rules of appellate procedure. Look, too, at the Ohio Rules of Evidence. All were promulgated by the Supreme Court of Ohio under authority of Art. IV, § 5(B).²⁷⁰ In each instance, the court obtained the skeleton and almost all of the flesh for these creatures of Ohio law from federal models.²⁷¹ Look further at the Modern Courts Amendment itself. That is the headwater for the court's rulemaking authority. Again, Ohio looked to a federal model for the foundation on which to lay the bedrock for Ohio's entire system of court-promulgated rules.²⁷² This time, it looked to the federal Rules Enabling Act as it existed at that time, and it adopted the federal concepts and structure.²⁷³ In fact, Ohio followed the federal form more faithfully than all but a handful of other states.²⁷⁴ Ohio lifted the three core elements of Art. IV, § 5(B) verbatim from the Rules Enabling Act, and it remained silent on the same issues upon which the federal Rules Enabling Act was silent.²⁷⁵

The glaring reality is that, for the past half century, Ohio has regarded the federal system as its pattern-maker-of-choice on rulemaking matters. The Supreme Court of Ohio has not so much as looked at another possible guide during its fifty-year voyage down the rulemaking path.²⁷⁶ We have traveled too far down that road for the navigator to now suggest that the maps it repeatedly chose to chart this trip were plotted for a different continent.

²⁶⁸ See, e.g., *State ex rel. Hoyt v. Metcalfe*, 88 N.E. 738, 741 (Ohio 1909) ("Repeals by implication are not favored with respect to statutes, and for a stronger reason they should not be favored with respect to constitutional provisions. The repugnancy, to work a repeal, must be wholly irreconcilable, as the intention to repeal will not be presumed, nor the effect of the repeal admitted unless the inconsistency is unavoidable."); see also SCALIA & GARNER, *supra* note 67, at 337 ("Repeals by implication are disfavored—very much disfavored. But a provision that flatly contradicts an earlier-enacted provision repeals it.") (internal quotations omitted); see generally *id. passim*.

²⁶⁹ See Rothstein, *supra* note 91, at 125–73.

²⁷⁰ OHIO CONST. art. IV, § 5(B).

²⁷¹ Rothstein, *supra* note 91, at 125–73.

²⁷² See *supra* note 41 and accompanying text.

²⁷³ *Id.*

²⁷⁴ See *supra* notes 221–25 and accompanying text.

²⁷⁵ See *supra* Part II.

²⁷⁶ See Parness & Manthey, *supra* note 3, at 250–55.

Of course, the court has modified, to some extent, each of the federal models to make them fit Ohio's needs.²⁷⁷ But, despite the changes, the similarities between the Ohio rules and their federal prototypes remain deep and tight. Because those similarities endure, the burden was on the director to show that the difference between constitutionally and statutorily created courts has somehow influenced the Supreme Court of Ohio's rulemaking activity. Did the court, for example, modify any federal prototypes in order to account for the constitutional nature of the Ohio trial and appellate courts? One will find that in the Supreme Court of Ohio's nearly fifty years of rulemaking, the court never once cited the constitutional/statutory distinction as the reason why any Ohio rule of practice or procedure had to be written differently from its federal model.²⁷⁸

The director's rubric for dismissing shared rulemaking-authority as a workable method for Ohio is analytically transparent. More than eighty percent of the other states have adopted the opposite view about sharing. That fact alone exposes the flimsiness of the director's argument.²⁷⁹

But the very weaknesses of the argument sparks suspicion. In light of Art. IV, § 5(B)'s silence²⁸⁰ on the pivotal question that the *Rockey* and the *Lovelady/Havel* cases tried unsuccessfully to answer, the director's rubric, albeit thin, may eventually be all the Supreme Court of Ohio would demand to overrule *Lovelady* and *Havel*. Does a public endorsement of the argument from the court's administrative director portend that reversal when, at some point, the question next comes before the court?

IX. CONCLUSION

Currently, if a statute were to satisfy the two conditions identified in this proposal to amend Art. IV, § 5(B), the statute would necessarily satisfy the requirements announced in *Lovelady/Havel*. In other words, the proposal to amend Art. IV, § 5(B) would not change the result of any case currently controlled by the rule announced in those cases.

²⁷⁷ See *supra* notes 47–49 and accompanying text.

