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LEGISLATIVE CONTROL OVER JUDICIAL RULE- MAKING: A PROBLEM IN CONSTITUTIONAL REVISION

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The allocation of the power to make court rules is a topic of central concern in the review and revision of state constitutions. In this Article, Professor Levin, teacher and author of numerous articles on procedure and evidentiary rules, and his co-author and student, Mr. Amsterdam, present their program for a division of responsibility between court and legislature.

Naked struggle for power between coordinate branches of government has not been unknown in the United States. The familiar episodes have grown out of grand issues which invited dramatic clashes of mighty forces. When these have occurred the judiciary has not always stood aloof from the fray, as the history of the ill-fated Court-packing plan of the thirties demonstrates. But lesser conflicts have posed problems for legislative and judicial minds: who shall write headnotes,¹ when cases shall be decided,² even what manner of paper shall be used for opinions.³ The judge locked out of court and waiting with the

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1. *In re Griffiths*, 118 Ind. 83, 20 N.E. 513 (1889), held invalid a statute requiring the court to make a syllabus of each opinion.

2. See the holding in *Atchison, T. & S.F. Ry. v. Long*, 122 Okla. 86, 251 Pac. 486 (1926), discussed in text at note 149 *infra*. A similar holding is *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63 (1922).

3. In *Houston v. Williams*, 13 Cal. 24 (1859), the court held unconstitutional as an encroachment upon judicial independence a statute requiring written opinions in all appellate court decisions. Field, J. wrote, for the court: "If the Legislature can

litigants in the corridor as a result of controversy over room assignments,⁴ the elevator operator de jure but not de facto,⁵ the judge-made janitor denied his executive pay checks⁶ are not heroic figures, yet they have left a legacy of increased understanding in the difficult area of separation of powers. Neither epic nor mock-epic, these struggles have a drama of their own⁷ and a cogent contemporary significance. They reflect a facet of the difficult and recurring problem of allocation of authority between court and legislature.

To examine afresh such allocation of power is a central concern of Convention or Commission whenever a state's basic charter is subjected to review. In the course of such review there must inevitably be posed this question: what should be the place of the legislature in the control of the courts and their business? To deal with this question

require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?" *Id.* at 25.

4. *Dahnke v. People*, 168 Ill. 102, 48 N.E. 137 (1897), was a proceeding in criminal contempt involving a county courthouse custodian who, under the directions of the board of county commissioners, had changed locks on the courtroom door during adjournment and refused readmittance to the judge, sheriff, bailiffs, attorneys, parties and witnesses in an attempt to enforce the board's assignment of particular courtrooms to individual judges. Said Magruder, J., "To make the judges of our courts depend upon a legislative or political body for the rooms in which they shall hold their sessions . . . would be to destroy the dignity and independence of the judiciary." *Id.* at 109, 48 N.E. at 140.

5. *Board of Comm'rs v. Stout*, 136 Ind. 53, 35 N.E. 683 (1893). The board of commissioners sued for an injunction to restrain the sheriff from operating the courthouse elevator. The sheriff, under orders from the circuit court, had seized control of the elevator and ousted its commission-appointed operator in the course of a hassle between court and board as to the hours of operation of the car. The board, in retaliation, sought to shut down the elevator altogether. The Supreme Court of Indiana, while judging the controversy "not seemly," upheld the power of the court and denied injunctive relief.

6. *In re Janitor*, 35 Wis. 410 (1874), held void an order of the state superintendent of public property dismissing the court-chosen janitor of the supreme court. A statute granting to the superintendent the power of control over the custodial personnel of the capitol was held by the court not to vest in said superintendent jurisdiction over the person of the court janitor, but "the power to remove or appoint the janitor is possessed by the court." *Id.* at 421.

7. A "spark thrown off in the clash of forces now contending for dominance in the administration of justice" is McCormick's characterization of *Kolkman v. People*, 89 Colo. 8, 300 Pac. 575 (1931). McCormick, *Legislature and Supreme Court Clash on Rule-Making Power in Colorado*, 27 ILL. L. REV. 664 (1933). Under a grant of rule-making power from the legislature, the supreme court had in 1929 promulgated a rule the effect of which was to permit trial judges to comment on the evidence to the jury. Following such comment Kolkman was convicted of hog-theft and appealed. Thereafter, but before the case could be decided on appeal, the legislature passed a statute revising its earlier grant of power and expressly declaring that the court should make no rule which would permit comment on the evidence. The majority opinion makes no express reference to this statute, but does undertake a spirited defense of the inherent right of a court to make its own rules without the authorization of statute. It appears from a dissenting opinion that the majority opinion was rewritten to include this discussion as a result of the legislative action. The court's opinion indicated that a search of the constitution revealed "no provision therein expressly directing or permitting the legislative or executive departments to make rules with reference to trial procedure in the judicial department of the government," and cited Wigmore.

it is necessary to consider, however briefly, some of the history, the present patterns of division of power, the doctrines and dogma which define them, all of these in the light of considerations which to us appear basic.

TOWARD CONSTITUTIONAL RECOGNITION OF THE RULE-MAKING POWER

From a constitutional point of view, the major problems of today were begotten by the successes in procedural reform achieved over the past quarter century. It may be hard to conceive of the abolition of the bill of particulars or the availability of pre-trial hearings as responsible for constitutional issues. It becomes less difficult when one recognizes that the advances in adjective law during this period were achieved primarily as the result of persuading legislators to invest appellate courts with rule-making powers,⁸ a disposition of authority which proved so felicitous that it gave rise to insistent demand that it be guaranteed by express constitutional provision.

For decades, if not for centuries, control over practice and procedure has been the subject of a concurrent jurisdiction.⁹ There were the courts with an alleged inherent power to engage in rule-making,¹⁰ and there were the legislatures which in fact exercised and were, with but rare dissent, conceded ultimate authority over virtually the entire procedural area.¹¹ Nor was this basic allocation of power challenged

All Legislative Rules for Judiciary Procedure Are Void Constitutionally, 23 ILL. L. REV. 276 (1928). This amounted, in the words of a dissenting justice, to "this warning to the Legislature: Hands off! There must be no more codes of civil procedure. . . ." *Kolkman v. People*, *supra* at 42-43, 300 Pac. at 590. In fact four opinions of some sixty-seven pages were written and reveal a harsh struggle of personalities among the members of the court.

8. The great landmark of this reform is of course the Federal Rules of Civil Procedure of 1938, important not only in their own right but for their profound and immediate stimulating influence upon procedural revision throughout the states. *States Move To Modernize Civil Procedure*, 24 J. AM. JUD. SOC'Y 189 (1941); Mitchell, *The Federal Rules of Civil Procedure*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 73, 79 (1949); INSTITUTE OF JUDICIAL ADMINISTRATION, RULE-MAKING POWER OF THE COURTS *passim* (1955). See also Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144, 159-61 (1948); Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435 (1958). But it must not be forgotten that in England a virtually absolute control over all procedure had been placed in the hands of the bench and bar by the Judicature Act of 1873, which went into effect in 1875, Marvel, *The Rule-Making Power of the Courts*, 13 A.B.A.J. SUPP. 14, 15 (1927); and that the federal courts in the United States had been exercising rule-making power in equity and admiralty under statutory grant from as early as 1842, *Wimberry v. Salisbury*, 5 N.J. 240, 253, 74 A.2d 406, 413 (1950). It was to these earlier achievements that the reformers who led the fight for the Federal Rules appealed for authority. Pound, *Regulating Procedural Details by Rules of Court*, 13 A.B.A.J. SUPP. 12 (1927); Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599, 602 (1926).

9. COOLEY, CONSTITUTIONAL LAW 49 (4th ed. 1931); VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION III (1949). Cases are collected in Annots., 158 A.L.R. 705 (1945), 110 A.L.R. 22 (1937).

10. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599, 601 (1926); VANDERBILT, *op. cit. supra* note 9; Annots., *supra* note 9.

11. *Ibid.* The most famous dissent is by Wigmore, *supra* note 7.

by those who sought to effect a unified federal procedure by way of court rule. Indeed, in the atmosphere created by 150 years of legislative control of judicial matters, it was inevitable that these reformers should have sought congressional mandate, that the Supreme Court should have been "enabled" to promulgate rules, and that the legislature should have retained a right of veto over what the Supreme Court might choose to adopt.¹²

The success of the federal endeavor stimulated a multi-pronged reform program by the American Bar Association,¹³ the "keystone"¹⁴ of which was the recommendation that state supreme courts everywhere be invested by statute with similiar rule-making powers. This was 1938. In the ensuing years the "trend throughout the country" has been to charge the courts with rule-making responsibility,¹⁵ bench and bar have become "rule-conscious,"¹⁶ and the climate of the time is such that the "rule-making power of the courts . . . is brought into focus wherever procedural reform is undertaken."¹⁷

Understandably, the next step was to provide for constitutional grant of judicial rule-making powers whenever opportunity presented itself. By this expedient the legislative recalcitrance, not to speak of bitter opposition, which had come so close to aborting at its start the program which led to the Federal Rules might be avoided. The long and arduous political struggles to push through enabling acts, and the initial doubts as to the validity of delegation to judges of "legislative" authority over procedure¹⁸ were still fresh in the minds of the reformers.¹⁹ So too was the mounting evidence of the success of the Federal Rules which were being accorded the accolade of a "universal

12. It is interesting to note that this atmosphere and history carries over to influence the framing of constitutional provisions. See discussion of the New Jersey experience in Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 241-42 (1951).

13. ABA, *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* (3d ed. 1952).

14. *Id.* at 10-11.

15. *Winberry v. Salisbury*, 5 N.J. 240, 253, 74 A.2d 406, 413 (1950).

16. Curd, *Substance and Procedure in Rule-Making*, 51 W. VA. L.Q. 34, 36 (1948).

17. Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule-Making*, 55 MICH. L. REV. 623 (1957).

18. See, e.g., discussion in *In re Constitutionality of Section 251.18, Wisconsin Statutes*, 204 Wis. 501, 236 N.W. 717 (1931); and *State v. Roy*, 40 N.M. 397, 60 P.2d, 646, 110 A.L.R. 1 (1936).

19. For a history of the struggle for a federal enabling act, see Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144, 145-48 (1948). Note that Roscoe Pound, for example, a leader in the drive for the enabling acts later also participated in the fight for constitutional grant of rule-making power to the courts. See Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 42 (1952).

chorus of approval"²⁰ and the more meaningful compliment of imitation, in whole or in part, by a majority of the states.²¹ Failure to consolidate these gains would be folly.

Thus the recent history of constitutional drafting in this country came to reflect a consistent concern with rule-making by the judiciary. Since 1945, Alaska, Florida, Georgia, Missouri, New Jersey and Puerto Rico have adopted new constitutions.²² In every one but that of Georgia rule-making power is expressly granted to the highest court of the jurisdiction,²³ and in Georgia the Constitutional Commission approved such a provision²⁴ only to have it deleted.²⁵ Whatever the weight of a "trend" of decision²⁶ in the forum of political action, it was being added to that of theorists and reformers²⁷ by establishing the feasibility and desirability of vesting rule-making power in the courts by constitutional mandate.

THE ROLE OF THE LEGISLATURE

To concede this much as established, however, to decide in favor of a constitutional grant of judicial rule-making authority, is to resolve no more than a single, preliminary question. A host of others remain. What of the legislature? Shall it be turned out of the arena of practice and procedure, or shall there be reserved to the duly elected representatives of the people a right of veto over the actions of the court? If we choose to retain substantial legislative control, under what terms and within what limits shall that control be available? Shall court and legislature each have a right to act in areas not pre-empted by the other? If power is concurrent, shall both be equally responsible for rule-

20. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144, 152 (1948).

21. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435 n.2 (1958). The text at this point adds: ". . . hardly a local jurisdiction remains unaffected."

22. Alaska, 1956; Georgia, 1945; Missouri, 1945; New Jersey, 1947; Puerto Rico, 1952. Florida New Judiciary Article, 1956.

23. See note 36 *infra*. See Pirsig, *The Proposed Amendment to the Judiciary Article of the Minnesota Constitution*, 40 MINN. L. REV. 815, 820 (1956), *re* Minnesota's decision not to provide constitutionally for rule-making in the 1956 amended judiciary article.

24. 2 RECORDS OF THE COMMISSION OF 1943-1944 TO REVISE THE CONSTITUTION OF GEORGIA 55, 58 (1946).

25. GA. CONST. art. VI, § 2-3708. From the statement of Roy Vincent Harris in the course of the debate before the commission, *supra* note 24, at 34, a legislature jealous of its prerogatives may have been an important factor. Promptly after adoption of the constitution, a statutory grant of rule-making power to the supreme court was enacted. GA. CODE ANN. § 81-1501 (Supp. 1955). The statute provides, however, that no rule shall take effect until ratified by the legislature. *Id.* § 81-1502.

26. See the discussion of "trends" in the text *infra* at note 121.

27. Indeed, the flood of rule-making literature is so great that citation is currently to bibliographies. See Joiner & Miller, *supra* note 17, at 623 n.1. In fact, one conscientious researcher a decade ago had already reported that "the literature in favor of the rule-making authority in the courts is now so extensive that even the bibliographies cannot be included here." Clark, *supra* note 19 at 160 n.54.

formulation, or shall the initiative be assigned to one with the task of review and evaluation left to the other? Or shall we attempt, as New Jersey appears to have done in 1948, subtly to differentiate between areas in which the court is immune from legislative review and other areas in which it remains subject to legislative veto?²⁸

These are not questions of mere detail. They, and others in similar vein, are fundamental, for they indicate a range of possibilities grouped primarily about two competing major premises. The first affirms the desirability of full rule-making responsibility in a judiciary insulated from legislative interference. The second posits acceptance, in some form, of concurrent jurisdiction between the two coordinate branches of government. To choose the latter alternative is to stay within the broad framework of present practice. It is not, however, the simpler course nor does it represent acceptance of the status quo, for the conditions under which courts and legislatures shall exercise their respective jurisdictions must, of necessity, be examined afresh before being raised to the level of constitutional mandate.

