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Many state constitutions specifically grant the judiciary the power to regulate practice and procedure within the court system.[1] May the legislature assume all or part of this power by way of state constitutional amendment, or do other sections of the federal or state constitution, including the separation of powers provision, provide an independent source of authority for the court system to retain primacy in this area? While control over the court's rulemaking authority has been a source of conflict between the legislature and the judiciary in a number of states for many years, a lack of a uniform, national body of case law exists defining the inherent powers of an independent state judiciary to control practice and procedure in its system. Commentators argue that the failure to specifically define the inherent functions will result in continuing conflict between the legislative branch and the judiciary, and constitute a threat to the independence of the judiciary. Professor Erwin Chemerinsky described the problem in stating:

> When it comes to judicial independence, the jurisprudence on separation of powers and due process is scarce. There are scattered opinions, but little in the way of sustained development of analysis. There really needs to be, in your opinions and our law review articles, development of the idea when legislative actions interfere with the essential functions of the courts. What does due process require in terms of access to the courts? The more your opinions can develop this, and the more our law review articles discuss this, the better the courts can be protected from the statutory threat.[2]

Does the threat of legislative usurpation of the court's rulemaking authority justify a broader assertion of the court's inherent authority to control practice and procedure within the judicial branch? The judiciary faces serious considerations in determining whether to aggressively identify and assert inherent authority in this area. This article explores those considerations and this important issue.

The Florida Constitution grants the supreme court exclusive power

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1. *See, e.g.*, ARIZ. CONST. art. VI, § 5; FLA. CONST. art. V, § 2(a); PA. CONST. art. V, § 10(C).

2. Erwin Chemerinsky, *Closing Remarks at 1998 Forum For State Court Judges, in* ASSAULTS ON THE JUDICIARY: ATTACKING "THE GREAT BULWARK OF PUBLIC LIBERTY" 139 (Rosco Pound Foundation ed., 1999).

to "adopt rules for practice and procedure in courts."[3] The Florida Legislature may repeal — but not amend — court rules by a super majority vote of both houses.[4] In January 2000, the Florida Legislature passed the Death Penalty Reform Act of 2000 (DPRA)[5] that reduced the time period for filing collateral postconviction motions and also dealt with the manner in which public records requests by death row inmates would be handled.[6]

The Supreme Court of Florida addressed the constitutionality of this legislation in *Allen v. Butterworth*.[7] In *Allen*, the court held that the provisions dealing with time limitations for postconviction motions, as well as the section addressing public records requests, violated the separation of powers provision of the Florida Constitution.[8] In reaching this conclusion, the court determined that the provisions were a legislative encroachment on the exclusive rulemaking power of the court.[9] This decision rests on the court's expressed rulemaking authority derived from the Florida Constitution and the due process rights of the individual defendant.[10]

During the next legislative session, an amendment to the Florida Constitution was proposed which, among other things, allowed rules of court to be modified or repealed by majority vote of the legislature.[11] The proposal also gave the legislature the right to adopt time limits related to challenges filed by deathrow inmates.[12] Although this proposal did not ultimately pass, it raised serious issues concerning the extent to which the Florida Constitution could or should be amended to remove the court from its primary role in managing operations and procedures of the judiciary.

Within months, the court was again forced to consider a statute prescribing the operation of the judiciary. In *Jackson v. Florida Department of Corrections*,[13] the court struck down a statute requiring inmates filing civil suits and requesting indigency status to file copies of previous civil litigation that they had instituted.[14] The court determined the

3. FLA. CONST. art. V, § 2(a).
4. *Id.*
5. Act effective Jan. 14, 2000, ch. 00-3, 2000 Fla. Laws 4-23.
6. *Id.*
7. 756 So. 2d 52 (Fla. 2000).
8. *Id.* at 59-66.
9. *Id.*
10. *Id.* at 54 (citing FLA. CONST. art. V, § 2(a)).
11. FLA. H. JOUR. 1031 (Reg. Sess. 2000) (proposed FLA. CONST. art. V, § 2(a)); FLA. S. JOUR. 2224 (Reg. Sess. 2000) (proposed FLA. CONST. art. V, § 2(a)).
12. *Id.*
13. 790 So. 2d 381 (Fla. 2001).
14. *Id.* at 386.

statute to be an invalid intrusion on the court's rulemaking power and that it interfered with the ability of the judiciary to operate due to the large amount of copying required and the amount of paper generated.[15] Thus, the statute also violated separation of powers provisions of the Florida Constitution.

The emphasis on the court's ability to function, as seen in *Jackson*, is an apparent recognition of an independent source of powers for the court's rulemaking authority. This independent source of authority may arise from the concept of separation of powers or from the necessity of a court having those powers to enable it to perform essential functions. If so, it is a vital recognition that an independent court system has inherent powers within the area of rulemaking which cannot be usurped.

The potential for conflict over procedural rulemaking at the state level is not unique to Florida or death penalty issues. For example, in 1987, the Texas Supreme Court amended its civil procedure rules to expressly overrule legislation passed a month earlier to curtail a perceived problem of frivolous pleadings.[16]

The extent to which the legislature may intrude on the operations of an independent court system is also being addressed at the federal level. In *French v. Duckworth*,[17] the Seventh Circuit found the automatic stay provisions[18] of the Federal Prison Litigation Reform Act unconstitutional.[19] According to the circuit court, the provision violated constitutional separation of powers by legislatively suspending final judgments of Article III courts because this interfered with the exclusive power of the federal judiciary.[20] The Supreme Court overturned the Seventh Circuit decision in *Miller v. French*,[21] but reconfirmed that if Congress had reopened or suspended an existing final judgment, the separation of powers provisions would be violated.[22]

As to the Florida dilemma, new Florida Supreme Court decisions must define the scope of the separation of powers authority identified in *Jackson*. This will be vital in determining ultimate control over practice and procedure in the Florida court system. *Jackson*, however, provides little guidance.[23] The scope of the separation of powers authority identi-

15. *Id.*

16. Bruce L. Dean, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 140-42 (1988) (footnotes and citations omitted).

17. 178 F.3d 437 (7th Cir. 1999).

18. 18 U.S.C. § 3626(e)(2).

19. *French*, 178 F.3d at 446.

20. *Id.*

21. 530 U.S. 327 (2000).

22. *Id.* at 346.

23. The supreme court held that section 57.085(7), *Florida Statutes*, was unconstitutional "as

fied in *Jackson* may be interpreted in three ways: (1) a separation of powers violation exists only when the legislature intrudes on the court's expressed constitutional powers to adopt rules for practice and procedure for its system and therefore, the separation of powers provision does not necessarily constitute a separate source of authority for the court to adopt rules; (2) the separation of powers provision is an independent source of the court's power to adopt certain rules for performing judicial functions, but not all procedural rules will necessarily involve the inherent powers of the court; or (3) the separation of powers provision encompasses the entire rulemaking authority relating to rules for practice and procedure in the court system because the power to adopt the entire body of procedural rules is essential to an independent judiciary.

This article will generally explore the pertinent considerations that faces the Florida judiciary in determining the inherent authority to adopt rules of practice and procedure for the Florida courts. Specifically, this article will: (1) discuss the historical background concerning the rulemaking issue; (2) discuss commentaries on judicial control over the rulemaking process; (3) define and determine whether state courts have inherent rulemaking powers; (4) explore if such powers in fact do exist, why they have not been more thoroughly discussed in law review articles and case law; (5) discuss what guidance federal case law provides in identifying these powers; (6) discuss whether differentiating the procedural from the substantive is important in determining the inherent powers necessary to regulate practice and procedure in the court system; (7) make observations concerning the choices facing the Florida court system in how to approach future cases involving inherent power; (8) discuss examples of inherent powers in other states and Florida; and (9) discuss criteria for identifying inherent power.

I. HISTORICAL BACKGROUND

A. *Common Law England*

Prior to this century, it was widely thought that legislatures had ultimate control over rulemaking. Courts, however, were granted significant or concurrent power to make rules, either through legislative dele-

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a violation of separation of powers and as a usurpation of our exclusive rule making authority." Jackson v. Dep't of Corr., 790 So.2d 381, (Fla. 2001). There is, however, little discussion concerning the scope of the separation of powers provision. Much of the discussion concerns whether the statute is procedural or substantive. Concern is raised regarding the cumbersome procedure imposed by the legislature and its effect on the operation of the judiciary. This discussion appears to relate to the inherent power of the court, a separation of powers issue.

gation or by recognition of their inherent authority as a court.[24] Roscoe Pound, however, took issue with the idea that ultimate legislative control over court rules constitutes a common law tradition. He argued that this power arose in the middle of the nineteenth century during a period of legislative omnipotence.[25] Pound stated that, "[t]he common law courts and the Court of Chancery in England had regularly exercised the rule-making power down to the Revolution, and it was not until the New York Code of Civil Procedure of 1848 that legislative regulation of every detail became the fashion."[26] He further argued that the code system had "lamentably failed" because of minute meddling and lack of systematic planning.[27] Additionally, Pound echoed Cardozo's view that. "The legislature is informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend."[28]

B. *Colonial Courts to 1900*

While Pound makes a valid argument regarding the common law tradition in England, little evidence exists of a strong tradition of the separation of powers in colonial courts.[29] For example, in Connecticut, the court was merely an offshoot of the legislature and had previously been part of the executive branch.[30] The situations in other American colonies were similar.[31] Court independence became a theme of the

24. A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 3 (1958) (footnotes omitted).

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

26. *Id.* at 35 n.18.