²⁷⁸ There have been many instances, of course, when language in a federal rule was rejected and rewritten for Ohio. The reasons have been many. On very rare occasion, a rule was revised due to constitutional concerns. See, e.g., 1980 Ohio Staff Note, Evid.R. 501, General Rule regarding Privileges (“[T]he difficult lines to be drawn between rules of procedure and substantive law so frequently encountered in evidence rules are no more clearly demonstrated than in the area of privileges. In adopting by reference privilege statutes and common law constructions the direct confrontation is avoided [in Ohio Evid.R. 501].”). That Staff Note recognizes that a similar difficulty exists also with rules regarding competency of witnesses. See *id.* (“Closely related to the question of privilege is the question of competency of witnesses.”). 1980 Ohio Staff Note, Evid.R. 601, General Rule Regarding Competency of Witnesses explains Ohio Rule 601 had to differ from its federal counterpart because the respective rules had to take account, for example, of the fact that the General Assembly and Congress had enacted statutes addressing different factors that affect competence of witnesses

These constitutional concerns, however, involved “the lines to be drawn [in Art. IV, § 5(B)] between . . . procedure and substantive law.” They did not in any way implicate the difference between constitutional and statutory courts.

²⁷⁹ Buenger Letter, *supra* note 236, at 25–32.

²⁸⁰ See *supra* note 64 *et seq.* and accompanying text.

By making these conditions explicit in the constitution and, therefore, permanent, the proposal would guarantee that the Supreme Court of Ohio would never revert to *Rockey*-like interpretation of Art. IV, § 5(B). When the conditions recognized in *Lovelady/Havel* are added to the current wording, Art. IV, § 5(B) will finally answer the question on which it has heretofore been silent. With the proposed enhancement, the amendment will establish a partnership between the court and the legislature on matters of practice and procedure and, thereby, prevent the court from ever again finding a mutually exclusive allocation of authority between it and the General Assembly. What's more, the proposal would render the false dichotomy between substance and procedure constitutionally insignificant. As a result of these effects, the court would never again serve both as the sole lawgiver on matters of practice and procedure and also as the sole judge of whether the actions it took as lawgiver fit within constitutional strictures that restrain the court in exercising its rulemaking authority.

X. APPENDICES



March 8, 2017

Janet Gilligan Abaray, Esq.
Burg Simpson Eldredge Hersh & Jardine
312 Walnut Street, Ste. 2090
Cincinnati, OH 45202

Dear Ms. Abaray:

As the voice of 28,000 members of the bar and bench, the Ohio State Bar Association (OSBA) has a long history of defending the efficient and effective administration of justice in Ohio by promoting consistent rules of practice and procedure. And when it comes to the operation of Ohio's courts and judicial rulemaking authority, we believe strongly in maintaining the proper balance of power between the Supreme Court of Ohio and the Ohio General Assembly. That is why I write to register our opposition to the proposed amendment to Article IV §5(B) of the Ohio Constitution submitted to the Ohio Constitutional Modernization Commission by attorneys Mark D. Wagoner, Jr. and Richard S. Walinski.

Though well intentioned, we are concerned that the amendment, as proposed, would effectively shift rulemaking authority from the Supreme Court of Ohio to the Ohio General Assembly. This would erode the authority of the Court as envisioned in the state constitution, as well as the critical balance achieved by the Modern Courts Amendment of 1968.

In his letter of January 10, 2017, Supreme Court of Ohio Administrative Director Michael L. Buenger provides outstanding historical context surrounding the adoption of the Modern Courts Amendment, as well as the many years of deliberation and work that informed the final product. The OSBA played a critical role in its development and maintains that our current system, whereby the Supreme Court of Ohio, relying on the expertise and experience of those who regularly use and administer the courts, promulgates the rules, while the General Assembly reserves (in essence) veto authority over those rules, has served us well for nearly 50 years.

We concur with Mr. Buenger in his conclusion: "*The General Assembly is certainly the proper entity to address substantive rights within the bounds of our state and federal constitutions. However, the task of establishing practice is, as it was when the Modern Courts Amendment was adopted, best left to the courts if the goal is to maintain a cohesive, reasonable and generally applicable system of rules.*"

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The OSBA supports the open and deliberative process the Supreme Court has established to review, alter and propose new rules and does not see a compelling reason to change it, especially through an amendment to the constitution that can have such far-reaching consequences.