Alternatives abound. We have mentioned five recently adopted constitutions which expressly affirm rule-making power in their courts. In addition to these, California,²⁹ Maryland,³⁰ Michigan,³¹ Missouri³² and Nebraska³³ now provide for the making of rules by the judiciary.³⁴ In Illinois, the proposed Judiciary Article to be submitted to the voters in November 1958³⁵ makes similar provision. These eleven documents represent no less than eleven differing solutions to the problem of allocating responsibility between court and legislature.³⁶ They

28. N.J. CONST. art. VI, § 2, ¶ 3; see note 36 *infra*.

29. CAL. CONST. art. VI, § 1a (1926); see note 36 *infra*.

30. MD. CONST. art. IV, § 18A (1944); see note 36 *infra*.

31. MICH. CONST. art. VII, § 5; see note 36 *infra*.

32. MO. CONST. art. V, § 5; see note 36 *infra*.

33. NEB. CONST. art. V, § 25 (1920); see note 36 *infra*.

34. The California Constitution, art. VI, § 1a (1926), vests power in a Judicial Council composed of eleven judges from the courts of all levels; the other constitutions vest power in the respective highest courts of the jurisdiction. For brief consideration of the role of the judicial council where rule-making power is vested in the highest court, see text *infra* at note 50.

35. *Ill. Const. Proposed Amendment art. VI, § 3*, ILL. ANN. STAT. (Supp. 1957).

36. The Philippine constitution represents in pure form the doctrine of judicial initiative and ultimate legislative review. The supreme court is granted "the power to promulgate rules concerning pleading, practice, and procedure in all courts and the admission to the practice of law." All pre-constitutional laws regulating procedure are repealed as statutes and declared rules of court, subject to modification by the court, so that the way is cleared for a unified system of procedure by court rule. It is declared that such rules "shall not diminish, increase, or modify substantive rights." Legislative review is sweeping and unqualified: "The Congress shall have the power to repeal, alter, or supplement the rules concerning pleading, practice and procedure, and the admission to the practice of law in the Philippines." PHIL. CONST. art. VIII, § 13.

The intentment of the proposed Judicial Article of the State of Illinois is apparently similarly to establish a scheme of concurrent power with express dictate

make it abundantly clear that it is impossible cavalierly to reject any of the available alternatives. Yet election among them in the dis-

of legislative supremacy in the event of conflict between rule and statute; the power of the court to promulgate rules is "subject to law and laws hereafter enacted." *Ill. Const. Proposed Amendment art. VI, §3*, ILL. ANN. STAT. (Supp. 1957). This express declaration of legislative dominance is particularly significant in that the original draft of a proposed Judiciary Article prepared by the Joint Committee on Judicial Article of Chicago and Illinois State Bar Associations had unequivocally vested the rule-making power in the courts with no provision for legislative review. 1952 U. ILL. L. FORUM 592; Sears, *A New Judicial Article for Illinois*, 40 A.B.A.J. 755, 804 (1954). "After considerable research and soul-searching," the Committee had "determined that rules of practice and procedure were an essential aspect of the judicial power and that the independence and integrity of the judicial system required that such power be vested exclusively in the courts." Cohn, *The Illinois Judicial System Under the Proposed Judicial Article*, 46 ILL. B.J. 593, 602 (1958). In this determination the legislature did not concur, but explicitly subjected the rule-making power to "laws hereafter enacted," in which provision "future laws relating to procedure were clearly intended to be included." Trumbull, *Why Lawyers Should Support the Judicial Amendment*, 46 ILL. B.J. 434, 448 (1958). In like manner the Maryland Constitution vests in the court of appeals power to make rules "which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law." MD. CONST. art. IV, § 18a (1944).

An approach still more restrictive of judicial power is that of the California constitution. A 1926 amendment creates a Judicial Council of eleven judges chosen by the chief justice in specified numbers from the courts of all trial and appellate levels, to "meet at the call of the chairman or as otherwise provided by it." The Council is vested with power to "adopt or amend rules of practice or procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force." CAL. CONST. art. VI, § 1a(5) (1926). But inasmuch as the field of procedure was already exhaustively covered by statute in 1926, the grant of a power which could not act to supersede even pre-amendment law was of little practical effect. It was clear that the amendment had reserved "to the legislature and the people the primary and higher right to provide rules of procedure for our courts, with the secondary right in the Judicial Council to adopt rules only, when and where the higher authority of the Legislature and the people has not been exercised." Lane v. Superior Ct., 104 Cal. App. 340, 344, 285 Pac. 860, 862 (1930); Stockton Theaters v. Palermo, 47 Cal. 2d 469, 476-77, 304 P.2d 7, 11 (1956). The Council appears rather an advisory panel to the legislature than an independent power; it is to "submit to the Legislature, at each regular session thereof, its recommendations with reference to amendments of, or changes in, existing laws relating to practice and procedure." CAL. CONST. art. 6, § 1a(5) (1926). In fact, California procedure remains almost entirely governed by code, INSTITUTE OF JUDICIAL ADMINISTRATION, RULE-MAKING POWER OF THE COURTS 4 (1955), except that rules of the Judicial Council now govern all appellate procedure under special statutory authority. CAL. CODE CIV. P. § 961, CAL. PENAL CODE § 1247K.

In similar manner, an amendment to the Nebraska constitution empowered the supreme court to "promulgate rules of practice and procedure for all courts, uniform as to each class of courts, and not in conflict with laws governing such matters. To the same end the court may, and when requested by the Legislature by joint resolution, shall certify to the Legislature, its conclusions as to the desirable amendments or changes in the general laws governing such practice and proceedings." NEB. CONST. art. V, § 25 (1920). This merely advisory and statute-supplementing role of the court was converted into full rule-making power by legislative enabling act in 1939, but when the court proposed a battery of rules to the legislature in 1943, the legislature rejected the rules and repealed the enabling act. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 117 (1949). Thus in California and Nebraska the full and absolute authority over procedure remains in the legislature; and what is constitutionally granted to the courts proves merely a patchwork power which, as Vanderbilt points out, is in the final analysis no power at all. "The supplementary power is common. All but a few courts exercise such power to some extent. The complete power is the true rule-making power both historically and analytically; a court cannot be said to be exercising rule-making power unless its rules override statutory rules." *Id.* at 92.

The Missouri constitution of 1945 limits judicial rule-making in terms of subject matter. The supreme court is empowered to make rules of practice and procedure

tribution of power is a fundamental and inevitable problem of constitutional revision. Any serious attempt at drafting a judiciary article must meet the issue frontally. It cannot be ignored.

for all courts, subject to the proviso that "the rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal." Moreover, even outside of the charmed circle within which judicial power is forbidden, "any rule may be annulled or amended by a law limited to the purpose." Mo. CONST. art. V, § 5. In terms the grant seems more restricted than that of the Philippine provision or the Illinois proposal. But dictum in a recent Missouri Supreme Court case appears to unsettle the legislative hegemony by attack from another angle. While recognizing that "the Legislature is given power to annul or amend" court rules, the court asserts that "a rule of practice and procedure established by this court under the authority of section 5 . . . would prevail over a previously enacted statute if there was a direct conflict." See *State v. Adams*, 365 Mo. 1015, 1019, 291 S.W.2d 74, 77 (1956). Thus the court's language would seem to place ultimate power over matters of procedure in Missouri in a sort of no man's land between court and legislature and to invite, in case of conflict, a cyclic scramble for the last word. See the South Dakota statute set out at note 130 *infra*.

An altogether different kind of restriction upon court control of procedure is demonstrated by the judiciary article of the Puerto Rico constitution: "The Supreme Court shall adopt for the courts rules of evidence and of civil and criminal procedure which shall not abridge, enlarge or modify the substantive rights of the parties. The rules thus adopted shall be submitted to the Legislative Assembly at the beginning of its next regular session and shall not go into effect until sixty days after the close of said session, unless disapproved by the Legislative Assembly, which shall have the power both at said session and subsequently to amend, repeal or supplement any of said rules by a specific law to that effect." P.R. CONST. art. V, § 6. Under the immediate supervisory power of the legislature, the court is given an initiative authority over procedure which is expressly extended into the area of evidence and to that extent is wider than the power granted by any other constitution. But the price it pays for this extended scope is a loss of flexibility. No procedural revision need be delayed beyond the close of the next legislative session; but every revision must be delayed at least that long. Moreover, it remains open to the legislature to intervene at will over the full range of practice and procedure with no other deterrent to hasty, ill-considered action than that it be by "specific law."

At the other extreme from jurisdictions which severely circumscribe the judicial authority is New Jersey where under the constitution of 1947, N.J. CONST. art. VI, § 2, ¶ 3, and the celebrated case of *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406 (1950), the power of the courts has reached its apogee. See text at note 108 *infra*. The constitutional mandate directs that "the Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts." In *Winberry v. Salisbury* the appellate division of the superior court, holding that this provision caused rules of court made under its authority to supersede all conflicting pre-constitutional statutes governing procedure, indicated that nevertheless "the legislature is given the final word in matters of procedure; it may expressly or by implication nullify or modify a procedural rule promulgated by the Supreme Court, or it may take the initiative in a matter of procedure when it deems that course wise." 5 N.J. Super. 30, 34, 68 A.2d 332, 334 (App. Div. 1949). This was dictum. Rejecting it, Chief Justice Vanderbilt for the majority of the supreme court replied "[T]he phrase 'subject to law' cannot be taken to mean subject to legislation. . . . The only interpretation of 'subject to law' that will not defeat the objective of the people to establish an integrated judicial system and which will at the same time give rational significance to the phrase is to construe it as the equivalent of substantive law as distinguished from pleading and practice. . . . We therefore conclude that the rule-making power of the Supreme Court is not subject to overriding legislation, but that it is confined to practice, procedure and administration as such." *Winberry v. Salisbury*, *supra* at 245, 247, 255, 74 A.2d at 409, 410, 414. With this pronouncement the Supreme Court of New Jersey became the first court to declare its absolute independence of the legislature in the realm of procedure. Judicial supremacy was judicially recognized. The rule came to be stated that "where there is a conflict between the statute and the rules, the rules shall govern," *Ward v. Public Serv. Elec. and Gas Co.*, 14 N.J. Super. 148, 151, 81 A.2d 203, 204 (L. 1951),

JUDICIAL RULE-MAKING: PLUS AND MINUS

No constitutional scheme which accepts judicial rule-making can be evolved rationally without an inventory of the plus and the minus

and that only "in the absence of a controlling rule" is procedural legislation valid. *Streader v. Streader*, 17 N.J. Super. 123, 127, 85 A.2d 532, 534 (App. Div. 1951).

Two years later the court was confronted with a problem of allowing attorney's fees. A judicially promulgated rule authorized such fees in the discretion of the trial court in the face of a statute which, it was urged, expressed a contrary legislative intent. The Attorney-General, arguing that counsel fees should not be awarded in such a case, urged that the court should "out of comity yield to the legislative provisions as to procedure. . . ." *State v. Otis Elevator Co.*, 12 N.J. 1, 14, 95 A.2d 715, 722 (1953). A divided supreme court found that the rule applied, holding, moreover, that it was an abuse of discretion for the lower court not to award attorney's fees. Answering the argument of the Attorney-General the court referred "to the much criticized federal doctrine of judicial deference," adding, "we will do well to avoid falling into the same error in this state. On the other hand, we must and do realize that our work as a judicial establishment is always subject to the will of the people; if we do not do our task well, they can and should and undoubtedly would make such changes that they may think wise by way of constitutional amendment." *State v. Otis Elevator Co.*, *supra* at 17, 95 A.2d at 723. It is significant that the court chose not to consider whether the statute did in fact express a legislative intent against the payment of the counsel fees in question and, further, that it did not consider the fact that the statute antedated the adoption of the 1947 constitution. Thus, separation of powers in New Jersey has become a matter of very tangible fact. Mutually exclusive realms of legislative and of judicial power extend away on either side of the fine line that is said to separate "substance" from "procedure." Within its separate realm, the court has declared itself responsible only "to the will of the people." For fuller discussion see note 119 *infra*.

The only other states where under the governing constitutional provision a *Winberry* result might obtain are Michigan and Florida. The Michigan constitution of 1908 provides that "the supreme court shall by general rules establish, modify and amend the practice in such court and in all other courts of record. The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings." MICH. CONST. art. VII, § 5. Outside of this specific mandate, the legislature is not expressly empowered to make laws governing procedure. It is perhaps surprising under these provisions that "the promulgation of court rules by the Michigan Supreme Court has been sporadic, piecemeal, and incomplete." Joiner & Miller, *supra* note 17 at 639. Understandably, "the vast bulk of practice regulations were created by statute." *Ibid.* Which power is supreme in case of conflict between rule and procedural statute may appear to have been settled in favor of court rules by *Berman v. Psiharis*, 325 Mich. 528, 39 N.W.2d 58 (1949). Compare, however, *Youngs v. Peters*, 118 Mich. 45, 76 N.W. 138 (1898) (court rule cannot override tax law provision concerning when deeds may issue). Neither opinion has adequate discussion of the problem. A recent case, *People v. Stanley*, 344 Mich. 530, 75 N.W.2d 39 (1956), typified by a commentator as "a moving statement in support of the superiority of inherent and constitutional rule-making when brought into conflict with legislative meddling with practice," Joiner & Miller, *supra* note 17 at 641-42, proves upon close reading to contain nothing whatever about judicial supremacy, and no conflict of rule with valid statute was at issue in that case. FLA. CONST. art. v, § 3, providing: "The practice and procedure in all courts shall be governed by rules adopted by the Supreme Court," appears as yet untested.

The Alaskan solution represents a compromise which secures some measure of judicial insulation without sacrificing all power of legislative review. Article IV of the constitution ratified in 1956 provides: "The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house." ALASKA CONST. art. IV, § 15. Thus rule-making power is placed firmly in the hands of the judiciary. Legislative overrule is preserved under terms which make its exercise neither as easy as ordinary legislation nor as difficult as constitutional amendment. Legislative tinkering is discouraged, but the power of the elected representatives of the people is available at last resort to curb flagrant abuse. See text at note 180 *infra*.

inherent in the rule-making power. Ultimately, the checks and balances to be built into a set of constitutional provisions, or the decision to do without them, must reflect an attempt to maximize the potential for good in making courts responsible³⁷ for adjective law while minimizing the risks of assigning them this authority. Thus the terms under which rule-making may be entrusted to the courts, and the scope and conditions of legislative veto if one is to be provided, can be formulated only after inquiring why the vesting of rule-making power in the judiciary is intrinsically sound, what, specifically, are the advantages promised, and what dangers or disadvantages run with the grant. To retain the advantages while reducing the risks is to approach the ideal.

