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Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers

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JUDICIAL RULE-MAKING ABSENT LEGISLATIVE REVIEW: THE LIMITS OF SEPARATION OF POWERS

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Introduction

The debate over the proper extent of judicial Rule-making authority may have more important consequences today than in the past. The original intention of the Rule-making movement was to streamline courtroom procedures,[1] which was then the overwhelming problem in the administration of justice. Today, many of the most important issues in administering justice arise in the area of so-called alternative dispute resolution—the use of options other than full-blown court proceedings to resolve controversies. The integration of these new procedures into the justice system is a vital task of those who devise court rules, whether judicial or statutory. The Rule-making authority helps to define the locus of creativity in developing and implementing these programs. In addition, this debate has important consequences for the theory of separation of powers within government.

This debate on the extent of judicial Rule-making authority did not end with the passage of the Federal Rules Enabling Act of 1934.[2] Rather, the debate shifted into the legislatures and courts of the several states. Many states did not consider merely whether their courts should be allowed to make their own Rules of Procedure, but also whether their legislatures should be excluded, in whole or in part, from this process.

This article will consider the consequences to those states that adopted this latter course and the lessons that all state courts may gather from the

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1. Throughout this paper "Rule" and its derivatives will be capitalized when referring to judge-made Rules of Court.

2. Act of June 19, 1934, ch. 651, 48 Stat. 1064, *as amended,* 28 U.S.C. § 2072 (1982). Professor Steven Burbank has recently published a remarkably thorough and illuminating history of this statute. Burbank, *The Rules Enabling Act of 1934,* 130 U. PA. L. REV. 1015 (1982) [hereinafter cited as Burbank]. Court Rule-making in America existed early in the colonial period. Rule of Court, Pennypacker's Pa. Colonial Cases 90, 98-100 (1685-86). Some statutory Rule-making power has always existed in the federal courts. Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83. *See* Burbank, *supra,* at 1037 & n.90.

Of course, statutes and Court Rules are not the only sources of procedural law. Courts may establish or modify procedures in the process of adjudicating specific cases. *See, e.g.,* Thomas v. Arn, 106 S.Ct. 466 (1985) (approving Sixth Circuit rule of waiver announced in case law). in case law).

experience. It concludes that on both theoretical and practical grounds, legislative review of judicial Rule-making is a valuable institutional check on the unbridled power of the courts. The people are better served by a system that emphasizes checks and balances rather than by a pure theory of separation of powers.

I. *Background*

The Court Rule-making movement of the early part of this century achieved its most famous victory with the passage of the Federal Rules Enabling Act of 1934, which led to the enactment of the Federal Rules of Civil Procedure. The ultimate theoretical triumph of the movement, however, came nearly two decades later. In 1950 the Supreme Court of New Jersey, in *Winberry v. Salisbury*,[3] declared its procedural independence from the New Jersey legislature. It held that, pursuant to the New Jersey constitution, a valid procedural Rule of Court, enacted pursuant to the Supreme Court's Rule-making power, could not be modified or repealed by the legislature. In subsequent cases, the New Jersey courts have consolidated this position,[4] and other states have adopted constitutional provisions expressly conferring upon their highest state court a power to make Rules independent of legislative review.[5]

Winberry v. Salisbury was immediately controversial. Some saw it as unjustifiable given the language of the New Jersey constitution.[6] Dean Roscoe Pound, by contrast, believed the case was a creative and important exercise in constitutional interpretation, leading to an improvement in judicial administration. Dean Pound found it virtually inconceivable that a state supreme court, bound as it was by the federal and state constitutions, would abuse the Rule-making power to the prejudice of either the legislative power or the citizenry.[7] As a result of *Winberry* and the following cases, New Jersey's Chief Justice Vanderbilt became the chief judicial advocate of the Rule-makers. That position is probably held today by Chief Justice Emeritus Samuel J. Roberts of the Supreme Court of Pennsylvania.[8]

By 1958, A. Leo Levin and law student Anthony G. Amsterdam were able to systematically evaluate the various constitutional schemes for allocating

3. 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950).

4. *E.g.*, State v. Leonardis, 73 N.J. 360, 375 A.2d 607 (1977). As shall become clear *infra*, Judge Jack B. Weinstein is optimistic when he suggests that New Jersey has, in practice, abandoned *Winberry v. Salisbury*. J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 82 (1977) [hereinafter cited as WEINSTEIN].

5. See *infra* text accompanying notes 20-26, 52-55.

6. Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951). *See* Kay, *The Rule-making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1 (1974).

7. Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952) [hereinafter cited as Pound, *Procedure*]. Dean Pound had previously summarized his views on this issue in Pound, *The Rule-Making Power of the Courts,* 12 A.B.A.J. 599, 600 (1926) [hereinafter cited as Pound, *Rule-making Power*].

8. The author had the honor of clerking for Justice Roberts in 1977-78.

the Court Rule-making power between a jurisdiction's highest court and its legislature.[9] They recognized explicitly what had previously been recognized only implicitly: that the difficulty in determining what is "procedural" and hence appropriate for Court Rule-making and what is "substantive" and for the legislature is not a mere difficulty in line drawing. It is a difficulty that arises from the fact that rules prescribing the way in which courts operate often closely concern the liberties and other rights of citizens. Any system of Court Rules that hopes to provide effective and comprehensive guidance for civil, criminal and equitable pleading, practice, trials, and review will inevitably have a "radical impact on the community."[10] Indeed, there are very few individual Court Rules that do not have an impact on the community (beyond the community of lawyers) or on individual or property rights. Levin and Amsterdam therefore proposed a system by which the highest court of a state would, in the first instance, have a general Court Rule-making power, with Rules subject to amendment or veto by two-thirds of both houses of the state's legislature. Such legislative revision would remain untouchable by Rule-makers for six years.[11]

Thus, by 1958 a spectrum of views had arisen concerning the power of courts to make their own rules. The most radical, John Wigmore's, held that all attempts by state legislatures or Congress to regulate court proceedings were inherently unconstitutional as interfering with the functioning of the judiciary.[12] This view had not been acted upon, unless one believed the cynics who said that *Winberry*'s reading of the New Jersey constitution was so strained that the decision was in effect the creation *ex nihilo* of an inherent, exclusive court power to make Rules of practice and procedure.[13] Under a more charitable view, New Jersey adopted by constitutional amendment a scheme granting its supreme court this exclusive power.[14] The Territory of Alaska adopted a scheme much like that proposed by Levin and Amsterdam.[15] Legislative review of court-made Rules was provided by the Missouri constitution.[16] In California, the Rule-making power was granted, subject to

9. Levin & Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958) [hereinafter cited as Levin & Amsterdam.] This definitive article examines most of the theoretical problems that exist concerning legislative control over judicial Rule-making. New commentary would scarcely be necessary except to show that experience has borne out most, but not quite all, of their theoretical considerations, and to point out the need for modification of their ultimate proposal.

10. *Id.* at 18.

11. *Id.* at 42.

12. Wigmore, *All Legislative Rules for Judiciary Procedure are Void Constitutionally,* 23 ILL. L. REV. 276 (1928) [hereinafter cited as Wigmore]. The tone, as well as the title, of this article is provocative and polemical, as are a number of the items Dean Wigmore wrote around this time. See, e.g., *infra* note 178.

13. *See* Kaplan & Greene, *supra* note 6.

14. N.J. CONST. art. VI, § 2, ¶ 3.

15. *See generally* Levin & Amsterdam, *supra* note 9.

16. MO. CONST. art. 5, § 5.

legislative review, to a Judicial Council with a broader judicial base than the California Supreme Court. In some jurisdictions, typified by the Courts of the United States, the explicit Rule-making authority remained purely statutory and thus inherently subject to legislative review. Finally, the days of elaborate, purely legislative codes of judicial procedure were by no means forgotten.[17]

Nonetheless, discussion of the merits and demerits of granting to courts the exclusive power to make their own rules of practice and procedure remained largely theoretical. Dean Pound's bald assertion that the chance of abuse of such practice was "too small to be taken seriously" remained largely untested.[18] The particular proposal set forth by Levin and Amsterdam, though not completely novel as a means for limiting legislative interference with the courts, was also largely untested.

It has now been more than thirty years since *Winberry v. Salisbury* was decided.[19] Several other states have adopted Rule-making schemes similar to New Jersey's,[20] and most have had time to analyze them in light of experience as well as theory.[21] Other state courts have interpreted provisions not explicitly dealing with Rule-making as establishing a nonreviewable Rule-making power.[22] Florida has adopted a scheme much like Levin and Amsterdam's,[23] and Ohio and Montana have adopted provisions that limit the time during which the legislature may review Court Rules.[24] Judge Jack B. Weinstein, while criticizing *Winberry*, has found abuses of the Rule-making power elsewhere to be rare and aberrational.[25] Similarly, Charles Grau, writing as part of the American Judicature Society's long-standing Rule-making project, states that the trend is toward maintaining accountability in the legislature.[26]

It is this writer's reluctant conclusion that Dean Pound was wrong, and that the grant of a nonreviewable Rule-making power to the courts leads, despite the good faith of judges, to important problems. Judge Weinstein's and Mr. Grau's assessments of the frequency of problems caused by this power are far too optimistic. On both theoretical and practical grounds this grant of power is unsound.

