Mississippi College Law Review

Volume 3 | Issue 1 Article 3

6-1-1982

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Custom Citation
3 Miss. C. L. Rev. 45 (1982-1983)

PROCESS, PROCEDURE AND CONSTITUTIONALISM: A RESPONSE TO PROFESSOR PAGE

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The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

—Mississippi Constitution Art. 1, § 1

To one unlearned in the law it would seem but a bland truism that a court has authority to make rules for its own operation. Professor William Page, however, is not unlearned in the law. In his article, *Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi,*[1] he consequently finds reasons to lament the recent promulgation by the Mississippi Supreme Court of a set of Rules of Civil Procedure to govern in the inferior courts of that state.

Essentially, the court rested its action on two grounds: what Professor Page aptly terms "institutional competence" (*viz.*, the proposition that judges presumably know more about court procedure than do legislators) and "judicial independence" (*viz.*, the view that separation of powers liberates courts from legislative intrusion into court procedure, just as it precludes court interference with legislative processes).[2]

Institutional Competence

Virtually anyone at all familiar with the processes and product of state legislatures would, as a factual matter at least, eagerly concede the court's "institutional competence" premise. Professor Page attempts a rather forlorn and backhanded defense of the relative competence of legislators in the realm of court procedure: "Legislatures do not have daily familiarity with procedure; but neither do they have any familiarity with occupational health, energy policy, or the myriad other complex substantive areas in which they must legislate."[3] Of course, that the legislature may be no more in-the-dark about court procedure than about any other thicket it plunges into does not meet, let alone rebut, the seem-

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1. Page, *Constitutionalism and Judicial Rulemaking: Lessons from the Crisis in Mississippi*, 3 Miss. C. L. Rev. 1 (1982).

2. *Id.* at 12.

3. *Id.* at 34.

ingly self-evident propositon that *courts* typically have more expertise in *how courts run* than do *legislatures.* To put it differently, the Mississippi Supreme Court did not presume to "legislate" respecting "occupational health, energy policy, or the myriad other complex substantive areas" it may understand no better than the legislature. Rather, it acted only in the one area it surely *can* be expected to know better, court procedure.[4]

In any event, Professor Page would choose to dismiss the "institutional competence" premise as irrelevant. "The major difficulty," he writes, "with the court's reasoning is that it confuses expertise with legitimacy."[5] The "major difficulty," in fact, with Professor Page's thesis is that *it* "confuses" *federal* constitutionalism with *state* constitutionalism. He observes: "Rulemaking . . . is lawmaking. . . . Courts do, of course, make law. But their *legitimacy* in doing so depends on their adherence to the *judicial process.* . . ."[6] The reader is thereupon apprised that this "judicial process," on which a court's precarious "legitimacy" "depends," consists in the court's meticulously limiting itself to deciding only actual cases and controversies. That is, courts exist only to adjudicate particular cases but never to promulgate (or "legislate," as my colleague would have it)[7] procedural codes of general application. In straying beyond this restriction, a court direly jeopardizes its mysterious "legitimacy":

> Once courts are cut free of the case or controversy element of their lawmaking function, as they are when they issue advisory opinions or when they make rules of procedure, they no longer have this legitimacy. . . . [T]he im-

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4. Professor Page writes:

> While many supreme court justices have been trial court judges, not all have. Furthermore, their duties on the appellate bench do little to provide them first-hand knowledge of the current needs of the trial courts. The practicing lawyers on legislative judiciary committees can have equal or superior awareness of those needs.

Page, *supra* note 1, at 34.

However, the state constitution mandates: "No person shall be eligible to the office of judge of the Supreme Court who shall not . . . have been a practicing attorney . . . for five years immediately preceding such appointment." MISS. CONST. art. VI, § 150. *See* Newell v. State, 308 So.2d 71, 76 (Miss. 1975).

5. Page, *supra* note 1, at 28.

6. *Id.* at 29 (emphasis added).