We are led to the familiar. The merits of rule-making have been thrice-rehearsed, indeed oftener,³⁸ so that the briefest survey will suffice. Long ago Pound³⁹ and Wigmore⁴⁰ propounded convincing arguments against relying upon legislative management of judicial procedure: legislatures have neither the immediate familiarity with the day-by-day practice of the courts which would allow them to isolate the pressing problems of procedural revision nor the experience and expertness necessary to the solution of these problems; legislatures are intolerably slow to act and cause even the slightest and most obviously necessary matter of procedural change to be long delayed; legislatures are subject to the influence of other pressures than those which seek the efficient administration of justice and may often push through some particular and ill-advised pet project of an influential legislator while the comprehensive, long-studied proposal of a bar association molders in committee;⁴¹ and legislatures are not held responsible in the public eye for the efficient administration of the courts and hence do not feel pressed to constant reexamination of procedural methods.

37. Some constitutional phraseology is mandatory in form, some permissive. Under the New Jersey constitution, art. VI, § 2, ¶ 3, which dictates that "the Supreme Court shall make rules" the court has written that, "the rule-making power of the Supreme Court, however, is not a privilege to be exercised by it at its option; on the contrary, it is a duty that the Justices of the Supreme Court must exercise as part of their constitutional obligations in cases involving the State quite as much as in private litigation. . . ." *State v. Otis Elevator Co.*, 12 N.J. 1, 14, 95 A.2d 715, 722 (1953). Similarly the Maryland constitution, art. IV, § 18, directs that "it shall be the duty of the Judges of the Court of Appeals to make and publish rules and regulations for the prosecution of appeals to said appellate court. . . ." Cf. the less mandatory language of Mo. CONST. art. V, § 5: "The supreme court may establish rules of practice and procedure for all courts."

38. See note 27 *supra*.

39. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926); *Regulating Procedural Details by Rules of Court*, 13 A.B.A.J. Supp. 12 (1927).

40. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928).

41. Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 44-45 (1952).

Moreover, it must be remembered that a very large part of maintaining maximum effectiveness in the courts does not lie in drastic wholesale procedural reform, but in the necessary minor alterations of single rules from time to time as experience dictates, and such small matters as these inevitably fare badly when they must compete for legislative attention. Even the best codes have the defect of rigidity; they cannot be changed without "all the pomp and circumstance of repeal or of legislative amendment"⁴² and while in effect bind the courts absolutely and without exception, even in situations where they may work inefficient or unjust results. If the courts attempt to adapt an antiquated or too-general rule to their current particular needs by a process of distinction and reinterpretation, the result is uncertainty; a few litigants will be trapped and badly injured, many more will be forced to argue their cases on points of procedure. Codes tend to foster litigation of procedural issues,⁴³ since the legislature cannot clarify by simple pronouncement whatever ambiguity may inhere in its codes and the courts themselves can provide clarification only in the process of adjudication. Court rules, on the other hand, are flexible in application, easy of clarification, and rapid of amendment should amendment be required. They are the work of an agency whose whole business is court business and for whom court efficiency can become a major interest, an agency keenly aware of the latest problems and fully capable of bringing to bear in their early solution a long and solid experience.

"It is inconceivable," wrote Chief Justice Terrell anent the rule-making power, "that litigants of the present who transact business by the press of a button, . . . traverse the continent overnight by airplane, hop to Europe by Clipper, and spend the weekend in Miami out of New York, would be content like Balaam, to travel the highway of justice on the back of an ass. . . . I think we owe it to society to hike the administration of justice off the ass. . . ." ⁴⁴ To date some thirty states have been trying to hike the administration of justice off the ass with the aid of rule-making powers vested, wholly or in significant part, in their courts of last resort.⁴⁵

42. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599, 602 (1926).

43. Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule-Making*, 55 MICH. L. REV. 623, 643 (1957), states that "a random comparison of decisions by courts exercising rule-making power before and after their court rules were adopted indicates that there are fewer decisions turning on procedural questions after the rules were adopted."

44. Petition Fla. State Bar Ass'n for Promulgation of New Fla. R. Civ. P., 145 Fla. 223, 230, 199 So. 57, 60 (1940).

45. ABA, *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 17 (3d ed. 1952); INSTITUTE OF JUDICIAL ADMINISTRATION, *RULE-MAKING POWER OF THE COURTS* (1955).

Opposition to regulation of practice and procedure by court rule was concentrated on a few major points.⁴⁶ The first cluster of arguments was intended to show that the courts either could not or would not exercise the power. This was pre-1938. There was much in history to support that position,⁴⁷ but by now opposition on this ground has evaporated almost entirely.⁴⁸ The record of recent experience has been convincing:⁴⁹ despite crowded dockets and backlogs, despite a primary interest in adjudication, despite an alleged inertia and disinclination to act, courts have in fact acted and the results have not been unworthy. The second cluster concerned a supposed inability of the judiciary to utilize techniques, such as public hearings, which would involve interested parties in the development and consideration of new adjective law. Indeed, some of the literature reads as though the new rules of procedure would emerge full-blown from a few Saturday morning conference sessions. Once again, history has laid low these fears. This is not to suggest that the optimum in tapping all available resources—bench, bar and law schools⁵⁰—has been finally reached. Rather, on the Federal scene a transition is now taking place which may be expected to improve on the Advisory Committee system by placing the Judicial Council in a role of new prominence.⁵¹ Nor should one minimize the potential significance of such change. The important thing, however, from the point of view of our inquiry is that, in the

46. See Warner, *The Role of Courts and Judicial Councils in Procedural Reform*, 85 U. PA. L. REV. 441 (1937); Sunderland, *The Regulation of Procedure by Rules Originating in the Judicial Council*, 10 IND. L.J. 202 (1935); 2 RECORDS OF THE CONSTITUTIONAL COMMISSION OF 1943-44 TO REVISE THE CONSTITUTION OF GEORGIA 34 (1946); Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois*, 47 NW. U.L. REV. 443, 450 (1952).

47. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599, 600 (1926); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule-Making*, 55 MICH. L. REV. 623, 639-40 (1957).

48. Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois*, 47 NW. U.L. REV. 443, 452 (1952); Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435 (1958); Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROB. 144, 149 (1948). There have been other objections, not mentioned in the text, which appear likewise to have evaporated as, e.g., the argument that "public opinion is so sharply divided on some of the more important questions of procedural reform that for courts to settle them would bring down on their heads a storm of criticism." Warner, *supra* note 46, at 448.

49. See note 8 *supra*.

50. These three sources of assistance were mentioned, in reverse order, by Mr. Chief Justice Warren in a communication read by Mr. Justice Clark at a panel discussion reported in *The Rule Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117, 118-19 (1958).

51. *Id.* at 117 discussing a proposed amendment to 28 U.S.C. § 331, which section directs, in part, that there shall be an annual Judicial Conference of the chief judges of the judicial circuits presided over by the Chief Justice of the United States and which "shall make a comprehensive survey of the condition of the business of the courts of the United States and prepare plans for the assignment of judges to or from circuits where necessary, and shall submit suggestions to the various courts, in the interest of uniformity and expedition of business." The statute was enacted. Pub. L. No. 513, 85th Cong., 2d Sess. (July 11, 1958).

words of Mr. Chief Justice Warren, "the responsibility of the Supreme Court will not be lessened."⁵² And if further evidence be needed, Professor Moore's valuable comparison of the old and new techniques⁵³ by which the Supreme Court avails itself of "an informed judgment" on which to rely⁵⁴ adequately demonstrates that the differences are of small moment in terms of the basic allocation of power between court and legislature.⁵⁵

Finally, we must consider a number of objections which, taken together, challenge the fitness of supreme court judges and justices to make the necessary policy determinations involved in rule-making.⁵⁶ At the least these would question that the best qualified individuals for such decisions are the judges of the highest appellate bench, "many of whom have reached an age in life when all change seems abhorrent."⁵⁷ Variations on the theme abound: judges will prefer their own convenience in such matters as requiring printed briefs to legitimate interests of litigants in reducing costs;⁵⁸ they are too long removed from practice to be "in touch" with problems of the bar or, indeed, of the trial bench;⁵⁹ and they are not to be entrusted with policy decisions which may affect "the liberties of citizens."⁶⁰ These arguments reflect a constant concern that judicial rule-making will impinge on substantive rights,⁶¹ not because judges would make rules governing sub-

52. *The Rule Making Function and the Judicial Conference of the United States*, 21 F.R.D. 117, 118 (1958).

53. *Id.* at 125-33. Professor Moore stresses that "final responsibility should remain where it now is, in the Supreme Court." *Id.* at 132. The reference to "final" responsibility, it is clear from the context, refers to the Court vis-à-vis the Judicial Council rather than the Congress. Judge Clark lists "retention of the present authority of the Supreme Court and of the existing rule-making statutes without amendment" as the first of three main features of the proposal that the Judicial Council be utilized in rule-making. Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 444 (1958). And in more colorful language: "The Court as the ultimate source of power is still the keystone of the arch." *Ibid.*

54. See Clark, *supra* note 53, at 441 and the reference to Mr. Justice Frankfurter's position at n.30.

55. A court charged with the responsibility of rule-making will, in the normal course, seek aid in discharging that responsibility. An advisory committee is a common device. This may well be supplemented by utilizing a Judicial Council. See, for a detailed description of the practice of the New Jersey Supreme Court, the discussion in *Winberry v. Salisbury*, 5 N.J. 240, 253-54, 74 A.2d 406, 413 (1950). See also *State v. Otis Elevator Co.*, 12 N.J. 1, 15, 95 A.2d 715, 722 (1953). Cf. *Sunderland, The Regulation of Procedure by Rules Originating in the Judicial Council*, 10 IND. L.J. 202 (1935): "The question whether rules of procedure should originate in a judicial council, does not necessarily depend on whether the final authority for their promulgation is to be the legislature or the courts."

56. Trumbull, *supra* note 48, at 450-52; Warner, *supra* note 46, at 447-51; Sunderland, *supra* note 55, at 210-11.

57. Warner, *supra* note 46, at 451.

58. *Id.* at 449: "That case might be designated pocketbooks of clients v. eyesight of supreme court justices."

59. Trumbull, *supra* note 48, at 451.

60. Warner, *supra* note 46, at 447.

61. Trumbull, *supra* note 48, at 451, 452.

stantive law as such, but rather because procedure and substance are inextricably interwoven.⁶²

It is of undoubted significance that the proponents of these arguments rarely take the position that it is really best for legislatures to deal with the full battery of procedural provisions, that they should exercise detailed control over court business. Where the debate has been formulated on a court v. legislature basis the conclusion may appear to be in terms of complete legislative responsibility,⁶³ yet the force of the reasoning and the tenor of the discussion do not carry this far. In short, it would be sufficient to meet these objections if the law were to devise a system of concurrent jurisdiction which could assure ultimate legislative power on those matters of policy which should be decided by a body "subject to the popular will,"⁶⁴ while retaining judicial initiative and primary responsibility in the vast range of technical material which is the bulk of the adjective law. This is not to suggest a technical vs. policy dichotomy; no such division will withstand analysis. It is to suggest that a system which charges the judiciary with the responsibility for the development of adjective law while retaining for the legislature, on appropriate terms, power to reassess and evaluate, may come close to maximizing the potential for good in the rule-making process while minimizing the risks inherent in it.

It becomes necessary to analyze these problems in terms of the subject matter of rule-making, examining the specifics of that with which courts deal, and by comparison, of that which is beyond their ken. We turn to consider the grist of the rule-making mill.

WHAT IS PROCEDURE?

Nothing could be clearer than the fact that courts in the exercise of the rule-making power have no competence to promulgate rules governing substantive law. Statutes which make the point are supererogatory.⁶⁵ Yet virtually everyone concedes that "rational separation is

62. *Ibid.* Cf. statement by Joseph A. Padway, Chief Counsel, AFL, *Hearings Before the House Committee on the Judiciary on H.R. 8892 and the Rules of Civil Procedure*, 75th Cong., 3d Sess. 37-51 (1938). See text at note 80 *infra*.

63. Compare the revealing questioning of Padway, *supra* note 62, at 46 with *id.* at 47.

64. Warner, *supra* note 46, at 447.

65. Heckel, *Constitutional Law, Survey of the Law of New Jersey 1950-1951*, 6 RUTGERS L. REV. 27, 30 (1951). Note that "while the courts necessarily make new substantive law through the decisions of specific cases coming before them, they are not to make substantive law wholesale through the exercise of the rule-making power." Vanderbilt, C.J., in *Winberry v. Salisbury*, 5 N.J. 240, 248, 74 A.2d 406, 410 (1950).

well-nigh impossible.”⁶⁶ We propose in this section to consider the difficulties of categorization for the primary purpose of shedding light on our central question: what role should the legislature be assigned with respect to rule-making? No legal litmus test with which to distinguish substance from procedure will emerge. Nor do we argue for abandonment of the terms and the distinction. No preferable alternatives suggest themselves and new words alone are likely to compound the confusion. Exploring the elusive line between substance and procedure is, however, rewarding in revealing factors relevant to the place of the legislature.

Costs, Time and Venue: Policies in Procedure

In New Jersey, where rule-making power has been held to be vested in the courts with no right of legislative veto, the supreme court has held the taxation of attorney's fees as costs to be a matter of procedure.⁶⁷ In the face of a conflict between rule and statute a unanimous bench disposed of the substance-procedure problem with a single, peremptory sentence: “The taxation of costs is essentially procedural, generally affecting the remedy only.”⁶⁸ Of course, in that case only \$6,500 was involved, while in England taxation of costs against one party can run to £89,000 in a case brought for only £40,000.⁶⁹ If the power of decision be in the court exclusively a virtual revolution in the conditions of litigation could be effected with no recourse short of constitutional amendment. Consider a lesser problem, taxing the cost of discovery. Putting to one side stenographic charges, often an item of substance in itself, what of the complications of distance where, *e.g.*, New York litigants propose California depositions? Payment of \$695, including attorney's expenses of \$395 and fees of \$300, was made a condition of the taking of one relatively short deposition in such a case.⁷⁰ More interesting problems develop when a liti-

66. Rutledge, J., dissenting in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 559 (1949). Nor is the difficulty solely one of failure to recognize the different purposes for which substance may be distinguished from procedure. We may avoid the trap of applying doctrine developed in the context of two-state conflict of laws situations or of *Erie*-spawned problems of federalism without discovering in the “pulls” of the rule-making area sufficient basis for “rational separation.”

