MEMORANDUM IN SUPPORT OF PROPOSED AMENDMENT

TO: **Judicial Branch and Administration of Justice Committee**
Ohio Constitution Modernization Commission

FROM: **Richard S. Walinski**

DATE: **October 19, 2016**

RE: **Proposal to Amend Article IV, § 5(B) of the Ohio Constitution**

Table of Contents

Abstract:

As part of the Modern Courts Amendment adopted in 1968, Art. IV, § 5(B) of the Ohio Constitution empowered the Ohio Supreme Court to promulgate "rules of practice and procedure" for all courts in the state. The structure and content of the Amendment followed closely the structure and content of the federal Rules Enabling Act as it read at the time Art. IV, § 5(B) was drafted and proposed.

Both the Rules Enabling Act and Art. IV, § 5(B) provide that once a rule or set of rules becomes law, all existing laws inconsistent with the rule or rules are of no

further effect. It also provides that no court-promulgated rule may abridge, modify, or enlarge any "substantive right." Both, however, are silent about whether the legislature may legislate on a topic covered in a court-promulgated rule after the rule has become law.

This void in Art. IV, § 5(B) has spawned much litigation. Despite — or, perhaps, because of —the Amendment's silence, the General Assembly has continued to exercise the plenary power to legislate that is granted it in Art. II, § 1. It has enacted statutes from time to time that conflict or appear to conflict with duly promulgated rules of court.

The recurring question has been whether the General Assembly may do so.

The supreme court has provided two, contradictory answers to that question. One line of cases holds that the General Assembly is disenfranchised once a promulgated rule takes effect; it may not legislate on the procedural matter addressed in the rule. Another and more recent line of cases holds that the General Assembly may change the procedural content of a rule but only if, in doing so, it declares its intention to make the procedure established in the rule into a "substantive right."

Both interpretations cannot be correct. And yet, neither line of cases is demonstrably wrong because neither rests on an analytically sound exegesis of Art. IV, § 5(B)'s text. No definitive judicial interpretation of that text is possible. The bare bones of the Amendment do not provide sufficient foundation for the extrapolation of a sound judicial interpretation that would fill the void.

It is proposed here, therefore, that Art. IV, § 5(B) be amended. The proposal is to adopt the Ohio Supreme Court's more recent holdings about the General Assembly's authority and thereby permanently fill the void.

---

1. The Modern Courts Amendment and the Federal Rules Enabling Act

Congress enacted the federal Rules Enabling Act in 1934. It authorized the United States Supreme Court "to prescribe, by general rules, . . . the practice and procedure of the district courts of the United States . . . ." In the decades that followed, the Enabling Act became the fountainhead for a deluge of court rulemaking, both federally and in the states. The Supreme Court of the United States, exercising authority granted it in the Rules Enabling Act, began by promulgating Rules of Civil Procedure in 1938. Under

parallel legislation, the Court eventually issued rules covering, among others, criminal[1] and appellate procedure.[2] Forty states have since come to recognize that their highest courts too have rulemaking authority, whether shared in some way with the state legislature or held exclusively by the court. Almost all have done so either by statutory delegation or by variously worded constitutional amendments.

In 1968, Ohio joined the movement toward court-promulgated rules — albeit somewhat belatedly[3] — with adoption of the Modern Courts Amendment. The Amendment was "the most significant change in the judiciary since ratification of the Ohio Constitution of 1850."[4]

---

[1] 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.

[2] Effective on July 1, 1968. See 389 U.S. 1063; Cong. Rec., vol. 114, pt. 1, p. 113, Exec. Comm. 1361; H. Doc. 204, 90th Cong.).

[3] By 1968, the Supreme Court of the United States had already recognized that the distinction that lies at the heart of the Rules Enabling Act is a false dichotomy between substance and procedure by the time the Modern Courts Amendment made the substance/procedural distinction central to its allocation of rulemaking authority. *See Hanna v. Plumer*, 380 U.S. 460 (1965) discussed in Sections 2 and 3, *infra.*

A deep rethinking about the relationship between substance and procedure 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) (internal citations omitted).

> 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.

[4] *See* Josiah H. Blackmore, *Civil Procedure in Ohio*, in 1 HISTORY OF OHIO LAW 457 (Michael Les Benedict and John F. Winkler, eds. (2004).

The similarities between Art. IV, § 5(B) and the federal Rules Enabling Act are striking.[5] Among the several provisions of the Amendment was the clause authorizing the Supreme Court of Ohio to "prescribe rules governing practice and procedure in all courts of the state."[6] That clause is now Art. IV, § 5(B).Besides using nearly identical language to grant authority to prescribe laws "governing practice and procedure in all courts," the Ohio Amendment uses exactly the same language prohibiting any court-promulgated rule that would "abridge, enlarge, or modify any substantive right." Art. IV, § 5(B) also has a supersession clause like the one in the Act. Each states that, if an

---

[5] *Compare id. 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 therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

For the succession of amendments to the 1934 Act before the enactment of the Modern Courts Amendment, see *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); Clark & Moore, *A New Federal Civil Procedure I. The Background*, 44 YALE L.J. 387 (1935); Sunderland, *The Grant of Rule-Making Power to the Supreme Court of the United States*, 32 MICH. L. REV. 1116 (1934); Jaffin, *Federal Procedural Revision*, 21 VA. L. REV. 504 (1935).

[6] 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." Art. IV, § 1(B)(1)(g)..

existing statute conflicts with a duly promulgated court rule, the statute will no longer have any force or effect after the rule takes effect.[7]

The process of promulgating rules is also similar. Each court may propose a rule of practice or procedure only once a year.[8] The legislature then has a defined period in which to consider the proposed rule.[9] Unless the legislature takes action by a designated date to disapprove the proposed rule, the court's proposal becomes law by default.