27. *Id.* at 31 (footnote omitted) (quoting REPORT OF THE BOARD OF STATUTORY CONSTRUCTION OF THE STATE OF NEW YORK, A PLAN FOR SIMPLIFICATION OF CIVIL PRACTICE 29 (1912)).

28. *Id.* at 32 (quoting Benjamin A. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113-14 (1921)).

29. *See, e.g.*, Richard S. Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 5-7 (1975).

30. *Id.* at 5.

31. *See* Peter M. Shane, *Interbranch Accountability In State Government and the Constitutional Requirements of Judicial Independence*, 61 LAW & CONTEMP. PROBS. 21, 27-28 (1998). Shane stated:

> When reorganizing government just before the Revolution, the predominant concern of Americans had been freeing legislative and judicial power from executive control. The judiciary was not yet clearly conceptualized as a distinct branch of government. Rather, the administration of justice was commonly conflated with the executive power. The power of adjudication implicated the Crown fully because colonial judges served at the King's pleasure and the Privy Council was the court of last resort for the colonist. When the colonies turned to the first wave of new

Framers of the United States Constitution.[32] Nevertheless, the period from the mid 1800's to the early 1900's is considered to be one of legislative dominance in the area of judicial rulemaking.

C. *Twentieth Century Trends*

During the early 20th century, a push was led by Roscoe Pound and others to transfer ultimate rulemaking authority to the judiciary. Since at least 1945, the overwhelming trend has been to grant specific constitutional authority for rulemaking to the judiciary.[33] Where this power has not been specifically extended by language in the state or federal constitution, courts have claimed such power as part of their inherent authority or through specific statutory delegation.[34]

D. *Florida Examples*

Historically, Florida has followed the national trend. Prior to 1957, there was no specific grant of rulemaking authority in the Florida Constitution. At least one commentator described this period as one in which the court made no claim of inherent authority over procedural rulemaking and was further characterized by recurrent statutory delegations of rulemaking authority to the courts.[35] Another writer described this era as one of legislative control over rulemaking.[36] While these commentators discuss this period as one of legislative primacy, it is unclear how far the Florida Supreme Court would have allowed the legislature to assume a dominant or exclusive role in rulemaking. While the court recognized the power of the legislature to adopt rules, it never specifically conceded that the Florida Legislature had the right to strip the court of its inherent powers.[37] For example, in *Humphries v. Hester & Stinson Lumber Company*,[38] the Florida Supreme Court noted that it

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> constitutions, their focus was on curbing the magistracy and establishing the broad scope of legislative power. Judges were freed from the power of the governor, but subjected in substantial manner to legislative supervision.

Id. For a contrary position, see Agran v. Checker Taxi Co., 105 N.E.2d 713, 715 (Ill. 1952) ("Prior to the adoption of the United States Constitution, courts exercised complete power in the control of their own procedure. . . The system became modified in this country by the adoption of statues, whereby the legislature usurped a part of the rulemaking.").

32. THE FEDERALIST No. 51 (James Madison).

33. Levin & Amsterdam, *supra* note 24, at 5-6; *see also* Pound, *supra* note 25, at 33.

34. *See* Peter F. Ruben, *Illinois Supreme Court's Disciplinary Authority Exclusive at Last*, 83 ILL. B.J. 410 (1995).

35. Ernest Means, *The Power to Regulate Practice and Procedure in Florida Courts*, 32 U. FLA. L. REV. 442, 445-46 (1980).

36. Roger A. Silver, *The Inherent Power of the Florida Courts*, 39 U. MIAMI L. REV. 257 (1985).

37. *See id.* at 275 n.124-27.

38. 103 Fla. 1079, 141 So. 749 (1932).

"has always been clothed with inherent power to make rules for its governance."[39] Other courts discussed limitation on the legislative assertion of power during this period. In 1952, the Illinois Supreme Court stated: "This departure from the time honored methods of rulemaking has not left the legislature without limitations in this field. The General Assembly has power to enact laws governing judicial practice only where they do not unduly infringe upon the inherent powers of the judiciary."[40] As early as 1859, the California Supreme Court stated that legislative control over the judiciary in the face of the constitutional judicial mandate is intolerable.[41]

In the post World War II era, Florida, like many other states, specifically granted rulemaking power to the judiciary by constitutional provisions. From July 1, 1957 to 1973, article V, section 3 of the Florida Constitution read in pertinent part: "[T]he practice and procedure in all courts shall be governed by rules adopted by the supreme court."[42] On January 1, 1973, the present language in article V, section 2 of the Florida Constitution became effective.[43]

Thus, the appropriate allocation of the power to make court rules has been a topic of concern on both the national level and in Florida for a number of years.[44] One commentator described the struggle for power in this area as having "a roller-coaster history as to which branch of government, legislative or judicial, is empowered to establish rules for pleading practice and procedure in the courts."[45]

II. COMMENTATORS AND THE SEARCH FOR GENERAL THEORIES

A. *Recognition of Mixed Roles*

Many commentators welcomed the expanding role of the judiciary in the rulemaking process,[46] while others argued that a continued role

39. *Id.* at 749, 1079. *See also* Sydney v. Auburndale Constr. Corp., 96 Fla. 688, 689, 119 So. 128, 128-29 (1928) (stating that the power to make its own rules for the conduct of its own business is an inherent power of the court).

40. Agran v. Checker Taxi Co., 105 N.E.2d 713, 715 (Ill. 1952).

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

42. FLA. CONST. art. V, § 3 (1968).

43. *See* Means, *supra* note 35, at 444. *See also* William L. Earl, *The Rule Making Power of the Supreme Court: The Twilight Zone between Substance and Procedure*, 24 U. FLA. L. REV. 87 (1971).

44. Levin & Amsterdam, *supra* note 24; Means, *supra* note 35, at 444-52; Jeffrey A. Parness, *The Legislative Roles in Florida's Judicial Rulemaking*, 33 U. FLA. L. REV. 359 (1981).

45. FELIX F. STUMPF, INHERENT POWERS OF THE COURTS: SWORD AND SHIELD OF THE JUDICIARY 17 (1994).

46. *See, e.g.*, Linda S. Mullinex, *Judicial Power and the Enabling Act*, 46 MERCER L. REV. 733 (1995); Roscoe Pound, *The Rulemaking Powers of the Court*, 12 A.B.A. J. 599 (1926); John

for the legislature was essential.[47] One commentator summarized the arguments for and against judicial rulemaking as follows:

> Reasons advanced supporting judicial rule making power include: (1) judicial immunity from political pressures; (2) judicial interest, expertise, and familiarity with procedural problems; (3) avoidance of legislative delay to enact needed procedural changes; (4) public expectation of judicial accountability for the efficient administration of justice; (5) willingness to constantly review procedural methods; (6) ability to make minor changes in individual rules without embarking on wholesale procedural or judicial reform; (7) less cumbersome enactment process; (8) decreased litigation resulting from application of court-made rules over legislative codes because of legislative inability to clarify ambiguity once rules are promulgated; and (9) consistent interpretation of rules by the same body who created them. In opposition, arguments advance favoring legislative rule-making include: (1) judicial resistance to change; (2) judges' bias favoring their own preferences; (3) judges who are out of touch with the needs of litigants and members of the bar; (4) the perception that the legislature better reflects the public will; and (5) concern that judicial rulemaking will restrict or create substantive rights.[48]

Even the authors that argue for concurrent roles for the judiciary and the legislature in the area of procedural rulemaking recognize that there are certain powers and functions which must remain within the ultimate control of the court:

> What the holdings do suggest is that there is a third realm of judicial activity, neither substantive nor adjective law, a realm of "proceedings which are so vital to the efficient functioning of a court as to be beyond legislative power." 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."[49]

B. *Florida Theories*

Commentators in Florida who have supported greater legislative involvement in the rulemaking process also recognize certain limitations on legislative encroachment on the inherent authority of the judiciary:

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

47. *See, e.g.*, Levin & Amsterdam, *supra* note 24, at 36, 42.