67. *John S. Westervelt's Sons v. Regency, Inc.*, 3 N.J. 472, 70 A.2d 767 (1949); *State v. Otis Elevator Co.*, 12 N.J. 1, 95 A.2d 715 (1952).

68. *John S. Westervelt's Sons v. Regency, Inc.*, *supra* note 67, at 479, 70 A.2d at 771. The opinion in *State v. Otis Elevator Co.*, *supra* note 67, has a more extended discussion of the problem.

69. Chorley, *Procedural Reform in England*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 98, 107 (1949).

70. *North Atl. and Gulf S.S. Co. v. United States*, 16 F.R.S. 30b.41 Case 2 (S.D.N.Y. 1952), *aff'd*, 209 F.2d 487 (2d Cir. 1954). The case involved S.D. AND E.D.N.Y. RULE 4 with respect to prepayment where depositions are to be taken over 150 miles from the courthouse. Litigation in state courts can also involve interstate depositions. See, *e.g.*, *Solliday v. District Court*, 135 Colo. 489, 313 P.2d 1000 (1957).

gant seeks to bring nine individuals from Moscow to New York and charge the other side with the costs.⁷¹

Joiner and Miller argue that taxation of costs should not be within the power of the court because it "involves something more than the orderly dispatch of judicial business."⁷² Limited to a choice between legislature and court as repositories of ultimate power, they may be right, but it would be a sorry thing indeed to take from the courts the power to deal with the plethora of problems which come under the heading of costs or to make their power depend on the terms of specific legislative grant.⁷³ This is an area where rule-making is appropriate, efficient and desirable. In the first instance, the development of this area should be for the courts, but it appears necessary that at some point there be available legislative authority to override the court where its actions reflect a policy fundamentally opposed to what the legislators might consider to be in the significant best interests of the people.

Even simpler problems of categorization invite confusion as courts attempt to delineate the limits of the rule-making power. The time within which an appeal must be taken is a matter which one would certainly expect to be treated as "procedural." Is not this a classic example of a provision "affecting the remedy only"?⁷⁴ The problem, however, so bedeviled a New Jersey appellate court that it was forced to conclude that the line between substantive law and adjective law is not the same as that between substantive law and procedural law because the "grant of power to make rules governing the practise and procedure . . . does not include in its scope all adjective law."⁷⁵ This statement is a model of clarity compared to an earlier

71. *V. O. Machinoimport v. Clark Equipment Co.*, 11 F.R.D. 55 (S.D.N.Y. 1951) (plaintiff's request for counsel fees denied). For the subsequent history of the case, see 12 F.R.D. 191 (S.D.N.Y. 1951).

72. Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule-Making*, 55 MICH. L. REV. 623, 653 (1957). In their short six-line discussion, they add that the taxation of costs "subsumes a fundamental decision as to how much of the expense of litigation the state shall bear. This thus becomes a legislative problem." *Ibid.*

73. See the valuable Note, *Use of Taxable Costs To Regulate the Conduct of Litigants*, 53 COLUM. L. REV. 78 (1953), which explores the taxation of both costs and expenses as a deterrent to bad faith tactics in litigation and concludes: "It may be assumed that the congested condition of the lower courts is at least in part attributable to this weakness in the law of costs." *Id.* at 93. For a consideration of the significance of inadequate power in the court, in the context of the pre-trial hearing, see 34 IOWA L. REV. 368, 370 (1949). Cf. P.A. R. Civ. P. 217 (costs on continuance).

74. See text and note at note 68 *supra*. For reference to various other tests see Joiner & Miller, *supra* note 72, at 630, 631.

75. *Winberry v. Salisbury*, 5 N.J. Super. 30, 34, 68 A.2d 332, 334 (App. Div. 1949), discussed note 36 *supra* where the subsequent history of the case is set forth.

pronouncement in the same opinion that, under a constitutional provision cast in terms of "procedure," it was "not enough" to find that time for appeal was "procedural law as distinguished from substantive law."⁷⁶ Taking the opinion as a whole, it seems fair to infer that, in the court's view, there are areas of the law which must be considered "procedural" under any acceptable definition of that term, and which, nonetheless, present basic issues of policy properly left to the legislature.

There is much merit in this counsel of caution, particularly if it be considered in terms of ultimate power and prerogatives. Applying the insight of the New Jersey court to the problems of venue sheds light in a troublesome area. Here, too, one can observe concern for maintaining legislative control over policy decisions. Joiner and Miller suggest that because the county in which "a case should be tried involves something more than the orderly dispatch of judicial business, . . . the people of the state should have the power" to determine where law suits should be initiated.⁷⁷ After determining that "initial venue is a matter for legislative determination," the same authorities conclude that rules governing change of venue should be treated differently; these should be for the court. Nor is the suggestion limited to the procedure of change, or to discretion in the individual case. Court rules should be promulgated governing the "grounds" as well as the method of change of venue, and the former may be based on prejudice, convenience, "or any other cause" for these "can involve the orderly dispatch of judicial business and should be subjects of judicial rule making."⁷⁸ If there is reason to retain in the legislature power of decision over where within a state relief must be sought and where criminal prosecution must take place, it is of doubtful wisdom to invest the courts with the responsibility of determining when such policies should give way before other considerations ranging from "convenience" to "any other cause." Again this is not to suggest that venue should be considered outside the scope of a court's rule-making power;⁷⁹ it is to suggest that dividing responsibility between court and legislature by putting initial venue on one side with change of venue on the other is undesirable. Since the formulation and continual supervision of venue provisions is a detailed, highly technical, yet important, task, it would again be a happier solution for the courts to bear initial responsibility in this area. Placing this responsibility on the courts need not, however, take away from the legislature the power to review, to reassess and to

76. *Ibid.*

77. Joiner & Miller, *supra* note 72, at 649.

78. *Ibid.*

79. *E.g.*, PA. R. CIV. P. 1006, 1042, dealing with venue.

revise where the major premises of the court appear to conflict with policies which the legislators feel should be asserted.

Substantive Considerations in the Interstices

The preceding subsection has dealt with procedural issues which, because they were procedural, should be left in the first instance to judicial regulation, but which, because they may have radical impact on the community, should, in our view, be subject to legislative review. This subsection continues the development of the same theme, with a major point of difference. The need for legislative review in the cases here considered arises from the fact that these procedures are so intimately related with substantive considerations that inherent in them is the potential of frustrating substantive policies. The criminal law can provide illustration.

Criminal procedure, no less than civil procedure, would be encompassed within a general constitutional grant of rule-making authority. So much of the literature on judicial rule-making has focused on problems of the civil side it becomes necessary, at times, to assert afresh the existence of a criminal jurisdiction with such procedural safeguards as trial by jury. There is no doubt that the mode of criminal trial can be safeguarded by express constitutional provision, yet a serious and respected student of constitutional revision in Pennsylvania has suggested that it might be appropriate for the judiciary to regulate procedure thus leaving to the judges of the Supreme Court control over trial by jury, double jeopardy and use of criminal information. "I am sure," writes a former Attorney General of the State of Pennsylvania, "that the rights of the accused would be adequately safeguarded if the Supreme Court were permitted to regulate all procedure by rule, and Sections 6 and 10⁸⁰ could both be safely eliminated."⁸¹ If such action were taken, an unlikely course,⁸² it would furnish a further example of procedural policy concerning which the legislature might well be given final voice. Indeed, even the existence of a legislative veto might render its use unnecessary.

Trial by jury does more than illustrate a point already made. It reveals an added facet of the desirability of a legislative role. It is school-boy lore that the substantive law developed in the interstices of procedure. Less familiar, but no less true, is the fact that sub-

80. Reference to PA. CONST. art. I, §6 (Trial by jury) and §10 (Criminal information; twice in jeopardy).

81. Schnader, *Dead Wood in the Pennsylvania Constitution*, 25 TEMP. L.Q. 399, 401 (1952).

82. Immediately preceding this statement Schnader had suggested certain re-phrasing as appropriate in the event of constitutional revision. *Ibid.*

stantive law continues to develop today in procedural terms. Removal of the right to trial by jury would probably have significant impact not only on the criminal law in action, but on important phases of the civil law as well, and the call for eliminating the constitutional guarantee of this mode of trial in civil cases is such that it cannot be ignored. There is no need to multiply examples, for instances of substantive considerations secreted in procedural interstices⁸³ are well known. Yet, to mention a few is to demonstrate that the solution cannot lie in categorizing the interstices, too, as substantive. Consider, *e.g.*, the limits of a directed verdict in negligence cases, the procedural effect of presumptions and the more general field of assigning burdens of proof.⁸⁴ It would be wrong to remove these areas from the general rule-making power of the courts. Then, too, there are those procedural safeguards of the criminal law "that have long been considered important bulwarks of individual liberty."⁸⁵ Over twenty years ago Sam Bass Warner was fearful that "some of the problems of procedural reform touch too closely the liberties of citizens to be decided in a democracy by any

83. The reference is to the familiar passage from MAINE, *EARLY LAW AND CUSTOM* 389 (1901): "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure. . . ."

84. In *George Siegler Co. v. Norton*, 8 N.J. 374, 86 A.2d 8 (1952), the court upset a jury verdict for plaintiff and ordered judgment entered for defendant, trustee of a railroad, in the face of a statute which provided "in any action against a steam railroad company to recover damages for injury or death occurring at any crossing at which the company has not installed any safety gates, bell or other warning or protective device of the kind usually employed to warn and protect the traveling public and such injuries or death are alleged to be due to the negligence of the company, the plaintiff shall not be nonsuited on the ground of contributory negligence on the part of the person injured or killed, but it shall be left to the jury to determine whether such person was exercising due . . . care. . . ." The court found the statute in conflict with its own rules with respect to the judge's power to withdraw the case from the jury, held the statute to be procedural, operating "within the field of our exclusive rule-making power . . . and therefore is superseded . . . and no longer effective." *George Siegler Co. v. Norton*, *supra* at 383, 86 A.2d at 12. It appears obvious that the statute, whether or not it be considered procedural, is an attempt to give effect to substantive policies.

UNIFORM RULE OF EVIDENCE 14 sets forth the effect to be given to presumptions and the Comment thereto considers the significance of "the substantive policy on which the presumption is based." See also the discussion in MORGAN, MAGUIRE & WEINSTEIN, *CASES ON EVIDENCE* 443 (4th ed. 1957), where the burden of going forward and the risk of non-persuasion are also referred to. For the same problem in another area see Padway, *supra* note 62.

Cf. Case, J., dissenting from the position of the majority with respect to rule-making in *Winberry v. Salisbury*, 5 N.J. 240, 266, 74 A.2d 406, 419 (1950), who notes that the procedural rules are the responsibility of the supreme court and adds: "The justices make the decision; four of them; perhaps three of them; on their own handiwork, a rule that cuts deeply into property and property rights. That decision would be absolutely honest and highly intelligent; but that is not the whole story; it could also be doctrinaire and arbitrary."

85. Warner, *supra* note 46, at 447. *State v. Haines*, 18 N.J. 550, 115 A.2d 24 (1955), holds that extension of the term of the grand jury is within the scope of the rule-making power of the court. Would a statute requiring corroboration by more than one witness in certain types of cases be procedural?

body not subject to the popular will.”⁸⁶ Others have been concerned about mortgage moratoria legislation and labor injunctions, both areas where procedural forms have been used to effectuate substantive policies.⁸⁷

In short, here again are areas which should, in the first instance be dealt with by way of judicial rule, although they involve policies best left subject, at some stage, to the will of a forum closer to the people.

The Risk of Improper Categorization

At times the difficulty of delineating substance from procedure becomes so great that a delusively attractive alternative presents itself: abolish the terms altogether, or at least proscribe their use. Riedl, who came to the problem in the course of considering what rules of evidence a court might properly promulgate, found the substance-procedure distinction “impossible” and proposed to abandon it.⁸⁸ In our view, the attempt was futile and must, on the whole, remain so. The quest for definition is not the result of happenstance, of historical accident by which an ambiguous term or an infelicitous phrase gained currency with a resultant obfuscation of ideas. The quest stems from the need to define an ill-defined and at times indefinable area of authority, from the need to know with what a court may deal in discharge of its obligation to determine how litigation shall proceed, and beyond what limits it may not trespass. Practice and procedure are familiar terms which, in the large, are accepted as referring to the “how” of litigation.⁸⁹ They are neither divinely ordained nor sacrosanct, but to substitute alternatives which come no closer to expressing the limits of that authority⁹⁰ is to run the risk of change which has “all the vices of novelty and none of the virtues of lasting improvement.”⁹¹ No clearly preferable alternatives have been forthcoming and constitutions continue to use the familiar phrase. Consequently, it remains necessary to deal with its meaning.

Riedl has proposed a test with which to delineate the scope of judicial authority in dealing with the law of evidence by rule. It has

86. Warner, *supra* note 46, at 447. See also opinion of Frankfurter, J. in *Malinski v. New York*, 324 U.S. 401, 414 (1944): “The history of American Freedom is, in no small measure, the history of procedure.”

87. Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Windberry v. Salisbury*, 65 HARV. L. REV. 234, 253-54 (1951).

88. Riedl, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 601, 604 (1940).

89. Joiner & Miller, *supra* note 72, at 630.

90. Another factor, which appeared to have concerned Riedl, *supra* note 88, is the risk that definitions appropriate to one type of problem shall improperly be carried over to another, quite different problem. See note 66 *supra* for discussion of this “trap.” The problem does not, in this case, appear insurmountable.

