Gaps Between Theory and Practice in Article 6 of the Michigan Constitution

By Adam D. Pavlik

Article 4 of the Michigan Constitution requires that laws not take effect until 90 days after the end of the session during which they are enacted, except on a two-thirds vote of the legislature.[1] Some 90 percent of laws since the Constitution of 1963 was ratified have been given immediate effect,[2] which has required some clever constitutional gamesmanship to overcome the supermajority requirement. The Michigan Constitution does not specifically require a roll-call vote on whether to give a bill immediate effect. Since the legislature has the authority to establish its own rules of procedure,[3] once a bill is passed, a separate motion is made to give the bill immediate effect, and the chamber conducts an uncounted "rising vote,"[4] which invariably reflects approval of immediate effect if desired by the majority.[5]

In short, it is fair to say there is a gap between the theory of this section of our constitution and the practical manner in which it is being implemented.[6] It should be apparent on its face that this is objectionable. "Given the fact that a primary reason for having a written constitution is to inform citizens of the fundamental law by which they are governed, the text of the Michigan Constitution should reflect the standard practice of state law making and vice versa."[7] "Citizens deserve…clarity."[8]

The judicial article of the Michigan Constitution—Article 6—has several examples of this same dynamic, where law as it is practiced in Michigan has drifted some distance away from what the text of the constitution appears to require. In much the same fashion as there have been calls to align the

Fast Facts

A written constitution should generally reflect the standard practices of how the government operates.

Certain practices in Michigan's judiciary have drifted from the apparent text of the judicial article of the Michigan Constitution (Article 6).

In some cases this drift is beneficial from a policy standpoint, but is still in tension with the constitution as written.

"immediate effect" provisions of the constitution with actual practice, we should consider reexamining some of the following constitutional provisions to better align them with law as it actually functions in Michigan.

Leave to appeal

The Michigan Constitution requires that the Supreme Court provide "reasons for each denial of leave to appeal."[9] When this language was debated at Michigan's last Constitutional Convention in 1961, its proponent argued that

> the supreme court does not ever give a reason for denial of leave to appeal. They merely say it is denied. This leaves the litigant and their attorney in the position of not knowing why. They maybe can guess, and when the client comes to the office and asks, the attorney can guess, and everybody can have a fine time, but they don't know.[10]

Yet the vast majority of denials simply repeat that the justices "are not persuaded that the questions presented should be reviewed by this Court." The court rules provide that "[t]he reasons for denying leave to appeal, as required by Const 1963, art 6, § 6 and filed in the clerk's office, are not to be published…."[11] This arrangement has been described as "a state of mutiny" on the part of the Supreme Court.[12]

Mutiny it may be, but seemingly reasonable mutiny. The opponents of this provision had the stronger argument at the convention.

> [W]hen you write in a provision that requires the court to give the reason for denial of leave to appeal, you are almost, in effect, asking the court to judge each particular case. Because if it is going to deny the leave, it says to set up the reason, and the reason will only be after it examines it, and so you might just as well grant an appeal as a matter of right.[13]

It would be better to strike the requirement of "reasons" for denials of leave to appeal from the constitution. The requirement does not reflect the accepted role for courts of last resort.

Jurisdiction

The Michigan Constitution vests the judicial power of Michigan in "one court of justice," which is then "divided" into a Supreme Court, a Court of Appeals, circuit courts, and probate courts.[14] The constitution also empowers the legislature to create "courts of limited jurisdiction,"[15] which establishes a distinction between "constitutional courts"—created by the constitution—and "legislative courts," which are established by statute.[16]

Michigan has "a single court with several divisions, each devoting its attention to a certain level of judicial administration."[17] The work of the Supreme Court is clear enough, sitting at the apex of our judicial system and serving as the final arbiter of Michigan law. Legislative courts such as the district and municipal courts hear whatever cases their enabling legislation assigns to them. The circuit courts, having general jurisdiction, hear cases not specifically assigned to any other court.[18] The probate courts and Court of Appeals, however, have a sort of in-between existence: while they are both constitutional courts,[19] the constitution also says that their jurisdiction "shall be provided by law."[20] This has led at least the probate courts to also having been described as "statutory court[s]"[21] in that "[p]robate courts have no power or authority except that conferred upon them by the statutes providing for their creation."[22] In other words, the constitution prescribes that these courts must exist, but does not specify what it is they must actually do, with the exception that probate courts "shall have original jurisdiction in all cases of juvenile delinquents and dependents, except as otherwise provided by law."[23]