48. Dean, *supra* note 16, at 149-50 (citation omitted). *See also* Kenneth S. Gallant, *Judicial Rule Making, Absent Legislative Review; The Limits of Separation of Powers*, 38 OKLA. L. REV. 447 (1985) (criticizing the theory that rulemaking can safely be entrusted to courts without fear that they will invade the legislative domain).

49. Levin & Amsterdam, *supra* note 24, at 31-32 (internal citations omitted).

> Finally, if concern over the possibility of legislative tampering is not completely assuaged by such considerations, additional assurance may be derived from the realization that the court could probably continue to protect its procedures against legislative encroachment to the extent supported by a limited claim of inherent rulemaking authority. The Florida court has never been particularly aggressive in claiming such authority, possibly because it has for so long been the recipient of generous delegations of rulemaking authority, either by statute or the constitution. However, the court has never completely renounced it. Indeed, in the very opinion by which it disclaimed possessing the measure of inherent authority that would enable it to adopt a wholesale revision of the rules of civil procedure in the face of existing statutory regulations, the court also asserted that statutes regulating procedure would not be respected by the court "if they hamper the administration of justice."
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> To the extent, therefore, that a rule of the court related solely to the orderly dispatch of judicial business and did not infringe upon, change, or affect any substantive right, it would probably be held to prevail over a conflicting statute. There would seem to be no more than a theoretical threat to legitimate legislative authority in such a minimal priority.[50]

The intent of this article is not to extensively enter into the fray concerning the wisdom of legislative participation in the rulemaking process. This topic has already received considerable attention.[51] This article will explore the extent of the judiciary's inherent powers and the responsibility of the court to identify them.

C. *Existence of Inherent Powers*

The concept that courts have certain powers directly resulting from their mere existence is not new. In 1928, the Supreme Court of Wisconsin stated, "[C]ertain powers have been conceded, to courts, because they are courts. Such powers have been conceded, because without them they could neither maintain their dignity, transact their business, nor accomplish the purpose of their existence."[52] Another strong early statement of a court's inherent rulemaking power came from the Colorado Supreme Court:

> The judicial power of the state is vested in the courts; the legislative and executive departments are expressly forbidden the right to exercise it, and the courts, charged with the duty of exercising the judicial power must necessarily possess the means with which to effectually and expeditiously discharge the duty; this duty can be performed and

50. Means, *supra* note 35, at 484-85.

51. Levin & Amsterdam, *supra* note 24, at 9; Dean, *supra* note 16, at 148, 170.

52. State v. Cannon, 221 N.W. 603, 603 (Wis. 1928).

> discharged in no other manner than through rules of procedure, and consequently this court is charged with the power and duty of formulating, promulgating, and enforcing such rules of procedure for the trial of actions as it deems necessary and proper for performing its constitutional functions.[53]

The court's inherent powers have been defined as those which are necessary to "exercise its jurisdiction, administer justice, and preserve its independence and integrity."[54] The existence of such inherent powers has generally been accepted.[55] The Texas Supreme Court stated that, "The *inherent* judicial power of a court is not derived from legislative grant or specific constitutional provisions, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities."[56] Even in those states where there is no specific separation of powers provision within the state constitution it has been recognized that certain core functions exist which may only be performed by the judiciary.[57]

Moreover, it is revealing that some states have determined that the judiciary has inherent powers regarding the operation of the court even where the legislature is granted specific constitutional power to regulate court procedure.[58] Although, "section 30 of article VI of the New York State Constitution grants the legislature the power to regulate the court's powers and procedures and the legislature has broad regulatory control over the Civil Court . . .," the court determined that certain basic inherent powers flowed from the fact that, "[a]rticle VI section 1 of the New York Constitution vests the judicial authority of the State in a unified court system."[59]

D. *Theoretical Bases*

There are "two primary theoretical basis for inherent judicial powers. The first is the separation of powers doctrine. The second is the

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53. Kolkman v. People, 300 P. 575, 584-85 (Colo. 1931).

54. Eichelberger v. Eichelberger, 582 S.W.2d 395, 398 (Tex. 1979).

55. *See* Dean, *supra* note 16, at 167 (agreeing that a court has inherent powers).

56. *Eichelberger* 582 S.W.2d at 398 (emphasis in original).

57. State *ex rel.* Friedrick v. Circuit Court for Dane County, 531 N.W.2d 32 (Wis. 1995); *see also* People v. Jackson, 371 N.E.2d 602 (Ill. 1977) (making clear that the Illinois Supreme Court had exclusive rulemaking powers in practice and procedure in matters involving the courts notwithstanding that the Illinois constitution gave it no specific rulemaking powers over the judiciary but that certain power flowed from its supervisory responsibilities).

58. *See* Lang v. Pataki, 674 N.Y.S.2d 903 (N.Y. Sup. Ct. 1998) (finding statute granting immediate trial to landowners if tenant failed to deposit post-petition rent or use and occupancy violated principle of separation of powers by interfering with court's control of its own docket).

59. *Id.* at 912-13. In *Lang*, the court conducted a detailed analysis of the concept of separation of powers and the existence of inherent judicial power. *See id.* at 913-14.

power inherent in a court because of its sheer existence."[60] The theories are not mutually exclusive, however, and courts have utilized both doctrines in upholding the judiciary's exercise of a particular power or invalidating an action of the legislative branch that intrudes on the inherent powers of the court.[61] Many times courts have stated that the exercise of inherent powers do not require some specific constitutional basis; therefore, the concept has also been referred to as "implied powers" or "incidental powers."[62] These terms, however, are not synonymous with inherent powers. There is a distinction between the two terms and inherent powers.[63] Inherent powers refer to the exercise of powers that are reasonably necessary for the conduct of a court's constitutional functions and that grow out of the court's jurisdiction. Implied powers are those that arise out of and are necessary to carry out the authority expressly granted and contemplated either constitutionally or legislatively.[64]

E. *Express and Implied Inherent Powers*

Inherent powers may be expressed or implied. The fact that the constitution expressly grants a particular power, does not mean that power may be abrogated by deleting or amending the particular section of the constitution granting that power. For instance, no one would seriously argue that a constitutional amendment deleting the judiciary's authority to oversee the bar would remove the power to regulate courtroom demeanor of attorneys through the utilization of contempt.

Also, inherent powers are not necessarily exclusive. Although some functions are within the core powers of a branch of government upon which other branches may not intrude,[65] the vast majority fall in the great borderland of shared authority.[66] In some situations the power of the legislature and the courts may overlap:

> The law is well established with respect to evaluating challenges to statutes whose constitutional infirmity is claimed to flow from impermissible intrusion upon the judicial power. . . Because the powers of the three branches of government inevitably overlap, this court has consistently held that the doctrine of the separation of powers cannot be applied rigidly . . . and has refused to find constitutional impropri-

60. STUMPF, *supra* note 45, at 6.

61. *See* State v. Clemente, 353 A.2d 723 (Conn. 1974).

62. *Friedrick*, 531 N.W.2d. at 37.

63. State v. Cannon, 221 N.W. 603, 607 (Wis. 1928).

64. STUMPF, *supra* note 45, at 5. *See also* Raymond B. Mallard, *Inherent Power of the Courts of North Carolina*, 10 WAKE FOREST L. REV. 1, 12 (1974).

65. Barland v. Eau Claire County, 575 N.W.2d 691, 696 (Wis. 1998) (discussing judiciary's exclusive authority over supervision of judicial assistants).

66. *Id.*

> ety in a statute simply because it affects the judicial function. . . . A statute violates the constitutional mandate for a separate judiciary magistracy *only* if it represents an effort by the legislature to exercise a power which lies *exclusively* under the control of the courts. . . . In accordance with these principles, a two part inquiry has emerged to evaluate the constitutionality of a statute that is alleged to violate separation of powers principles by impermissibly infringing on the judicial authority. . . . A statute will be held unconstitutional on those grounds if: (1) it governs subject matter that not only falls within the judicial power, but also lies exclusively with judicial control; or (2) it significantly interferes with the orderly functioning of the Superior Court's judicial role.[67]

The court may, in fact, defer to the legislature's preference as expressed in a statute while at the same time recognizing the judiciary's ultimate control in an area.[68] Therefore, some level of legislative oversight or participation is not necessarily repugnant to the concept of judicial primacy.[69] Generally, however, it has been held that where the legislature may take limited action in regard to a court's inherent power, its actions may not unduly burden the operation of the court system.[70] Thus, the idea enunciated by the Florida Supreme Court in *Jackson*, that certain burdens placed on the court system may be so onerous that their imposition by the legislature constitute a violation of separation of powers, is not unique to Florida.