7. Professor Page identifies the court's action as a product of "legislative jurisdiction." *Id.* at 16. This characterization is, of course, argumentative, turning as it does on *his* notion of separation-of-powers and "judicial process." The court's own straightforward notion seems at least equally compelling: "The inherent power of this Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts." Newell v. State, 308 So.2d 71, 76 (Miss. 1975). After all, as Professor Page admits, "the [constitutional] phrase 'judicial power' is not self-defining. . . ." *Id.* at 17.

portance of their personal preference on issues of policy becomes critical. In short, they begin to function as a political body.[8]

Putting aside the problem of deciphering the meaning and relevance of the enigmatic implication that, apart from the present issue, an elected state supreme court does *not* "function as a political body,"[9] Professor Page's position begs the question. As a matter of fact, the case and controversy limitation as an element of jurisdiction—including the not-always-honored proscription against issuing "advisory opinions"—is instrumental to the "judicial process" of certain *federal courts* only by virtue of the United States Supreme Court's gloss of Article III of the *federal* Constitution.[10] Professor Tribe has explained:

> '*Justiciability* is the term of art employed to give expression to this . . . limitation placed upon federal courts by this case and controversy doctrine.'
>
> Justiciability doctrine is peculiarly self-regarding. In deciding whether a case or controversy exists, federal courts decide whether they would be acting appropriately if they resolved the question which the litigants press upon them. . . . [Its explication], therefore, is in an important sense the description of an institutional psychology: an account of how the federal courts, or more accurately the Justices of the Supreme Court, view their own role.[11]

Significantly, even *federal courts* established under Article I (such as the United States Tax Court, the local courts of the District of Columbia, and until 1953, the Court of Claims)[12] and hence not subject to Article III's "cases" and "controversies" language (and gloss) unquestionably have authority to render advisory opinions.[13] The Mississippi Constitution contains no language even remotely suggesting a "cases" and "controversies" restriction.[14]

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8. *Id.* at 30. (footnotes deleted).

9. *Id.*

10. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-7 to 3-29 (1978); C. WRIGHT, LAW OF FEDERAL COURTS § 12 (1976).

11. TRIBE, *supra* note 10, § 3-7 at 53 (footnotes deleted; emphasis in original). *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 54 (1978) [hereinafter cited as NOWAK] ("Interpreting [the 'cases' and 'controversies'] requirement is an important example of the self-imposed limitation on judicial review.")

12. C. WRIGHT, LAW OF FEDERAL COURTS § 11, at 35-36 (1976). Under the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, the Court of Claims is now merged with the Court of Customs and Patent Appeals as the new Court of Appeals for the Federal Circuit.

13. NOWAK, *supra* note 11, at 56. State courts, too, are thus free to issue advisory opinions, and some do. *See generally* Comment, 44 FORDHAM L. REV. 81 (1975). The North Carolina Supreme Court has exercised the power to issue such opinions without any constitutional or statutory authorization. *Id.* at 81 note 3. The Mississippi Supreme Court does not render advisory opinions. Gipson v. State, 203 Miss. 434, 36 So.2d 154 (1948).

14. In fact, the language of the state constitution makes it quite clear that the framers had in mind a materially different institution from the United States Supreme Court. Whereas the latter, for instance, is a court of both original and appellate jurisdiction, U.S. CONST. art. III, § 2, the Mississippi Supreme Court is clearly confined to appellate jurisdiction: "The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals." MISS. CONST. art. VI, § 146; State v. Keeton, 176 Miss. 590, 595, 169 So. 760, 762 (1936).