If we can provide additional information or input as you continue to review this and other proposals, please contact me or OSBA's Director of Policy and Government Affairs, Todd Book.

Sincerely,



Ronald Kopp
President

cc: Richard S. Walinski, Esq.
Mark D. Wagoner, Jr., Esq.
Michael L. Buenger, Esq.

The Supreme Court of Ohio

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January 10, 2017

Ms. Janet Gilligan Abaray
Burg Simpson Eldredge Hersh & Jardine
312 Walnut Street, Suite 2090
Cincinnati, Ohio 45202

Dear Chairwoman Abaray:

I write to comment upon a proposal recently submitted to the Ohio Constitutional Modernization Commission ("Commission") by Attorneys Mark D. Wagoner, Jr. and Richard S. Walinski. Though framed as a moderate adjustment to the state constitution, in practice the proposal would significantly alter the current distribution of judicial rulemaking powers between the Supreme Court of Ohio and the Ohio General Assembly. Furthermore, the proposal could substantially erode the coherency of the rules of practice and procedure which, as will be explained, was one of the principal objectives of the Modern Courts Amendment of 1968.

The proposal before the Commission would add at the end of Article IV, Section 5(B) ¶ 1, the following new sentence:

The General Assembly may change rules promulgated hereunder by introducing a bill (1) that states in its preamble specifically that it is the legislature's purpose to create a substantive right and (2) that it is enacted into law as provided in Article II, Section 16.

The proponents state that the purpose of this new language is to clarify the distinction between substantive right and procedure. However, when this language is read within the entirety of the Article IV, Section 5(B) ¶ 1, the proposal could effectively shift procedural rulemaking authority from the Supreme Court of Ohio to the Ohio General Assembly. While the proposal ostensibly leaves intact the Supreme Court's rulemaking power, the addition of the new sentence would ultimately render that power superficial at best. Using the moniker of

"substantive right," the General Assembly could effect considerable and largely unreviewable changes to rules of practice and procedure.¹

As an initial matter, it is important to place the proponents' underlying concern and proposed solution in a proper historical and constitutional context. First, Ohio initially considered changing the allocation of rulemaking power between the courts and the legislature well before the enactment of the federal Rules Enabling Act in 1934, which the proponents argue is the basis of the Modern Courts Amendment. But in 1914, a commission studying the Ohio judicial system unanimously recommended that authority over rules of process, practice and procedure be vested in the Ohio Supreme Court.² This recommendation followed on the heels of President William Howard Taft's similar proposition to Congress in 1910 that "the best method of improving judicial procedure at law is to empower the [U.S.] Supreme Court to do it through the medium of the rules of Court as in Equity."³ Ohio's Modern Courts Amendment, rather than representing a dramatic shift in power to the judiciary, is actually the culmination of many years of thought and experience in state and federal courts.

Second, the proponents state that they seek to end the "false dichotomy" between procedure and substantive right "as the standard for deciding which branch of Ohio government has constitutionally allocated authority to legislate." They appear to argue that Ohio should adopt an allocation of responsibilities similar to that followed in practice by Congress and the federal courts. It is important to note, however, that this allocation of responsibilities between the Congress and the federal judiciary is not grounded in constitutional design but is framed by the specific language of the Rules Enabling Act and more broadly by Congress's general authority under U.S. Constitution, Article III to superintend the federal courts. All federal courts, other than the U.S. Supreme Court, are creations of statute.⁴ Even the administration of the federal courts is a power delegated by Congress under statutes creating the U.S. Judicial Conference and the U.S. Administrative Office of the Courts.⁵ Therefore, the division of labor between the U.S. Supreme Court and Congress on procedural and structural matters is, as the proponents rightly note, attributable to the fact that much of the federal judiciary's operations is dependent upon and coextensive with Congress's legislative authority.

¹ Article IV, § 5(B) ¶ 1 currently reads, in pertinent part, as follows:

(B) The Supreme Court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the General Assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the General Assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

² 106 Journal of the House of Representatives (Ohio) 1388, 1389 (1915) (to reduce delay and expense in the administration of justice, Supreme Court should have plenary authority to prescribe rules of practice and procedure).

³ See 46 Cong. Rec. 17, 26 (1910).