91. Clark, *supra* note 53, at 451.

been reformulated, in broader terms, by other writers who have not abandoned the substance-procedure dichotomy.⁹² Accordingly, both tests are deserving of study in order (1) to shed further light on the scope of the power conferred by a constitutional grant expressed in terms of practice and procedure; (2) to deal with the important and controversial question of reforming the law of evidence by way of court rule;⁹³ (3) to determine whether the difficulty in defining the judicial rule-making power, in drawing the line in such manner that it will not be too confining and yet not too encompassing, does not by its very existence argue for vesting in the legislature a power of ultimate review.

For Riedl, the power of a court to promulgate a rule of evidence depends on whether that rule "is a device with which to promote the adequate, simple, prompt, and inexpensive administration of justice in the conduct of a trial or whether the rule, having nothing to do with procedure, is grounded upon a declaration of public policy."⁹⁴

The difficulty with Riedl's test is in its major premise. It assumes that the rules, even of evidence, which courts will be concerned about categorizing, fall neatly into one of two pigeon-holes: "declaration of public policy" or "rule to promote the prompt, inexpensive administration of justice." Nothing could be further from the truth, as is demonstrated by the briefest glance at his conclusions concerning specifics. Physical and mental examinations by a physician, certainly proposed as a means of furthering adequate administration of justice,

92. Joiner & Miller, *supra* note 72, at 635.

93. Judge Learned Hand has been quoted as asserting that rule-making power with respect to evidence "has been a very contentious subject." REPORT OF THE COMMISSION TO STUDY THE IMPROVEMENT OF THE LAW OF EVIDENCE, NEW JERSEY 9 (1956). The New Jersey experience bears this out. In 1954 a committee was appointed to report to the supreme court with respect to revision in this area. They did so in 1955. REPORT OF THE COMMITTEE ON THE REVISION OF THE LAW OF EVIDENCE TO THE SUPREME COURT OF NEW JERSEY (1955). In September, 1955, an editorial in N.J.L.J., recognizing the problem posed in the light of the *Winberry* decision, attempted to offer a constructive suggestion. After noting that "this is not the occasion for a philosophical discourse on the distinctions between 'substance' and 'procedure,'" went on to urge that it "would be best to have the Legislature enact the Code as an entirety, and then have the Supreme Court adopt it as a whole." *How Shall the Proposed Code of Evidence Be Adopted?*, 78 N.J.L.J. 316 (1955). A legislative commission appointed thereafter recommended a significantly different set of provisions than that of the supreme court committee. It urged that the legislature retain responsibility for the Evidence "Rules," and invited the supreme court to recommend amendments to the legislature when such became necessary. REPORT OF THE COMMISSION, *supra* at 11-12. See also *An Approach to Evidence Revision*, 81 N.J.L.J. 16 (1958), reporting a further proposal for joint action and stating that "the method of implementation has been the primary obstacle."

The ABA has considered as a "matter for local determination" the question as to whether evidence reform should be achieved by way of statute or court rule. ABA, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 64 (3d ed. 1952). See, generally, Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 482 (1940); Clapp, *Privilege Against Self-Incrimination*, 10 RUTGERS L. REV. 541, 562-73 (1956).

94. Riedl, *supra* note 88, at 604.

is for Riedl a matter to be determined by the legislature as involving a "General Public Policy".⁹⁵ While there can be no doubt that public policy is involved, can it possibly be suggested that this is an issue "having nothing to do with procedure"?

"Expert Testimony" and "Survivor's Testimony against Representatives" are similarly classified as being in the legislative domain,⁹⁶ although here, too, there is ample basis for argument that the sole policies involved are those which call for a higher order of administration of justice, a more rational resolution of facts in controversy. When we turn to the problem of privilege we meet the classic example of substantive law in the rules of evidence. Extrinsic policy considerations are said to be operative and paramount. This is indeed true, but it must not be forgotten that the orderly dispatch of litigation, with the maximum information from permitted sources made available to the tribunal, is also a consideration and is, itself, a matter of high policy. The interplay of these factors and the need for balancing them is articulated by Wigmore in his statement of the famous four fundamental conditions for the recognition of a privilege: "The injury that would inure to the relation [being protected] by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."⁹⁷ Furthermore, as the persistent and still current controversy over the desirability of a doctor-patient privilege so clearly demonstrates, whenever the existence of a privilege is called into question the issue must be resolved by balancing the advantages to be gained by according it against the resultant loss in efficient administration of justice.⁹⁸

Here, again, it would appear desirable to charge the courts with initial responsibility for reforming the law of evidence by way of rule. The initiative should be assigned to the judiciary and the power invested in the courts. Only in this way are we likely to achieve a simplified, rational set of provisions controlling the trial of an issue of fact. Nor should the courts be obliged to pick and choose among the rules.⁹⁹ It would be wrong to say that, in the first instance, privilege shall be for the legislature, but what constitutes a waiver of privilege shall be for the courts. Aristotelian logic might be satisfied by a line so drawn, yet the policies are too interrelated to give promise of functional success.

95. *Id.* at 605.

96. *Ibid.*

97. 8 WIGMORE, EVIDENCE § 2285 (1940).

98. McCORMICK, EVIDENCE 222-23 (1954).

99. "Since the proposed Code of Evidence was conceived and drafted as an integrated whole, and because procedure and substance are so interwoven," an editorial, 78 N.J.L.J. 316 (1955), urged adoption as a whole.

Specific mention of evidence should be included in the constitutional provision to avoid futile, barren disputation over the authority to deal with evidence as a whole.¹⁰⁰ Anything less is likely to invite indecision or the halfhearted reform which "is worse than none at all."¹⁰¹ There is sufficient basis for considering the whole of evidence doctrine as procedural, relative to the "how" of litigation rather than to the creation and resolution of substantive rights.¹⁰² But to say this much is not to argue that the courts are to be invested with ultimate power in an area so peculiarly appropriate for final determination by that branch of government which more immediately reflects the sentiment of the community.

What emerges, in short, is that the primary difficulty with the substance vs. procedure dichotomy in the rule-making area is that it forces simultaneous characterization for two very different purposes: first, for the purpose of determining whether the court may act at all and second, for the purpose of determining whether the legislature has competence to review and rescind a promulgated rule. This difficulty is of course not present where the rule-making power is by way of legislative grant. It need not be present where the power is conferred by way of constitutional provision, so long as the constitution proceeds to specify the role reserved for the legislature.

There is a substantial risk in ceding too much to the legislature, particularly if in so doing courts are to abdicate completely from the exercise of any rule-making authority in the ceded area. The point is illustrated in considering a reformulation of the Riedl test by Joiner and Miller. While asserting that their version "approximates"¹⁰³ Riedl's, Joiner and Miller propose something very different. The question for them is whether a particular area involves "something more than the orderly dispatch of judicial business."¹⁰⁴ If it does, then it is not an appropriate subject for treatment by court rule. The difficulty with this position is that it excludes too much. Applied rigorously, it would exclude not only such matters as venue and costs, but also such questions as the procedural effect of presumptions. This is not to suggest that the proponents of the test would so apply it. Indeed, they recognize that theirs is not a formulation which should be

100. See the New Jersey experience, note 93 *supra*.

101. Clark, *supra* note 53, at 451.

102. Clapp, *supra* note 93, marshals an impressive array of authority and concludes that the Uniform Rules of Evidence are entirely procedural except for a few particulars. *Id.* at 571. Of the two exceptions which he mentions, one concerns payment of impartial medical experts, a fiscal matter, and the other a privilege not to speak to police officers. *Id.* at 571 n.119.

103. Joiner & Miller, *supra* note 72, at 635.

104. *Id.* at 649.

expected to answer all questions of rule-making authority.¹⁰⁵ The point, however, is deserving of emphasis: if it would be wrong to cut off the legislature from areas which are legitimate subjects of its concern, it would be unfortunate in equal, if not in greater measure, to stultify the grant of rule-making authority by keeping the court from utilizing it in areas in which it could be of service.

It is important to recognize that courts themselves may be prone to define their own authority too narrowly. As Kaplan and Greene have pointed out, the absence of any legislative control over the judiciary may result in a niggardly view by the court of its own powers, for to assert the right to make rules is, in such a case, to assert the right exclusively and finally.¹⁰⁶ It is certainly true, on the other hand, that a court immunized from any review of its own determinations as to what is within its rule-making power as well as from any veto over what it chooses to promulgate, may prove too prone to assume authority.¹⁰⁷ Neither alternative is a happy prospect. The possibility of each is further reason to provide for residual powers in the legislature.

NEW JERSEY'S NATIONAL TREND

The only state to assert for its Supreme Court uncontrolled and uncontrollable rule-making power¹⁰⁸ is New Jersey.¹⁰⁹ Wigmore, Pound and Vanderbilt, an imposing triumvirate, can be credited with placing that jurisdiction in the class of those which grant rule-making power to the supreme court without the possibility of legislative veto. To point out that membership in this class is presently limited to one state is not to deny the influence of New Jersey's experience. On the contrary, there is reason to believe that an influence has been exerted. New Jersey's story is worth retelling.

The major battle ground on which are resolved differences concerning the allocation of power between the coordinate branches of government is the constitutional convention, or its analogue. Infelicitous drafting may invite further conflict on another day in another

105. *Id.* at 629.

106. Kaplan & Greene, *supra* note 87, at 253 n.80.

107. *Id.* at 253.

108. The New Jersey Legislative Committee noted: "When our Supreme Court assembles to make rules, it sits not as a court of justice, but as a law-making body. . . . Indeed this special law-making assembly has advantages that the other does not possess; for its acts are not subject to veto; and the seven men who compose it can don their judicial robes and render judgment on the extent of their own powers and the validity of their own acts." REPORT OF THE COMMISSION, *supra* note 93, at 10. See also statement of Case, J., note 84 *supra*.

109. See note 36 *supra*.

forum,¹¹⁰ but even without the express invitation of ambiguity or lacuna no victory gained in the formulation of the instrument can be considered safe until finalized by judicial construction in the course of litigation. Nor can court opinion be considered the very last word so long as dissent invites reappraisal and the criticism of the commentators invites amendment. New Jersey has been involved with all three phases. We turn, first, to the Constitutional Convention of 1947.

A preliminary draft of the provision in question, proposed by the Committee on the Judiciary and circulated by it, read: "The Supreme Court shall, subject to law, make rules governing the administration and the practice and procedure in all the courts in the State."¹¹¹ Arthur T. Vanderbilt attempted to persuade the Committee to change the draft in favor of a grant of rule-making power unfettered by threat of legislative reversal. He viewed the words "subject to law" as imposing legislative control on the court and urged that they be deleted.¹¹² In the course of his argument to the Committee, Vanderbilt asserted that "The trend throughout the United States has been to confide the rule-making power to the highest court and to hold that court responsible for results."¹¹³

The words "subject to law" were not deleted, although their position in the paragraph was altered so that it read: "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts."¹¹⁴ Three years later Arthur Vanderbilt, now Chief Justice of New Jersey, took occasion to interpret the key phrase in the leading case of *Winberry v. Salisbury*.¹¹⁵ Speaking for the court,

110. In *Winberry v. Salisbury*, 5 N.J. 240, 243, 74 A.2d 406, 408 (1950), the majority opinion found the governing provision to be "not only ambiguous, but elliptical." Kaplan & Greene, *supra* note 87, at 246, suggest that the New Jersey provision "is not a model of clear drafting." See also the problems invited by the language of the Alaska constitution, discussed *infra* note 162.

111. *Tentative Draft of Judicial Article*, § II, par. 3, 2 N.J. CONST. CONVENTION OF 1947, at 1167 (1951).

112. *Letter of Arthur T. Vanderbilt*, 4 *id.* at 729.

113. *Ibid.*

114. N.J. CONST. art. VI, § 2, par. 3. The Judiciary Committee in its report, 2 N.J. CONST. CONVENTION OF 1947, at 1180, 1190 (1951), and by the statement of its vice-chairman on the floor of the convention in the course of presenting the article made it abundantly clear that the legislature was to "have power . . . to alter those rules of practice [promulgated by the court] analogous to the power now possessed by the Congress of the United States." 1 *id.* at 146-47. For discussion of the relevant material and evaluation of its treatment by the majority in *Winberry v. Salisbury*, see Kaplan & Greene, *supra* note 87, at 241-45.

115. 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950). *Winberry* brought suit to expunge an alleged libel against himself from the records of a grand jury. Judgment was entered for defendant and plaintiff appealed within the period provided by statute, but after the forty-five days allowed by rule of the supreme court. The appellate division dismissed the appeal and the supreme court affirmed.

Vanderbilt once again asserted the same trend,¹¹⁶ this time as part of the argument devoted to demonstrating¹¹⁷ that "subject to law" meant subject to substantive law, that practice and procedure had been placed in the hands of the court "both initially and finally,"¹¹⁸ that the legislature had been stripped of its former power to override.

The *Winberry* case has been debated extensively.¹¹⁹ A particularly valuable article by Kaplan and Greene analyzes the majority opinion carefully not only in terms of the history of the crucial phrase and its meaning in context, but also in terms of the policy factors against which the result must be measured.¹²⁰ Treating gently the matter of trends, Kaplan and Greene suggest that " 'Trends,' like beauty, lie mostly in the eye of the beholder; but for ourselves, we find no observable groundswell for the idea that the legislature should be barred from final competence to regulate court procedure. Rather we find a growing recognition of the soundness of the policy of vesting comprehensive rule-making power in the courts, with accountability in the last analysis to the legislature."¹²¹ Certainly, this represents accurately the history of rule-making

Case, J. concurred on the ground that the "initial authority to make rules lay with the court," apparently relying on the fact that the statute in question had antedated the 1947 constitution. *Id.* at 255, 74 A.2d at 414, Heher, J. dissented without opinion.

116. 5 N.J. at 253, 74 A.2d at 413.

117. Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 29 (1952), refers to the interpretation of "subject to law" as a holding. Heckel, *supra* note 65, at 27 considers this dictum, adding "although it has been stated that our judiciary will not render advisory opinions, the decision of the Supreme Court in *Winberry v. Salisbury* is actually one." *Ibid.* Kaplan & Greene, *supra* note 87, at 239, say that the answer to the meaning of the phrase "subject to law" was given "in considered dictum if not in holding."