Even more important than what the Rules Enabling Act and the Modern Courts Amendment say is what the two texts leave unsaid. Each is silent on two centrally important questions. First, neither defines what constitutes "a rule practice and procedure" nor do they describe how rules of practice and procedure differ from "a substantive right." As will be discussed below, this silence remains a vexing problem.[10]

Second, even though both the 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. Again as discussed below, this latter omission has caused no disruption under the federal Rules Enabling Act. And it presented only a theoretical

---

[7] *Compare id.* ("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, c. 651, 48 Stat. 1064, *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.").

[8] *Compare* 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 as amended by Act of May 10, 1950, c. 174, §2, 64 Stat. 158 (proposed rules must be "reported to Congress by the Attorney General at the beginning of a regular session ").

[9] *Compare id.* ("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 id.* ("Such rules shall not take effect . . . until after the close of such session. ").

[10] Paul D. Carrington, *Substance and Procedure in the Rules Enabling Act*, 1989 DUKE L. J. 281, 284 (1989) ("The interpretive problem [with the Rules Enabling Act] lay in the mystic terms 'substance' and 'procedure' as used in the Act. ").

problem in 1968 when the Modern Courts Amendment was ratified. The omission has, however, become a recurring problem in Ohio because, as years have passed, the General Assembly has often enacted legislation that conflicts with court-promulgated, apparently procedural rules.

One might assume that two pieces of positive law that are so similar as Rules Enabling Act and Art. IV, § 5(B) would generate similar judicial interpretations. They have not. In fact, the federal and Ohio experiences have been quite different. The U.S. Supreme Court since 1934 has never held that a court-promulgated rule abridged, enlarged, or modified a substantive right. In fact, it has rarely been faced with the question. The Ohio experience has been quite different. Since 1968, the Ohio Supreme Court considered more than three dozen cases involving potential conflicts between statutes and court rules. Finding conflicts in at least 32 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).

What explains the difference between the federal experience and Ohio's? The difference derives 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. In it, Congress delegated rulemaking authority to the Supreme Court. The Modern Courts Amendment, however, is a constitutional provision. It lodges the authority to prescribe "rules of practice and procedure" — an area over which the General Assembly theretofore had had exclusive legislative authority[11] —in the Ohio Supreme Court as a matter of constitutional allocation, not by

---

[11] William W. Mulligan and James E. Pohlman, *1968 Modern Courts Amendment to the Ohio Constitution*, 29 OHIO ST. L.J. 811, 829 (1968) ("Prior to this constitutional amendment, practice and procedure in Ohio have been governed by statute."). *See also* Blackmore, *supra* note 1. *Cf. Morrison v. Steiner*, 32 Ohio St. 2d 86, 88 (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 Supreme Court under Section 5(B), Article IV of the Constitution of Ohio.").

delegation through legislative authority.[12] Constitutional allocation implies a separation of powers; delegation does not. Unfortunately for Ohio, "[t]he precise boundaries of purely procedural matters are of little practical significance for a separation of powers analysis."[13] It is also unfortunate for Ohio is that the implications of the distinction between delegated authority and constitutional allocation were not fully appreciated at the time the Modern Courts Amendment was adopted.[14] This oversight made the

---

[12] *See generally* STEPHEN H. STEINGLASS AND GINO. J. SCARSELLI, OHIO STATE CONSTITUTION 65 (2011) (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.").

[13] Leslie M. Kelleher, *Taking "Substantive Rights" (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 69-70 (1998).

[14] *Cf.* William W. Mulligan and James E. Pohlman, *supra* note 11. A review of law reviews published since 1969 that discussed adoption of the Modern Courts Amendment revealed no discussion of the dissimilar sources of the courts' 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 Acts two key provisions.

Martin H. Redish and 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 covered by Rules of Decision Act of 1789, i.e., in both federal-question cases and diversity cases. *See, e.g*. Stephen B. Burbank, *The Rules Enabling Act of*

Modern Courts Amendment's silence about where legislative authority resides after a rule has been duly promulgated qualitatively more significant in Ohio than in the federal system.

Why that distinction has produced different effects is discussed more fully in the following sections.

2. "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." This distinction, however, is inherently vague[15] and has, therefore, proved to be notoriously difficult to define in the abstract.[16] As a result, its utility for marking the constitutional boundary between the two sides of this supposed dichotomy is functionally nil.

1934, 130 U. PA. L. REV. 1015, 1159 n.620 (1982) *passim*; John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693 (1974) *passim*; Carrington, *supra* note 10 *passim*; Kelleher, *supra* note 13 *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 decide since 1934 under the federal Act.

[15] "A word or phrase is . . . vague when the concept to which it unquestionably refers has uncertain application to various factual situations." ANTONIN SCALIA AND 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, 14647 (1971) ("A word that may or may not be applicable to marginal objects is vague."). *See also* 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"); 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.").

[16] 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* Stephen B. Burbank, *supra* note 14 at 1159n. 620.

For purpose of defining the Court's authority under the federal Rules Enabling Act, the U.S. Supreme Court has essentially given up trying to ascribe any predictive, consistent distinction between substance and procedure. In *Hanna v. Plumer*,[17] the Court acknowledged that substance and procedure sometimes mean different things in different contexts and that, at other times, they overlap. When it comes to determining whether a court-promulgated rule is procedural for purposes of the Rules Enabling Act, however, the Court created a presumption that allows it to avoid having to define the difference with precision: any existing rule that the Court has successfully promulgated is presumed to be procedural because, to have become effective, the rule had to have passed through the structure and procedural steps established by Congress in the Rules Enabling Act. As the Court explained later in *Burlington Northern v. Woods*,[18]

> 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.