17. These schemes are collected in Levin & Amsterdam, *supra* note 9, at 6-9 & nn.28-36.

18. Pound, *Procedure, supra* note 7, at 48.

19. 5 N.J. 240, 74 A.2d 405, *cert. denied*, 340 U.S. 877 (1950).

20. *E.g.*, ARIZ. CONST. art. VI, § 5(5); COLO. CONST. art. VI, § 21; DEL. CONST. art. IV, § 13; HAWAII CONST. art. VI, § 7; ILL. CONST. art. II, § 1, art. VI, §§ 4, 6, 16; MICH. CONST. art. VI, §§ 3, 5; N.H. CONST. pt. II, art. 73-A; N.D. CONST. art. VI, § 3; PA. CONST. art. V, § 10; W. VA. CONST. art. VIII, §§ 3, 8.

21. Some provisions have not yet been interpreted, notably Delaware's and Georgia's. *See infra* text accompanying note 53.

22. *See, e.g.*, State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1974); Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976) (interpreting N.M. CONST. art. VI, § 3).

23. FLA. CONST. art. V, § 2(a). *See also* ALASKA CONST. art. IV, § 15.

24. MONT. CONST. art. V, § 2(3); OHIO CONST. art. IV § 5(B).

25. WEINSTEIN, *supra* note 4, at 79, 80, 82-87.

26. C. GRAU, JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS AND ACCOUNTABILITY 14-22 (Am. Judicature Soc'y 1978).

II. *Defining the Rule-making Power*

The Court Rule-making power usually consists of a grant, either legislative or constitutional, to the highest court of jurisdiction of the authority to make rules of practice and procedure for itself and for inferior courts in its jurisdiction.[27] The power is sometimes restricted expressly or implicitly to Rules that "neither abridge, enlarge, or modify the substantive rights of the litigants."[28] Frequently, the power is restricted in terms of procedural subject matter as well, and will preserve to the legislature power over jurisdiction[29] or rules of evidence.[30] The power usually includes the power to suspend earlier procedural statutes inconsistent with the new Rules.[31] Occasionally, as in North Carolina, the state constitution grants the Rule-making authority to the supreme court only over certain courts.[32] In a few other states, notably Connecticut, the general trial court, as well as the supreme court, has a nonreviewable Rule-making power concerning its own proceedings.[33]

The determination of whether an exercise of the Rule-making power is proper typically depends upon two factors: whether it "regulates practice and procedure" and whether it "abridges, enlarges, or modifies substantive rights." Into these areas even wise men—perhaps especially wise men—such as Justice Frankfurter have feared to enter.[34] In attempting to delineate boundaries between substance and procedure in diversity cases, the federal courts have created their own problems: no one forced the Supreme Court to create, or even worse, to try to explain, the *Erie* doctrine.[35] Such subtle analysis is expressly required, however, by any grant of the Rule-making power set forth in the usual terms.

The standard definition of a "rule of practice or procedure" is one that regulates the manner in which lawsuits or criminal prosecutions are conducted. A "substantive right" under this scheme is one that regulates human behavior and defines rights outside the courtroom, concerning what have been called "primary decisions respecting human conduct."[36] Although some courts have taken a different view,[37] "substantive rights" also ought to include the definition of the sanction to be applied for a wrongful "primary" action, e.g.,

27. Occasionally this power is found by the courts to inhere in the structure of government. *E.g.*, State v. Clemente, 166 Conn. 501, 353 A.2d 733 (1974); State v. Bridenhager, 257 Ind. 699, 279 N.E.2d 794 (1972).

28. *E.g.*, OHIO CONST. art. IV, § 5(B); PA. CONST. art. V, § 10(c). *See* 28 U.S.C. § 2072 (1982).

29. *E.g.*, PA. CONST. art. V, § 10(c). *See* 28 U.S.C. § 2072 (1982).

30. *E.g.*, MO. CONST. art. V, § 5. *See* GA. CONST. art. VI, § 1, ¶ 9.

31. *E.g.*, PA. CONST. art. V, § 10(c). *See also* 28 U.S.C. § 2072 (1982) (inconsistent laws "shall be of no further force and effect").

32. N.C. CONST. art. IV, § 13(2) (appellate courts only).

33. State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1974); DEL. CONST. art. IV, § 13(1).

34. *See* Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).

35. Erie R.R v. Tompkins, 304 U.S. 64 (1938).

36. Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

37. *E.g.*, State v. Leonardis, 73 N.J. 360, 375 A.2d 607 (1977); Laudenberger v. Port Auth., 496 Pa. 52, 436 A.2d 147, 155 (1981), *app. dismissed*, 456 U.S. 940 (1982).

the measure of damages in a civil case, or the amount of fine, or length of incarceration in a criminal case.

In practice, this strict two-step analysis is not applied by the courts. Virtually all courts agree that a Rule promulgated pursuant to the Rule-making authority is valid if it regulates procedure as defined above and if its effect on substantive rights as defined above is incidental.[38] The problem of the Rule in *Sibbach v. Wilson & Co.* provides a prototype for court analysis of rules.[39] The Rule, by providing a procedure for a mandatory forensic medical examination,[40] was upheld because it undoubtedly expedited cases involving illness or injury to the person. Yet it also undoubtedly modified the rights of individuals to bodily privacy.[41] For our current purposes, we need only make two observations about *Sibbach*: First, had Congress found the invasion of privacy there sanctioned to be intolerable, it could have changed the Federal Rules of Civil Procedure with no more trouble than that taken to correct common law decisions or statutory interpretations perceived as erroneous. Second, no grant of Rule-making power to courts that absolutely forbade such (arguably) incidental effects upon rights of citizens could be effective in providing broad procedural reforms.

Levin and Amsterdam state that Court Rules are by definition procedural, and therefore statements that they should not "abridge, enlarge or modify" substantive rights are "supererogatory."[42] Yet their own analysis shows that such phrases serve the purpose of keeping the Rule-makers' eyes on the ball: without such a qualification, any effect on procedure, however incidental, might conceivably validate important changes in the substantive law.

Much confusion has been created by the grammatical usage of "substantive" and "procedural" to apply to enactments, whether statutes or Court Rules. One may characterize a right as "substantive" (as the right to speak freely) or "procedural" (as the right to exercise peremptory challenges against a certain number of jurors). No true dividing line exists: for example, the right to confidentiality of conversations with one's physician is a substantive right of confidentiality, but may well determine the evidence presented in a court.

One may best describe enactments as having effects that are substantive (affecting primary activity), effects that are procedural (affecting courtroom proceedings), or, frequently, as having some substantive and some procedural effects. Describing the enactments themselves as substantive or procedural is not in itself harmful so long as it is recognized that the phrase "procedural

38. *See, e.g.*, Busik v. Levine, 63 N.J. 351, 307 A.2d 571, *app. dismissed*, 414 U.S. 1106 (1973); Laudenberger v. Port Auth., 496 Pa. 52, 436 A.2d 147, 155 (1981), *app. dismissed*, 456 U.S. 940 (1982). Both of these cases show how far courts will go to find an effect "incidental."

39. 312 U.S. 1 (1941).

40. FED. R. CIV. P. 35.

41. This is not to make a major claim about the nature of the right to privacy, but simply to say that, given the existence of FED. R. CIV. P. 35, an individual may be compelled to undergo an examination of his body that he might not otherwise be compelled to have.

42. Levin & Amsterdam, *supra* note 9, at 14. *But cf.* Burbank, *supra* note 2, at 1107. Obviously, this writer is more in agreement with Professor Burbank's view.

enactment" is shorthand for "enactment with procedural effect." Unfortunately, this has frequently been ignored, and courts have acted as though it is reasonable to look at an enactment and determine whether it is by its nature substantive or procedural. Even these courts admit it may be in the boundary area between substance and procedure and that the determination may be difficult.[43]

The concept of "boundary" is itself unclear. It should not conjure the usual image of an area in which it is unclear whether the enactments fall on one side or another of a fuzzy dividing line. Rather, it is the usual characteristic of enactments that fall within this boundary that they are clearly perceived to have effects that are substantive and effects that are procedural. Any attempt to make a conceptual division for the purpose of allocating Rule-making authority may result in arbitrary classification of those enactments with effects in both spheres. This will detrimentally affect the ability of both the legislature and the courts to understand clearly their proper functions and powers.