⁴ See, Andrew St. Laurent, Reconstituting *United States v. Lopez: Another Look at Federal Criminal Law*, 31 COLUM. J.L. & SOC. PROBS. 61, 86 (1997) ("[T]he lower federal courts are a creation of a Congress which presumably may burden, limit, or disband them as it sees fit.")

⁵ 28 U.S.C. § 331 (2016); 28 U.S.C. §§ 601-629 (2016).

While it has long been recognized that the federal courts retained *limited* inherent power to oversee litigation,⁶ history tells us that generally speaking the power to regulate practice and procedure rests firmly in the hands of Congress.⁷ In other words, through the Rules Enabling Act Congress transferred a part of *its* legislative authority to the U.S. Supreme Court,⁸ always retaining plenary constitutional power to qualify, alter or even reclaim a power it has delegated. Therefore, when the U.S. Supreme Court promulgates rules of practice and procedure pursuant to the Rules Enabling Act it is actually exercising Congress's authority through delegation.⁹ Perhaps the reason the U.S. Supreme Court has not attempted to definitively mark the line between substantive rights and procedure in the federal context, as the proponents contend, is because: (1) any rules created under the Rules Enabling Act presumptively express Congress's intent; but (2) as creations of delegated legislative power Congress can at any time use its authority to undo the Court's otherwise presumptively correct choices regarding practice and procedure. Stated differently, if Congress does not reject a proposed federal rule of practice the courts merely assume that Congress agrees that the rule is a proper exercise of Congress's authority to regulate practice and procedure even if the rule has ancillary impact on substantive rights.¹⁰ The point is that because the U.S. Supreme Court is exercising rulemaking power through the delegation of Congress's authority, there is simply less need to wrestle with the question of substantive right versus procedure.

On this point Ohio – as most other states¹¹ – differ remarkably from the federal model by constitutionally vesting rulemaking authority directly in the state judiciary. Again unlike the

⁶ See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (federal courts may not exercise inherent powers in a way that conflicts with constitutional or statutory provisions); *Kovilic Const. Co., Inc. v. Missbrenner*, 106 F.3d 768 (7th Cir. 1997) (“supersession” clause of the Rules Enabling Act suggests that exercises of inherent powers may not conflict with the national procedural rules).

⁷ Cf. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 n.3 (1987) (“Article III of the Constitution, augmented by the Necessary and Proper Clause of Article I, § 8, cl. 18, empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in those courts.”).

⁸ See *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.* (2010) 559 U.S. 393, 422 (Congress decided to delegate the creation of rules to Court rather than to a political branch (Steven, J. concurring in part and concurring in judgment)).

⁹ See *Sibbach v. Wilson & Co.*, (1941) 312 U.S. 1 (Congress has power to regulate the practice and procedure of federal courts and may exercise that power by delegating to Supreme Court or other federal courts authority to make rules not inconsistent with statutes or Constitution).

¹⁰ See *Burlington Northern R. Co. v. Woods* (1987) 480 U.S. 1, 5 (“The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants’ substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules. (Citations omitted).”)

¹¹ See e.g., Ala. Const. art. VI § 150; Alaska Const. art. IV, § 4.15; Ariz. Const. art. VI, § 5.5; Ark. Const. amend. 80 § 3; Calif. Const. art. VI, § 5(d); Colo. Const. art. VI § 21; Del. Const. art. IV § 13; Fla. Const. art. V § 2; Ga. Const. art. VI § 9; Haw. Const. art. VI § 7; Ill. Const. art. VI; Ind. Const. art. VII §§ 4, 6; Ka. Const. art. III § 1; Ky. Const. § 116; La. Const. art. V § 5; Md. Const. art. IV, pt. 2 § 18; Mich. Const. art. VI § 5; Mo. Const. art. V § 5; Mt. Const. art. VII § 2(3); Neb. Const. art. V § 25; N.H. Const. pt. 1, art. 73-a; N.J. Const. art. VI § 11(3); N.C. Const. art. IV § 13(2); N.D. Const. art. VI § 3; Penn. Const. art. V § 10(c); S.C. Const. art. V § 4; S.D. Const. art. V § 12; Tex. Const. art. V § 31; Utah Const. art. VIII § 4; Vt. Const. ch. II § 37; Va. Const. art. V § 6; Wash. Const. art. IV §§ 24, 30; W.V. Const. art. VIII § 3. Even in the absence of an explicit constitutional grant of authority to promulgate rules of practice and procedure, some state supreme courts have relied on either inherent or explicit constitutional superintending authority to do so coincidental to their general supervisory power over inferior courts. See e.g., *Pankey v. City of Mobile* (Ala. 1948) 35 So.2d 497; *State v. Second Judicial Dist. Court ex rel. County of Washoe*