As a practical matter, the jurisdiction assigned by the legislature to the probate courts and Court of Appeals has largely been a matter of convention. Thus, while it is not said expressly in the constitution, "the principal function of [the Court of Appeals] is to act as an intermediate appellate court."[24] Similarly, probate courts have jurisdiction over a grab bag of subjects that have traditionally been heard by probate courts. While the constitution says that the "one court of justice" is "divided" into its various branches, this division has never been absolute; circuit courts function as miniature intermediate appellate courts with respect to various matters,[25] and probate and circuit courts have oftentimes exercised concurrent jurisdiction over various subjects.[26] While the gist of the judiciary's structure is set out by the constitution, the details have historically been filled in by the legislature in a manner consistent with conventional expectations about what the constitutional gist is supposed to accomplish.

Recent developments, however, have put increasing strain on this arrangement. For example, when the Michigan Constitution gives "original jurisdiction in all cases of juvenile delinquents" to the probate court "except as otherwise provided by law," the unarticulated apparent expectation is that any exceptions would be limited—the circuit court might hear cases involving juveniles charged with *serious crimes* or who are *very close* to being adults, for example. However, the work of the probate courts relating to juveniles was essentially transferred *in toto* to the Family Division of Circuit Court in 1998.[27] When the constitution says that the "one court of justice" is "divided" into circuit and probate courts, this arguably means that there should be meaningful barriers between the work they—and their judges—can do. Yet Michigan allows for a concurrent jurisdiction plan to provide that a judge of any given Michigan trial court "may exercise the power and jurisdiction of" any other trial court,[28] even in situations that are far from the "edges" of their own court's jurisdiction. Thus, it was held constitutional for an elected probate judge to sit on a circuit court and sentence a defendant in an otherwise routine criminal proceeding not touching on the probate court's traditional jurisdiction.[29] If the Court of Appeals is intended to focus on "a certain level of judicial administration," it would seem to be incompatible with its constitutional role for its appellate judges to perform trial work. Yet the power to "provide by law" that court's jurisdiction was held sufficient to transfer the work of the court of claims—a trial court—to four selected judges of the Court of Appeals.[30]

These changes—which seem to be inconsistent with the general intent of the constitution, even if narrowly defensible as an exercise of the legislature's authority to "provide by law" certain courts' jurisdiction—seem like examples of "constitutional hardball": practices which are "within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with" "the 'go without saying' assumptions that underpin working systems of constitutional government."[31] In effect, what Michigan has is a practical system of legislative supremacy with a sword of Damocles hanging over the collective heads of the legislature should—in the opinion of the appellate courts—they go "too far." In light of the withering criticism the court of claims reforms were subjected to—one account said it would be a "complete disaster"[32]—it is on the one hand hard to argue that we should further formalize a system of legislative supremacy if the legislature will exercise its discretion irresponsibly. Yet if we are going to practice a system of legislative supremacy, would it not be better if our constitution stated that directly? Indeed, such changes could in many ways be a positive, as there is a persuasive case to be made that Michigan's trial courts should be merged into a single trial court in the fashion once proposed by Justice James Brickley.[33] In any event, maintaining a system where the constitution describes a judicial structure we no longer really use seems unwise.