F. *Affirmative and Negative Inherent Powers*

Inherent powers in the area of rulemaking may be viewed as both affirmative and negative. In a number of states, the term "inherent power" in the rulemaking context has been used in a negative manner to invalidate legislative intrusion into the rulemaking realm of the judiciary. In some states where there is no specific provision in the constitution or in the statutes which authorizes judicial rulemaking, the doctrine of inherent powers has been determined to be a specific power source. Another example of the dual nature of this power is embodied in Felix F. Stumpf's title of his book on inherent powers, *Inherent Powers of the Courts, Sword and Shield of the Judiciary*.[71]

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67. State v. Angel C., 715 A.2d 652, 672 (Conn. 1998) (internal citations and quotations omitted) (emphasis in original).

68. *In re* Amendments to Rules of App. Proc. 685 So. 2d 773 (Fla. 1996).

69. *See, e.g.*, United States v. Brainer, 691 F.2d 691 (4th Cir. 1982) (holding that the legislative branch could pass reasonable restrictions concerning court's inherent contempt powers).

70. *See* State *ex rel.* Friedrick v. Circuit Court for Dane County, 531 N.W.2d 32, 37 (Wis. 1995).

71. STUMPF, *supra* note 45.

G. *The Scope of Separation of Powers*

Unlike federal courts, the inherent powers of state courts are not strictly tied to adjudicative functions. The Pennsylvania Supreme Court specified that the court's rulemaking functions arise from both the separation of powers provision as well as an express grant within the state constitution.[72] The court rejected the argument that the separation of powers provisions only applies to purely judicial functions and not to rulemaking.[73] Roscoe Pound stated, "the procedures of courts is something that belongs to the courts rather than to the legislature, whether we look at the subject analytically or historically . . ." and "if anything was received from England as a part of our institutions, it was the making of . . . general rules of practice was a judicial function."[74]

H. *Scope of Secondary Authority*

Literature concerning the inherent authority of the judiciary is not as sparse as asserted by Chemerinsky.[75] Much of the literature on the subject deals with either which entity should have ultimate control over judicial practice and procedure[76] or how far the court may go in exercising nontraditional court functions, such as budgeting, under the doctrine of inherent powers.[77] On the topic of how much of practice and procedure may be considered to be within the inherent powers of the court, however, there is a lack of uniformity and consistency of national decisions, as well as a lack of literature which is national in scope. As Stumpf stated, despite the extensive exercise of these inherent powers "learned writers have described the concept as 'shadowy' and 'nebulous' or as a problem of definition that has bedeviled and eluded many courts and commentators for years."[78]

I. *Lack of Uniformity: Constitutional Differences and Other Factors*

There are a number of reasons for the deficiency in uniformity and

72. *See In Re* 42 PA. C. S. § 1703, 394 A.2d 444 (Pa. 1978) (rejecting the application of the open public meeting laws to judicial rulemaking).

73. *See id.* at 449.

74. Pound, *supra* note 46, at 601.

75. *See* Chemerinsky, *supra* note 2, at 139.

76. *See* STUMPF, *supra* note 45, at 19 (citing to a number of law reviews discussing the interbranch conflict over the rulemaking power).

77. *See, e.g.*, Howard B. Glaser, Wachlter v. Cuomo: *The Limits of Inherent Power*, 78 JUDICATURE 12 (1994); Ted Z. Robertson & Christa Brown, *The Judiciary's Inherent Power To Compel Funding: A Tale of Heating Stoves and Air Conditioners*, 20 ST. MARY'S L.J. 864 (1988); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993); STUMPF, *supra* note 45, at 47-60 and cases cited therein.

78. STUMPF, *supra* note 45, at 1.

guidance concerning how much procedural rulemaking is within the scope of the judiciary's inherent powers. First, there has been no need for the court to reach this issue because so many states grant the procedural power through express constitutional provisions. Second, there has been a reluctance on the part of the judiciary to create confrontations with the legislature unless absolutely necessary. Third, by identifying specific powers as inherent, there is an implication that these powers are necessarily exclusive, an idea which is at odds with specific constitutional provisions, historical background, and concerns raised by numerous commentators regarding the proper role for the legislature in the procedural rulemaking process. Fourth, state constitutional provisions and judicial interpretations dealing with the separation of powers and rulemaking provision are extremely varied. Fifth, by enumerating or describing a particular type of rulemaking power that is inherent in the judiciary, certain rulemaking responsibilities may be unintentionally omitted from those later found necessary for the operation of an independent judiciary. Sixth, there is a dearth of controlling authority or guidance at the federal level. Finally, the problem in determining what is procedural versus substantive renders the process of identifying that part of the procedural functions that are also inherent in the judiciary extremely difficult. In part, the issue of inherent rulemaking powers has never received much attention because the authority to adopt rules for the state judiciary has been granted by specific constitutional provision or by statute. As the Pennsylvania Supreme Court stated:

> Given the scope of the statutory grant, the issue as to whether the Supreme Court's rule-making authority was inherent or whether it stemmed solely from 17 P.S. §61 was never put to a conclusive test; as long as the power was there, its source was not of great importance. And in 1968 this already somewhat dormant issue became moot. It was in that year that the Judiciary Article of the Pennsylvania Constitution was altered to grant the Supreme Court in article V, § 10(c) 'the power to prescribe the general rules governing, practice, procedure and the conduct of all counts.'[79]

Several state courts are granted the specific constitutional authority to adopt rules of practice and procedure.[80] In other states, such as Florida, courts have been given some level of control by statutory provisions.[81] Where this specific authority is granted, there has been little need for the court to identify any portion of its general rulemaking power as part of the inherent power of the court. Means reached the

79. *See In re* Pa. C. S. § 1703, 394 A.2d 444, 447 (Pa. 1978) (quoting PA. CONST. art. V. § 10(c)).

80. *See* ARIZ. CONST. art. VI, § 5; FLA. CONST. art. V, § 2(a); PA. CONST. art. V, § 10(c).

81. Means, *supra* note 35, at 445-46.

same conclusion concerning Florida courts, stating that where courts are given express powers, there is no need to aggressively pursue the concept of inherent powers.[82] Exercising or claiming powers that are not expressly granted to the judiciary can subject a court to challenge and criticism for overreaching.

Courts have been required to utilize the doctrine of inherent power only in situations where there is no expressed grant of power, or in which the court is exercising functions not traditionally within the judicial branch. Thus, many of the court decisions dealing with inherent powers concern the affirmative exercise of powers that are controversial.[83]

Similarly, it has also been difficult to create a uniform body of case law because of the differences of language in state constitutions. The variations in constitutional language may relate to those sections dealing with separation of power or those sections which define the rulemaking responsibility. Some state constitutions contain strict prohibitions against one branch of government exercising powers of another. For example, the Ohio Constitution specifically states in pertinent part that, "[T]he general assembly shall (not) exercise any judicial power, not herein expressly herein conferred . . ."[84] The Alabama Constitution states "the legislative department shall never exercise the executive and judicial power, or of either of them."[85] Other constitutions more generally state that no member of one branch of government may exercise the powers of another.[86] On the other hand, some state constitutions contain no specific language addressing separation of powers.[87]

The responsibilities for procedural rulemaking may also be addressed in numerous ways by state constitutions. Levin and Amsterdam recognized at least eleven variations in language concerning allocating responsibilities between the legislature and the judiciary in this area.[88] Some state constitutions grant specific rulemaking authority to the court and provide for no express legislative oversight or restriction as to court rules.[89] Other constitutions grant the state supreme court general rulemaking powers over the practice and procedure and the conduct of all courts as long as they do not abridge, enlarge, or modify

82. *Id.* at 484.

83. Appropriation of sufficient resources to operate the courts is one area that has received much attention. *See supra* note 77.

84. OHIO CONST. art. IV, § 1. *See also* State *ex rel.* Ohio Academy of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1084 (Ohio 1999).

85. ALA. CONST. art. III, § 43.

86. *See, e.g.*, ARIZ. CONST. art. 3; MO. CONST. art. II, § 1; MONT. CONST. art. III, § 1.