III. *The Nonreviewable Rule-making Power*

A. *Bases of the Power*

Dean Pound proposed two theoretical bases for a nonreviewable Rule-making power. The first is that courts have more expertise in court procedures and are therefore more likely to produce better rules than would result if legislatures were allowed to tinker with their products. As corollaries of this basis, he believed that courts would be more flexible in changing their own rules to meet their needs than would legislatures in changing rules that they had enacted, and that courts would be impervious to the political pressures that occasionally distort legislative judgment in every area. Second, he believed that courts were extremely unlikely to abuse the Rule-making power by extending it into areas that all would agree were substantive and thus for the legislature.[44] Dean Wigmore went further. He believed that the heart of the judicial function, the decision of cases, is impaired when the judiciary is required to follow rules of procedure laid down by an outside authority.[45]

Chief Justice Vanderbilt of the New Jersey Supreme Court fully accepted these bases. He described the Rule-making authority as "essential to the operation of an integrated judicial establishment."[46] He did not qualify his statement in any way, but amplified it by holding, "Complete power and responsibility in the judiciary are concepts quite inconsistent with the notions of overriding legislation."[47] He believed a program of Rule-making could be confined to effects on "practice, procedure and administration as such."[48] Thus, Vanderbilt believed

43. *See, e.g.,* Laudenberger v. Port Auth., 496 Pa. 52, 436 A.2d 147, 155 (1981), *app. dismissed,* 456 U.S. 940 (1982).

44. *See generally* Pound, *Procedure, supra* note 7.

45. *See generally* Wigmore, *supra* note 12.

46. Winberry v. Salisbury, 5 N.J. 240, 245, 74 A.2d 406, 409 (1950).

47. *Id.* at 249, 74 A.2d at 411.

48. *Id.* at 255, 74 A.2d at 414.

that the legislature could safely be excluded from these areas without the danger of encroachment upon the truly legislative function of defining rights and duties.[49] He did not intend to reshape or denigrate the majoritarian theory underlying the grant of legislative and executive powers to the partisan elected representatives of the people.

Not the least important basis for nonreviewable Rule-making power is the sheer relief felt by judges who would rather avoid political quarrels. Even Judge Weinstein and Professor Steven Burbank, both friends of accountability in Rule-making, argue that the congressional phase of the struggle to enact the Federal Rules of Evidence lessened public respect for the Supreme Court as an institution.[50] No one will dispute that such struggles can be both loud and long. As the Indiana Supreme Court has stated, "[W]e will not retrogress into that hodgepodge of dual authority from which we have so recently emerged."[51] Such a position is sympathetic if not ultimately convincing.

B. *Exercise of the Nonreviewable Rule-making Power*

Courts claim a power, not reviewable by the legislature, to make Court Rules, or such power appears on the face of the state's constitution, in states whose political, legal, and social histories are otherwise quite diverse. They include Arizona, Colorado, Hawaii, Illinois, Kentucky, Michigan, Mississippi, New Jersey, New Mexico, North Dakota, Pennsylvania, and West Virginia.[52] The trend toward granting courts such powers is continuing: in 1983, the people of Georgia adopted such a constitutional provision, but required that Rules for lower courts be issued by the supreme court with the advice and consent of those courts.[53] In Connecticut, the inherent power to make Court Rules extends beyond the supreme court and includes the superior court as a Rule-making body as well.[54] Ohio and Montana allow legislative review of proposed Rules for a limited time only, and Florida has joined Alaska in adopting a system of legislative review by a supermajority.[55]

On the whole, one can readily concede that judicial Rule-making has led to improvements in the administration and functioning of courts, and this is true whether the Rule-making authority is reviewable by the legislature or not. The question is thus whether legislative reviewability is truly necessary. It is typically posed as whether judges would exceed their lawful authority, or whether there would be an unfortunate tendency for the courts to expand

49. *Id.* at 249-50, 74 A.2d at 411-14.

50. Burbank, *supra* note 2, at 1195 & n.777; WEINSTEIN, *supra* note 4, at 101-02. This writer believes that the issues involved in the debate over the Federal Rules of Evidence, particularly the privilege issue, were important issues requiring public debate and that the Supreme Court properly performed its duty by raising these issues. This writer also believes that the legislature properly performed its role by taking up the debate.

51. State v. Bridenhager, 257 Ind. 699, 703, 279 N.E.2d 794, 796 (1972).

52. See *supra* text accompanying notes 23-33.

53. GA. CONST. art. VI, § 9, ¶ 1.

54. See *supra* text accompanying note 33.

55. See *supra* text accompanying notes 23-24.

their own authority at the expense of legislative power over the substantive law. But there are other components of the problem: whether Rules with clearly procedural effects nonetheless involve other issues to the extent that they should properly remain subject to legislative control; whether procedural effects of Rules should be subject to legislative review; and whether the legislature is the appropriate body to determine what Court Rules should be reviewed. We can begin this inquiry by examining the ways in which the nonreviewable Rule-making power has been exercised.

1. *Clear Court Usurpation of Power to Define Primary Substantive Rights*

The difficulties with a nonreviewable Rule-making power show themselves most clearly in those cases in which Court Rules overtly modify rights that one intuitively considers substantive rights of the parties to the action before the court. For example, in *Laudenberger v. Port Authority*,[56] the Pennsylvania Supreme Court upheld a Rule of Civil Procedure that created prejudgment interest in certain classes of cases.[57] The court justified the creation of this type of interest by Rule on several grounds. First, it stated the clearly correct proposition that the Rule had been created to encourage prompt settlement of cases and to reduce the numbers of cases on the dockets. From this, it reasoned that the objective of the Rule is essentially procedural.[58] The court went on to state that, in any case, the law of damages is procedural because it "concerns the just administration of rights recognized by substantive law."[59] The court retreated from this somewhat doctrinaire position by admitting that Rules that change the amount of money that the defendant owes the plaintiff at the end of a suit involve substance as well as procedure. It held, however, that refusal to make Rules on that basis alone would emasculate the Rule-making authority and thus the provision of the state constitution that Rules should not "abridge, enlarge, or modify" substantive rights could not be taken literally.[60] Underlying this entire discussion is the premise that "the legislature is *without power to control procedure.*"[61] The Pennsylvania court relied upon a similar result reached by the New Jersey Supreme Court with much less strident rhetoric in *Busik v. Levine*.[62] That case sought to emphasize the pro-

56. 496 Pa. 52, 436 A.2d 147 (1981), *app. dismissed*, 456 U.S. 940 (1982).

57. PA. R. CIV. P. 238.

58. Laudenberger v. Port Auth., 496 Pa. 52, 436 A.2d 147, 150-51 (1981), *app. dismissed*, 456 U.S. 940 (1982).

59. *Id.*, 436 A.2d at 155.

60. *Id.*

61. *Id.*, 436 A.2d at 152, quoting from *In re* 42 Pa. C.S. § 1703, 482 Pa. 522, 529, 394 A.2d 444, 448 (1978), quoting from Garrett v. Bamford, 482 F.2d 810, 814 (3d Cir. 1978). It is interesting that this important state constitutional concept should have been stated first by a federal court interpreting state law in the absence of guidance from the state's courts. There is a long history of federal court interpretation of Pennyslvania's constitution, stretching back to Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (C.C. Pa. 1795) (in diversity suit, holding statute on which land claim was based void on state constitutional grounds).

62. 63 N.J. 351, 307 A.2d 571, *app. dismissed*, 414 U.S. 1016 (1973) (plurality opinion).

tections afforded by the collegial nature of the Rule-making process and the ability of the New Jersey court to obtain a wider variety of opinion than it can in making substantive changes through the common law process of adjudication of single cases. It also pointed out the identity of result between adjudicatory and Rule-making implementation of a doctrine and deemphasized the institutional problem of reviewability.[63]

Other examples of the Rule-making process come from the criminal law, once again notably, but by no means exclusively, from New Jersey. The New Jersey Supreme Court created, by Rule, a "pretrial intervention" program by which certain defendants could, by successfully undergoing a probationary period, avoid the consequences of a criminal trial and conviction and have their records cleared. In *State v. Leonardis*,[64] the court not only upheld this program but required that the state exercise sound discretion in determining which defendants to recommend for the program. The courts were given the authority to correct abuses of discretion by the prosecutor in refusing to admit persons to the program.

The court admitted, and one cannot doubt, that this program, as administered by the courts, creates a right in certain criminal defendants to escape the entry of a criminal judgment against them. It thus also abridges the right of the state to obtain such a judgment. In making this recognition, the court stated that it would "welcome" the participation of the New Jersey legislature in designing the "substantive aspects" of the pretrial intervention program.[65] But it did not suggest that the legislature was free to order the program abandoned and dissolve the rights created by the Court Rules. Indeed, the court emphasized its traditional powers over remedies in criminal law.[66] The powers discussed, however, were powers exercised through common law adjudication, not expressly contrary to statute.

The New Jersey pretrial intervention program may be characterized like the prejudgment interest Rules: It is a device for clearing clogged dockets, but it does so by changing the value of certain causes of action to the parties. In reading the *Leonardis* opinion, however, one cannot doubt that the most important purpose of the program is substantive rather than administrative: The drafters believed that certain first offenders should be relieved of criminal liability for their acts.