In other words, although the content of a Federal Rule of Civil Procedure may at times or for some purposes be substantive and not procedural, that fact does not rebut the presumption that the Rule is procedural for purposes of the federal Rules Enabling Act because the presumption arises out of the processes for creation and approval prescribed in the Act. The foundations that give rise to the presumption that the U.S. Supreme Court uses to resolve the substance/procedure duality will be discussed in section three below.

---

[17] 380 U.S. 460 (1965).

[18] 480 U.S. 1, 6 (1987) citing *Hanna v. Plumer*, 380 U.S. at 471.

The Supreme Court of Ohio has itself recognized that the supposed substance/procedure dichotomy is bankrupt. Three years after the Modern Courts Amendment was adopted, the court in *Gregory v. Flowers* said that

> The 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.[19]

Despite the recognized futility of trying to ascribe any mutually exclusive distinction between "substantive" and "procedure"— and even though the U.S. Supreme Court has given up attempting to separate substance and procedure into mutually exclusive categories for purposes of allocating lawmaking authority — the Ohio Supreme Court is routinely required to apply this the false dichotomy as the standard for deciding which branch of Ohio government has the constitutionally allocated authority to legislate. Since 1968, the Ohio Supreme Court was been faced with explicating the allocation of legislative authority no less than 37 times.[20] As will be

---

[19] 32 Ohio St. 2d 48, 56 (1972) quoting 1 CHARLES FREDERIC CHAMBERLAYNE, MODERN LAW OF EVIDENCE 217.

[20] Each of the cases decided by the supreme court addresses — to a greater or lesser extent — the same three fundamental components of the lawmaking authority under Art. IV, § 5(B): (1) whether the subject matter of the statute and court rule substantive or procedural (2) if procedural, whether the statute and rule conflict, and (3) if procedural, whether Art. IV, § 5(B) permits the General Assembly to legislate on the matter. 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. *State ex. rel. Sapp. v. Franklin Cty. Court of Appeals* (2008),118 Ohio St.3d 368; *State ex. rel. Boylen v. Harmon* (2006), 107 Ohio St.3d 370; *State ex rel. Thompson v. Spon* (1998), 83 Ohio St.3d 551; *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St.3d 420; *State ex rel. Beacon Journal v. Waters* (1993), 67 Ohio St.3d 321; *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73; *State v. Brown* (1988), 38 Ohio St.3d 305; *State v. Slatter* (1981), 66 Ohio St.2d 452.

discussed in section four, the Ohio Supreme Court does not have the option to bypass the substance/procedure dichotomy as the U.S. 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. Those various features in the federal rule-making process whereby Congress can control or override rules promulgated by the Supreme Court and which serve as the basis for the presumption do not exist in the text of the Modern Courts Amendment.

---

(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. *Proctor v. Kardassilaris* (2007), 115 Ohio St. 3d 71; *Hiatt v. S. Health Facilities* (1994), 68 Ohio St. 3d 236, 1994-Ohio-294; *In re Coy* (1993), 67 Ohio St. 3d 215, 1993-Ohio-202; *State ex rel. Hurt v. Kistler* (1992), 63 Ohio St. 3d 307; *State v. Smorgala* (1990), 50 Ohio St. 3d 222; *State ex rel. Clark v. Toledo* (1990), 54 Ohio St. 3d 55; *State v. Rahman* (1986), 23 Ohio St. 3d 146 (Ohio Evid. R. 601); *Alexander v. Buckeye Pipe Line Co*. (1977), 49 Ohio St. 2d 158; *Boyer v. Boyer*, 46 Ohio St.2d 83 (1976); *City of Cuyahoga Falls v. Bowers* (1979), 9 Ohio St. 3d 148.

(3) The 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. *Havel v. Villa St. Joseph* (2012), 131 Ohio St.3d 963; *Erwin v. Bryan* (2010), 125 Ohio St.3d 519; *State ex rel. Loyd v. Lovelady* (2006), 108 Ohio St.3d 86; *Hartsock v. Chrysler Corp.* (1989), 44 Ohio St. 3d 171 (jurisdictional case); *Malloy v. Westlake* (1977), 52 Ohio St. 2d 103 (jurisdictional case); *State v. Hughes* (1975), 41 Ohio St. 2d 208 (jurisdictional case); *Krause v. State* (1972), 31 Ohio St. 2d 132 (no statute at issue in the case).

(4) The 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. *Rockey v. 84 Lumber Co.* (1993), 66 Ohio St.3d 22,; *State ex rel. Silcott v. Spahr* (1990), 50 Ohio St. 3d 110; *State v. Greer* (1988), 39 Ohio St. 3d 236; *State v. Rahman* (1986), 23 Ohio St. 3d 146 (Ohio Evid. R. 501); *Johnson v. Porter* (1984), 14 Ohio St. 3d 58; *State ex rel. Columbus v. Boyland* (1979), 58 Ohio St. 2d 490.

(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. *Flynn v. Fairview Village Retirement* (2012), 132 Ohio St.3d 199; *Myers v. Brown* (2012), 132 Ohio St. 3d 17, 2012-Ohio-1577; *Seger v. For Women, Inc.* (2006), 110 Ohio St. 3d 451; *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 1999-Ohio-123; *State ex rel. Bohlman v. O'Donnell* (1994), 68 Ohio St. 3d 496, 1994-Ohio-349; *Stark v. Arn* (1993), 66 Ohio St. 3d 354; 1993-Ohio-41.