Rulemaking authority

The Michigan Constitution confers on the Supreme Court the authority to "establish, modify, amend and simplify the practice and procedure in all courts of this state."[34] This has been said to make the Supreme Court "the final arbiter of all matters of practice and procedure in the courts of this state."[35] It also confers on the Supreme Court the power "to regulate and discipline the members of the bar of this state."[36] The Court's "rule-making power in matters of practice and procedure is superior to that of the legislature."[37] Although there are myriad statutes relating to the practice of law in Michigan courts, "the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will."[38] The practical implementation of this state of affairs is that "[r]ules of practice set forth in any statute…are effective until superseded by rules adopted by the Supreme Court."[39]

Unfortunately, "the line between substance and procedure is at best a hazy one in numerous areas where the difference counts."[40] Assertions of independence coexist with apparent reliance on enabling legislation. For example, in the very case just quoted regarding its authority to regulate the State Bar, the Supreme Court *also* cited a statute conferring (purporting to confer?) "the power to provide for…the discipline, suspension, and disbarment of [the Bar's] members for misconduct."[41]

The inconsistent invocation of statutory rules of procedure by the courts, and the uncertain extent to which the courts mean to suggest they are actually *relying* on these statutes as a grant of authority, leaves the lines dividing judicial prerogatives from legislative ones unclear. In 1999, the Supreme Court moved away from the more assertive analysis it had employed in the past and instead adopted an analytic framework that is significantly more deferential to the legislature.[42] This has resulted in a "dearth of case law [which] is [presumably] the result of restraint by the judiciary in overturning legislation."[43] One commentator has argued that the present doctrine "subordinat[es] court procedure to statutory procedure and giv[es] supremacy to the legislature in an area that the Michigan Constitution by its terms assigns to the judiciary."[44]

Of course, this does not necessarily mean that this is a bad state of affairs. "There is nothing inherently unattractive about the [present] rulemaking regime…, but it seems more compatible with the federal Constitution than the Michigan constitution."[45] What would be valuable is clarity. If we are going to have a practical system of legislative supremacy, it produces uncertain jurisprudence to purport to maintain a system of judicial supremacy in procedural rulemaking. For

example, the Insurance Code declares that "[t]he issues of whether [an] injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court" in certain circumstances.[46] This sounds pretty procedural, and its constitutionality is uncertain.[47] But if we are going to have a practical system of legislative supremacy, it would be better to reconcile the constitution to that reality instead of leaving in place a regime that forces all interested actors to wrestle with rarely used but theoretically available methods the courts *might* use to invalidate a law.

Conclusion

Article 6 of the Michigan Constitution contains several noticeable gaps between law as it is practiced in Michigan and the theory that our constitution appears to express. I am less concerned with the *substantive* decision to deviate from the constitution's apparent intent than with the legal and intellectual contortions we resort to in order to maintain a patina of constitutionality on the solutions we have arrived at. Reform of the judicial article to bring it into closer conformity with actual Michigan practice would be a salutary project. ■

Adam D. Pavlik is the circuit court administrator/staff attorney of the Tuscola County Trial Courts. Previously, he was the law clerk to Chief Judge Michael G. Mack of the 26th Circuit Court in Alpena and Montmorency counties. He has bachelor's degrees from James Madison College at Michigan State University and a law degree from MSU College of Law.