The New Jersey pretrial program may also be characterized as an alternative dispute resolution system for one class of otherwise criminal cases. When viewed in this way, *Leonardis* appears to be an assertion of the primacy of the judiciary in devising such schemes. The role reserved to the legislature appears to be subsidiary. While participation is "welcomed," legislative leadership is not.

63. *Id.* at 368-70, 307 A.2d at 581-82.
64. 73 N.J. 360, 375 A.2d 607 (1977), *reconsidering* 71 N.J. 85, 363 A.2d 321 (1976).
65. *Id.*, 375 A.2d at 614.
66. *Id.*, 375 A.2d at 612.

In a closely related case, the Arizona Supreme Court declared that under its Rule-making authority, it was empowered to adopt the American Bar Association's standards concerning the imposition of criminal fines by trial judges.[67] These standards set forth guidelines for determining the appropriate amount of a fine and the method for payment. The defendant was given the right to have his fine reviewed in the light of those standards, making it clear that they define the limits of his monetary liability. The court recognized, of course, that no fine could exceed the statutory maximum.[68] These cases all demonstrate that the nonreviewable Rule-making authority is subject to abuse by direct interference with substantive rights.

2. *Courtroom Procedures That Clealy Result in Modification of Substantive Rights*

A second class of cases are those in which one can intuitively see that the challenged provision affects courtroom procedures, but the provision in practice changes the nature of the cause of action or of the remedy imposed upon the defendant. In *Arneson v. Olson*,[69] the Supreme Court of North Dakota held that a statute limiting the doctrine of res ipsa loquitur in medical malpractice cases violated the court's procedural Rule-making power. The court held that its Rule-making power included the authority to make Rules of Evidence, that the doctrine of res ipsa loquitur is such a rule, and that therefore the legislature had no authority to modify the doctrine. While one may characterize the doctrine as a Rule of Evidence, it is not a usual rule concerning admissibility of a piece of evidence. Rather, it concerns the burden of proof: What kind and amount of evidence will make out the plaintiff's claim that the defendant has been negligent?[70] As the court's decision makes clear, the legislature was attempting to change the nature of the tort of medical malpractice from one in which negligence could often be inferred from an unfavorable result to one in which the plaintiff would typically need to present expert testimony to show directly that a certain medical procedure was improperly performed.[71] Thus, while not necessarily changing the formal elements of medical malpractice—the negligent performance or omission of a medical service that identifiably injures the patient—it in fact reduced the number of circumstances in which a plaintiff could expect to recover.[72] As the legislature stated, it was doing so in response to a perceived health-care cost crisis to "assure the

67. *In re* Collins, 108 Ariz. 310, 497 P.2d 523 (1972).

68. *Id.*

69. 270 N.W.2d 125, 132 (N.D. 1978).

70. This does not make a major claim concerning the controversy as to the proper effect of the doctrine of res ipsa loquitur. The comments here apply regardless of one's view of this controversy.

71. 270 N.W.2d 125, 132 (N.D. 1978).

72. Consider, for example, those cases where the imputation of negligence through res ipsa loquitur is fictional, i.e., wrong in that the imputedly negligent conduct would not meet the definition of negligence, but a jury might nonetheless bring back a verdict of liability.

availability of competent medical and hospital services to the public in North Dakota at reasonable costs."[73] This is without doubt a legitimate real-world aim of legislative policy, enacted in a rational way. It effectively redefines the cause of action and in doing so promotes the public interest. The only way it affects courtroom proceedings is that the judge must do such things as instruct the jury and rule on motions for nonsuit in light of the new statute.

One may hear in this legislation an undertone of distrust for juries' ability to apply correctly an obscure and difficult legal doctrine. The North Dakota legislature obviously believed that the doctrine of res ipsa loquitur sometimes produces inaccurate results in which physicians who were not in fact negligent are often found liable for malpractice. This concern for the correct administration of justice is treated by the North Dakota Supreme Court as infringement upon the court's proper domain. In striking the balance between the availability of medical services and the opportunity to recover for unsuccessful medical procedures, however, legislative concern for the accuracy of malpractice verdicts ought to be proper. In this case, the legislation was prompted by the perception that medical malpractice cases were about to drive the costs of practicing medicine above a tolerable limit, resulting in a reduction in the availability of health care in the state. One can hardly fault the legislature for looking first to the malpractice claims themselves and to whether they were being decided in a manner that would encourage just results.

The criminal law provides an analogous example. Bail is the procedural device by which jurisdiction over the person of the criminal defendant is usually maintained during the pendency of a criminal prosecution.[74] The supreme courts of Illinois[75] and Washington[76] have held that statutes defining the right of criminal defendants to bail following conviction but pending appeal are unconstitutional as interfering with their Rule-making authority over bail. In Illinois, a state Court Rule provided for bail pending appeal at the discretion of the trial court. The legislature passed a statute purporting to deprive the trial court of the power to grant postconviction bail in the case of specifically delineated "forcible felonies."[77] The supreme court, without finding a constitutional right to bail pending appeal, nonetheless struck down the statute because the state constitution obliged the court "to provide by rule for expeditious and inexpensive appeals."[78] Bail after conviction being part of appellate procedure, the legislature had no authority to limit its availability.[79]

73. 270 N.W.2d 125, 126-27 (N.D. 1978), quoting from N.D. CENT. CODE § 26-40.1-01 (1960) (repealed by S.L. 1983, ch. 332, § 26).

74. Those who do not make bail are, of course, kept in jail; some defendants are released, under subpoena, without bail awaiting trial.

75. People *ex rel.* Stamos v. Jones, 40 Ill. 2d 62, 237 N.E.2d 495 (1968).

76. State v. Smith, 84 Wash. 2d 498, 527 P.2d 674 (1974).

77. ILL. REV. STAT. ch. 38, ¶¶ 2-8, 121-6(b); ILL. S. CT. R. 609, *quoted in* People *ex rel.* Stamos v. Jones, 40 Ill. 2d at 63-64, 237 N.E.2d at 496.

78. People *ex rel.* Stamos v. Jones, 40 Ill. 2d at 65, 237 N.E.2d at 497-98, *quoting from* ILL. CONST. art. VI, § 7.

79. *Id.*

By contrast, the Washington Supreme Court struck down a statute that provided for a right to bail pending appeal broader than that provided by Rule of Court.[80] It reasoned similarly, holding that it was "implicit that the right to bail is essentially procedural in nature."[81]

While bail is a procedural device used by courts, it affects the most important substantive right involved in most serious criminal cases—the right of the defendant to freedom. Failure to make bail deprives the defendant of his freedom as much as a sentence of imprisonment. When the legislature determines the standards for granting bail pending appeal, it is legislating the right of a certain class of persons to freedom.[82]

Similarly, nonconstitutionally derived "prompt trial" Rules undoubtedly expedite criminal cases, but they may also have a direct effect on the cause of action. In *State v. Edwards*,[83] the Washington Supreme Court approved a Rule of Criminal Procedure imposing a time limit for bringing a criminal case to trial. The sanction on the state for the failure to begin trial within the time, unless excused, was dismissal of the prosecution. Although having the procedural effect of setting the time within which trial should begin, the Rule on its face set forth circumstances in which a criminal conviction could not be obtained, no matter what the evidence of defendant's guilt. In effect, once again, a court by Rule is legislating the right of the state to obtain criminal convictions in certain cases and the converse right of the defendant to freedom.

Three areas, one civil and two criminal, have thus been identified in which the exclusive Rule-making power serves to oust the legislature from jurisdiction to make statutes that affect the central rights of the parties involved. The statutes found to be unconstitutional, while affecting courtroom proceedings, were nonetheless necessary and proper means to further the substantive aims of the legislature. Similarly, the Rules approved, while affecting courtroom proceedings, also functionally defined the cause of action, a party's ability to obtain the benefit of a judgment, or disabilities to be suffered by a party during the pendency of the litigation.

3. *Rules Affecting Substantive Rights Collateral to the Cause of Action*

A third group of cases involves Rules that affect rights which are not directly implicated by the cause of action before the court. These typically involve the law of evidence, particularly Rules of Privilege, which are designed to protect the privacy of persons who may be unconnected to any legal proceedings. In *Ammerman v. Hubbard Broadcasting, Inc.*,[84] a slander suit, the

80. State v. Smith, 84 Wash. 2d 498, 527 P.2d 674, 676 (1974), considering WASH. REV. CODE § 10.73.040 (1956) and WASH. CT. R. 3.2(h).

81. 84 Wash. 2d 498, 527 P.2d 674, 677 (1974).

82. *See* Commonwealth v. Fowler, 451 Pa. 505, 304 A.2d 124 (1973) (plurality opinion) (holding that a Rule could not create a right of postverdict bail where none existed in statutory or decisional law).

83. 94 Wash. 2d 208, 616 P.2d 620 (1980).