3. Congress and the Supreme Court of the United States

"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."[21] The U.S. Supreme Court has consistently recognized that the power it has 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.[22] The U.S. Supreme Court has authority to legislate, therefore, only to the extent that and only so long as it possesses the authority that Congress delegated to it.

If Congress and the Supreme Court disagree about a proposed rule of practice and procedure, Congress has any number of ways of addressing the disagreement. Congress can postpone the effective date of the proposed rule.[23] Or it can rescind or modify the

---

[21] Stephen B. Burbank, *supra* note 14 at 1106.

[22] *Sibbach v. Wilson & Co* (1941)., 312 U.S. 1, 9-10, 15 ("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. Co*., 559 U.S. 393 (2010), 406-407 ("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,* 380 U.S., at 471-474 ("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.).

[23] 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' concern that the Court had overstepped its constitutional and statutory rulemaking authority. Leslie M. Kelleher, *supra* note 13.

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) ("the rules enabling acts have 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.").

Rules Enabling Act, by which Congress delegated the authority to the Court. Or it can amend the rule that the Court proposed.[24] Or it can simply assume legislative authority over the subject and enact legislation in substitution for the proposed rule.[25] And even if a rule proposed by the Supreme Court has become law, Congress can pass legislation changing what the Supreme Court had legislated through its rule-making authority.[26] Congress has exercised each of these various options at one time or another regarding the Federal Rules of Civil Procedure[27] and Federal Rules of Criminal Procedure.[28] In short, the number and extent of Congress' various options exist as attributes that flow from the foundational fact that Congress delegated the authority the Court exercises.

Congress' most assertive action against rules that the U.S. Supreme Court proposed, however, pertained to the proposed Federal Rules of Evidence, which the Court first proposed in 1972. Both houses of Congress introduced bills to postpone the effective date that the Supreme Court had set for the proposed Rules, giving Congress time to examine the Court's view of its claimed authority to promulgate evidence

---

[24] *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.* (2010), 559 U.S. 393, 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, 116 S. Ct. 1638, 134 L. Ed. 2d 880 (1996).").

[25] *Id.* 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., *supra* note 4 at § 5006 (2005).

[26] *Id.*

[27] For example, in the Private Securities Litigation Reform Act of 1995 (PSLRA), 109 Stat. 737, Congress established pleading standards in private securities litigation that differed from F. R. Civ. P. 8(a). *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313-314 (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.'").

[28] For example, Congress amended Rule 6(e)(3)(C) of the Federal Rules of Criminal Procedure in Homeland Security Act of 2002, Nov. 25, 2002, P.L. 107-296, Title VIII, Subtitle I, § 895.

rules.[29] As the postponed 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 rule making, Congress prohibited adoption of rules of evidence except and until they might be "expressly approved by Act of Congress."[30] Ultimately, the Federal Rules of Evidence became law as a statute enacted by Act of Congress, not as rules of practice and procedure promulgated by Supreme Court under authority of the federal Rules Enabling Act.[31]

4. General Assembly and the Supreme Court of Ohio

In contrast to Congress' ranging authority to participate in the process of court rulemaking, the only action that Art. IV, § 5(B) recognizes for the General Assembly is to disapprove rules of practice or procedure within a prescribed period after they are proposed. If the General Assembly is to act at all, it must do so by adopting a concurrent resolution of disapproval by June 30 of the year in which the court submitted the proposed rule to the legislature for review. Unless both houses of the General Assembly concur, the proposed rule becomes law. The surprising history of the Ohio Rules of Evidence demonstrates how fragile this provision of Art. IV, § 5(B) can be, sitting as it does in the hands of a multi-layered, designedly slow-acting, and easily stalled General Assembly.

---

[29] Senate: 119 Cong. Rec. 2395-96; House of Representatives 119 Cong. Rec. 3739 3749 (1973).

[30] Act of March 30, 1973, Pub. L. 93-12, 87 Stat. 9 ("*Be it enacted* . . . That notwithstanding any other provisions of law, the Rules of Evidence for United States Courts 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.").

[31] Pub. L 93-595, 88 Stat 1926, 1975. For a summary of Congress' unusually assertive involvement in the eventual Federal Rules of Evidence, see 21 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *supra* note 4 at § 5006.

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

The proposed Federal Rules of Evidence became a reagent for analyzing the respective roles of Congress and the U.S. Supreme Court in rulemaking. The Ohio Supreme Court's proposed Ohio Rules of Evidence had the same effect; it brought into high relief the uncertainty inherent in the false dichotomy between substance and procedure and, thus, in what is properly within the legislative domains of court and legislature. The conflict that ensued also demonstrated the impotence of a concurrent resolution as the only check on the court's rulemaking power.

The first version of the Proposed Ohio Rules of Evidence was published for review and public comment on February 21, 1977.[32] A significantly different version eventually became law three years later on July 1, 1980. During the intervening years, however, the General Assembly acted as assertively in response 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. They were so closely modeled that it would have made evidence law in Ohio subject to Congressional legislation.[33] The Office of Ohio Attorney General William J. Brown was the only party to publicly urge rejection of the proposed Rules. Nevertheless, the General Assembly by unanimous votes in both houses adopted a Concurrent Resolution of Disapproval. Among reasons for its opposition, the General Assembly was concerned that codified evidence rules — at least those patterned after the Federal Rules — threatened to affect substantive rights and, to that extent, were not

---

[32] *Proposed Ohio Rules of Evidence*, 50 OHIO ST. B. ASS'N REP. 231–57 (1977).