ENDNOTES

1. Const 1963, art 4, § 27.
2. Citizens Research Council of Michigan, *Use of Immediate Effect in Michigan* (No. 1133, March 2015) <http://www.crcmich.org/PUBLICAT/2010s/2015/use_immediate_effect_michigan-2015.pdf>, pp 4–5 (accessed April 30, 2016).
3. Const 1963, art 4, § 16.
4. *Hammel v Speaker of the House of Representatives*, 297 Mich App 641, 646; 825 NW2d 616 (2012).
5. See *Use of Immediate Effect*, pp 5–6.
6. See *id.* at 1 ("The original intent behind this provision . . . was for immediate effect to be the exception, as opposed to the standard practice for the effective date of laws. However, legislative practice has made immediate effect more of the rule than the exception.").
7. *Id.* at 8.
8. Editorial, *Align Constitution with Practice*, Detroit News (March 20, 2015), p A16.
9. Const 1963, art 6, § 6.
10. 1 Official Record, Constitutional Convention 1961, p 1,294.
11. MCR 7.301(E). Cf. Rowling, *Harry Potter and the Order of the Phoenix* (New York: Scholastic, 2003), *passim* ("Department of Mysteries").
12. Kelman, *Case Selection by the Michigan Supreme Court: The Numerology of Choice*, 1992 Det C L Rev 1, 13.
13. 1 Official Record, Constitutional Convention 1961, p 1,295.
14. Const 1963, art 6, § 1.
15. *Id.*
16. See *Manion v State*, 303 Mich 1, 20; 5 NW2d 527 (1942) ("The 'court of claims' is a legislative and not a constitutional court and derives its powers only from the act of the Legislature and subject to the limitations therein imposed.").
17. 2 Official Record, Constitutional Convention 1961, p 3,384.
18. Const 1963, art 6, § 13 ("The circuit court shall have original jurisdiction in all matters not prohibited by law . . . .").
19. *Okrie v State*, 306 Mich App 445, 458; 857 NW2d 254 (2014) (per curiam) (referring to the Court of Appeals' "essential constitutionally created jurisdiction"); *Michigan Trust Co v McNamara*, 167 Mich 406, 411; 132 NW 1078 (1911) ("Our probate court is a constitutional court.").
20. Const 1963, art 6, § 10 and § 15.
21. *In re Cook's Estate*, 366 Mich 323, 328; 115 NW2d 98 (1962).
22. *In re Jeffers' Estate*, 272 Mich 127, 134; 261 NW 271 (1935).
23. Const 1963, art 6, § 15.
24. *Okrie*, 306 Mich App at 457.
25. Const 1963, art 6, § 13 ("The circuit court shall have . . . appellate jurisdiction from all inferior courts and tribunals except as otherwise provided by law . . . .").
26. See, e.g., *People v Sabo*, 65 Mich App 573, 578; 237 NW2d 564 (1975).
27. MCL 600.1009; *In re Contempt of Dorsey*, 306 Mich App 571, 582; 858 NW2d 84 (2014) (per curiam) ("The family division of the circuit court (family court) now exercises this jurisdiction.").
28. MCL 600.401(2).
29. *People v Farren*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2014 (Docket No. 312951).
30. *Okrie*, 306 Mich App at 458.
31. Tushnet, *Constitutional Hardball*, 37 J Marshall L Rev 523, 523 n 2 (2004).
32. Gentilozzi, *A change at lightning speed: Court of Claims move to the Court of Appeals is going to be complete disaster, attorneys say*, Mich Law Wkly (November 11, 2013), p 1; see also Hastings, *Down the Rabbit Hole with the Court of Claims*, 93 Mich B J 14, 16 (July 2014) ("an embarrassment to the democratic ideal [that] should not be repeated").
33. Brickley, *Justice in Michigan: A Program for Reforming the Judicial Branch of Government*, 74 Mich B J 1,131 (1995).
34. Const 1963, art 6, § 5.
35. *In re Contempt of Henry*, 282 Mich App 656, 667; 765 NW2d 44 (2009) (per curiam).
36. *Grievance Administrator v Lopatin*, 462 Mich 235, 241; 612 NW2d 120 (2000).
37. *Mumaw v Mumaw*, 124 Mich App 114, 120; 333 NW2d 599 (1983) (per curiam).
38. *McDougall v Schanz*, 461 Mich 15, 27; 597 NW2d 148 (1999).
39. MCR 1.104.
40. 1 Longhofer, Michigan Court Rules Practice (6th ed), § 1104.1, p 11.
41. MCL 600.904, cited by *Lopatin*, 462 Mich at 241.
42. See *McDougall*, 461 Mich at 29.
43. Longhofer, § 1104.1.
44. Hershkoff, *The Michigan Constitution, Judicial Rulemaking, and* Erie*-Effects on State Governance*, 60 Wayne L Rev 117, 138–139 (2014).
45. *Id.* at 140.
46. MCL 500.3135(2)(a).
47. See *McCormick v Carrier*, 487 Mich 180, 193 n 7; 795 NW2d 517 (2010) (statute "raises questions as to whether the Legislature may have unconstitutionally invaded this Court's exclusive authority to promulgate the court rules of practice and procedure").