A fortiori, the Mississippi *state* courts are thus not chained to "how," as Professor Tribe puts it, "the Justices of the [United States] Supreme Court, view *their* own role."[15]

The Mississippi Supreme Court's conclusion that the judicial function under that state's constitution embraces procedural rulemaking therefore hardly seems to warrant the label "breathtaking":[16] "The phrase 'judicial power' in section 144 of the Constitution includes the power to make rules of practice and procedure, not inconsistent with the Constitution, for the efficient disposition of judicial business."[17]

Any suggestion that, in fundamental aspects of its nature or structure, a state government *mandatorily* is a clone of the national government is patently unsound. As to state legislative apportionment, for example, the United States Supreme Court not only has rejected the national legislature as a purported analogy,[18] but has consistently construed its reapportionment norm of "one-man-one-vote" to mean one thing regarding Congressional elections and quite another regarding elections for state office.[19]

Equally unsupportable would be the contention that, when construing its own constitution, a state court is under some general constraint to defer to the United States Supreme Court's reading of a similar or even identical provision of the federal Constitution. Aptly, though in another connection, the California Supreme Court has declared: "It is established that our Constitution is 'a document of independent force' 'whose construction is left to this court, informed but untrammeled by the United States Supreme Court's reading of parallel federal provisions . . . .' "[20]

Thus, the argument against the "institutional competence" premise is essentially that, for no obvious or articulated reason, the Mississippi Supreme Court, in its posture vis-a-vis the

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15. TRIBE, *supra* note 10, § 3-7, at 53 (emphasis added).

16. Page, *supra* note 1, at 11.

17. Southern Pacific Lumber Co. v. Reynolds, 206 So.2d 334, 335 (Miss. 1968), *quoted in* Newell v. State, 308 So.2d at 76.

18. We hold that . . . the Equal Protection Clause requires that the seats of both houses of a bicameral state legislature must be apportioned on a population basis. . . .

Much has been written since our decision in *Baker v. Carr* about the applicability of the so-called federal analogy to state legislative apportionment arrangements. . . . [W]e . . . find the federal analogy inapposite and irrelevant to state legislative districting schemes.

Reynolds v. Sims, 377 U.S. 533, 568-573 (1964) (italics in original).

19. *See* NOWAK, *supra* note 11, at 662-64.

20. Allen v. Superior Court, 18 Cal. 3d 520, 525, 134 Cal. Rptr. 774, 776, 557 P. 2d 65, 67 (1976).

legislature, voluntarily should be more deferential to the abnegatory example of the United States Supreme Court. This is certainly arguable (though not seductive to me) as a purely aesthetic contention, but it is no more than that. In attempting to clothe it with spurious reasoning derived from some *a priori* notion of appropriate "judicial process," Professor Page has generated only a tour de force. Courts, he posits, should (to preserve their "legitimacy") behave a certain way, essentially using the federal mode as their beacon. The Mississippi Supreme Court is a court. It does not behave like a *federal* court. Therefore it is wrong.

Attempting to buttress his charge of "illegitimacy," Professor Page observes that the court promulgated the new rules without adequate contemporaneous explanation and in a manner that (a) could be construed to indicate perfunctoriness and (b) engendered confusion regarding which of two drafts of the rules it had finally adopted. Conceding *arguendo* that the promulgation was not accomplished with optimal deftness, what bearing can this have on the court's *authority,* or "legitimacy"? Applying the same test to the legislature, for instance, how much of the current state (or federal) statutory law is "legitimate"?

In addition, Professor Page objects that

> the court's competence in rulemaking is undermined by its function as the interpreter of rules. Once the court has approved the rules, it has taken a public position in favor of their validity; if confronted later in adjudication with a challenge to their validity, it will be very difficult for the court to be objective and impossible for it to appear so.[21]

But would this problem disappear if, as Professor Page proposes,[22] the court were to limit itself to *recommending* rules, subject to final legislative adoption? And what does this argument say as to the "legitimacy" of the routine practice of courts, state and federal, in reconsidering precedents and indeed in granting rehearings after decisions in particular cases?