federal judiciary, much of the structure, jurisdiction and authority of Ohio's courts is anchored firmly in the state constitution and is not dependent on the exercise of separate legislative authority. For example, the Ohio constitution requires a supreme court, courts of appeals, and courts of common pleas. And although the General Assembly has the power to establish other inferior courts, it cannot, as Congress might with respect to the lower federal courts, abolish the three constitutionally mandated court levels or alter jurisdiction that is firmly ensconced in the state constitution. The Ohio constitution also requires the actual placement of state courts. For example, a court of appeals must hold hearings in the counties that comprise the district¹² and a court of common pleas must exist in each county of the state.¹³ The structure, jurisdiction and authority of state judiciaries is generally anchored in a state's constitution largely because state courts are our nation's general jurisdiction courts¹⁴ (and not limited jurisdiction courts as are federal courts) charged with resolving all manner of dispute including most federal causes of action.¹⁵ The general nature of state court jurisdiction is further evidenced by the fact that currently 37 state constitutions, including Ohio's, contain an "open court and right to redress" command, a command totally absent from the federal Constitution.

This constitutional grant of rulemaking power to state supreme courts should be understood in the general context of state constitutions, which are grounded in a different normative framework than is the federal constitution. States exercise the nation's general police powers,¹⁶ which most state courts have held are plenary in nature and subject only to explicit constitutional limitation or direction.¹⁷ No principle of enumeration frames and confines the exercise of state power as is the case with federal power. Absent a specific limitation in a state constitution or a federal constitutional limitation such as the guarantee of a republican form of government, states are relatively free to structure themselves and legislate as they need in order to promote public health, safety and welfare. This is precisely why most state constitutions are voluminous documents that outline in significant detail the distribution of state power across the three branches of government, the limitations on that power either through proscription or prescription, and the powers granted directly to the state courts.

Given the subtle but important differences regarding the role of federal and state courts, there is a high need to preserve state judicial authority over a wider range of issues affecting the

(Nev. 2000) 311 P.3d 1209; *Ammerman v. Hubbard Broadcasting, Inc.* (N.M. 1976) 551 P.2d 1354; *Squillace v. Kelley* (Wyo. 1999), 990 P.2d 497.

¹² Art. IV, § 3(A).

¹³ Art. IV, § 4(A).

¹⁴ *Plaquemines Tropical Fruit Co. v. Henderson* (1898) 170 U.S. 511, 517 (noting that in defining and regulating jurisdiction of federal courts, Congress has taken care not to exclude the jurisdiction of the state courts from every case to which the judicial power of the United States extends).

¹⁵ See *Claffin v. Houseman* (1876), 92 U.S.C. 130, 136 (there is a strong presumption that state courts share concurrent jurisdiction over federal matters with the federal courts).

¹⁶ See *U.S. v. Morrison*, 529 U.S. 598, 618 (2000) (Founders denied national government of generalized police powers leaving such general powers in the states). See also, *U.S. v. Lopez*, 514 U.S. 549, 584, 585 (Thomas, J., concurring) ("[W]e always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power[.]").

¹⁷ See *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce* (2010), 127 Ohio St.3d 511 (General Assembly has plenary authority to enact legislation limited only by the state and federal constitutions).

judicial branch¹⁸ if only to ensure access to a judicial forum for the peaceful resolution of virtually any dispute. To understand state court rulemaking through the prism of federal court rulemaking is to improperly conflate America's dual constitutional system (and by extension its dual court system) into a single system of understandings. State courts are not mirror images of federal courts¹⁹ for they can have vastly different and more expansive responsibilities. Ohio need not follow federal court practices simply because some may think those practices are simpler, less burdensome, or represent a better division of labor between the branches of government. That the people of Ohio have decided on a different distribution of governing power does not make that distribution improper or invalid. Indeed, as noted, the vast majority of states concur in Ohio's constitutional model by vesting their state supreme courts with limited legislative powers in reference to the promulgation of rules of practice and procedure.²⁰ It is the odd state that does not. The practices of the federal government in this regard need not be the only model for the distribution of governing power given the vastly different functions of state constitutions and state courts.