[33] *Cf.*, *e.g.*, Proposed Ohio Evid. R. 402, *id.* at 235-36 ("All 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.") (Emphasis added.)

the properly within the court's constitutional authority to legislate under Art. IV, § 5(B).[34]

Shortly after rejecting the Rules of Evidence, the General Assembly adopted another resolution, Am. Sen. Joint Resolution No. 25, 1976-77 Ohio Legis. Bull. 1123-26, 112th Gen. Ass., 1st Sess. It created a joint select committee that was to study the proposed Ohio Rules of Evidence and evidence-reform generally. Id. at 390 Appendix B. 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."

In 1978, the court proposed an identical version of the Ohio Rules of Evidence. The result in 1978 was the same: unanimous disapproval in both houses.[35] In 1978, however, there was wide opposition to court-adopted of evidence rules patterned after the federal.[36] 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 in the state and individual practitioners.

In 1979, the court submitted nothing. But the House introduced H.B. 684.[37] The bill proposed a statutory code of evidence that, as introduced, was in all material respects

---

[34] Am. H. Con. R. No. 14, 1977-78 Ohio Legis. Bull. 510, 112th Gen. Ass., 1st Sess. *See also* Richard S. Walinski and Howard Abramoff, *Proposed Ohio Rules of Evidence: The Case Against*, 28 CASE W. RES. L. REV. 344, 347-49, 388 Appendix A, 393 Appendix C (1977).

[35] Concurrent Resolution No. 43. 1977-78 Ohio Legis. Bull. 514, 112th Gen. Ass., 2nd Sess.

[36] Hon. William J. Brown and Richard S. Walinski, *Ohio Rules of Evidence: An Open Letter to the Bar of Ohio,* OHIO ST. B. ASS'N REP. 1639 (1978).

[37] 1979-80 Ohio Legis. Bull. 363, 113th Gen. Ass. 1st Sess.) ("To enact sections 2318.01 to 2318.58 of the Revised Code to establish comprehensive statutory rules of evidence.").

identical to what the supreme court had proposed in 1977 and 1978. Representative Terry M. Tranter's purpose in introducing the bill, however, was to stake out for the General Assembly the same legislature the authority over the eventual Ohio Rules of Evidence that Congress had preserved for itself by enacting the Federal Rules of Evidence as a statute.

In 1980, the court forced the constitutional issue that had emerged in 1977: whether it or the General Assembly had authority to legislate on evidence law. It again filed a set of proposed evidence rules. The 1980 version had been partially rewritten to address the objections voiced against the Rules as the court had proposed in 1977 and 1978.

A joint committee of the House and Senate began lengthy hearings on the court's 1980 proposal, enlisting a group of consultants to assist in the study. Altering its schedule, the joint committee began lengthy hearings. As the joint committee it completed review of an Article in the court's proposed Rules, the committee sent to the court requests for revisions of specific Rules. Initially, the court approved the requested changes. It accepted, for example, a change in Rule 102 that affected how all of the Ohio Rules of Evidence are to be interpreted. The court accepted the General Assembly's suggestion that the Ohio Rules be interpreted in a way diametrically opposite from the way Fed. R. Evid. 102 establishes for interpretation of the federal evidence rules.[38]

As May 1 approached, however, the court stopped accepting changes that the legislature had recommended. By that date, it was apparent that the select committee would not have time to complete its review of the proposed rules by May 1, the final date set in Art. IV, § 5(B) for amendments. The committee hadn't, for example, begun its

---

[38] At the request of the General Assembly in 1980, the Ohio Supreme Court 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*, 50 OHIO ST. B. ASS'N REP. 1197, 1198 (1988). 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 . . . ."

review of Article VII (Lay and Expert Opinions) or Article VIII (Hearsay). The Senate, therefore, introduced yet another concurrent resolution of disapproval.[39] Once again, the Senate passed the Resolution unanimously. The Resolution was communicated to the House for concurrence.

The Senate Resolution was referred to the House Judiciary Committee.[40] Chairman Harry J. Lehman refused to place the Resolution on the committee's agenda.

As June 30 approached, a group of representatives attempted to force Senate Resolution out of the Judiciary Committee. For parliamentary reasons, the effort failed. As a result, with the Senate Resolution still in the House Judiciary Committee, the House failed to concur in the Senate Resolution. 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.

Thus, an unfinished version of the Rules of Evidence became law in Ohio on July 1, 1980 without having received a single legislator's vote of approval in either house of the General Assembly in the four year since their first promulgation. 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 to legislate.

B. The Role of the General Assembly in Rulemaking

The General Assembly's options beyond adopting a concurrent resolution of disapproval, however, are far from clear. As noted previously, Art. IV, § 5(B) itself is silent about whether the General Assembly may continue to legislate to any extent on a

---

[39] Sen. Joint Resolution No. 22, 1979-80 Ohio Legis. Bull. 148, 113th Gen. Ass. 2nd Sess.

[40] *Id*.

matter "governing practice and procedure" once the court has promulgated a rule on the matter.