87. New York's and Wisconsin's constitutions are two examples.

88. Levin & Armsterdam, *supra* note 24, at 6.

89. ARIZ. CONST. art. V, § 1; MO. CONST. art. V, § 5.

substantive rights.[90] Yet other constitutions provide for some type of legislative oversight, such as a veto power (usually not amendment power), by an extraordinary role or action of the legislature.[91] Still other constitutions are silent as to specific rulemaking authority, but grant general supervisory powers to the state supreme court.[92] The Wyoming Constitution even limits this power by adding the language, "as may be proscribed by law."[93] Finally, section 6, article 30 of the New York Constitution grants the legislature the power to adopt rules concerning the court's power and procedures as well as giving it broad regulatory control over the civil court.[94]

Even when dealing with similarly worded constitutional provisions, the courts of the various states may construe them differently. In Florida, the Florida Supreme Court has said the separation of powers provisions will be strictly construed.[95] The New Jersey Supreme Court, however, has construed similar constitutional language in a more flexible manner:

> The doctrine of separation of powers is fundamental to our State government. Article III, paragraph 1 of the New Jersey Constitution specifically prohibits any one branch of government from exercising powers belonging to a coordinate branch. Nevertheless, we have always recognized that provisions of the State Constitution prohibiting one branch of government from infringing on the power of the other "requires not an absolute division of power but a cooperative accommodation among the three branches of government." Also, it is well-settled that "a legislative enactment will not be declared void unless its repugnancy to the Constitution is so manifest as to leave no room for reasonable doubt."[96]

In *State v. Cotton*,[97] the Florida Supreme Court specifically rejected the New Jersey flexible construction of separation of powers noting that "[t]his Court, on the other hand, in construing the Florida constitution, has traditionally applied a strict separation of powers doctrine."[98]

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90. *See, e.g.*, PA. CONST. art. V, § 10(c).

91. *See, e.g.*, FLA. CONST. art. V, § 20.

92. *See, e.g.*, ILL. CONST. art. VI, § 16.

93. WYO. CONST., art. V, § 2.

94. N.Y. CONST. art. 6, § 30.

95. State v. Cotton, 769 So. 2d 345, 353 (Fla. 2000).

96. Mt. Hope Dev. Assocs. EAJ, Inc. v. Mt. Hope Waterpower Project, L.P., 712 A.2d 180, 185 (N.J. 1998) (internal citations omitted). *See also* State v. Prentiss, 786 P.2d 932, 935-39 (Ariz. 1989) (stating that separation of powers did not require hermetically sealing off of one department from another).

97. 769 So. 2d 345 (Fla. 2000).

98. *Id.* at 353. The court, however, recognized it was difficult to delineate a complete separation of powers. *Id.* at 353. *See also* State Dep't of Health and Rehabilitative Servs. v. Hollis, 439 So. 2d 947, 948 (Fla. 1st DCA 1983).

J. *Avoiding Legislative Conflict*

Another reason the courts usually rely on specific authority, rather than inherent powers, is the desire not to unnecessarily create antagonism and confrontation with the legislature. The identification of an implied area of judicial supremacy creates an atmosphere for potential legislative backlash. Courts generally will affirmatively act to avoid conflict. For example, after the Evidence Code was adopted by the Florida Legislature, the supreme court recognized that there were both substantive and procedural aspects to the code.[99] The court it therefore adopted the code to avoid potential confusion.[100]

Dual adoption is only one mechanism for accomplishing peace between the branches. Courts also avoid conflict with the legislature by construing statutes so that they are compatible with court rules or by deferring to the legislature in a limited area because of its expertise.[101] For instance, the Florida Supreme Court has deferred to the expertise of the legislature in identifying certain time limitations.[102]

Even in those cases where conflict arises, the court attempts to accommodate the wishes of the legislature. For example in *Allen v. Butterworth*, the Supreme Court of Florida adopted many sections of the Death Penalty Reform Act.[103] It refused to adopt, however, those provisions which severely interfered with individual rights or which infringed too deeply on the inherent powers of the court.[104] In fact, nothing in the constitution "precludes the judiciary from adopting legislative statements or expressions of policy as part of the rules governing matters within the jurisdiction of the judiciary."[105]

Courts are also reluctant to utilize the doctrine of inherent power because it calls into question participation by the legislature in the

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99. *In re* Florida Evidence Code, 372 So. 2d 1369 (Fla. 1979), *opinion clarified by* 376 So. 2d 1161 (Fla. 1979).

100. *Id.* at 1369.

101. *See* St. Mary's Hosp. v. Phillipe, 769 So. 2d 961 (Fla. 2000) (interpreting automatic stay provision in medical malpractice act so as not to conflict with Florida Rule of Appellate Procedure 9.130 regarding stay pending review).

102. *See, e.g.*, Kalway v. Singletary, 708 So. 2d 267 (Fla. 1998) (holding that legislative adoption of time periods for prisoners to bring certain types of actions did not violate separation of powers).

103. Allen v. Butterworth, 756 So. 2d 52, 65 (Fla. 2000).

104. *Id.* at 54. Another example in Florida is the evidence code which contained both substantive and procedural aspects the court adopted in the case in order to incorporate the procedural aspects and avoid confusion. *In re* Florida Evidence Code, 372 So. 2d 1369 (Fla. 1979); *see also In re* Florida Evidence Code, 675 So. 2d 584 (Fla. 1996). It was only when faced with an invasion of individual rights that the court refused to adopt a portion of the code as proposed by the legislature. *See In re* Amendment to Florida Evidence Code, 782 So. 2d 339 (Fla. 2000).

105. Florida Publ'g Co. v. State, 706 So. 2d 54, 56 (Fla. 1st DCA 1998).

rulemaking process. In a number of states, like Florida, the legislature has some role in that process.[106] Commentators have argued that legislative input is essential because procedural rulemaking, by necessity, also affects the substantive rights of the parties. The need for legislative review in these cases arises from the fact that these procedures are so intimately related with substantive considerations that inherent in them is the potential of frustrating policies.[107] If an area is determined to be within the exclusive inherent power of an independent court system, it is difficult to argue that any type of review by another branch of government is permissible.[108] If, however, rulemaking is only a power that is granted by specific constitutional language, then the constitution may also describe the level of legislative participation. In turn, reliance on specific constitutional authority provides legitimacy to legislative participation.

Furthermore, courts may not wish to identify certain powers as being inherent. This is because a specific enumeration of powers may lead to the unintended exclusion of other, non-listed powers. This is analogous to the rule of statutory construction, *expressio unius est exclusio alterius*.[109] Thus, the potential for exclusion exists when a court specifically enumerates inherent powers or attempts to describe them by the use of criteria or categories. Thus, if a power did not fit within a category or meet the designated criteria, then argument could be made that it was not an inherent function of the judiciary. The issues of applicability of federal case law and substantive versus procedural rules are discussed in the next two sections.

III. LIMITED FEDERAL GUIDANCE

A. *Federal Case Law*

Federal case law does not provide an overall blueprint that states may follow in these areas. In addition, federal courts have found that state case law provides little guidance in resolving separation of power issues in the federal court system.[110] The structure of the United States Constitution, which gives Congress the power to create inferior federal courts as well as the power to make laws "deemed necessary and proper

106. For example, in Florida the legislature may repeal judicially adopted rules of procedure by a two-thirds vote of each house. *See* FLA. CONST. art. V, § 2(b).

107. Levin & Amsterdam, *supra* note 24, at 18.

108. *See* Dean, *supra* note 16, at 187 n.160 (citing to articles that argue that if rulemaking is an inherent power exclusive to the judiciary, independent review of court promulgated rules is an impossibility).

109. "The expression of one thing is the exclusion of another." BLACK'S LAW DICTIONARY 403 (6th ed. abridged 1991).

110. *See* United States v. Brainer, 691 F.2d 691, 697 n.9 (4th Cir. 1982).

to execute those powers vested in Congress," differs markedly from the provisions of state constitutions dealing with separation of powers.[111] The federal constitution contains no specific separation of powers language. As noted earlier, many state constitutions have very explicit language forbidding one branch from performing the functions of another.

Additionally, the federal constitution does not provide guidance as to what the judiciary's powers are. Article III's textual brevity, which provides little guidance for court literalists as to the proper extent of judicial authority, poses a distinct problem for courts deciding separation of powers cases involving the judiciary. Unlike Article I and Article II, which extensively delineate the powers of Congress and the executive branch, Article III merely vests "judicial power" in the federal court. Article III does not indicate what constitutes judicial power.[112] Ironically, state constitutions typically provide more insight into the nature of judicial powers than the federal constitution.

B. *Federal Interpretation*

Separation of powers at the federal level has been interpreted extremely narrowly. The focus has been on judicial independence as to decision-making rather than determining those powers that are necessarily part of the court system. Judge Easterbrook of the Seventh Circuit echoes this limited focus. He found that Article III establishes three safeguards of judicial independence: (1) tenure of office; (2) protection against financial penalties; and (3) the rule (an implication of establishing a "judicial power") that final judgment must be carried out.[113] There has also been a long standing recognition that Congress has the power to prescribe rules of practice for the federal courts.[114] Under this analysis, the Fourth Circuit refused to follow state case law and upheld a speedy trial rule passed by Congress.[115]

Additionally, federal courts may be distinguished from their state counterparts because, unlike state courts, they are not common law courts.[116] The common law nature of state courts is important because of the common law tradition that the details of legal procedure "for the most part of Anglo-American legal history had been left to rules of

111. *See* U.S. CONST. art. I, § 8, cl. 9 & 18. *See also Brainer*, 691 F.2d at 698.

112. Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1316 (1993).

113. *See* French v. Duckworth, 178 F.3d 437, 448-53 (7th Cir. 1999) (Easterbrook, J., dissenting).

114. *See* Hanna v. Plumer, 380 U.S. 460, 473 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 19 (1941).

115. United States v. Brainer, 691 F.2d 691, 695 (4th Cir. 1982).

116. *Id.* at 697 n.9.

court."[117] For these reasons, the less stringent separation of powers interpretation at the federal level has not been considered binding upon the state courts.[118] Thus, individual state courts are left to apply the more stringent separation of powers provision of their own constitutions. Nevertheless, federal law may be instructive in two respects: (1) prescribing the outer limits of potential legislative intrusion; and (2) determining whether there is any particular class of rulemaking that is beyond the scope of legislative enactment.

C. *Vital Function*

Consider, for example, that even absent strict separation of powers language or a common law basis, there are inherent powers of the federal court that cannot be usurped.[119] This distinction is not based upon a procedural versus substantive distinction, but on a realm of powers "so vital to the efficient functioning of a court as to be beyond legislative power."[120]

In *Plaut v. Spendthrift Farm*,[121] the United States Supreme Court identified a limited scope of inherent powers upon which Congress could not tread. Article III of the United States Constitution gives the courts the power to pronounce the law in a particular case or controversy. That power is "not merely to rule on a case, but to decide them conclusively, subject to review only by superior courts in Article III hierarchy."[122] Thus, a provision of the Securities and Exchange Act requiring federal courts to reopen judgments unconstitutionally infringes upon the constitutional powers of the federal courts.[123] The test for impermissible infringement has been defined as whether a statute prevents the judiciary from accomplishing its constitutionally assigned functions.[124] While Congress can reasonably regulate contempt powers of the court, it could not abrogate it or render them inoperative.[125]

D. *Individual Constitutional Rights*

There is also another class of rules created by the federal courts that

117. Pound, *supra* note 25, at 35.

118. *See* B.H. v. State, 645 So. 2d 987, 991 (Fla. 1994).

119. Chambers v. Nasco, Inc., 501 U.S. 32, 43 (1991).

120. *Brainer*, 691 F.2d, at 697. *See also* Levin & Amsterdam, *supra* note 24, at 31-32.

121. 514 U.S. 211 (1995).

122. *Id.* at 219.

123. *Id.* at 225-26.

124. *Brainer*, 691 F.2d at 698.

125. *See* Michaelson v. United States *ex rel.* Chicago, St. Paul Minneapolis & Omaha Ry. Co., 266 U.S. 42, 65-66 (1924) (recognizing that the inherent power of federal courts to punish for contempt is subject to regulation by Congress, provided such regulation neither "abrogates that power, nor render[s] it practically inoperative").

cannot be repealed, limited, or amended. These are rules based on the protection of individual constitutional rights. In *Dickerson v. United States*, the Court held that the *Miranda* warning, a prerequisite to the admissibility of a statement made by the accused during custodial interrogation, was constitutionally based, and could not be overruled by legislative act.[126] Clearly, Congress cannot interfere with rules put in place to protect rights guaranteed by the federal constitution.[127] Presumptively, the same could be said for those rules adopted by state courts to protect rights guaranteed by the state or federal constitution.[128]

IV. DEFINING THE PROCEDURAL

Uniform interpretation of inherent procedural powers has been thwarted by the difficulty courts have had in defining what is procedural. Courts have been befuddled by the task of differentiating the substantive from the procedural. On a national level, it has been called "nigh-impossible,"[129] while in Florida, it has been called a "twilight zone."[130] Substantive law is said to create and define legal rights with respect to persons and their property. Practice and procedure may be described as the legal machinery by which substantive law is made effective.[131] The boundary, however, is imprecise.[132] It is therefore sometimes difficult to distinguish whether a particular matter involves substance or procedure, especially because a substantive right must be implemented procedurally.[133]

Making the task more difficult is that different states have taken opposite positions on whether particular powers are procedural. For instance, the Florida "Evidence Code" is both substantive and procedural in nature.[134] In North Dakota and Arizona, it has been described as procedural.[135] The inability to reach consensus concerning what is procedural complicates the broader issue of which procedural powers are also inherent powers.

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126. 530 U.S. 428, 437-38 (2000).

127. *Id.* at 444.

128. *See* Goodwin v. State, 751 So. 2d 537, 544-45 (Fla. 1999) (determining that Florida legislature could not interfere with the independent and inherent authority of the court to assess effect of error on verdict where such assessment was grounded on constitutional principles).

129. *See* Levin & Amsterdam, *supra* note 24, at 14-15.

130. *In re* Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (1972) (Adkins, J., concurring).

131. *See* Silver, *supra* note 36, at 276 and cases cited therein.

132. *See* Means, *supra* note 35, at 453.

133. Silver, *supra* note 36, at 277 (citations omitted).

134. *In re* Amendments to Florida Evidence Code, 782 So. 2d 339, 342 (Fla. 2000) ("[T]he Florida Evidence Code is both substantive and procedural in nature. . . .").

135. *See* Arneson v. Olsen, 270 N.W.2d 125, 131 (N.D. 1978); State *ex rel.* Collins v. Seidel, 691 P.2d 678, 681-82 (Ariz. 1984).

For the purpose of this article and for the purpose of identifying the inherent powers of the court, it may be unnecessary to enter the quagmire of defining what is procedural. This is because the broader category of potential inherent rulemaking powers may be identified by a survey of the types of rules adopted by the courts under their authority to regulate practice and procedure. Every state has rules governing practice and procedure within its courts. While those rules may differ by title, they generally will cover many of the same areas.[136] The regulation of practice will include codes of conduct for lawyers and judges. There will usually be rules of judicial administration which may relate to court records, court personnel, administrative matters, docket control, and recusal of judges. Procedural rules may be adopted for all subject areas of practice including: civil; family; criminal; probate; appellate; and juvenile. Among other things, these rules may address: court filings; time limitations; form of pleadings; service of process; subpoenas; discovery; court proceedings; jury selection; utilization of the contempt powers; offers of judgment; entry and enforcement of judgment; and extraordinary writs.

Because these various rules may have both substantive and procedural aspects, it may be more productive to define the potential scope of inherent court rulemaking in terms of those areas where the courts have traditionally adopted rules. Any further artificial definition of procedural would be just as unworkable. As discussed earlier, the attempt to draw this line proved to be a daunting task in Florida as well as on the national level.[137]

Attempting to define procedure may retain some importance if a court found that the scope of inherent powers is coextensive with the authority to adopt procedural rules. For a number of reasons discussed later on, such a broad assertion of inherent authority may be both unwise and unsupportable.

V. ANALYSIS OF VARIOUS APPROACHES

As stated earlier, it appears there are three options for the courts in

136. For instance, in Florida, there are have rules of court governing matters including: civil procedure; judicial administration; criminal procedure; workers compensation procedure; probate; traffic court; small claims; juvenile procedure; appellate procedure; mediation; court appointed arbiters; regulation of court reporters; professional conduct of lawyers; and conduct of judges. *See* FLORIDA RULES OF COURT (West 2000).

137. *See generally* Levin & Amsterdam, *supra* note 24, at 14-24 (exploring difficulties of distinguishing between substance and procedure in order to determine the legislature's proper role in rulemaking); *see also* Clinton A. Wright III, Note, *Confusion In Florida Offer of Judgment Practice: Resolving the Conflict Between Judicial and Legislative Enactments*, 43 FLA. L. REV. 35 (1991).

determining the scope of inherent rulemaking powers that flow from either the separation of powers provisions of state constitutions or from the existence of an independent judiciary.

A. *Poverty of No Inherent Powers Approach*

Option number one, that a court has no inherent power outside what is specifically granted within the constitution, is unsupportable as previously discussed. As such, there is no jurisdiction which has taken this position. In New York and at the national level, where the legislative branch has specific authority to adopt procedural rules, the courts have recognized certain rulemaking powers which are within the inherent powers of the court.[138] There has been no need for a specific constitutional grant of rulemaking authority. These jurisdictions specifically refute the extreme position that no inherent rulemaking power exists.

