

LAW SCHOOL FOR LEGISLATORS
Separation of Powers

I. Basic Constitutional Provision Applicable to Relationship Between Legislature and Judiciary

1. Article III, § 2.

Sec. 2. The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

2. Article VI, § 1.

Sec. 1. The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

3. Article IV, § 1.

Sec. 1. The legislative power of the State of Michigan is vested in a senate and a house of representatives.

4. A little used constitutional provision but one which reflects the framers' view of the power relationship between the branches:

Article IV, § 25.

Sec. 25. For reasonable cause, which is not sufficient ground for impeachment, the governor shall remove any judge on a concurrent resolution of two-thirds of the members elected to and serving in each house of the legislature. The cause for removal shall be stated at length in the resolution.

II. General Principles

1. The doctrine of separation of powers is a shield for each of the branches of government to use for the protection of our form of government and for the people it serves; it is not a sword to be used by one branch against another. *Judicial Attorneys Ass'n v. State* (1998) 586 N.W.2d 894, 459 Mich. 291.
2. Some overlap of the three branches of government is permitted, under state constitution's separation of powers clause, but only where the area of one branch's exercise of another branch's power is very limited and specific. *Mayor of Detroit v. State* (1998) 579 N.W.2d 378, 228 Mich. App. 386.

3. Constitutional principle of separation of powers does not require that all three branches must be kept completely separate, with no overlap of functions or powers; rather, the evil to be avoided is accumulation of one branch of powers belonging to another. *People v. Conat* (1999) 605 N.W.2d 49, 238 Mich. App. 134.

III. Relationship Between Judiciary and Legislature

1. Power given to a court under the constitution is judicial power, and it is beyond the power of the Legislature to take from the court that judicial power, and it is equally beyond authority of the Legislature to confer on a court a power not judicial. *Johnson v. Kramer Bros. Freight Lines, Inc.* (1959) 98 N.W.2d 586, 357 Mich. 254.
2. Fidelity to constitutional structure compels Supreme Court to be vigilant in preventing the judiciary from usurping the powers of the political branches. *Michigan Chiropractic Council v. Commissioner of Office of Financial and Ins. Services* (2006) 716 N.W.2d 561, 475 Mich. 363.
3. Within the meaning of state constitution, it is the province of judicial power to decide private disputes between or concerning persons, but of legislative power to regulate public concerns, and to make law for the benefit and welfare of the state. M.C.L.A. Const. Art. 4, § 1, Art. 6, § 1. *National Wildlife Federation v. Cleveland Cliffs Iron Co.* (2004); 471 Mich 608; 684 N.W.2d 800.
4. Acceptance by one governmental branch of the expansion of the powers of another branch is not dispositive in whether a constitutional power has been properly exercised. M.C.L.A. Const. Art. 4, § 1, Art. 5, § 1, Art. 6, § 1, *National Wildlife Federation v. Cleveland Cliffs Iron Co.* (2004); 471 Mich 608; 684 N.W.2d 800.
5. Just as the judicial branch owes deference to the legislative branch when the “legislative power” is being exercised, so too does the legislative branch owe deference to the judicial branch when the exercise of the “judicial power” is implicated. M.C.L.A. Const. Art. 4, § 1, Art. 6, § 1.
6. Even with the acquiescence of the legislative and executive branches, the judicial branch cannot arrogate to itself governmental authority that is beyond the scope of the “judicial power” under the constitution. M.C.L.A. Const. Art. 6, § 1, *National Wildlife Federation v. Cleveland Cliffs Iron Co.* (2004); 471 Mich 608; 684 N.W.2d 800.
7. Supreme Court is not authorized to enact court rules establish, abrogate, or modify the substantive law; rather, its constitutional rule-making authority extends only to matters of practice and procedure. M.C.L.A. Const. Art. 6, § 5, *McDougall v. Schanz* O (1999) 461 Mich. 15, 597 N.W.2d 148.

IV. Emerging Issues

1. Awarding attorney fees to prevailing parties in civil suits SB 989, SB 990, SB 991 – This bill would award attorney fees to the prevailing party in a civil lawsuit unless a court finds that special circumstances cause such an award to be unjust or inequitable.
 - There is a substantial question as to whether this is properly within the jurisdiction of the Supreme Court
 - There are significant questions as to whether this would bar or severely limit access to courts by those without the resources to obtain needed representation who have meritorious claims
 - Currently judges retain discretion to determine sanctions on case by case basis as opposed to a mandatory system

2. A bill to impose actual costs and fees incurred by prevailing party in a civil suit if the court finds that lawsuit was frivolous and impose an additional sanction on parties, and their attorneys (and their law firms) if a claim or defense is found to be frivolous in order to deter similar conduct – SB No. 1001
 - Currently there are methods to award fees and costs to sanction such conduct
 - Is there compelling evidence to alter the current sanctions policies
 - Will these sanctions thwart access to justice by discouraging the filing of meritorious claims

3. Elimination of the Right to Peremptorily Challenge Jurors in a civil or criminal case – SB 995 and SB 996
 - This bill may be viewed as regulating practice and procedure in the court which is within the constitutional province of the Supreme Court
 - This bill may undercut the ability to select an unbiased jury
 - There are only three peremptory challenges currently allowed in civil cases which does not appear to impose a significant burden on the jury selection process
 - Multiple fees in SB 996 may discourage access to courts