Despite the Ohio Constitution's silence, the General Assembly has continued to enact statutes that purport to alter procedures that are already addressed in court-promulgated rules. Since 1968, the Ohio Supreme Court has decided dozens of cases 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. Although the court has been confronted with the substance/procedure dualism many times, the court has shed very little light on what the distinction denotes. 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."[41]

Two distinct rules of law have, however, 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. The other holds just precisely the opposite: the General Assembly may legislate on a matter of practice or procedure even if the court has promulgated a rule on the matter. The rules of law established and followed in these two lines cannot both be correct. Both

---

[41] *State ex rel. Columbus v. Boyland* (1979), 58 Ohio St. 2d 490; *Johnson v. Porter* (1984), 14 Ohio St. 3d 58; *State v. Rahman* (1986), 23 Ohio St. 3d 146;*State v. Greer* (1988), 39 Ohio St. 3d 236; *Rockey v. 84 Lumber Co.* (1993), 66 Ohio St.3d 22; *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward (*1999), 86 Ohio St. 3d 451, 1999-Ohio-123; , *State ex rel. Loyd v. Lovelady* (2006), 108 Ohio St.3d 86, and *Havel v. Villa St. Joseph* (2012), 131 Ohio St.3d 963.

lines of cases, however, remain definitive holdings by the Ohio Supreme Court according to its own rules regarding the precedential value of its opinions.[42]

C. THE *ROCKEY V. 84 LUMBER* LINE OF CASES

The first line emerged in 1993 beginning with *Rockey v. 84 Lumber*.[43] 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 state statute that the General Assembly enacted after adoption of that Rule. The statute prohibited a plaintiff from alleging the amount of actual damages if it exceeded a specified dollar about.

Without explaining how a procedural rule is to be distinguished from a substantive right, the court simply declared that the statute was procedural. It then ruled that the statute conflicted with the court-promulgated rule. The court made both findings without referring to *Gregory v. Flowers* in which, shortly after the Modern

---

[42] Opinions that the Ohio Supreme Court 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 value of the signed opinion depended on whether court issued a syllabus to the opinion. *See, e.g., State v. Wilson* (1979), 58 Ohio St.2d 52, 60 ("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."). "A per curiam opinion is entitled to the same weight as a syllabus in stating the law." *Truesdale v. Dallman*, 690 F.2d 76 (1982), 77 (6th Cir.), citing *State ex rel. Canada v. Phillips*, 168 Ohio St. 191 (1958), 151 N.E.2d 722, paragraph 6 of the syllabus ("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.").

The Ohio Supreme Court recognizes that syllabus rulings can be overruled by implication. *See, e.g., Fichtel & Sachs Indus. v. Wilkins* (2006), 108 Ohio St. 3d 106, 111, 2006-Ohio-246 ¶40 ("We have implicitly overruled paragraph two of the syllabus in *Kroger* [*Grocery & Baking Co. v. Glander* (1948), 149 Ohio St. 120] in later decisions.").

[43] 66 Ohio St. 3d 221 (1993) aff'd *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St. 3d 451 (1999), 478 ("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.").

Courts Amendment was adopted, the court recognized that "[t]he distinction between substantive and procedural law is artificial and illusory. In essence, there is none."[44] Nor did the court inquire whether the General Assembly intended to convert the procedural matter into a substantive right. Instead, without attempting any textual analysis of what the pivotal terms must mean in the context of Art. IV, § 5(B), the court passed directly to the central question about which §5(B) is silent. In the body of the opinion, the court stated that, because the Civil Rule was promulgated under the authority of Art. IV, § 5(B), the General Assembly was left without constitutional authority to legislate in conflict with the Rule. It held that the court-promulgated Rule prevailed over the statute, rendering the statute unconstitutional. The court explained 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.[45]

In syllabus two of the opinion, the court ruled that

> 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. [46]

In holding that the General Assembly is disenfranchised once a rule of procedure takes effect, the court expanded the effect of its own lawmaking authority beyond the plain language of Art. IV, § 5(B). It did not consider the possibility that a court-promulgated rule could fairly be labeled procedural and at the same time abridge or modify substantive rights.

---

[44] Text at note 19 *supra.*

[45] 66 Ohio St. 3d 225.

[46] *Id*. at 221.

The court offered no textual, historical, or principled analysis to support either its expansive reading of the Amendment or its assertion its "interpretation is the only one consistent with the original reason for adopting" Art. IV, § 5(B).[47] Rather, the Ohio Supreme Court trusted implicitly that the substance/procedure dichotomy would provide a workable standard for deciding whether it is the court or the legislature that has the constitutional authority to legislate. That faith, however, did not reflect then-current scholarly analyses of the distinction in the rulemaking context[48] And the court's faith was plainly at odds with what the U.S. Supreme Court had concluded about the same distinction used in the federal Rules Enabling Act.

---

[47] The court cited four lower court decisions — two as direct authority and two as additional authority — 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" that, once the court has duly promulgated a rule of practice and procedure, the General Assembly is thereby deprived of ever legislating on that matter. The two cited as direct authority were common-pleas cases. The two decisions cited as additional authorities were court-of-appeals cases. One of the four cases didn't stand for the proposition for which it was cited. *Jacobs v. Shelly & Sands, Inc.* (1975), 51 Ohio App. 2d 44, 365 N.E.2d 1259; 1976 Ohio App. LEXIS 5882; 5 Ohio Op. 3d 165, involved a previously, not subsequently, enacted legislation (statute was effective January 1, 1975; the court-promulgated rule was effective July 1, 1975).

The other three 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 began their analysis 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 were enacted afterward the rules had been promulgated. *See Graley v. Satayatham* (C.P.1976), 74 O.O.2d 316, 318, 343 N.E.2d 832, ___ ("all 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'"); *Simon v. St. Elizabeth Med. Ctr.* (C.P.1976), 3 O.O.3d 164, ___, 355 N.E.2d 903, 905 citing *Graley v. Satayatham* (take precedence over any other conflicting laws."); *In re Vickers Children* (1983), 14 Ohio App.3d 201, 204, 14 OBR 228, 231, 470 N.E.2d 438, 442 [court stated without legal or historical analysis that "It 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.").