84. 89 N.M. 307, 551 P.2d 1354 (1976).

New Mexico Supreme Court invalidated a newly created statutory privilege as conflicting with its own Rule of Evidence. The legislature had passed a "newsgatherer's shield law" to enable the press to gather and broadcast news while protecting the confidentiality of its informants.[85] The statute had three classes of beneficiaries: reporters, who were encouraged to seek news they would otherwise be unable to obtain; sources, who were encouraged to talk to reporters about important matters with less fear; and the general public, who received the benefit of coverage of stories that might otherwise not be reported (or might be poorly reported). The New Mexico Supreme Court, however, found this privilege to be a matter of evidentiary law that did "no more than regulate the method of proceeding by which substantive rights and duties are determined,"[86] and that the legislature had usurped the court's Rule-making authority by enacting this privilege by statute. To the contrary, the particular rule of evidence affected the ability of reporters to gather news, the right of privacy of their sources, and the amount and quality of news available to the public. The North Dakota Supreme Court has agreed with the New Mexico court, holding that a Court Rule shrinking the spousal privilege from that enacted by the legislature was a valid exercise of the Rule-making authority.[87]

In fairness, not all state courts with nonreviewable Rule-making powers follow this position. The Colorado Supreme Court recognized that the legislature had properly designed its "rape shield law" to protect the privacy of rape victims, stating that, "The basic purpose of [the statute] is one of *public policy*: to provide rape . . . victims greater protection from humiliating and embarrassing 'fishing expeditions' into their past sexual conduct."[88] It thus upheld the statute in the face of a claim that it transgressed the court's exclusive Rule-making power. Although the court noted that the statute did not conflict with any Court Rule,[89] nothing here suggests that the court is likely to invade the province it marked out for the legislature. The court has distinguished between privilege rules and other rules of evidence that do not protect privacy, but merely control such matters as order and manner of proof; these latter rules are solely within the Rule-making authority.[90] Similarly, the Michigan Supreme Court has held evidentiary law to be procedural, unless "a clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified."[91]

An unusual nonevidentiary case in which a nonreviewable Court Rule imposed monetary costs on a nonlitigant is *City of Seattle v. State*.[92] The

85. N.M. STAT. § 20-1-12(A) (1953, Supp. 1975).
86. 89 N.M. 307, 551 P.2d 1354, 1357 (1976).
87. Production Credit Ass'n v. Olson, 280 N.W.2d 920 (N.D. 1979).
88. People v. McKenna, 196 Colo. 367, 585 P.2d 274, 278 (1978).
89. *Id.*, 585 P.2d at 279.
90. *See id.*, 585 P.2d at 277-79.
91. Kirby v. Larson, 400 Mich. 585, 598, 256 N.W.2d 400, 406 (1972) (plurality opinion).
92. 100 Wash. 2d 16, 666 P.2d 359 (1980).

Washington Supreme Court, by statewide Rule for Appeal of Decisions of Courts of Limited Jurisdiction, effectively required that local courts obtain tape-recording equipment.[93] The city of Seattle, which was required to provide such equipment to its local courts, sought reimbursement for the cost of this equipment from the state, pursuant to statute authorizing such reimbursement for programs mandated by state law. The supreme court held that the city was indeed required to spend these funds because the Rule was valid and that the source of authority for the expenditure was the court, not the state legislature. The statute authorizing reimbursement, however, applied only to programs mandated by the legislature, and thus the city was without recourse.[94] The court could not, and did not attempt, to escape the fact that its Rule directly required the appropriation of funds by the city. Conversely, it did not attempt to place this case in the small but well-established class of cases in which courts have held that their ability to administer justice was dependent upon their ability to require the appropriation of funds.[95] It based its decision solely on its power to require obedience to its Rules.

4. *Intermediate Summary*

In short, abuse of the Rule-making power, in the sense that Rules clearly affecting substantive rights have been validated and statutes protecting substantive rights have been voided, has occurred in a broad variety of cases. The cases, however, are relatively few and generally do not involve a wholesale usurpation of legislative authority. They have resulted, however, in the invalidation of at least one major legislative program.[96] They have also, under the guise of controlling rules of evidence, made the legislative definition and protection of privacy rights more difficult.[97] Under the guise of clearing court dockets, they have upset long-established rules concerning the amount a plain-

93. Wash. Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJ) 5.1(a).

94. WASH. REV. CODE ANN. § 43.135.060(1) (1983).

95. *E.g.*, Smith v. Miller, 153 Colo. 35, 384 P.2d 738 (1963) (inherent court power to provide funding for probation office); People *ex rel.* Conn v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337 (1966) (funding criminal defense counsel); Noble County Council v. State *ex rel.* Fifer, 234 Ind. 172, 125 N.E.2d 709 (1955) (probation office); Hall v. Washington County, 2 G. Greene 473 (Iowa 1850); 386 Mich. 1, 190 N.W.2d 228 (1971), *cert. denied*, 405 U.S. 923 (1972) (probation and sheriff's offices); State *ex rel.* Hillis v. Sullivan, 48 Mont. 320, 137 P. 392 (1913) (sheriff's office); State v. Second Judicial Dist., 85 Nev. 241, 453 P.2d 421 (1969); State *ex rel.* Johnson v. Taulbee, 66 Ohio St. 2d 417, 423 N.E.2d 80 (1981); Commonwealth *ex rel.* Carroll v. Tate, 442 Pa. 45, 274 A.2d 193, *cert. denied*, 402 U.S. 974 (1971) (broad inherent power to appropriate funds for many aspects of court administration); Commonwealth v. Hall, 7 Watts 290 (Pa. 1838) (funds to house jurors while attending court); Zilstra v. Piva, 85 Wash. 2d 743, 539 P.2d 823 (1975) (probation office); Carpenter v. Dane County, 9 Wis. 274, 9 Wis. 249 (rev. ed.) (1850).

96. Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978), discussed *supra* at text accompanying notes 69-72.

97. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976); Production Credit Ass'n v. Olson, 280 N.W.2d 920 (N.D. 1979), both discussed *supra* at text accompanying notes 84-86.

tiff may collect,[98] and they have redefined the scope of criminal liability for certain first offenders.[99]

It would be absurd to contend that the nonreviewable Rule-making power has tended to a tyranny of the judiciary. Nonetheless, these cases show that there is an unhealthy tendency of courts, unfettered by the possibility of legislative review, to expand the concept of "Rules of Procedure" beyond reasonable limits. The relatively large number of states in which this has occurred suggests that this tendency does not require any bad faith or deliberate overreaching on the part of the judges involved. Rather, it follows from the fact that vigorous public leaders, including judges, will not be shy in exercising their power, and from the fact that, with nonreviewable powers, even a simple mistake is not correctable by another branch of government. Thus errors, once made, may tend to grow imperceptibly.

5. *"True" Rules of Procedure*

We next reach a class of cases in which the Rules challenged involved courtroom procedures, without clear direct effect upon the substance of primary human activity or the sanctions to be imposed for wrongful primary conduct. Yet some of them involve the heart of our polity, and we intuitively feel they cannot wholly be left to the control of the judiciary in the performance of what is, after all, merely an adjunct to its main business of deciding cases. The paradigm for these are cases involving the power to grant litigants the right to a jury trial.

While the jury is a central feature of our legal system—in the public mind perhaps *the* central feature—it is not guaranteed by constitutions, state or federal, to all parties in all cases. In criminal cases, the Federal Constitution and some state constitutions do not guarantee the right to demand a jury to all misdemeanants, nor to the prosecutor.[100] At least in the latter instance, it may well be that granting such a right to the government was not originally necessary because it was in the nature of criminal courts to try cases by jury.[101]

98. Busik v. Levine, 63 N.J. 351, 307 A.2d 571, *app. dismissed,* 414 U.S. 1106 (1973); Laudenberger v. Port Auth., 496 Pa. 52, 436 A.2d 147 (1981), *app. dismissed,* 456 U.S. 940 (1982), both discussed *supra* at text accompanying notes 56-63.

99. State v. Leonardis, 73 N.J. 360, 375 A.2d 607 (1977), discussed *supra* in text accompanying notes 64-66.

100. U.S. CONST. amend. VI. This amendment clarifies to some extent U.S. CONST. art. III, § 2, stating that in criminal cases trial shall be by jury. In Singer v. United States, 380 U.S. 24 (1965), the Supreme Court held there was no constitutional right in defendants to waive a jury, but did not find any constitutional requirement that the government have the power to demand a jury. The Federal Constitution requires a jury trial only for "serious" offenses. Duncan v. Louisiana, 391 U.S. 145 (1968). As to the failure of state constitutions to allow all parties to demand jury trials in all criminal cases, see generally Hardamon v. Municipal Court, 178 Colo. 271, 497 P.2d 1000 (1972); State v. Garcia, 229 So. 2d 236 (Fla. 1969); People v. Bell, 53 Mich. App. 161, 218 N.W.2d 873 (1974); Commonwealth v. Sorrell, 500 Pa. 355, 456 A.2d 1326 (1982); Lapp v. City of Worland, 612 P.2d 868 (Wyo. 1980).