At a more practical level it is important to note that the rules of practice and procedure are a finely tuned system designed to govern practices in all courts in Ohio. Whether we examine the Rule of Civil Procedure, the Rules of Criminal Procedure, the Rules of Appellate Procedure, the Rules of Evidence or the Rules of Juvenile Procedure, the rules governing each area balance multiple considerations and subjects, the utmost of which is the need for efficient and effective judicial processes that safeguard the rights of all citizens. For example, the rules are designed to prevent parties from engaging in piecemeal litigation absent compelling circumstances. Thus, under the Rules of Civil Procedure an order granting summary judgment on one issue in a case is not subject to piecemeal review by an appellate court unless the trial court has expressly determined that "there is no just reason for delay." *See*, R. Civ. Proc. 54(B). An entire body of case law has built over the years to guide both trial and appellate judges as well as litigants regarding the circumstances under which such determination should be made and the consequences of that determination. These cases often inform the Rules of Appellate Procedure. Receipt of the power suggested by the proponents would allow the General Assembly to pick and choose which causes of action would be subject to immediate appeal and which would not. Coherency across the rules would be lost.

Accordingly, the rules of practice and procedure do not represent standalone systems of procedure but rather overlapping systems of procedure designed to ensure orderly litigation across the state. This is precisely the objective of Article IV, Section 5(B) as currently constructed. Prior to the adoption of the Modern Courts Amendment, practice and procedure in Ohio's courts was governed by the Ohio Practice Code, a compilation of statutory enactments.²¹ But as noted at the time the Modern Courts Amendment was proposed, "While the Ohio Practice

¹⁸ Parenthetically, even the U.S. Constitution recognizes the role of state courts in resolving a wide range of issues and being a forum for resolving federal questions. *See* ASARCO Inc. v. Kadish (1989), 490 U.S. 605, 617 (Constitution does not require Congress to create inferior federal courts; Supremacy Clause requires state judges to be bound by federal law when applicable).

¹⁹ *Cf.* Eugene Kontorovich, *Three International Courts and their Constitutional Problems*, 99 CORNELL L. REV. 1353, 1376 (2014) (state court jurisdiction was preserved by the U.S. Constitution, it was not granted by it).

²⁰ *See* note 10.

²¹ William W. Milligan & James E. Pohlman, *The 1968 Modern Courts Amendment to the Ohio Constitution*, 29 Ohio St. L.J. 811 (1968).

Code has served the state long and well, it has become overly complicated and disorganized."²² Through multiple standalone legislative enactments, the General Assembly constructed a practice code that over time became less coherent, integrated, and organized. Altering a particular practice one year without regard to the long-term impact on other areas of the code eventually produced a code that was more attentive to special considerations than general coherency. This is evidenced by staff notes published during consideration of the Modern Courts Amendment. Those notes reveal concern with the legislative approach to constructing rules of practice and procedure. The staff notes included a list of "pros" and "cons" with vesting rulemaking power in the Supreme Court. The "pros" associated with the Modern Courts Amendment included:

- "The method makes use of expert knowledge, results in interpretation of rules by those who make them, provides a more flexible procedure because of the speed of amendment, insures a continuing effective procedure, and emphasizes the subsidiary nature of procedure to substantive law.
- The legislature is subject to the influence of pressures other than those who seek the efficient administration of justice and who are not responsible for judicial efficiency in the public eye."²³

As is apparent from the staff notes, a major objective to the Modern Courts Amendment was to reduce the impact of special influences on practice and procedure thereby establishing a more predictable and coherent system of rules designed to promote general judicial effectiveness and efficiency.

But the staff notes also listed as "cons" the courts' inability to respond readily to the public's point of view, the courts' reluctance to exercise powers expressly granted, and the courts' inability to use fact-finding techniques, such as public hearings.²⁴ To address these concerns, the Supreme Court adopted and utilizes today an open process that engages in extensive deliberation. The Ohio Supreme Court's Commission on the Rules of Practice and Procedure, the body responsible for proposing changes to the rules, is comprised of eminent judges, magistrates, attorneys, scholars and other experts including those who regularly use or administer the courts. For example, the Superintendent of the Ohio Highway Patrol as well as a representative from the Department of Public Safety serve as *ex officio* members.