No less an authority on the judicial process than Justice Cardozo emphasized, in a well-known decision,[23] that our system contemplates no congruence among the states or between a state and the nation as to the nature of that process. The Montana Supreme Court, in declaring a state railroad commission tariff schedule unconstitutional, had announced that its decision would be of purely prospective application—that is, relief would not be granted

21. Page, *supra* note 1, at 35.
22. *Id.* at 43.
23. Great Northern Ry. Co. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932).

even in the instant case. Notwithstanding the United States Supreme Court's general aversion to pure prospectivity,[24] the Court unanimously affirmed; Justice Cardozo unambiguously acknowledged a state court's liberty in this regard:

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. . . . The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. . . . If this [pure prospectivity] is the common law doctrine of adherence to precedent as understood and enforced by the courts of Montana, *we are not at liberty,* for anything contained in the constitution of the United States, *to thrust upon those courts a different conception* either of the binding force of precedent or *of the meaning of the judicial process.*[25]

Finally, my colleague mauls the straw-man argument that the federal conception of judicial review, derived from *Marbury v. Madison,*[26] supports the court's action. Of course it does not; in fact, it has no bearing at all. The salient questions are: (1) How is the Mississippi Supreme Court's position that its new Rules of Civil Procedure flow out of the Mississippi Constitution's separation-of-powers provision instrumentally different from, for example, the United States Supreme Court's position that its "Miranda" warnings flow out of the federal Constitution's self-incrimination provision? and (2) even if the two positions are pertinently distinguishable, Why must (or should) Mississippi conform to the federal mold? These questions Professor Page does not address.[27]

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24. *Cf.* Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law,* 79 HARV. L. REV. 56, 76 (1965).

25. *Great Northern Ry. Co.*, 287 U.S. at 364-66 (emphasis added). State courts often pronounce prospective applications when abolishing sovereign or charitable tort immunity, as indeed the Mississippi Supreme Court recently did. Pruett v. City of Rosedale, 421 So. 2d 1046 (Miss. 1982). In fact, is not all obiter dictum, with which appellate courts regularly favor the reader, an "advisory opinion"?

26. 5 U.S. (1 Cranch) 137 (1803).

27. To put the matter somewhat differently, the "cases" and "controversies" limitation applies to a court's adjudicative function of rendering decisions and really is incoherent as applied to a court's administrative or supervisory function of issuing procedural rules not connected to any particular decision. For instance, many state supreme courts, including Mississippi's (see MISS. CODE ANN. § 73-3-301 (Supp. 1982)), are charged with the task of issuing rules of professional conduct, abstract from any concrete case. In *Marbury,* the Supreme Court began the process still under way of surveying its own domain, and in U.S. v. United Mine Workers, 330 U.S. 258 (1947), it held axiomatically that "a court has jurisdiction to determine its own jurisdiction." *Id.* at 292, note 57 (quoting Carter v. U.S., 135 F.2d 858, 861 (5th Cir. 1943)). This only is what the Mississippi Supreme Court has done. *See* Tollison, A Plea For Adoption of the Proposed Mississippi Rules of Evidence, 53 MISS. L. J. 49, 64 (1983). The *Newell* case, ably analyzed by my colleague as the basis of the court's action, was in fact preceded by a decision in which the state supreme court unanimously held itself not bound by a statute purporting to govern its procedure; Chief Justice Gillespie declared: "The inherent power of the Supreme Court to pro-

Judicial Independence

Professor Page's assault on the court's "judicial independence" premise boils down to two aesthetic objections and an *ipse dixit.*

He argues, first, that judges already have enough independence—by virtue of their lengthy terms of office and the prohibitions on reduction of their salaries, and in the judicial power to void egregiously unfair procedures as violative of due process—so why should they want more? The answer, of course, is: Why shouldn't they?