[48] See notes 3 and 14 *supra.*

D. THE *LOVELADY/HAVEL* LINE OF CASES

The other comparably seminal line of cases began with *State ex rel. Loyd v. Lovelady*,[49] which the Ohio Supreme Court decided in 2006. There, the court was presented with facts similar to *Rockey, viz.*, an apparent conflict between a Civil Rule and a subsequently enacted statute. 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. The statute, however, allowed a longer period of time in a particular kind of case.

The court held — this time, attempting some analysis — that the statute prevailed over the Rule because that statute was "substantive." Despite stating that Art. IV, § 5(B) gives the court "the exclusive authority," — a phrase that does not appear in Art. IV, § 5(B) — the court ruled that the General Assembly may legislate on matters of practice and procedure.[50] 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 . . . . " <u>If the legislature intended the enactment to be substantive, then no intrusion on this court's exclusive authority over procedural matters has occurred</u>.[51]

This, of course, is a novel definition of the substantive/procedure dualism, one that makes the distinction turn, not on the denotation or connotation of the words "substantive" and "procedure" themselves, but on whether the legislature had formed the intent that the procedural matter addressed in the statute should become "a substantive right." Nor did the court consider whether Art. IV, § 5(B), because it refers to the concept of "a substantive right," must be read to contemplate the existence of the contradistinctive concept, "a procedural right." After all, the plain language of the

---

[49] 108 Ohio St. 3d 86 (2006).

[50] *Id.* at ¶13.

[51] *Id.* at ¶14 (emphasis added).

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. Instead of parsing out the significance of the fact that noun *right* is qualified by the adjective *substantive*, the court said, "a statute may create a substantive right despite being 'packaged in procedural wrapping.'"[52]

The court thus ruled that it is within the General Assembly's authority to prescribe or proscribe on matters of practice and procedure, even if the matters are covered in preexisting court-promulgated rules that conflict with a Rule that the court had the "exclusive authority" to promulgate. The court conditioned this prerogative on the General Assembly having had the intent to create a "right" when it enacted the statute in conflict with the rule.

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. The court took the declaration as establishing the legislative intent that, according to *Lovelady*, 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.[53]

In holding that the statute prevailed over the court-promulgated rule, the court did not overrule syllabus 2 of *Rockey,* which held that the "Ohio Rules of Civil Procedure . . .

---

[52] 131 Ohio St. 3d at 245 ¶ 34, quoting *State ex rel. Loyd v. Lovelady* (2006), 108 Ohio St.3d at 89 ¶ 14.

[53] 108 Ohio St. 3d at 89 ¶14.

must control over subsequently enacted inconsistent statutes purporting to govern procedural matters."

Even though *Lovelady* repeats — without citation — *Rockey*'s holding that "practice and procedure" are the court's exclusive domain, the reasoning in *Lovejoy* nevertheless contradicts the holding in *Rockey*. While *Rockey* stands for the proposition that, once the court promulgates a rule on procedural matter, the General Assembly is disenfranchised regarding that matter, *Lovelady* 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 "substantive" right regarding the procedural matter.

Havel is perhaps even more important than *Lovelady* because the court attempted to lay a firmer foundation for its holding in *Lovelady* that the General Assembly may override a court-promulgated procedural rule by enacting a statute that converts a procedural matter into a procedural right. Again, it attempted to do so again without overruling *Rockey*'s syllabus 2.

In *Havel v. Villa St. Joseph*,[54] the court was presented with a situation similar to both *Rockey* and *Lovelady.* It was again presented with a conflict between a court Rule and a subsequently enacted statute. 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. The statute, however, made bifurcation mandatory upon the request of any party.

Although the General Assembly had not declared explicitly (as it had in *Lovelady*) its intention to create a substantive right, the court in *Havel* nevertheless held that the statute was substantive. The court gave three reasons. The first is the pivotal reason because that is where the court attempted to explain why the term "substantive right" encompasses "rules governing . . . procedure." The court held that that every right

---

[54] 131 Ohio St. 3d 235 (2012), 2012-Ohio-552 (emphasis added).

created by statute is, by definition, a "substantive right." To reach that conclusion, the court adopted a commonly cited definition of *substantive*. 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 a substantive or procedural law depends upon whether the statute creates a right.

Note how in the quoted text the phrase "substantive right" comes to mean any right created by statute. There is, of course, common-law authority — even in Ohio — for that definition, and that is the definition the court in *Havel* presumed. It made that presumption without considering whether that meaning fits the text.

That definition, however, may not be the sense in which the term "substantive right is used in Art. IV, § 5(B). It may well be that the term "substantive right" was not used a sense that makes procedural matters a subset of substantive rights. It is just as plausible that it was used as a qualified limitation on the authority reallocated to the court, that Art. IV, § 5(B) distinguishes substantive rights from procedural rights . If used in that sense, Art. IV, § 5(B) allocated to the court the authority to establish procedural rights — authority that had previously been held by the General Assembly — provided that those court-promulgated procedural rights not affect any substantive right.

The text of Art. IV, § 5(B) can plausibly be read as doing just that. First, read that way, Art. IV, § 5(B) would use the word *substantive* in its commonly accepted, but nonetheless vague, sense as the antonym of *procedural*.[55] This is the sense in which the *Rockey* line of cases understood "substantive right." In fact, that may be the more plausible reading. If Art. IV, § 5(B) did only so much as *Lovelady*/*Havel* interpreted it — the General Assembly retained the authority to legislate on procedural matters — i.e., why was that portion of the constitutional amendment necessary?