Proposed amendments to the Rules of Practice and Procedure once approved by the Court are filed annually with the General Assembly on or before January 15th. Further opportunities then follow for additional public comment and amendments to the proposed rule may be made up until May 1st in light of additional comments. The General Assembly retains the ability to reject the proposed changes by filing a concurrent resolution of disapproval. If no such concurrent resolution is filed or a filed resolution does not receive the threshold number of votes in each chamber, the changes to rules of practice and procedure become effective July 1st of that year.

²² *Id.* at 829.

²³ Staff Research Report No. 75, Problems of Judicial Administration 57, Ohio Legislative Ser. Comm'n (Feb. 1965)

²⁴ *Id.*

The proposal before the Commission would transfer the bulk of procedural rulemaking authority away from the Supreme Court and to the General Assembly and could undermine the primary objective of the Modern Courts Amendment: to establish a predictable and coherent system of rules. Article IV, Section 5(B) retention of the Supreme Court's rulemaking power does not alter the practical effect of the proposal. While the proposed amendment is framed as merely installing the Supreme Court's legal precedent, the proposed language could actually remove the Supreme Court's judgment from rulemaking altogether. As observed, the simple moniker of "substantive right" on a legislative act effectively forecloses any judicial review. While parsing the difference between "substantive" and "procedural" can prove difficult, the courts are regularly tasked with interpreting statutory language and have dealt with this particular issue since the Modern Courts Amendment was adopted in 1968.²⁵

Finally, it is not entirely clear what problem this proposal is attempting to solve. The proponents note in their memorandum in support that the Supreme Court has on no less than 37 occasions sought to bring clarity to the distinction between substantive right and procedure. Even conceding this point, that means the Supreme Court has addressed this issue 37 times in 48 years. (To put this in context, the Ohio judiciary, on average, handles approximately 3.3 million cases per year.) In other words, while the distinction has been a matter that occasionally needs clarification, any confusion over the distinction has not been so great as to cause a collapse in general understand of the rules of practice and procedure nor a source of heighten and continuing conflict between the two branches of government. The very function of the judiciary is to interpret the law in light of the facts and circumstance presented in a case. This can at times produce divergent views on a matter given the facts under review. But interpreting and applying the law is also a daily activity for judges throughout Ohio in large cases as well as small cases. To propose that the current constitutional system be overturned because 37 times in the last 48 years the Supreme Court has been required to clarify the difference between substantive right and procedure seems unnecessary.

Rather than clarifying the allocation of responsibilities, the proposal, in effect, fuses the concepts of "substantive right" and "procedure" into a single concept. There is effectively no distinction between the two if by simply declaring the existence of a substantive right the General Assembly can rewrite rules of practice and procedure even as to matters that are unequivocally procedural in nature. Practice in Ohio's courts will not be governed by a deliberative process resulting in a coherent set of rules but rather, over time, by the "influence of pressures other than those which seek the efficient administration of justice[.]" The proposal before the Commission would return Ohio to the pre-1968 era where by a simple declaration and without any benefit of a check, the General Assembly could rewrite rules of practice and procedure at its discretion. This is not a step forward but rather a step back to a time when rules governing the processes of courts became "overly complicated and disorganized." The proposal represents a significant erosion in the ability of the Supreme Court to address multiple

²⁵ Those proposing this amendment contend that *Lovejoy* represented a decisive change in the law, creating an era where the legislature can freely legislate procedure. But the Supreme Court had previously ruled that the General Assembly may create a substantive right through a statute that appears procedural in nature. See *City of Cuyahoga Falls v. Bowers*, 9 Ohio St.3d 148, 150, 459 N.E.2d 532 (1984). The key question before the Court has never been *when* the statute was passed, but rather *what* the statute says.

overlapping considerations in practice and procedure in order to ensure that orderly, coherent and fair procedures are followed in all courts of Ohio.

The General Assembly is certainly the proper entity to address substantive rights within the bounds of our state and federal constitutions. However, the task of establishing practice is, as it was when the Modern Court's Amendment was adopted, best left to the courts if the goal is to maintain a cohesive, reasonable and generally applicable system of rules. For that reason, I would urge that this committee approach with great caution the proposed amendment to Article IV, Section 5(B) of the Ohio Constitution.

Respectfully,



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Administrative Director

cc: Richard Walinski, Esq.
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