Next, Professor Page urges that "[p]rocedural rights may be important . . .,"[28] can "deeply affect the relationships of the citizens and the state,"[29] and "implicate powerful economic and political interests."[30] Then, after quoting a rather alarming but not palpably relevant pronunciamento by Napoleon Bonaparte, he concludes ominously that "[b]oth [Napoleon's] logic and the court's would virtually eliminate the legislature's power over the structure and operation of government."[31] Perhaps so (though one fervently hopes not), but the court's position that it was acting in the best interest of, in my colleague's words, "the citizens and the state," and acting indeed to protect those interests from the throes of legislative intransigence, remains unrefuted.

Ultimately, Professor Page endeavors to turn the court's separation of powers rationale on its head by arguing, in essence, that procedure and substance are inextricably entwined and that the court, in adopting procedural rules, has actually usurped the legislative prerogative over substance. In other words, far from being *justified* on account of the separation of powers, the court's action actually *violates* the separation, by invading the legislative domain. To the contrary, procedure and substance would appear to be fairly readily segregable. Clearly, for instance, the specification of the period within which a complaint must be answered in order to avoid default in no way diminishes or burdens the substantive rights reflected in the pleadings.[32] By contrast, a rule

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mulgate procedural rules for the efficient disposition of its case load stems from the fundamental constitutional precepts of separation of powers and vesting of judicial powers in the Courts. MISS. CONSTITUTION, art. I, § 1, art. VI, § 144 (1890)." Matthews v. State, 288 So. 2d 714, 715 (Miss. 1974).

28. Page, *supra* note 1, at 39.

29. *Id.* at 40.

30. *Id.*

31. *Id.* at 39.

32. Nor, I would submit, does a prospective alteration of a limitations period diminish or burden the underlying right involved. After all, one can always waive assertion of one's substantive right, either by bringing suit late (whatever the limitations period) or by not bringing suit at all. Professor Page differs with me on this. *Id.* at 42.

imposing a ceiling on the allowable recovery manifestly alters the substantive right in question and could not, consequently, be successfully disguised as "procedural." During the tempestuous recent controversy surrounding the promulgation of the Federal Rules of Evidence, Professor Moore instructively wrote:

> Rules of evidence are clearly within the Supreme Court's rulemaking power. They are procedural, for they govern the presentation of facts to court or jury, enabling the trier to apply relevant principles of substantive law on the basis of the facts adduced. That many rules of evidence are important and have a substantial effect in reaching an adjudication does not take them outside rulemaking. . . . Until recent congressional action, judicial rulemaking had been generally regarded as the right way to deal with the subject matter of evidence. It is still the right way. Congress should recognize as much and refrain from further intervention in the rulemaking process.[33]

Professor Page contends that the court's eschewal of the class action device "will *affect* substantive rights. . .";[34] that "even the most purely procedural rule can *affect* the substantive policy of the right being enforced";[35] that "[t]oo many procedural rules go beyond mere housekeeping and *implicate* important questions of policy";[36] that "even the most clearly procedural rule can *affect* public policy";[37] and that "[m]any rules that are purely procedural for *Erie* or conflict-of-laws purposes nonetheless *affect* the scope of substantive rights . . . ."[38] True enough. Procedure can certainly "affect" substantive law (as can myriad other factors such as the acumen of one's counsel, the composition of the jury, and the vicissitudes of the economy). This is not to say, however, that procedure *constitutes* substantive law. The difference, if not always crystal clear, is real, workable and salient.

History

Apparently not content that "the court made no attempt"[39] to justify its action by reference to history, Professor Page constructs a hapless straw-man historical argument on behalf of the court—

33. Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9, 11-12 (1974) (footnote deleted). I do not mean to equate evidence and procedure; in fact, it would seem that the substance-versus-procedure distinction is *eo ipso* clearer in the case of procedural rules than in that of evidential rules, and that, as an abstract proposition, the latter would be expected to have the greater impact on substantive rights. The state legislature has, incidentally, been similarly derelict in its inattention to Mississippi's motley common law "system" of evidence. "Rules of evidence are sorely needed, for as the Court pointed out in *Michelson v. United States*, it cannot create a sound corpus of evidence on a case by case basis." *Id.* at 11 (footnote deleted). *See* Tollison, *supra* note 27, at 49-51.