101. Indeed, in this century in Pennsylvania, it has been held that, without legislative authorization, the court had no jurisdiction to try a criminal case without a jury. Commonwealth v. Hall, 291 Pa. 341, 140 A. 626 (1928). *Contra,* State v. Garcia, 229 So. 2d 236 (Fla. 1969), *aff'g* 224

The justification, set forth by the Pennsylvania Supreme Court in *Commonwealth v. Hall*,[102] for refusing to allow criminal trial by a judge was a recognition that courtroom procedure could well involve legitimately political questions: "[Waiver of a jury] involves a matter of public policy, which . . . so affects the body of the law, both substantive and adjective, on the criminal side, as to imperatively call for legislation when a material departure like that attempted at the present trial is to take place."[103]

Following the decision in *Hall*, the legislature authorized criminal defendants to waive the right to a jury trial with the consent of the court and the commonwealth.[104] After the Pennsylvania constitutional reforms of 1969 gave to the judiciary the nonreviewable Rule-making authority, that state's supreme court changed its tune and did so without discussing prior history. It enacted a Rule of Criminal Procedure allowing the defendant to waive a jury trial with the consent of a court alone and suspended the prior statute.[105] The legislature thereupon reenacted the substance of the former statute,[106] ensuring that a constitutional confrontation would not be long delayed.

In *Commonwealth v. Sorrell*,[107] the Pennsylvania Supreme Court, per Justice Roberts, determined that the Rule of Criminal Procedure was validly promulgated and the statute was unconstitutional. The majority opinion emphasized the obvious fact that trial by jury and trial by judge are procedural devices for the determination of guilt or innocence. The majority perceived the ability of the commonwealth to demand a jury as interfering with the trial court's ability to rule on a defendant's motion for a nonjury trial.[108] However, other than restating the independence of the judiciary, the court did not discuss the reasons why it was more competent than the legislature to weigh the decision to grant the prosecution the power to demand a jury trial.[109]

The majority opinion in *Sorrell* is relatively brief but its theoretical bases are fully set forth in Justice Roberts' earlier opinion in support of affirmance in *Commonwealth v. Wharton*,[110] a case in which the court had divided equally

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So. 2d 395 (Fla. App. 1969). During the colonial period, it had seriously been questioned whether a defendant could even plead guilty outside the presence of a petit jury. Proprietor v. Wilkins, Pennypacker's Pa. Colonial Cases 88 (37th Ct. 1685-86).

102. 291 Pa. 341, 140 A. 626 (1928).

103. *Id.* at 355-56, 140 A. at 631.

104. Act of June 11, 1935, Pa. Laws 319, § 1, formerly 19 PA. STAT. ANN. § 786 (1959) (suspended by PA. R. CRIM. P. 1101 note, and former PA. R. CRIM. P. 1124).

105. PA. R. CRIM. P. 1101.

106. 42 PA. CONS. STAT. § 5104(c).

107. 500 Pa. 355, 456 A.2d 1326 (1982). The author represented the commonwealth in this case.

108. *Id.*, 456 A.2d at 1328-29.

109. The court also overlooked a set of cases in which it had approved statutes giving parties access to various modes of court proceedings. *E.g., In re* Investigating Grand Jury, 490 Pa. 31, 415 A.2d 17 (1980) (legislature may create investigating grand jury as tool for investigation and prosecution of crime and may give such juries subpoena power); Parker v. Children's Hosp., 483 Pa. 106, 394 A.2d 932 (1978) (legislature may create mandatory arbitration procedure in malpractice cases). *Cf.* Commonwealth v. Fowler, 451 Pa. 505, 304 A.2d 124 (1973) (for legislature or common law rather than Court Rule to create right to postverdict bail) (plurality opinion).

110. 495 Pa. 581, 435 A.2d 158 (1981).

on this issue. He there pointed out that the question whether a right was "substantive" is different from whether it is important.[111] This, of course, was a change from the effective view of the earlier Pennsylvania law.[112] He also discussed at greater length his perception of the practical problems of granting the right to demand a jury trial to the prosecution,[113] suggesting that this policy determination, as well as the constitutional ideology of Rule-making, underlay his decision.

Not all courts have agreed with this analysis of the power to grant the right to demand a jury trial. The Colorado Supreme Court, interpreting a constitutional provision similar to Pennsylvania's, approved a statute granting accused petty misdemeanants the right to demand a jury trial.[114] It explicitly, but without supporting reasoning, found the right "substantive."[115] The Florida Court of Appeals has referred a request to create the right to demand a jury trial in certain cases to the legislature.[116] The Ohio Supreme Court has held that the Rule-making authority allows it to prescribe the number of jurors to hear a case, but has disclaimed responsibility for determining which classes of cases should be heard by jury.[117]

Cases from other states show a willingness to consider enactments whose principal effects we intuitively call procedural to be beyond the bounds of legislative competence. These cases typically do not involve matters as weighted by history as the right to a jury trial, and thus it is easier for the courts to assert their power to control proceedings. *Winberry v. Salisbury* was one of the leaders here, holding that a Court Rule had changed the statutory time for filing an appeal.[118] Interestingly, as early as 1940, the Arizona Supreme Court had anticipated this doctrine, holding that a Rule could validly set the time for appeal, but the Rule-making ideology of *Winberry* is not fully articulated there.[119] In *Commonwealth v. Clemente*,[120] the Connecticut Supreme Court held that the legislature had no authority to pass a state analogue to the federal Jencks Act,[121] because criminal discovery was a matter of courtroom procedure to be determined by Court Rules. This case contains some of the strongest rhetoric supporting nonreviewability of Rules and is particularly notable because it vests some of the nonreviewable Rule-making authority in the Connecticut Superior Court, a trial court created by the state constitution. The Connecticut Supreme Court followed this 1974 case when holding

111. *Id.*, 435 A.2d at 162.

112. Commonwealth v. Hall, 291 Pa. 341, 140 A.2d 626 (1928). *See* Commonwealth v. Charlett, 481 Pa. 22, 391 A.2d 1296 (1978).

113. Commonwealth v. Wharton, 495 Pa. 581, 435 A.2d 158, 166-68 (1981).

114. Hardamon v. Municipal Court, 178 Colo. 271, 497 P.2d 1000 (1972).

115. *Id.*, 497 P.2d at 1003.

116. Singletary v. State, 290 So. 2d 116 (Fla. App. 1974), *cert. dismissed*, 293 So. 2d 361 (Fla. 1974).

117. State *ex rel.* Columbus v. Boyland, 58 Ohio St. 2d 490, 391 N.E.2d 324 (1979).

118. 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950).

119. Burney v. Lee, 59 Ariz. 360, 129 P.2d 308 (1940).

120. 166 Conn. 501, 353 A.2d 723 (1974).

121. CONN. GEN. STAT. ANN. § 54-86(b) (Supp. 1985); 18 U.S.C. § 3500 (1982).

in 1982 that the superior court's expansion of the state's right to join offenses against a single defendant validly superseded a statute limiting that right.[122] This last case is similar to one aspect of the previously discussed North Dakota decision in *Arneson v. Olson*.[123] In addition to its other holdings, the North Dakota court invalidated that portion of the medical malpractice statute limiting joinder of certain defendants in health-care professions with any other persons. A final example of this class of cases comes from Arizona, whose supreme court has held that it may validly provide by Rule for the service of process on those beyond the state's borders.[124]

One cannot take these cases too far, however. Even in Pennsylvania, the courts have recognized that the legislature may validly create certain modes of court procedure. The legislature has, for example, validly created investigating grand juries to aid in law enforcement and a mandatory arbitration system for medical malpractice claims.[125] Thus, at least one state with a strong Rule-making tradition has sometimes shown a willingness to allow legislative leadership in the creation of new methods for redressing wrongs.[126] This allowance of legislative leadership does not amount to an abdication of judicial responsibility to ensure that the newly created systems do essential justice to the parties.[127]

Of the issues involved in these cases, by far the most interesting is the question of the right to demand trial by jury. As Justice Roberts pointed out in *Commonwealth v. Wharton*,[128] one should not confuse the issue of whether a right is important with whether it is substantive or procedural, and, given the standard definitions, one can hardly consider the right to trial by jury to be anything other than a procedural protection from the unchecked power of the judge. Yet *Commonwealth v. Hall*[129] is but the one of a series of cases stretching throughout the Rule-making era in which the courts have found the right to a jury trial to be "substantive" as well as "adjective."[130] A choice-of-fact-finder rule may so change the likelihood of a certain outcome in a class of cases that it is seen as a "substantive" rule. This reasoning is most clearly set forth in a non-Rule-making context, the so-called reverse-*Erie*[131]

122. State v. King, 187 Conn. 292, 445 A.2d 901 (1982).

123. 270 N.W.2d 125 (N.D. 1978), discussed *supra* in text accompanying notes 69-72.