The source of the dictum v. holding controversy is to be found in the fact that the statute in question antedated the 1947 constitution and the supreme court had already held in *John S. Westervelt's Sons v. Regency*, 3 N.J. 472, 70 A.2d 767 (1950) (attorney's fees), that the rules promulgated on the effective date of the 1947 constitution "superseded the preexisting law, statutory or otherwise." *John S. Westervelt's Sons v. Regency*, *supra* at 478, 70 A.2d at 771.

118. 5 N.J. at 266, 74 A.2d at 419.

119. Kaplan & Greene, *supra* note 87; Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952); Heckel, *Constitutional Law, Survey of the Law of New Jersey 1950-1951*, 6 RUTGERS L. REV. 27, 29-30 (1951); 99 U. PA. L. REV. 418 (1950); 36 IOWA L. REV. 569 (1951); 24 TEMP. L.Q. 477 (1951); 31 B.U.L. REV. 97 (1951).

Since *Winberry* the New Jersey courts have had a number of occasions to hold statutes superseded by rule of court, simply reiterating Vanderbilt's view as settled law and evidencing so little concern with the date of the statute as to fail to have it appear in the opinion. *Senst v. Senst*, 14 N.J. Super. 317, 82 A.2d 204 (App. Div. 1951); *George Siegler Co. v. Norton*, 8 N.J. 374, 86 A.2d 8 (1952); *State v. Ahrens*, 25 N.J. Super. 201, 95 A.2d 755 (App. Div. 1953). In *Columbia Lumber & Millwork Co. v. DeStefano*, 12 N.J. 117, 95 A.2d 914 (1953), Brennan, J., writing for the New Jersey Supreme Court, applied the rule of *Winberry* without further analysis to hold a 1949 statute of no effect to the extent that it conflicted with a 1948 court rule. For other New Jersey cases see note 36 *supra*.

120. Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951).

121. *Id.* at 251.

in this country over the past quarter century and the current state of authorities.¹²² It is true that there is perceptible movement in the direction of giving courts power without accountability in the area of "administration," a subject which will be separately treated.¹²³ It is also true that Wigmore in a famous editorial,¹²⁴ variously characterized,¹²⁵ and Pound in writings cited in *Winberry*¹²⁶ as well as in a reply to Kaplan and Greene in defense of *Winberry*,¹²⁷ support the desirability of Vanderbilt's conclusion. It is necessary to consider the major points of the majority and concurring opinions.

In evaluating alternative schemes of allocating power between the courts and the legislature as a problem in constitutional revision, we may put to one side those arguments which turn on the history of the language in New Jersey's governing provision as well as other factors present in, but limited in significance to, the particular case. To the extent that the particular words chosen by the draftsman have been held to imply a particular result, we may be interested in selecting them or avoiding them in the course of future drafting, but that they can constitute no aid in resolving the problem of allocation viewed as a normative question, is clear. Also putting to one side arguments in favor of rule-making generally and those strictly in rebuttal, two affirmative points emerge from the majority position. First is the argument that since the judges of the Supreme Court are charged with the rule-making obligation, they are not merely authorized to make rules but are mandated to do so,¹²⁸ and they alone should bear the responsibility so that they may be held accountable.¹²⁹ Second is the argument that the rule-making power must be viewed as continuous, that it would be intolerable and inconsistent with the general plan of the New Jersey Constitution for the legislature to remove from the competence of the court particular areas of procedure, a result which must follow from legislative intervention since no mechanism is available, short of legislative repeal of the overriding statute, to reintroduce into the ken of the court an area once

122. See note 36 *supra*; INSTITUTE OF JUDICIAL ADMINISTRATION, RULE-MAKING POWER OF THE COURTS *passim* (1955).

123. See text beginning at note 158 *infra*.

124. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928).

125. Kaplan & Greene, *supra* note 120, at 251, after describing the title of Wigmore's editorial as "temerarious," suggest that his "omnibus argument is better taken as the *jeu d'esprit* of a master than as a serious constitutional analysis." Pound, *supra* note 117, at 37, takes issue with this characterization and terms Wigmore's article a "serious and well-grounded proposition." Cf. Joiner & Miller, *supra* note 72, at 629, who conclude that "theory must give way to reality."

126. 5 N.J. at 254-55, 74 A.2d at 413.

127. Pound, *supra* note 117.

128. See note 37 *supra*.

129. 5 N.J. at 253, 74 A.2d at 413.

removed legislatively. The suggestion that the legislature might act to override the court, with the court remaining competent by further rule to override the legislature, a situation which may be developing in Missouri,¹³⁰ is rejected as intolerable.¹³¹

There is merit to both of these points made by the court, but it appears to us that they need not call for what Mr. Justice Case has characterized as placing practice and procedure "within the court's irresponsible creation and control."¹³² If the legislature is to be accorded power to act, certainly there ought to be constitutional provision for the reacquisition of initiative by the court. Similarly, the court can, in a very real sense, be held accountable and be in fact responsible for procedural law if the conditions of legislative intervention are such as to discourage tinkering with detail and meddling with anything less than compelling matters of policy. Where the legislature has felt obligated to interpose its judgment on a question which rises to this level of significance, it should be the responsibility of the court to continue to fashion a procedural system which operates efficiently consistent with such policy. To ask this much is to do no more than to maintain a proper sense of perspective, distinguishing between techniques and basic policy considerations. How this may be accomplished is considered below.¹³³

Mr. Justice Case wrote a concurring opinion in *Winberry* which, for purposes of the problem here being considered, was a dissent. He makes a telling point which has validity beyond the confines of the particular litigation. "Constitutions are not made," he suggests, "and ought not to be construed, upon the hypothesis that men presently or prospectively in office will continue indefinitely to function in their particular capacities."¹³⁴ In short, a sense of historical perspective is imperative. After all, it is a constitution which we are attempting to fashion. Certainly it is true that the history of procedural reform in this century has been, primarily, a history of rule-making by courts.

130. See note 36, *supra*. Compare S.D. CODE § 32.0902 (1939) which provides in part: "Nothing in this section shall abridge any power the Legislature may have to enact, amend, or repeal statutes or rules of court relating to pleading, practice, or procedure, nor shall anything herein abridge the power of the court hereafter to promulgate further, or to amend, or repeal any such statute the Legislature may have enacted, amended, or repealed, or to make such new or additional rules or amendments of its existing rules as it may elect."

131. 5 N.J. at 244, 74 A.2d at 408.

132. *Id.* at 266, 74 A.2d at 419.

133. See text at note 180 *infra*.

134. 5 N.J. at 264, 74 A.2d at 418. See also the conclusion in 99 U. PA. L. REV. 418, 421 (1950): "[Y]et, case law outlives those who make it, and conceivably future supreme courts in New Jersey will be as conservative as the instant one is progressive. This would result, under the present interpretation of the constitution, in a procedural moratorium immunized to the will of the people."

But this has not always been the case. The major advance in this country during the nineteenth century was by way of legislative enactment, beginning with David Dudley Field's code which, after its adoption in New York, literally swept over the country.¹³⁵ There is no need here to rehearse the difficulties in which code pleading and code practice soon became embroiled; the history is familiar enough.¹³⁶ The point to be made is that there have been times when reform through the courts was unthinkable, when stodginess and conservatism ruled the bench.¹³⁷ These may be unlikely to return, but it would be wrong to foreclose the possibility of legislative action should the unlikely eventuate. The opinion in *Winberry* may be viewed as a reaction to an obstreperous legislature which three short years after the adoption of the new constitution in New Jersey, was already threatening to render judicial rule-making impotent.¹³⁸ The risk of the obstreperous is inherent in democratic living; it may be minimized by conditioning the use of power. It should not serve as sufficient reason for a skewed view of the proper vesting of ultimate controls.

THE DOMAIN OF EXCLUSIVE JUDICIAL POWER

Grant the necessity for concurrent jurisdiction in the field of procedure, immediately another problem presents itself. Should there not be some realm of judicial administration entirely free from legislative supervision? Or shall the legislature be permitted to dictate to the

135. Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 55, 58 (1949); Mitchell, *The Federal Rules of Civil Procedure*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 73 (1949).

136. By 1878 New York's relatively simple Field Code had grown into a grotesque giant which Field himself condemned as a "monstrosity." Quoted in Mitchell, *supra* note 135, at 74. By 1880 it had close to 3500 sections, a few hundred shy of ten-fold increase in a generation. *Ibid.* What followed was a "history of code tinkering." Clark, *supra* note 135, at 61.

137. Speaking of Field, Clark writes: "Presumably he never thought of action through the courts; there was no reason why he should in the light of the habits of the day." Clark, *supra* note 135, at 58. And, more persuasively, "had he [thought of working through the courts], he would have realized how hopeless was then this approach." *Ibid.* See also the statement quoted in note 134 *supra*.

It is interesting to note that for nearly a year after Congress had passed the 1934 Act authorizing the Supreme Court to promulgate rules of civil procedure the Court took no action "and seemed oblivious to the charge committed to it." Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 438 (1958). Indeed, as one commentator observed, "that the court should accept its duty passively would have been the traditional thing in view of the experience in several states." *Editorial, Dramatic Pronouncement by Chief Justice Hughes*, 19 J. AM. JUD. SOC'Y 3 (1935). For the Michigan experience of "sporadic, piecemeal, and incomplete" exercise of the rule-making function by the court see note 36 *supra*. Examples could be multiplied, not excluding New Jersey. See Kaplan & Greene, *supra* note 120, at 252.

138. For discussion of some of the legislative conflicts, as well as an attempt to override *Winberry* by constitutional amendment see *id.* at 251-53. See also note 180 *infra*. For more recent conflict see discussion of the New Jersey experience with respect to evidence, *supra* note 93.

courts every detail of their internal regimen: command appellate courts to issue written opinions in every case,¹³⁹ declare within what time cases shall be heard,¹⁴⁰ deny to the court the power to issue its mandate until a prescribed period of time after judgment shall have elapsed?¹⁴¹ There are spheres of activity so fundamental and so necessary to a court, so inherent in its very nature as a court, that to divest it of its absolute command within these spheres is to make meaningless the very phrase *judicial power*.

It is significant that even under constitutions which make no express grant of rule-making power to the judiciary and which have been held to sanction extensive and overruling legislative control of court practice and procedure, an area of strict judicial immunity has been consistently recognized.¹⁴² Throughout a long history dominated by what Pound has called "the idea of legislative omniscience,"¹⁴³ court after court has nevertheless declared invalid under the several constitutions legislative enactments said to pass "the limit which separates the legislative from the judicial power"¹⁴⁴ and to constitute a "palpable encroachment upon the independence" of the judiciary.¹⁴⁵ The rationale of these cases is demonstrated by the opinion in *Burton v. Mayer*,¹⁴⁶ a case in which the Kentucky Court of Appeals refused to be bound by a statute which purported to deny it the right to issue its mandate immediately in a case already decided and where delay might well render the judgment futile. Said the court: "The grant of judicial power to the courts carries with it, as a necessary incident, the right to make that power effective in the administration of justice under the Constitution."¹⁴⁷ This theme is expanded upon in other cases which emphasize the fundamental scheme of separation of powers and the corollary proposition that judges may not be inhibited from judging, from the effective resolution of justiciable controversies.¹⁴⁸

139. *Houston v. Williams*, 13 Cal. 24 (1859); *Vaughan v. Harp*, 49 Ark. 160, 4 S.W. 751 (1887).

140. *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63 (1922); *Atchison T. & S.F. Ry. Co. v. Long*, 122 Okla. 86, 251 Pac. 486 (1926).

141. *Burton v. Mayer*, 274 Ky. 263, 118 S.W.2d 547 (1938).

142. COOLEY, *CONSTITUTIONAL LIMITATIONS* 175-94, 356 (8th ed. 1927), and cases cited therein. Cases also collected in *Annot.*, 110 A.L.R. 22, 33-38 (1937).

143. Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 34 (1952).

144. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1872).

145. *Houston v. Williams*, 13 Cal. 24, 25 (1859).

146. 274 Ky. 263, 118 S.W.2d 547 (1938).

147. *Id.* at 266, 118 S.W.2d at 549.

148. *State ex rel. Watson v. Merialdo*, 70 Nev. 322, 329, 268 P.2d 922 (1954), held unconstitutional a statute which conditioned the payment of a judge's salary on the filing of an affidavit by the judge that no matter submitted to him within ninety days remained undecided. The court found it of moment that neither forfeiture

Similarly, in *Atchison T. & S.F. Ry. v. Long*¹⁴⁹ the validity of a statute which provided that in a certain type of tax assessment proceedings the district court should try the cause within ten days after answer was in question. Noting that the effect of such a provision would be to deny to the courts discretion to grant a continuance, whatever the exigencies confronting a particular litigant, and thus perhaps prevent judicial adjudication of a controversy otherwise within the competence of the court, the Supreme Court of Oklahoma held the statute invalid. An act which "in any manner limits or restricts the judicial arm of the government in properly exercising its discretion in discharging the duties imposed upon it by the Constitution . . . is void and must fall. . . . No one will deny that the legislative arm of the government has the power to alter and regulate the procedure in both law and equity matters, but for it to attempt to compel the courts to give a hearing to a particular litigant at a particular time, to the exclusion of others who may have an equal claim upon its attention, strikes a blow at the very foundation of constitutional government."¹⁵⁰ We do not pause to evaluate the results reached in particular cases. What the holdings do suggest is that there is a third realm of judicial activity, neither substantive nor adjective law, a realm of "proceedings

nor diminution was involved; fighting delay in judging with delay in paying was coercive and improper as legislative interference with the judiciary. Similarly, *State ex rel. Kostas v. Johnson*, 224 Ind. 540, 69 N.E.2d 592 (1946), held invalid a legislative attempt to deal with the law's delay, this time by the device of denying a judge jurisdiction over any cause which remained undecided for ninety days and in which an appropriate petition shall have been filed by one of the parties. The opinion notes that legislation "forbidding" courts to hold any issue for longer than a specified period is normally construed as "directory only" and, having no mandatory effect, is constitutionally unobjectionable. Both the *Merialdo* and the *Johnson* cases reason from the premise of constitutional separation of powers. See also cases cited notes 153-55 *infra* and the oft-cited discussion in ROTTSCHAEFER, CONSTITUTIONAL LAW §§ 48-49 (1939).