In short, *Havel*'s failure as a persuasive explication of Art. IV, § 5(B) stems from its definition of "substantive right" as subsuming procedural rights. It ignores the fact that, as the terms are used in Art. IV, § 5(B), procedure and substance appear to have been juxtaposed one against the other in the usual and customary senses as antonyms, not one as subordinated to the other.

5. Our Proposal and how it would resolve the problem in Art. IV, § 5(B)

The difference between *Rockey* and *Lovelady*/*Havel* lines of cases on the allocation of constitutionally created rulemaking authority 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. Under *Lovelady*/*Havel*, however, both the court and the General Assembly have roles in the process of rulemaking for Ohio courts. Although the difference between the rules announced in *Rockey* and in *Lovelady*/*Havel* could not be more stark, both lines remain authoritative holdings of the Ohio Supreme Court.

---

[55] BRYAN A. GARNER, DICTIONARY OF MODERN AMERICAN USAGE 782-83 (3rd ed. 2009) ("**substantive . . . B. . . .** appear[s] most often . . . in law (in which it serves . . . as the adjective corresponding to *substantive* and as the antonym of *procedural* <substantial rights>)."

The court hasn't yet explained why it refrains from overruling *Rockey*'s syllabus 2.[56] It is much to the court's credit, however, that it has — apparently — come to recognize that *Rockey*'s disenfranchisement of the General Assembly is unworkable, if not indefensible. The disenfranchisement that *Rockey* found in Art. IV, § 5(B) cannot be defended by textual analysis of Art. IV, § 5(B). But the same criticism must be made of *Lovelady* and *Havel*. Neither the *Rockey* nor *Lovelady*/*Havel* line of cases rests on a close textual analysis of the Modern Courts Amendment. The court is hardly to be faulted, of course, for failing to discover persuasive guidance in the current language of the Amendment. Art. IV, § 5(B)'s allocation of lawmaking authority turns on a vague and inscrutable distinction. And Ohio doesn't have available to it the same detour that the U.S. Supreme Court found in *Hanna* and *Burlington Northern* and has used as its means to sidestep that substance/procedure enigma.

The cause of the futility that is uniquely Ohio's lies in the very structure of Art. IV, § 5(B). The present text never will support an unassailable, judicially-created patch to cover 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.

None of these propositions, either individually or in sum, provides a firm premise from which to deduce that the General Assembly has — or does not have — the authority to legislate after the court has promulgated a rule.

---

[56] Although the Ohio Supreme Court recognizes that syllabus law may be overruled by implication, see note 42 *supra*, the court's decisions in *Lovelady*/*Havel* do not support that inference with respect to *Rockey*'s syllabus 2. 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."

The void in Art. IV, § 5(B) is unanswerable through the common-law process of interpretation and construction. As Karl Llewellyn long ago compellingly observed about canons of construction, "there are two opposing canons on almost every point."[57] In his words, they are a compilation of paired opposites.

It takes, however, only a momentary reflection on *Lovelady* and *Havel* — the court's current reading of Art. IV, § 5(B) — to see that in those cases the court envisions a constitutional allocation in which the General Assembly has a role in the court's rulemaking authority that resembles Congress' relationship to rulemaking under the federal Rules Enabling Act. Like Congress, the General Assembly may legislate on matters that are already addressed in court rules promulgated under Art. IV, § 5(B).The proposed amendment would resolve the conflicting rulings in *Rockey* and *Lovelady/Havel*.

We repeat: the proponents of the amendment recognize that it is rarely wise to pursue a constitutional amendment simply to resolve merely 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 continue to adopt conflicting interpretation of Art. IV, § 5(B) — lies in the constitution itself. The flaw is in the structure of the Modern Courts Amendment.

---

[57] 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"). *See also* William N. Eskridge, Jr. and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking* Symposium: *A Reevaluation of the Canons of Statutory Interpretation*, 45 VAND. L. REV. 593, 595 (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 substantive canons of statutory construction reflects an underlying 'ideology,' or mix of values and strategies that the Court brings to statutory interpretation.").

The proposal we advance avoids trying to resolve the hopelessly vague substance/procedure distinction. Rather, the proposal addresses directly the void in the 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.

Specifically, the proposal does so through the interlineation what the *Rockey* and *Lovelady*/*Havel* lines of cases were unable to do through interpretation:

> (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. <u>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</u>.

Note that the proposed language distinguishes between a bill and an act. The distinction is to make clear that the declaration of the General Assembly's intention to change an existing rule of practice or procedure need not be stated in the enactment itself. It may appear in the act's preamble, as was in the case in *Lovelady*.[58] The proposal is more specific, however, regarding the General Assembly's declaration than what

[58] 108 Ohio St. 3d at 89 ¶14.

Havel might permit. In that case the court found a sufficient expression of intent in a declaration that appeared in a "statement of findings and intent" appearing in uncodified language of the applicable bill.[59] The proposal specifies that the purpose be stated in the preamble, thus excluding expressions of individuals or committees that might appear to be legislative history.

Conclusion

Currently, if a statute were to satisfy the two conditions identified in this proposal, the statute would meet constitutional muster under the rule announced in *Lovelady/Havel.* But by making these conditions explicit in Art. IV, § 5(B) the proposal would guarantee that the court will never revert to *Rockey*-like interpretation of Art. IV, § 5(B), which deduces a bright-line allocation of legislative authority that turns entirely on the inherently vague and false dichotomy between substance and procedure.

---

[59] 31 Ohio St. 3d 235 at ¶30. ("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.").