34. Page, *supra* note 1, at 41 (emphasis added).

35. *Id.* (emphasis added).

36. *Id.* at 42 (emphasis added).

37. *Id.* at 43 (emphasis added).

38. *Id.* (emphasis added).

39. *Id.* at 17.

based on the genesis of the Mississippi Constitution in 1890 and the development of civil procedure in other states—which he then boldly dispatches.[40]

The message of history on this issue, as on many constitutional questions, is muffled if not outright equivocal;[41] and the relevance of nineteenth century history, in particular, seems to me tenuous. What *is* arguably relevant is more recent history: The Mississippi legislature had for many decades derelictly failed to act, thereby engendering serious injustice and mounting inefficiency in the court system. This legislative *inaction* necessitated and hence justified judicial *action.*[42] Indeed, the "legitimacy" of Mississippi's inferior courts—that is, their capacity to command the respect and good will of the populace—was, if anything, enhanced by the state supreme court's ushering them into modern times.[43]

To the extent, however, that more remote history is relevant, it is worth noting that Mississippi, among all the states, has the

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40. Ensnared by his own rhetorical device, my colleague, having conceded that the court in no sense explicitly resorted to historic justification, nonetheless later observes that "[t]he court did not rest its action *solely* on an historic argument. . . ." *Id.* at 27 (emphasis added).

41. *See, e.g.*, Comment, 26 HASTINGS. L.J. 1059, 1062-63 (1975).

42. Manifest necessity, owing to legislative inaction, clearly can serve to justify otherwise debatable judicial action. *Cf.* Baker v. Carr, 369 U.S. 186, 211-212 (1962):

> There are sweeping statements to the effect that all questions touching foreign relations are political questions. . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches [inter alia]. . . . For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question 'governmental action . . . must be regarded as of controlling importance,' if there has been no conclusive 'governmental action' then a court can construe a treaty and may find it provides the answer.

Indeed such necessity was explicitly invoked as a basis for judicial initiative in Newell v. State, 308 So. 2d 71, 78 (Miss. 1975), the court's chief precedent: "[W]hen, as here, the decades have evidenced a constitutional impingement [owing to legislative inattention to the need for procedural reform], impairing justice, it remains our duty to correct it."

43. On such an afternoon the various solicitors in the cause . . . ought to be—as are they not?—ranged in a line . . . between the registar's table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense piled before them. Well may the court be dim . . .; well may the fog hang heavy in it, as if it would never get out; . . . well may the uninitiated from the streets, who peep in through the glass panes in the door, be deterred from entrance. . . . This is the Court of Chancery . . ., which so exhausts finances, patience, courage, hope, so overthrows the brain and breaks the heart, that there is not an honorable man among its practitioners who would not give—who does not often give—the warning, 'Suffer any wrong that can be done you rather than come here.'

C. DICKENS, BLEAK HOUSE 18-19 (Signet Classic ed.).

oldest heritage of an entirely elective judiciary, dating from 1832.[44] By contrast, federal Supreme Court Justices are appointed by the President subject to confirmation (or rejection) by the Senate[45]—and all other federal judgeships do not even exist but as Congress deigns to create and maintain them.[46] As such, is it unreasonable that the role of the judiciary might be slightly larger, and its authority somewhat different, in Mississippi than in the federal court system?[47]

It is also, I imagine, of some significance that, notwithstanding its copious detail concerning the structure, powers, and obligations of the legislature (eighty-one sections, in all), Article IV of the Mississippi Constitution ("Legislative Department") makes absolutely no reference to the promulgation of rules of civil procedure.[48] Further, the state constitution explicitly grants plenary appellate jurisdiction to the state supreme court,[49] unlike the federal Constitution, which pointedly subjects the United States Supreme Court's appellate jurisdiction to statutory modification or curtailment.[50] It has accordingly been noted:

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44. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 111 (1973). Professor Page sees much significance in the fact that, at the adoption of the current state constitution in 1890, the Mississippi Supreme Court was no longer elective. It is true that, owing to the vagaries of Reconstruction politics, Mississippi was obliged to accept an appointed three-judge court for a few decades commencing in 1868. *Id.* at 323. This happenstance is less impressive to me than the facts that Mississippi created an entirely elective judiciary in 1832, reverted to it in 1910, and has clung to it without interruption from then to now. In Mississippi today, supreme court justices must stand for reelection, by district, every eight years. MISS. CONST., art. VI, §§ 145, 149. Circuit and chancery court judges must stand every four years. *Id.*, art. VI, § 153. Mississippi's judiciary is, by this measure, very "democratic," not only in contrast to the appointed-for-life federal judiciary, but in contrast to the judiciaries of many states, in some of which judges are also appointed (e.g., MASS. CONST. § 65 and N.J. CONST. art. VI, § 6) and in others of which elective terms are quite lengthy: for instance, on the California Supreme Court, twelve years (CAL. CONST. art. VI, § 3); and on the New York Court of Appeals, fourteen years (N.Y. CONST. art. VI, § 2).

45. U.S. CONST. art. II, § 2.

46. *Id.*, art. III, § 1.

47. Oddly, the relevance in this regard of the fact that Mississippi *legislators* are elected is apparent to Professor Page but the concomitant relevance of the fact that Mississippi *judges* too are elected (unlike their federal brethren) eludes him:

> [I]f the legislature has considered the reform and rejected it, then the court finds itself standing against the explicit wishes of the citizens' elected representatives . . . . There is a distinctly *undemocratic* flavor to an argument that the court should give the people what they need, not what they want.

Page, *supra* note 1, at 28 (emphasis added). Apart from the rhetorical indulgence embodied in the unsupported dichotomy that the legislature gives the people what they want whereas the court does not, why is *any* action by an *elected* body (albeit a court) intrinsically "undemocratic," or any more so than the same action taken by another elected body (such as a legislature)?

48. Seemingly, no stone was left inadvertently unturned: "The legislature shall not authorize payment to any person of the salary of a deceased officer beyond the date of his death." MISS. CONST. art. IV, § 92. Nor were the framers oblivious to the subject of procedure: "Statutes of limitation in civil causes shall not run against the state or any subdivision or municipal corporation thereof." *Id.* art. IV, § 104.

49. MISS. CONST. art. VI, § 146.

50. U.S. CONST. art. III, § 2. Ex Parte McCardle, 74 U.S. (7 Wall.) 506, 513 (1869).

> Yet, while the Supreme Court has always considered the rulemaking process to be judicial in nature, it has nevertheless consistently recognized the preeminence of the legislative branch in this area. . . .
>
> This legislative primacy results from Congress's power to make 'Exceptions and . . . Regulations' to the Supreme Court's appellate jurisdiction. . . .
>
> If the Constitution were merely silent regarding the power to promulgate rules of judicial procedure [as the Mississippi Constitution is], it could hardly be doubted that the Supreme Court possessed the rule-making power granted by the Constitution. However, the Constitution has given Congress the prerogative of making exceptions and regulations to the Supreme Court's appellate jurisdiction. It is apparent . . . that the [federal] constitutional power to make rules of court procedure is neither exclusively legislative nor entirely judicial.[51]

In addition, in Mississippi the constitution *mandates* the creation of the state's general-jurisdiction inferior courts,[52] whereas the federal Constitution, as previously noted, significantly leaves the very creation and continued existence of all federal courts other than the Supreme Court to the unfettered discretion of Congress.[53] This is vital, for, as Alexander Hamilton pointed out: "A power to constitute courts is a power to prescribe the mode of trial. . . ."[54] Since in Mississippi the constitution creates the courts, the source of authority to issue rules to govern those courts is that same constitution; under the principle of *Marbury v. Madison,* it is the state supreme court that is the ultimate expounder of that document[55] and thus of which governmental branch ought to issue the necessary procedural rules. In other words, the authority of the Mississippi court system derives directly from the state constitution, hence, it has inherent rulemaking jurisdiction. On the other hand, the authority of the federal judiciary is, immediately at least, legislatively derived, hence, its rulemaking jurisdiction is concomitantly circumscribed.