Particularly striking is *State ex rel. Bushman v. Vandenberg*, 203 Ore. 326, 280 P.2d 344 (1955), in which the court held unconstitutional a statute providing for automatic disqualification of a judge upon application of a party. Finding that, under the terms of the statute, disqualification was at the will of a litigant based on "good cause, bad cause, or no cause at all," *id.* at 337, 280 P.2d at 348, the court held the legislative enactment void as contravening "the principle of the separation of powers." *Id.* at 341, 280 P.2d at 350. See also *McConnell v. State*, 227 Ark. 988, 302 S.W.2d 805 (1957), which held void a rather extreme statute dealing with continuances.

Compare the reasoning in two cases upholding judicial power over appointment of personnel: *In re Appointment of Clerk of Court of Appeals*, 297 S.W.2d 764 (Ky. 1957) and *Noble County Council v. State ex rel. Fifer*, 234 Ind. 172, 125 N.E.2d 709 (1955). In the former case the court noted with concern a public announcement of the Commissioner of Finance which, "according to the press," expressed an intention of withholding payment of the salary of the clerk of court until directed to do so by court order, found it had authority to "make ex parte orders without formally instituting an action to secure the desired relief," promptly did so.

149. 122 Okla. 86, 251 Pac. 486 (1926).

150. *Id.* at 88-89, 251 Pac. at 488-89.

which are so vital to the efficient functioning of a court as to be beyond legislative power.”¹⁵¹ This is the area of minimum functional integrity of the courts, “what is essential to the existence, dignity and functions of the court as a constitutional tribunal and from the very fact that it is a court.”¹⁵² Any statute which moves so far into this realm of judicial affairs as to dictate to a judge how he shall judge¹⁵³ or how he shall comport himself in judging¹⁵⁴ or which seeks to surround the act of judging with hampering conditions¹⁵⁵ clearly offends the constitutional scheme of the separation of powers and will be held invalid.

We need not survey the total range of subjects held to fall within this field, nor do we deal with specialized problems such as admission to the practice of the law and the discipline of persons so admitted, prob-

151. *Ex parte Foshee*, 246 Ala. 604, 607, 21 So. 2d 827, 829 (1945). The statute in this case was not held invalid.

152. Dowling, *The Inherent Power of the Judiciary*, 21 A.B.A.J. 635, 636 (1935). Cf. the test applied in *Ex parte Shenck*, 65 N.C. 353, 368 (1871). Holding valid a statute regulating the disbarment of attorneys, the court writes: “The recent act above referred to does not take away any of the inherent powers of the courts, which are absolutely essential in the administration of justice, and is not such an encroachment upon the rights of the judicial department of the government as to warrant us in declaring it unconstitutional and void.” And see Paul, *The Rule-Making Power of the Courts*, 1 WASH. L. REV. 223, 231 (1926).

153. It has been held that a statute declaring a particular type of document conclusive evidence of the facts to which it attests is void as “an intrusion into the functions of the judicial department.” *Gordon v. Lowry*, 116 Neb. 359, 217 N.W. 610, 611 (1928); *Southern Cotton Oil Co. v. Raines*, 171 Ga. 154, 155 S.E. 484 (1930); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872); *accord*, *State v. Atkinson*, 271 Mo. 28, 195 S.W. 741 (1917). The legislature may not prescribe a period of time after decision within which a mandate may not issue. *Burton v. Mayer*, 274 Ky. 263, 118 S.W.2d 547 (1938). It has also been held that the legislation may not prohibit the directing of a verdict, *Thoe v. Chicago, M. & S.P. Ry. Co.*, 181 Wis. 456, 195 N.W. 407 (1923), nor prescribe by law that it shall be the duty of the court in any case of doubt as to the construction of a statute creating a lien, to so construe it as to give the person claiming the lien the full amount of his claim. *Meyer v. Berlandi*, 39 Minn. 438, 40 N.W. 513 (1888). See opinion of Justice Fairfield in *Burt v. Williams*, 24 Ark. 91, 94 (1863): “A legislative act is an annunciation by the legislative authority that certain results shall follow particular actions or conditions; but the ascertainment of the act or condition and the application of the consequences belong to the courts.” Note that our concern is with the rationale of these cases rather than with the question of whether the correct result has been reached in applying the general principles to individual situations.

154. Some courts have held that the legislature may not by statute require a court to write syllabi to its opinions, *In re Griffiths*, 118 Ind. 83, 20 N.E. 513 (1889); nor compel the court to write opinions in every case, *Houston v. Williams*, 13 Cal. 24 (1859); *Vaughan v. Harp*, 49 Ark. 160, 4 S.W. 751 (1887); *Ocampo v. Cabañgis*, 15 Phil. 626 (1910).

155. The legislature may not fix a time within which a court must hear a cause, *Schario v. State*, 105 Ohio St. 535, 138 N.E. 63 (1922); *Atchison, T. & S.F. Ry. Co. v. Long*, 122 Okla. 86, 251 Pac. 486 (1926), nor appoint nor provide for the appointment of assistants to the justices of the supreme court, *State ex rel. Hovey v. Noble*, 118 Ind. 350, 21 N.E. 244 (1889), nor prescribe for the court what shall constitute a sufficient brief on appeal, *Solimito v. State*, 188 Ind. 170, 122 N.E. 578 (1919); *Epstein v. State*, 190 Ind. 693, 127 N.E. 441, 128 N.E. 353 (1920). Also see authorities cited note 148 *supra*.

lems which may deserve independent constitutional treatment.¹⁵⁶ We recognize that the outer boundaries of this sphere of total judicial autonomy have been difficult to locate with precision.¹⁵⁷ Suffice that such a place of sanctuary exists and that whenever courts have felt themselves too tightly pressed by legislative regulation they have found in the doctrine of judicial independence a large reservoir of integral supremacy. A constitutional draft which expressly reserves ultimate authority over procedure to the legislature need not be feared as sanctioning legislative invasion of this last judicial stronghold. It is beyond procedure. So long as a constitution maintains the fundamental separation of powers this area of functional independence of the judiciary will be preserved in the very grant of the judicial power. And within it the courts remain the vigilant watchdogs of their own freedom.

ADMINISTRATION

Several of the more recently drafted constitutions, however, go further and expressly set aside another large terrain as the exclusive domain of the courts. The New Jersey Constitution of 1947 gives to the supreme court power to "make rules governing the administration of all courts and, subject to law, the practice and procedure in all such courts."¹⁵⁸ Whatever may have been the intent of the drafters concerning supremacy in the field of procedure, it is evident that the grant of power over "administration" is complete and unqualified.¹⁵⁹ The Puerto Rico Constitution,¹⁶⁰ the proposed Illinois Judicial Amendment,¹⁶¹ and perhaps the Alaskan Constitution¹⁶² grant to their respective highest courts a similar authority: power without review in the area of "administration." What these grants represent, apparently, is constitutional recognition of the modern unified court system. They comprehend a power over matters which are not "procedural" in the

156. For varying provisions see N.J. CONST. art. VI, § 2, ¶ 3 (exclusive power in the supreme court over admission to the practice of law and the discipline of persons admitted); PHIL. CONST. art. VIII, § 13 (concurrent jurisdiction with legislative supremacy in the matter of admission to the practice of law).

157. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 179 (8th ed. 1927).

158. N.J. CONST. art. VI, § 2, ¶ 3.

159. See 5 N.J. at 256-57, 74 A.2d at 414-15 (Case, J. concurring); *Committee on the Judiciary Report*, 2 NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947, at 1180 (1951).

160. P.R. CONST. art. V, § 7.

161. *Ill. Const. Proposed Amendment art. VI, § 2*, ILL. ANN. STAT. (Supp. 1957).

162. ALASKA CONST. art. IV, §§ 15, 16. Note the ambiguity in § 15 as to whether all court-made rules, or only those governing practice and procedure, are subject to legislative overrule. Other constitutions containing no such sweeping grant of general "administrative" power specifically provide for the assignment of judges in all courts. CAL. CONST. art. VI, § 1a (1926) (Judicial Council); Md. CONST. art. IV, § 18A (1943) (Chief Justice as "administrative head of the judicial system" subject to rules of the Court of Appeals); Mo. CONST. art. V, § 6; see N.J. CONST. art. VI, § 7, ¶¶ 1, 2.

sense that the latter treat of the procedures involved in bringing a particular case to adjudication, but which are concerned rather with the internal organization of large and complex systems of courts. They establish a scheme whereby the chief justice of a state, or the highest court of the state, is responsible for the efficient, businesslike operations of all state courts, and to this end they vest in that high authority powers which include the assignment of particular judges to specialized duties, the temporary assignment of judges to courts other than their own to equalize work-loads, the assignment of one judge's cases to another judge to equalize dockets.¹⁶³ What it is important to investigate at this point is whether this area of "administration" is rather in the nature of the inviolable sphere of necessary judicial autonomy discussed above or whether it more nearly shares with the area of "procedure" qualities which make desirable a reservation of ultimate legislative authority within it.

What then is "administrative" power? The apparent clarity of the term "administration" is deceptive. How far does it extend? What does it exclude? While the general area of its import is apparent, it is a concept almost infinitely extensible. A monograph published by the Governor's Committee on Preparatory Research for the New Jersey Constitutional Convention of 1947 bears the title: "Judicial Administration." After discussing "Rules of Practice and Procedure", "A Business Office for the Courts", "Judicial Control over Non-Judicial Officers Concerned with the Administration of Justice", and "The Judicial Council", its author concludes, "a discussion of judicial administration is not complete without consideration of the rules of grand and petit juries, the prosecutor's office, the desirability of public defenders, probation departments, specialized courts to deal with small causes, domestic relations, juvenile offenders and the like, the coordination of the work of courts and other governmental agencies, as for example police courts and the Commissioner of Motor Vehicles, and numerous other topics. Few, if any of these subjects are proper for treatment in a Constitution. The salient changes in judicial administration suitable and eligible for constitutional consideration are the items which have been dealt with under the main headings, to which this report is accordingly confined."¹⁶⁴ It will be noted that although

163. VANDERBILT, *MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION* 34-35 (1949).

164. Schnitzer, *Judicial Administration*, in N.J. GOVERNOR'S COMM. ON PREPARATORY RESEARCH FOR THE NEW JERSEY CONSTITUTIONAL CONVENTION, *MONOGRAPHS*, F VII 10-11 (1947). For the range of subject matters sometimes included in various uses of the word "administration" see also ABA, *THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE* 22, 28-29 (3d ed. 1952); Burton, "Judging Is Also Administration": *An Appreciation of Constructive Leadership*, 33 A.B.A.J. 1099 (1947).

the report is so confined, the constitutional grant in terms is in no way similarly confined. "Administration of the courts" cannot mean merely the power of assignment of judges, for this power is specifically vested in the Chief Justice by another section of the Judicial Article.¹⁶⁵ It cannot mean merely the power to maintain a general business office for the courts; this too is specifically provided elsewhere.¹⁶⁶ But the problem is not merely one of the word. At its narrowest plausible definition "administration" remains a field so wide that to entrust it to the exclusive power of the judiciary is palpably unwise. The operative General Rules of Administration of the Supreme Court of New Jersey provide that the Supreme Court, the Superior Court, the County Courts and the District Courts shall sit from 10 A.M. to 1 P.M. and from 2 P.M. to 4 P.M.¹⁶⁷ They declare upon what days the court shall sit,¹⁶⁸ and establish the period of summer vacation of all courts.¹⁶⁹ If it should become essential in the public interest that a court be available in the evening, should not the legislature have power to make this change? If the judicially favored schedule of long summer recess should prove unsatisfactory to the public needs, should not the legislature have power to override judicial recalcitrance and provide for a summer-sitting court? It is not suggested that the legislature should, or would, accept an active supervisory role in court affairs, require weekly reports from judges, declare that upon this particular day courts shall remain open until five. Such detailed regulation might well be rejected by the courts as an encroachment upon judicial independence, an invasion of the realm of functional integrity of the courts.¹⁷⁰ Clearly a balance must be struck; and the courts will not hesitate to invoke the separation of powers doctrine to maintain their own living space. But independence requires no such immunity as would remove from the legislature all power to adjust the state courts to the important needs of the people of the state. The New Jersey General Rules of Administration now provide that motions, conferences and pretrial hearings shall be held in open court,¹⁷¹ that judge's chambers shall, if possible, be in the courthouses,¹⁷² that the clerks of

165. N.J. CONST. art. VI, § 7, ¶ 2.

166. N.J. CONST. art. VI, § 7, ¶ 1.

167. N.J. RULE 1:28-1.

168. N.J. RULE 1:28-2.

169. N.J. RULE 1:28-4.

170. We view as insubstantial the possible argument that an affirmative grant of legislative supremacy over "administration" operates to override the grant of judicial power which assures the courts an absolute independence within the realm necessary to their judicial functioning. In the ultimate, it will be for the courts to establish the boundaries of their necessary, integral immunity.

171. N.J. RULE 1:28-6.

172. N.J. RULE 1:28-7.

court shall, in all cases which have been pending for six months without proceedings, give notice of a motion by the court to dismiss for want of prosecution.¹⁷³ These rules are no doubt excellent. But they imply that the court might, with equal freedom from legislative review, order that all such hearings be heard in chambers, that the judge's chambers shall not be in the courthouse, that a court motion for dismissal as inactive shall be noticed after six weeks. At the very least it must be admitted that somewhere within the expansive confines of "administration" there lie problems whose solutions require decisions of significant public policy. Such decisions, although they are to be made in the first instance by the court, should certainly be subject to ultimate review by the politically responsible members of the legislature.¹⁷⁴

This is not to argue that the courts should have no power of self-administration. On the contrary, the astonishing record of judicial reform in New Jersey over the past ten years¹⁷⁵ gives persuasive evidence of the immense benefits to be gained from a unified, centralized and streamlined court system. The application to the judicial arm of "principles of business management"¹⁷⁶ has paid rich dividends of rapid and efficient justice. It is as necessary to an effective system of courts that it control its own administration as that it control its own practice and procedure.¹⁷⁷ We must not deprive it of that power. But as with practice and procedure, we are not forced to elect between the equally undesirable alternatives of absolute judicial control and absolute legislative control. There is a middle scheme that holds out all of the advantages of judicial autonomy while severely minimizing its collateral dangers. This is the scheme of concurrent jurisdiction: granting to the courts full authority of initiative self-regulation, reserving to the legislature an ultimate voice to curb abuse.¹⁷⁸ In fact, just as in "pro-

173. N.J. RULE 1:30-3.

174. Supreme court judges in New Jersey are appointed for an initial seven year term and upon reappointment hold their offices during good behavior. N.J. CONST. art. VI, § 6, ¶¶ 1, 3. In Pennsylvania judges of the supreme court serve for twenty-one years and are ineligible for reelection. PA. CONST. art. V, § 2.