124. Heat Pump Equip. Corp. v. Glen Alden Corp., 95 Ariz. 319, 390 P.2d 109 (1964).

125. *In re* Investigating Grand Jury, 490 Pa. 31, 415 A.2d 17 (1980); Parker v. Children's Hosp., 483 Pa. 106, 394 A.2d 932 (1978).

126. *But see* State v. Leonardis, 73 N.J. 360, 375 A.2d 607 (1977).

127. *See* Mattos v. Thompson, 491 Pa. 385, 421 A.2d 190 (1980).

128. 495 Pa. 581, 435 A.3d 158, 162 (1981), relying upon Sibbach v. Wilson & Co., 312 U.S. 1 (1941).

129. 291 Pa. 341, 140 A. 626 (1928).

130. *Id.* at 355-56, 140 A. at 631. Some of these cases are discussed *supra* in text accompanying notes 114-117. *See also* Alaska v. Browder, 486 P.2d 925, 932 n.11 (Alaska 1971); California v. Green, 47 Cal. 2d 209, 302 P.2d 307 (1956), *overruled in part on other grounds*, People v. Morse, 60 Cal. 2d 631, 388 P.2d 33, 36 Cal. Rptr. 201 (1964); Sparks v. United States, 358 A.2d 307 (D.C. 1975); People v. Spegal, 5 Ill. 2d 211, 125 N.E.2d 468 (1955).

131. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

case of *Dice v. Akron, Canton & Youngstown Railroad.*[132] The Supreme Court there held that a state court, in hearing a claim under the Federal Employers' Liability Act,[133] must allow the jury to decide the same issues that a federal court would allow the jury to decide. The Court drew upon prior cases in holding that

> to deprive railroad workers of the benefit of a jury trial [by state court rule] . . . "is to take away a goodly portion of the relief which Congress has afforded them." It follows that the right to jury trial is too substantial a part of the rights accorded him by the Act to permit it to be classified as a mere "local rule of procedure" for denial in the manner that Ohio here used.[134]

Here we see a foreshadowing of Levin's and Amsterdam's recognition that any powerful rule of procedure will affect the outcome of cases. While in form a neutral fact-finding body, the jury is recognized as the equalizer between the lone workingman and the powerful railroad company that is often the defendant in FELA cases.

Indeed, in *Commonwealth v. Sorrell*, we feel the analogous concern of the Pennsylvania Supreme Court that the prosecutor not be allowed to use the jury to obtain fact finders more likely to be upset about crime than certain judges.[135] Yet in this context this concern misses the point—that within constitutional limits, fairness, in the sense of providing a potentially receptive fact finder, is a legitimate concern of both legislatures and courts. The legislature ought to be entitled to allow parties to choose fact finders with an eye toward which fact finder it believes is most likely to be fair to all interests, within the limits set by constitutional grants of due process and the right to jury trial. Limits to legislative power are also set by the duty of the courts to assure due process by assuring an unbiased fact finder. Thus, regardless of Rule or statute, the courts might be required to grant a bench trial to a criminal defendant at his request if no fair jury could be found.[136] This is not, however, to deny the obvious fact that judges, each of whom is "fair" within the meaning of due process, may be more or less likely to find a given defendant guilty, and that any given fair jury may be more or less likely than a given judge to find the same defendant guilty. One of the chief skills of the trial advocate is the ability to select favorable jurors from the pool of those who are essentially fair, or, where permitted, to choose among judges.[137] Nothing in the notion of due process entitles a criminal defen-

132. 342 U.S. 359 (1952).

133. 45 U.S.C. §§ 51-60.

134. 342 U.S. 359, 363 (1952), quoting from Bailey v. Central Vt. R.R., 319 U.S. 350 (1943), and Brown v. Western Ry., 338 U.S. 294 (1949).

135. *See* Commonwealth v. Sorrell, 500 Pa. 355, 456 A.2d 1326, 1328-29 (1982).

136. Consider in this light Singer v. United States, 380 U.S. 24 (1955).

137. The practice of "judge shopping" in jurisdictions where cases are not randomly assigned has been justly criticized. Where nonrandom assignment exists, however, the lawyer who ignores the choice of judge is as derelict in his duties as one who sleeps through jury selection.

dant to choose among fair fact finders in order to find the one most likely to acquit without giving the prosecution the same ability to choose among fact finders.

This view of the jury trial cases emerges from their edges, so to speak, and may not reflect all the influences on them. A case such as *Dice* may reflect simple bias in favor of juries nearly as much as it recognizes the outcome-influencing effect of granting a jury trial to the plaintiffs. Thus, a few years later, in a diversity case governed by state law, the United States Supreme Court held that the plaintiff had the right to have certain issues heard by a jury even though, in state proceedings, they would not enjoy such a right.[138] Nonetheless, these cases reflect a feeling in many courts that truly important procedures must be subject to legislative review. Where necessary to allow this review, these cases will reflect an operative definition of "substance" and "procedure" somewhat at variance with the standard stated definition.[139] Contrary to the thinking of Justice Roberts, the definition of "substance" is at times linked with importance. Judge Weinstein sees in this the ideology of the Rule-makers giving way to practical considerations.[140] In part this is true, but as we shall see, this ideology is also giving way to more powerful, older, and more important ideologies.[141]

6. *Legislative Shaping of Rule-making Processes*

A final class of cases are those in which the legislature, apparently assuming that the courts will exercise a nonreviewable Rule-making authority, attempts to ensure that the authority will be somewhat responsive to popular concerns. In these cases the legislature has passed a statute requiring that the courts, in exercising their Rule-making authority, comply with the same sort of open meeting laws imposed upon other organs of government. Courts have not been sympathetic. The supreme courts of Michigan, Nevada, and Pennsylvania have all declared that because the Rule-making authority is theirs, so is the exclusive power to determine the circumstances under which Rules shall be made. The extremity of reaction to the open meeting laws can be gauged by the letter sent by the Pennsylvania Supreme Court to the governor and leaders of the legislature, and published as though a case, *In re 42 Pa.C.S.* § 1703.[142] In this remarkable document, the justices announce their disobedience to the Pennsylvania Open Meeting Law in the promulgation of Rules on the ground that it violates the court's Rule-making authority. For the first time, they announced that the Pennsylvania legislature is wholly "*without*

138. Byrd v. Blue Ridge Elec. Corp., 356 U.S. 525 (1958). *See* Singer v. United States, 380 U.S. 24, 34 (1955) (on the importance of the jury as a fact-finding body).

139. The traditional definitions of "substance" and "procedure" are discussed *supra* in text accompanying notes 27-43. Cases showing the functional use of a different definition include those set forth *supra* in text and notes 109, 114-117, and 130-134.

140. Thus he titles one of his chapters "Ideology Succumbs to Practicality." WEINSTEIN, *supra* note 4, at 77.

141. See part V *infra*.

142. 482 Pa. 522, 394 A.2d 444 (1978).

power to control procedure,"[143] a statement concerning Pennsylvania law that originated with the Third Circuit.[144] The letter goes on to reject the view that the Open Meeting Law should be followed as a minor and inconsequential change in court procedure for making Rules:

> However, the practical immediate effect of Section 1703 is far less important than the principle of the separation of powers and the policies that it represents. In the instant situation what is to be protected is not per se the power of the Supreme Court to carry on its rule-making in a more closed fashion than Section 1703 mandates but rather the principle that the power to make rules is that of the judiciary and the judiciary alone. Viewed from this perspective, it is understandable how the separation of powers doctrine has been thought to allow and indeed mandate "the court . . . to resist, temperately, though firmly, any invasion of its province, whether great or small.[145]

This, of course, contradicts the line of cases from various jurisdictions urging comity between the legislature and judiciary, particularly where Rules have not been made, or where they differ little from the corresponding statutes.[146] Although the court pays lip service to doctrines of justiciability, it is difficult to see how this letter is anything other than an unrequested advisory opinion. The letter is based upon a shorter document sent to the governor and legislative leaders of Michigan by its supreme court, and published as *In re the "Sunshine Law."*[147] The Michigan letter, although more temperately phrased, was in its own way more radical. Rather than explaining why the court had, in making a specific Rule, ignored a statute, the Michigan letter simply announced an intention to disobey the Sunshine Law. It did so without attempting to confront the arguments for obedience, which the Pennsylvania court at least considered ex parte.[148] The Nevada Supreme Court, in the only adversary determination of this issue, held that an open meeting statute could not even apply to lower court judges making purely local rules.[149] As the members of the Pennsylvania Supreme Court note, no court with constitutional Rule-making authority has reached a different result.[150]

The Nevada case and the two documents published as cases show the strength of the separation of powers rhetoric in the hands of the courts. It is used in instances in which, in an important sense, the desire to separate powers is simply irrelevant to the most important tasks assigned to the courts. Whether

143. *Id.*, 394 A.2d at 448.