As to the development of procedural rules in other states, the lesson is ambiguous. As Professor Page concedes, the high courts of eleven other states during the present century have claimed

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51. Comment, 26 HASTINGS L.J. 1059, 1064-67 (1975).

52. "The legislature *shall* divide the state into not more than twenty (20) circuit court districts and not more than twenty (20) chancery court districts. . . . Should the legislature fail to redistrict the circuit or chancery court districts [at specified intervals, to reflect census data], the Supreme Court shall, by order, redistrict such circuit or chancery court districts." MISS. CONST. art. VI, § 159 (1890, amended 1982) (emphasis added). It is true that Mississippi's limited-jurisdiction county courts are of legislative origin in the sense that their existence is not mandated by the state consitution. *See* MISS. CONST. art. VI, § 172. This, however, in no way erases the central fact that, in terms of constitutional foundation, the Mississippi judiciary (and particularly the state Supreme Court) is distinct from its federal counterpart.

53. U.S. CONST. art. III, § 1.

54. THE FEDERALIST No. 83.

55. *See* Newell v. State, 308 So.2d 71, 77 (1975).

essentially the same authority he views as usurptive on the part of the Mississippi Supreme Court.[56] In any event, why should Mississippi be constrained to follow the lead of even all forty-nine other states, let alone a mere majority? The peculiar genius of our system is that the American state is comprised of fifty distinct polities, through whose individual experiments (successes and failures) the nation collectively advances. As Justice Brandeis pointed out: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[57] Though Justice Brandeis was concerned on that occasion particularly about "social and economic experiments," is his rationale any less supportive of "political experiments"?[58]

Conclusion

Professor Page has performed a valuable service. By criticizing the Mississippi Supreme Court's rule-making initiative thoughtfully, thoroughly, and eloquently—yet, in my judgment, failing to make the case—he has vindicated that initiative.

At issue, fundamentally, is not the principle itself of separation-of-powers, but rather whether our federal system contemplates potential diversity among the several states as to the precise content of that principle. The Mississippi Supreme Court has justified its promulgation of procedural rules on its quite tenable conception of government organization in Mississippi. Judicial integrity, it has concluded, requires that the courts govern themselves internally and not be perpetual captives of the legislature, which has long shackled them to superannuated and justice-impeding procedures by egregious dereliction respecting a task that, in any event, would clearly appear to be more in the domain of judicial than legislative competence.

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56. Page, *supra* note 1, at 26 n. 157.

57. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

58. *Id.* The Court consistently has given the Brandeis observation expansive application, recently invoking it, for instance, in a criminal procedure decision, *Chandler v. Florida*, 449 U.S. 560, 579 (1981). As such, of what concern to Mississippi is the posture assumed by other states, like antebellum Maryland, *see* Page, supra note 1, at 20, and on what basis does Professor Page challenge the court to "answer" other states? *Id.* at 11. (My collegue would perhaps prefer that this nation were a "united state" rather than the United States.)

Professor Page's argument consists of basically three components: (1) history; (2) the largely self-defined role of federal courts in the structure of national government; and (3) the claim that substantive law and civil procedure are indistinct. I have attempted briefly to outline why I believe that the first component is unhelpful, the second, irrelevant, and the third, erroneous.

"A court is a court," Professor Page contends, in essence. Our constitutional system, however, argues back, "There are courts, and then there are courts."