175. Brennan, *After Eight Years: New Jersey Judicial Reform*, 43 A.B.A.J. 499 (1957); Karcher, *New Jersey Streamlines Her Courts*, 40 A.B.A.J. 759 (1954); Vanderbilt, *Our New Judicial Establishment; The Record of the First Year*, 4 RUTGERS L. REV. 353 (1950); Vanderbilt, *Record of the New Jersey Courts in the Sixth Year*, 9 RUTGERS L. REV. 489 (1955).

176. Brennan, *Does Business Have a Role in Improving Judicial Administration?*, 28 PA. B.A.Q. 238 (1957).

177. *Section of Judicial Administration, Committee on Judicial Administration, Report*, 63 A.B.A. REP. 530, 532 (1938). Whether a supreme court charged with responsibility for the administration of the judicial system should have the power to fix the number of judges is an interesting question which need not be resolved here.

178. 1 STORY, CONSTITUTION 393 (5th ed. 1891): "But when we speak of a separation of the three great departments of government and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and

cedure," the very difficulty of definition and categorization of the "administrative" realm argues for a scheme of concurrent jurisdiction. Where shadowy boundaries are used to delineate spheres of exclusive power, litigation is common, mistakes inevitable and irrevocable. Courts may overleap themselves without recall and make final determinations of policy best left to the legislature. Or, from fear of just such overleap, the courts may altogether decline to act in questionable border areas. But where power is concurrent, the difficulty of drawing boundary lines becomes less disastrous. If "procedure" and "administration" are both to be spheres wherein the court and legislature have a common authority, no distinction need be made between them. And even the boundary which separates this concurrent realm from the realm of "substance" becomes less hazardous where the only difference in terrain is that on one side the terms under which legislative power is to be available are somewhat different than the terms which surround the same power on the other side. So long as legislative review is possible within the area of court power, the court will be less hesitant in giving wide and effective sweep to its own power. And should it err, the legislature holds a higher power of redress.

But the mere words *concurrent jurisdiction* are no talismanic phrase to solve all problems. A final, fundamental question remains. Ultimate power by its exercise becomes immediate. "Power . . . is of an encroaching nature."¹⁷⁹ How are we to insure the maintenance of the delicate balance of power that we have established?

THE CONDITIONS OF LEGISLATIVE INTERVENTION

Positing faithful adherence to a constitutional scheme of judicial initiative there should be little risk of an outright legislative power-grab. That such gross usurpation of authority is not an altogether impossible contingency, however, is attested to by the history of New Jersey under its current Judicial Article.¹⁸⁰ But the real danger is

distinct and have no common link of connection or dependence, the one upon the other in the slightest degree. The true meaning is that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments."

179. *Id.* at 396.

180. Vanderbilt, C.J., records the incident in *Winberry v. Salisbury*, 5 N.J. 240, 250, 74 A.2d 406, 411 (1950): "Notwithstanding the rejection of the language of the proposed 1944 Constitution which would have emasculated the rule-making power of the Supreme Court, in 1948 the Legislature passed S-58, section two of which provided in part that the Rules promulgated by the Supreme Court, effective September 15, 1948, 'shall regulate practice and procedure in the courts established by the Constitution until modified, altered, or abrogated by law.' The bill was vetoed by the Governor who returned it to the Legislature on October 30, 1948, stating that in his opinion this provision was unconstitutional, 'for it would, if effective, completely deprive the Supreme Court of any further rule-making authority . . .,' 71 N.J.L.J.

that the legislature will resume control by slow encroachment. Piece-meal legislative tinkering within the framework of court rule might be ultimately more disastrous even than immediate return to statutory regulation. The continuing exercise of dual powers within the procedural realm would allow at best an unstable symmetry of system. We have sought to assure ourselves the advantage of professional wisdom and experience in the formulation of our rules of practice. If an ill-advised and unconsidered legislative whim can at a stroke refute the whole of this wisdom and experience, we have in fact gained very little.¹⁸¹ But turn the adjectives around. Even were the court's initial rule unsound and the legislative act the very soul of wisdom, still a too-easy legislative intervention frustrates the whole end of judicial rule-making. We have seen that a cardinal virtue of the rule of court is its ready flexibility and immediate responsiveness to current problems, its ability to profit from the latest lessons of judicial empirical science and to move quickly in self-revision. If the court has made a mistake, it will be the first to know,¹⁸² and under the rule-making scheme has ample opportunity for rapid change. If after this first alteration the experience of the next ten, or of twenty, years should produce a better system, it can again adapt. But once the legislature enters the field, the area covered by this intervention is fixed with the force of statute.¹⁸³ It cannot again be altered by the court, but must await the

389 (Nov. 4, 1948).” For discussion and suggestion that the threat of such wholesale legislative invasion may have influenced the *Winberry* decision, see Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 249 (1951). See also note 138 *supra*.

181. Pound quotes a speaker at a public hearing before the Judiciary Committee of the Senate of New Jersey as reporting: “Under the old system, when the legislature had the primary power of rule making, every Monday, when the legislature was in session, the hopper would be filled with bills by various assemblymen—young lawyers—who happened to lose a case and in whose judgment it was brought about because of deficiency in some rule of procedure. Immediately the hopper would receive some bill intended to cure that.” Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 44 (1952). For the unfortunate Nebraska experience see note 36 *supra*. In Colorado the legislature has seen fit to revoke the power of the court to make one particular, unpopular rule, that relating to comment on the evidence. See note 7 *supra*.

Contrast the restraint of Congress after the adoption of the Federal Rules. “A search has turned up in the rules area only a single statute, one of no far-reaching import. Congress has seemed literally uninterested in all such proposals, and committee chairmen have quite regularly turned them over to the Court or the Advisory Committee for final attention. The fear of recurrence of legislative tinkering has been a profound stimulus for the presently contemplated reconstitution of the Advisory Committee.” Clark, *Two Decades of the Federal Civil Rules*, 58 COLUM. L. REV. 435, 443 (1958).

182. For the role which a Judicial Council should play in keeping the court informed see Clark, *supra* note 181, at 443-44.

183. The alternative of holding that the court may promptly promulgate a further rule which shall supersede the statute until the legislature act again (see the discussion of this possibility developing in Missouri, *supra* note 130) was wisely rejected in *Winberry*. See note 131 *supra* and text at that point. Compare the discussion in Kaplan & Greene, *supra* note 180, at 248.

superior pleasure of the legislature. However wise and immediately successful the statute at the time of its enactment, it is inelastic. Over the course of years this point of petrification in the viable body of procedure may be expected to grow as painful as a gallstone.

The life of constitutions is a long one. Statutes accumulate. If the legislature is given unqualified power to overrule the courts on matters of procedure there may well come a time, in the course of that long life, when the jurisdiction will arrive at what is in effect a return to the rigidities of code procedure. To affirm the power of self-regulation of the courts and to restrict the dangers of statutory whim and statutory petrification, qualifications must be placed upon the legislative supremacy. It is important that the legislature have power of review. But it is equally important that that power be exercised only upon due deliberation and that, once exercised, its products shall be subject to periodic reappraisal.

Three basic safeguards should suffice to secure these ends. The first is that an enactment which would effect the repeal or amendment of any existing rule of court or which would establish a new procedural regulation, whether or not inconsistent with existing rules, should be required to receive some portion more than a simple majority vote in the legislature. In this we have the precedent of the new Alaskan Constitution which provides that court-made rules may be "changed by the legislature by two-thirds vote of the members elected to each house."¹⁸⁴ The effect of such provision is to discourage rash and too-facile intervention in the business of the courts. Legislative attention is focused upon a bill proposing to regulate court procedure and substantial legislative support is required for its passage. This is in accord with the fundamental proposition that the place of the legislature in the field of judicial administration and procedure should be that of a reserved ultimate reviewing power, not that of a frequently-intervening supervisory force. On the whole, the courts can be expected to manage their own business as well as it can be managed. If in some particular they do not, they should have a first chance to experiment and change. Recurrent legislative overhaul of mere mechanics is not in order. It is only in the case of a persistent and flagrantly unpopular course of judicial conduct, a case in which the courts have made an important decision of public policy and made it in a way that substantially opposes the strong sense of popular opinion, that appeal to overruling legislative authority is needed. In such a case public disapproval of judiciary policy should express itself in a strong preponder-

184. See note 36 *supra*.

ance of the legislative vote. Two-thirds of the legislators selected to each house should concur upon the need for intervention before the legislature moves to intervene.¹⁸⁵

Second, before the legislature enters the area of court procedure it should understand the views of the court. This could be assured constitutionally by a provision that, in consideration of a bill proposing an enactment to regulate judicial administration on procedure, the chief justice of the supreme court shall be given an opportunity to be heard. The voice of the chief justice will impress upon the legislators the importance of the enactment under consideration. It will be able to appraise for the voting legislators the effect of the proposed alteration upon the whole judicial scheme of business and to approve or disapprove with the influence of authority. This in itself may suffice to put the matter to rest. If, however, the legislative scheme seems good, the court, once brought to consider it, may choose itself to adopt the proposal by rule of court and altogether obviate the need for legislative action. If the words of the proposal embody some unclarity, the court, with its more practiced eye and experienced understanding of the concrete situations in which question may be expected to arise, can request a clearer exposition of legislative intent and by so much reduce the risk of multiplying litigation of procedure. And if there occurs a real conflict between judicial and legislative opinion, compromise is possible before enactment. The precise manner in which the chief justice shall communicate the views of his court must be left to the convenience of court and legislature. But that he shall in some manner be heard on issues of concern to the court is of such primary importance as to demand express constitutional provision.

Third, provision should be made for the automatic termination of effect of all such enactments, so that the areas frozen down by legislative intervention may again become, within a reasonable time, accessible to alteration by the courts. To achieve this essential flexibility of renovation a Judicial Article should require that any statute governing court procedure or administration shall have the force and effect of statute only during a period of six years¹⁸⁶ immediately following the date of

185. This is not intended, nor should it operate, to deny the governor a right of veto. The added influence of the chief executive, and the further reflection required by reconsideration may prove significant. Cf. the role of the Governor in the New Jersey experience, note 180 *supra*.

As is clear from the text, the legislature may act to change a rule of court or it may intervene to add a provision dealing with a problem not specifically covered by any court rule, or it may take the initiative and deal with a larger area concerning which no provisions at all have been formulated by the court as, *e.g.*, execution of judgments or evidence. The special conditions, including the two-thirds rule, should apply equally in all of the situations mentioned.

186. Where a legislature meets only once every two years, a shorter period would not appear appropriate and a longer period involves risks of rigidity.

its taking effect and shall, at the expiration of those six years, cease to have the effect of statute, but shall continue in effect as a rule of court subject to repeal or amendment by the court or by two-thirds vote of the members elected to each house. During the six years of statutory effect, the enactment may of course be repealed, altered or reenacted by the legislature in the same manner, and any amendment or reenactment will then be immune from court alteration for a period of six years from the time it takes effect.¹⁸⁷ In establishing such a pattern of limitation, a merry-go-round of regimes is not to be feared. Over a period of six years, the courts will have thoroughly tested out any legislative plan of procedure, established its merits, learned to live with its deficiencies. If at the end of that time, the court feels that there is still a strong preponderance of legislative support for the plan, the court will no doubt consider seriously whether to defer to the legislative will rather than run the risk of overturning the procedural scheme only to have it turned back up again by legislative override. Deference is not unlikely. Thus the legislature remains influential even in inaction. The very existence of potential legislative veto forces the courts themselves to regard problems of procedure from the legislative as well as from the judicial viewpoint. But if the legislative plan has seriously hampered the courts, the court will change it, and the chief justice will be prepared to argue convincingly to the legislature the necessity of such change. In the light of experience, the legislature may now be ready to surrender its own scheme and to accept that proposed by the court, or at least to consider compromise. Or if the plan is one which a strong majority of the legislators deem too clearly dictated by public policy to compromise, the legislature may reenact it every few years and thus entirely forestall return to court rule. But such reenactment will not go without reappraisal. Positive action by two-thirds of the legislators elected to each house is again required, and the chief justice must be heard. The legislature must reappraise its own enactments upon pain of having the court reappraise them. Any area of procedure "frozen down" under this scheme will in the long run be frozen not by inertia, but by virtue of a strong continuing support among the elected representatives of the people. This is as it should be. Procedure, neither unstable nor over-rigid, remains responsive to the urges of both court and legislature.

187. Where an amendment serves only to make minor changes in a procedural statute it should not necessarily be held to extend the effective period of the original statute beyond the first six year period. It will be for the court to determine, in the light of the context of legislative history as well as the form by which the change was effected, whether the second act constitutes a reaffirmation of the basic legislative policy of the first.

CONCLUSION

The whole aim of the balance of powers suggested in this paper is the creation of a scheme whereby the courts may maintain an effective, flexible and thorough-going control over their own administration and procedure, with the possibility of ultimate legislative review in cases where important decisions of public policy are necessarily involved. This is the aim of safe efficiency: immediately practical, fundamentally democratic. It is intended to encompass all matters traditionally considered "adjective law", all pleading, pretrial, trial and post-trial mechanisms, all evidence, including presumptions and privilege, and the whole of the internal organization of the modern court system. Such a balance of powers might be established, we believe, by a constitutional provision essentially as follows:

1. *The supreme court shall make rules governing the administration, practice and procedure, including evidence, of all courts in the state.*
2. *Such rules, or any statute enacted under this paragraph, may be repealed, amended or supplemented by the legislature by two-thirds vote of the members elected to each house, and any such enactment shall have the force and effect of statute during the six years next following the date of its taking effect and shall thereafter have effect as rule of court until repealed or amended by the supreme court or by the legislature.*
3. *In consideration of any bill proposing an enactment under this section, the chief justice of the state shall be given opportunity to be heard.*