B. *Complete Rulemaking Authority in the Courts*

Option two, which has been adopted by several jurisdictions, is that the entire area of rulemaking for practice and procedure is within the province of the judiciary.[139] This position may have initial appeal as a response to Chemerinsky's concern that court inaction leads to the potential loss of due process rights, as well as promotes greater conflict between the legislature and the judiciary. Arguably, this position also avoids a second definitional problem regarding procedural versus substantive areas as the only issue that needs to be addressed is what area is within the inherent power of the court. Further, this option would probably preclude a legislative attempt to regain primacy over rulemaking powers. This position, however, may be unwise from a policy standpoint and is probably legally and historically unsupportable in most jurisdictions, including Florida.

As noted earlier, most courts have refrained from an over aggressive assertion of inherent powers in part to avoid conflict between the branches. Judicial restraint has also reflected the legislature's superior ability to gather information within certain areas as well as an understanding that many procedural rules have substantive aspects better dealt with by the legislature. These concerns all appear to be valid policy considerations which would justify review of individual proposals on a case by case basis.

The historical background also does not support exclusive judicial

138. *See* Part II.C. and III, *supra.*

139. *See, e.g.*, Ammerman v. Hubbard Broad., Inc., 551 P.2d 1354, 1359 (N.M. 1976) (indicating that the separation of powers provision of New Mexico's constitution was the basis for the exclusive rulemaking function of the state supreme court).

control over the entire area of rulemaking for practice and procedure. The era of legislative domination in which the court only asserted limited authority based on inherent powers is inconsistent with the assertion that the inherent powers of the court encompasses the entire rulemaking field. Moreover, those jurisdictions still providing for legislative primacy over rulemaking would also refute the assertion that control over the entire area of procedural rulemaking is necessary for an independent judicial branch. While this precedent is not necessarily controlling it would appear to be persuasive. Additionally, many jurisdictions most likely have specific authority, like Florida, have held that the entire area of rulemaking is not within the scope of the inherent powers of the court.[140]

C. *Partial Autonomy Over Rulemaking*

Option three is that certain areas of rulemaking for practice and procedure are within the inherent powers of the judiciary. This appears to be the most viable and most legally supportable position and has been adopted in the greatest number of jurisdictions. It specifically recognizes the legitimate role of the legislature in the rulemaking process, as well as providing the judiciary the most flexibility in dealing with interbranch conflict without invading the province of the legislature. Any state selecting this alternative, however, must be aware of the potential problems associated with the choice.

The recognition that certain procedural rules are outside the scope of the court's inherent powers means that the legislature is not totally precluded from attempting to usurp specific rulemaking authority from the court. Defining the inherent powers of the court may prove as difficult and problematic as differentiating the procedural from the substantive. Without a bright line rule defining inherent powers, conflict with the legislature should be expected. Further, the courts would be required to review individual cases to determine whether the legislature substantially interfered with the court's ability to perform its essential functions.

Stronger court opinions relating to the inherent rights of courts are essential. There must be a greater recognition that the manner in which inherent rights are identified is critical. More concrete definitions or workable criteria for identification of substantive versus procedural rules will result in less potential conflict with the legislature. A brief survey of national and Florida cases regarding inherent powers may be useful in establishing a workable method of identification.

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140. *But see* Sydney v. Auburndale Constr. Corp., 96 Fla. 688, 119 So. 128 (1928) (rejecting this position).

D. *Nationwide Examples of Inherent Power*

The best, albeit dated, compilation of inherent powers at a national level is Stumpf's book on inherent powers.[141] The rulemaking process would seem to fall within Stumpf's category of inherent authority concerning "court governance."[142] He stated that courts have the authority "to regulate and conduct their internal affairs and to prescribe rules and conditions of the oversight of those persons who are or become actors in the activities related to the judicial process."[143]

The oversight of persons who are part of the judicial process has generally been accepted to be within the realm of judicial control. Courts have thus determined that they have the inherent power to adopt rules of conduct for judges, lawyers, and other court personnel.[144] This oversight authority is one of the reasons that regulation of contempt is within the court's inherent powers. The power of contempt is vital to the judiciary in maintaining order and controlling the courtroom. The contempt power is also essential to the court's enforcement of orders and final judgments. Therefore, other branches of government cannot pass regulations dictating to judges when and how to exercise their contempt powers.[145]

Other areas, especially those related to the manner in which pretrial and trial matters are to be handled, exist where courts should exercise rulemaking authority. Stumpf recognized that trial courts are uniformly found to have inherent powers "so that the adjudicative process can

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141. STUMPF, *supra* note 45, at 81-105.

142. *Id.* at 15.

143. *Id.* at 16.

144. As to conduct of judges, see, e.g., Weinstock v. Holden, 995 S.W.2d 408 (Mo. 1999) (determining that statue involving disqualification of judges violated the separation of powers provisions of the state constitution). *In re* Kading, 235 N.W.2d 409 (Wis. 1975) (holding that Wisconsin Supreme Court has inherent authority to adopt Code of Judicial Conduct including a specific rule requiring the filing of annual financial statements); As to attorneys, see, e.g., *In re* Edwards, 266 P. 665 (Idaho 1928) (holding that Idaho Supreme Court has inherent power to adopt rules and regulations prescribing qualifications of persons seeking to practice law); Turner v. Kentucky Bar Assoc., 980 S.W.2d 560 (Ky. 1998) (holding that statute authorizing non-lawyer to represent parties in workers' compensation proceedings violated constitutional principles of separation of powers); Belmont v. Bd. of Law Exam'rs, 511 S.W.2d 461 (Tenn. 1974) (holding that judicial branch has inherent power to prescribe and administer rules for licensing and admitting lawyers); Ruben, *supra* note 34, at 114. As to regulating conduct of other court personnel, see, e.g., L.J.S. v. State Ethics Comm'n, 744 A.2d 798 (Pa. 2000) (determining that it was a violation of separation of powers for state ethics commission to discipline judicial assistant); State v. Meadows, 454 S.E.2d 65 (W.Va. 1994) (holding that judiciary has authority to control conduct of bailiffs).

145. *See* Murneigh v. Gainer, 685 N.E.2d 1357 (Ill. 1997); *see also Ex parte* Barnett, 600 S.W.2d 252, 254 (Tex. 1980) (holding that court has inherent power to punish party refusing to obey court order).

function" where rules and statutes are silent.[146] Where the legislature has spoken, however, the authority is less clear. Statutes dealing with specific conduct within the courtroom would also violate the separation of powers' provision by intruding on the inherent power of the court.[147]

A number of courts have held inherent powers existed to regulate items relating to procedure, such as time limitations, where and what to file, discovery, case management, and entry and enforceability of final judgments.[148] Some courts have even gone so far as to say that the judiciary has the inherent power to control all practice and procedure.[149] Others, as previously mentioned, have determined that the evidence code should be adopted by court rule.[150] Some courts have determined that the responsibility for setting time limits to file appeals is within the inherent powers of the judiciary.[151] But generally, statutes of limitations are set by the legislature[152] and certain time limits set by the legislature for posttrial proceedings have been upheld.[153]

E. *Inherent Powers in Florida*

The inherent powers of Florida courts have generally been defined very broadly: "All courts in Florida possess the inherent powers to do all things that are reasonably necessary for the administration of justice within the scope of their jurisdiction, subject to valid existing laws and constitutional provisions."[154]

The Supreme Court of Florida applied this definition to the inherent power to adopt rules, stating: "It is well established that courts of justice have the inherent power to prescribe such rules of practice, such rules to regulate their proceedings and such rules to facilitate the administration

146. *See* STUMPF, *supra* note 45, at 37.

147. State v. LaFrance, 471 A.2d 340 (N.H. 1983) (holding that statute allowing law enforcement officials to wear firearms in courtroom is an unconstitutional violation of separation of powers because trial judges have inherent power to control courtroom proceedings).

148. For a full survey on the inherent powers of the court, state by state, see STUMPF, *supra* note 45, at 81-106.

149. *See* Ammerman v. Hubbard Broad., Inc., 551 P.2d 1354, 1358 (N.M. 1976).

150. *See* Hall v. State, 539 So. 2d 1338, 1339-40 (Miss. 1989).

151. *See* Metcalf v. Altermeller, 369 N.E.2d 498 (Ill. App. Ct. 1977) (noting that Illinois Supreme Court had authority to adopt rules for limiting the time for taking appeals); State v. Connery, 661 P.2d 1298 (Nev. 1983) (holding judicially created that rule of criminal procedure superseded statute concerning time for filing appeals); Kittles v. Rocky Mt. Recovery, Inc., 1 P.3d 1220 (Wy. 2000) (determining that statute limiting time period for filing appeals from county court was unconstitutional as it was in conflict with Wyoming Supreme Court rule).

152. *See* Boyd v. Becker, 627 So. 2d 481 (Fla. 1993).

153. *See, e.g.*, Le v. State, 953 P.2d 52 (Okla. Crim. App. 1998) (holding legislature may define scope of postconviction relief without violating separation of powers provisions).

154. State v. Ford, 626 So. 2d 1338, 1345 (Fla. 1993) (quoting Roger A. Silver, *The Inherent Powers of the Florida Courts*, 39 U. MIAMI L. REV. 257 (1985)).

of justice as they deem necessary."[155] More recent cases have dealt with regulating court filings[156] and exercising the power of contempt.[157]

Two authors have attempted to comprehensively identify the specific inherent powers of Florida courts. Burris attempts to describe inherent powers in terms of broad subject matters which are within the inherent powers of the court.[158] Of the fourteen powers he identifies, those which are specifically related to rulemaking are: (1) regulation of the legal profession; (2) establishment of rules of practice and procedure for the courts; (3) control of the judiciary duties of the clerk or deputy clerk; (4) contempt powers; (5) access to court records; and (6) waiver of immunity for judicial and quasi judicial officers.[159] Several of the other broad categories identified by Burris involve adjudicative powers of the court, such as the interpretation of contracts and determining the constitutionality of a statute.[160]

A law review article by Silver identifies a litany of actions which were within the inherent powers of the court.[161] He first identifies five categories where the Florida legislature and the court have disputes involving separation of powers. These categories include: (1) the power to admit defendants to bail pending appeal; (2) the power to require presentence investigation; (3) the power to immunize attorneys from disciplinary proceedings; (4) the power to determine when an action is considered commenced; and (5) the right to determine the appropriateness of joinder and severance.[162] Silver then identifies forty-five examples of the court's inherent powers where there is no substantial separation of powers dispute between the court and the legislature.[163]

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155. *In re* Jacksonville Bar Ass'n, 125 Fla. 175, 177, 169 So. 674, 675 (1936).

156. *See* Basse v. State, 740 So. 2d 518 (Fla. 1999).

157. *See, e.g.*, Acosta v. Creative Group Invs., Inc., 756 So. 2d 193 (Fla. 3d DCA 2000).

158. Johnny C. Burris, *The Administrative Process and Constitutional Principles: Separation of Powers*, 74 FLA. B. J. 28, 32 (2000).

159. *See id.* at 32.

160. *See id.*

161. *See generally* Silver, *supra* note 36.

162. *See id.* at 282-85.

163. *See id.* at 286-89. Silver states:

> The Florida courts have the inherent power to punish for contempt, to determine their own jurisdiction, to enforce judgments, to enforce collection of judgments, to vacate judgments, to set aside satisfaction of judgments, to appoint process servers, to appoint co-counsel to represent insolvent criminal defendants, to change venue when deemed necessary to secure a fair trial, to instruct jury on maximum and minimum penalties in a criminal trial, to direct a verdict of not guilty and to set aside a jury verdict in a criminal trial, to appoint an acting state attorney, to dismiss an action for failure to prosecute, to impose the sanction of dismissal for failure to comply with a court order, to impose the sanction of dismissal as a coercive measure, to strike a voluntary dismissal, to dismiss an appeal, to dismiss or decline jurisdiction on the basis of the doctrine of forum non conveniens, to revoke

While this list is somewhat helpful, it fails to be dispositive concerning which of these powers are inherent to the court and which cannot be subject to over-intrusion by the legislature for two reasons. First, the analysis in many of these cases is based on a specific set of facts rather than the court's authority to adopt a general set of rules. Second, there has been no attempt by the legislature to regulate many of these specific areas, so there is no analysis concerning the extent of legislative involvement which would be appropriate.

VI. CONCLUSION: CRITERIA FOR DETERMINING INHERENT POWERS

In determining what is an inherent power, the most important analysis is whether a proposal directly affects a core function of the court. The next issue that must be analyzed is how directly and how severely the proposed rule affects the court's ability to perform the function. The more that legislative intrusion is directly related to a core function of the court, the more likely the court will invoke the doctrine of inherent powers.[164]

The core functions of a court are: (1) protection of constitutional rights; (2) determination of controversies between parties, including construing constitutional and statutory provisions; and (3) enforcement of final judgments.

Thus, "[t]he invocation of the doctrine is most compelling when the judicial function at issue is the safeguarding of constitutional rights."[165] The courts will even enjoin legislative actions in areas identified as both substantive and procedural where it infringes the protection of constitutional rights.[166] Furthermore, while Florida courts have let the legisla-

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probation, to seal court records, to revoke the probate of a will, to correct errors, to reform written instruments, to re-establish court records, to modify and clarify court orders, to award attorney's fees against an attorney in correcting a scrivener's error in a final judgment, to enter judgments nunc pro tunc, to impose dress requirements, to require judicial consent for the withdrawal of attorneys, to prohibit future pro se appearances in court, to protect minor children, to entertain matters pertaining to child custody, to award exclusive occupancy of a marital home in divorce proceedings, to award temporary relief, to prevent abuse of judicial procedure, to exclude the testimony of expert witnesses, to issue writs of *ne exeat*, to control the conduct of proceedings, to protect a defendant in a criminal trial from inherently prejudicial influences that threaten fairness, to preserve order and decorum in the courtroom, to guarantee to litigants the fundamental right to a fair trial, and generally to further the administration of justice.

Id. (citations and footnotes omitted).

164. *See* Rose v. Palm Beach County, 361 So. 2d 135 (Fla. 1978).

165. *Id.* at 137.

166. *See In re* Amendments to the Florida Evidence Code, 782 So. 2d 339, 342 (Fla. 2000) (refusing to adopt amendment to evidence code which unconstitutionally violated a defendant's right to confrontation).

ture set the time period for bringing civil writs,[167] the supreme court would not give the same deference to the legislature for setting time periods for collateral challenges to criminal convictions, such as writs of habeas corpus, which are grounded in individual constitutional rights.[168]

While all three of the criteria are related to the decision making process, it would be a mistake to believe that a court's inherent powers are strictly adjudicative.[169] A court's authority is not limited to adjudication, but includes certain ancillary functions, such as rulemaking and judicial administration which are essential if the courts are to carry out their constitutional mandate.[170] The Massachusetts Supreme Court has similarly stated the judicial function extends beyond the determination of questions in controversy and includes functions incidental to the adjudication role.[171]

In weighing those items that are not strictly within the adjudicative powers of the court, one must look at a number of criteria which can be gleaned from case law cited within this article:

(1) Items directly related to the conduct of persons who are major actors in the adjudicative process will usually be considered to be within the exclusive province of the judiciary.

(2) Regulation of judiciary personnel will generally be considered to be within the exclusive province of the judiciary.

(3) Control of court records will generally be considered to be within the exclusive province of the judiciary.

The other items one must look at are: (1) how severely the intrusion affects the operation of the court; (2) the extent that the item involves substantive considerations; (3) traditionally who has exercised the function or power which is at issue; and (4) any other public policy concerns related to the particular issue. Other criteria should be identified by the state judiciary.

I began this article believing (similar to the thoughts expressed by Chemerinsky) that, in order to preserve an independent judiciary and due process rights, it was essential for the courts to more aggressively define those powers which are inherent to an independent judiciary. There also seemed to be a lack of uniform body of case law and literature to guide the legislature, the courts, and practitioners concerning inherent powers. I was even inclined to believe that in light of threats from the legislature that the courts should draw a bright line rule, that all

167. Kalway v. Singletary, 708 So. 2d 267, 269 (Fla. 1998).

168. Allen v. Butterworth, 756 So.2d 52, 61 (Fla. 2000).

169. *See* Matters of Salary of the Juvenile Director, 552 P.2d 163, 169 (Wash. 1976).

170. O'Coin's, Inc. v. Treasurer, 287 N.E.2d 608, 611 (Mass. 1972).

171. *Id.*

rulemaking concerning practice and procedure was within the scope of the inherent powers of the court.

For reasons expressed herein, I have come to believe that only certain of the rulemaking powers can be considered to be within the inherent powers of the court. In addition, the legislature should retain the present veto power if the court intrudes on substantive issues. Unfortunately, this position will inevitably lead to future conflicts with the legislature.

The court, therefore, should take certain steps which will ultimately lead to a more solid framework. First, the court should specifically identify when legislative action unduly burdens the court's inherent power. Reliance solely on the specific constitutional rulemaking authority, without the assertion of inherent authority, may avoid immediate controversy, but this position provides little guidance for the legislature and the public concerning the scope of the court's inherent powers.

Second, the court needs to better define what are inherent powers and specifically lay out the criteria to be used in identifying when these powers exist. Better identification of inherent powers will provide guidance to both the legislature and the court so the possibility of conflict is lessened. There appears to be little likelihood the federal courts will provide this guidance. It is therefore necessary for the state courts to issue comprehensive decisions concerning the court's inherent rulemaking powers.