144. Garrett v. Bamford, 482 F.2d 810, 814 (3d Cir. 1978). See note 63 *supra.*

145. 482 Pa. 522, 394 A.2d 444, 450 (1978).

146. *E.g.*, People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978); State v. Leonardis, 73 N.J. 360, 375 A.2d 607 (1977).

147. 400 Mich. 660, 255 N.W.2d 635 (1977).

148. *Compare id. with In re* 42 Pa. C.S. § 1703, 482 Pa. 522, 394 A.2d 444, 448-50 (1978).

149. Goldberg v. Eighth Judicial Dist., 572 P.2d 521 (Nev. 1977).

150. 482 Pa. 522, 394 A.2d 444, 450 (1978).

Rule-making is done in public or behind closed doors does not dictate to the courts the content of any Rule. Still less does it deprive the court of the authority to render judgments or have them enforced, or impair the courts in acting as guardians of the rights of persons, or in carrying out the function of judicial review of legislative or executive action. Openness is particularly needed where a supreme court makes rules for the state trial courts because some of the justices may never have been trial judges or even trial lawyers. The people's interest in the openness of Court Rule-making is all the stronger where their representatives have no power to change the Rules.

7. *Judicial Self-control*

All of this is not to say that courts with nonreviewable Rule-making power never exercise self-control in propounding and interpreting Rules, or in interpreting the scope of their own power. We have already seen that the courts of Colorado and Michigan carefully set aside evidentiary doctrines that affect rights of privacy as appropriate for legislative action.[151] Conversely, the Connecticut Supreme Court, whose statements of independence from the legislature have been among the strongest, has recognized that the access of individuals to their own court records defines a "substantive" right to know. It therefore upheld a statute giving to convicts the right to see their presentence reports, which were otherwise sealed by Rule of the superior court.[152] Similarly, we have seen how various jurisdictions have preserved to the legislature the power to grant trial by jury or access to other modes of proceeding to litigants.[153]

Indeed, occasionally a court will seek authority other than the Rule-making power to approve an action which might reasonably be considered to fall within it. In *Pittsburgh Corning Corp. v. Bradley*,[154] the Pennsylvania Supreme Court was presented with a local regulation of the Philadelphia Court of Common Pleas which required litigants in tort cases involving exposure to asbestos to go through a nonjury trial before a judge whose primary docket consisted of asbestos cases. Either party had the absolute right to seek a jury trial *de novo*. The court of common pleas had justified this unusual procedure on the ground that an explosion of asbestos litigation threatened to smother its ability to handle civil cases until well into the twenty-first century. The Pennsylvania Supreme Court agreed that a crisis existed and that a requirement of a brief nonjury trial before an informed judge would short-circuit many requests for jury trials that would be even more lengthened by the fact that jurors would have to become familiar with the effects of asbestos on the human body.[155] The supreme court, however, finessed the question of whether the

151. See *supra* text accompanying notes 88-91.

152. Steadwell v. Warden, 186 Conn. 153, 439 A.2d 1078 (1982). This case recognized the strong separation of powers language contained in State v. Clements, 166 Conn. 501, 353 A.2d 723 (1974).

153. See *supra* text accompanying notes 114-117, 125-127 & 132-138.

154. 499 Pa. 291, 453 A.2d 314 (1982).

155. *Id.*, 453 A.2d at 315-17.

local court had properly exercised its nonconstitutional Rule-making authority. Instead, the supreme court required the court of common pleas to comply with the Rule in the exercise of the former's supervisory and administrative powers and did not purport to exercise its own Rule-making authority.[156] This distinction may have little practical effect in light of this court's use of the Rule-making authority toward an essentially administrative end in *Laudenberger v. Port Authority*.[157] Nonetheless, it indicates that the Pennsylvania Supreme Court, seldom shy about exercising authority, recognizes the delicacy of the courts' positions when they seek, even in an emergency, to modify the institution of jury trial without legislative participation.

The state whose courts have most successfully and consistently exercised self-restraint in defining their own powers is probably Ohio, where the Rule-making authority is subjected to very limited legislative review.[158] We have already seen how the Ohio Supreme Court has distinguished between the legislative right to grant a jury trial and judicial implementation of the rights.[159] The court has in several other contexts recognized the effects upon causes of action of Rules granting access to courtroom procedures. In *State v. Waller*,[160] the court struck down a Rule granting to the state an absolute right to appeal certain issues in criminal cases as conflicting with a statute which required the courts to exercise discretion to allow or deny such appeals. Similarly, the court accepted correction from the legislature in a matter affecting the custody of children. A Court Rule had limited the circumstances in which custody could be awarded to anyone but a parent.[161] In *Boyer v. Boyer*,[162] the court held that a subsequent statute allowing custody to be given to other relatives gave children a substantive right to be placed with the person who will best serve their interests and thus overrode the Rule. In a third example, the court held that the legislature could properly determine which prosecutions should be initiated by arrest and which by citation. This subject matter, of course, involves the procedural devices by which a court obtains personal jurisdiction over a criminal defendant. In *State v. Slatter*,[163] the court nonetheless recognized that what was at stake was the defendant's right to freedom, which, of course, is impaired by arrest in a way it is not impaired by citation. It thus saw what the courts of Illinois and Washington did not see in determining that the availability of post-trial bail was for the court rather than the legislature to decide. One of the classic law school conundrums is whether statutes of limitations are substantive or procedural: the Ohio court wisely recognized that, in this context, they regulate whether a cause of ac-

156. *Id.*, 453 A.2d at 317-18.

157. 495 Pa. 52, 436 A.2d 147 (1981).

158. OHIO CONST. art. IV, § 5(B).

159. See *supra* text accompanying note 117.

160. 47 Ohio St. 2d 52, 351 N.E.2d 195 (1976). *Accord*, State v. Hughes, 41 Ohio St. 2d 208, 324 N.E.2d 731 (1975).

161. OHIO CIV. R. 75(P) (relettered OHIO CIV. R. 75(P) in 1977. Repealed in 1978).

162. 46 Ohio St. 2d 83, 346 N.E.2d 286 (1976).

163. 66 Ohio St. 2d 452, 423 N.E.2d 100 (1981).

tion will exist, and thus it upheld a statute modifying the limitation period for bringing unemployment compensation claims.[164] Finally, and perhaps most obviously correct, the court held that a Rule of Procedure could not abolish the doctrine of sovereign immunity.[165]

The Ohio model is useful for all courts in the exercise of the Rule-making functions and particularly for those in jurisdictions where little or no legislative review is available. That court has not hesitated to make and validate Rules that clarify and expedite courtroom procedures.[166] Equally, however, it has been sensitive to the interaction between Court Rules and the rights of persons, both to "primary private activity"[167] and to recovery for wrongs done or defenses to claims of wrong. As a result, although theoretical problems remain, little is left beyond legislative control that most legislatures would want to change.

IV. *Judicial Self-protection*

The rhetoric of the Rule-makers suggests that nonreviewability is a natural and necessary outgrowth of the doctrine of separation of powers. Having decided upon an independent judiciary, the argument goes, the best way to ensure independence is to guarantee to the courts final power over their own procedure.[168] When the ultimate goal of the separation of powers doctrine is considered, we see that this is simply not the case.

Separation of powers, in this context, is intended to ensure that there will be a fair and neutral forum in which disputes can be resolved. As the doctrine of judicial review of both executive and legislative action has become central to our notion of the function of courts, court power has come to include the ability to resist intrusion by the political arms of government for the purpose of taking away the power to make this review or of unfairly influencing or discouraging its exercise.

Contrary to Wigmore's analysis,[169] review of Rules by the legislature does not impair the heart of the judicial function. The counter-majoritarian and adjudicatory functions of the courts are not bound to a particular set of court procedures nor even to the power to make those procedures. Rather, the heart is the power to adjudicate controversies and have orders enforced. No Court Rule, whether set by the legislature or the courts themselves, impairs the role of the courts unless it impairs these powers. Rules of court, whether legislative or judicial, may increase or decrease court efficiency; and certainly, as Pound argues,[170] courts are generally more likely than the legislature to make effi-

164. Gregory v. Flowers, 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972).

165. Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972).

166. See State *ex rel.* Columbus v. Boyland, 58 Ohio St. 2d 490, 391 N.E.2d 324 (1979); State v. Waller, 47 Ohio St. 2d 52, 351 N.E.2d 195 (1976).

167. Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).

168. *See generally e.g.*, Pound, *Rule-Making Power, supra* note 7.

169. Wigmore, *supra* note 12, at 279.

170. *See generally* Pound, *Rule-Making Power, supra* note 7.

cient rules for themselves. As Levin and Amsterdam point out, however, the threat to the role of the courts typically comes not through legislative revision of Rules, but through attacks on more fundamental judicial matters.[171] It may take the form of President Jackson's reported challenge to the Supreme Court,[172] the congressional removal of habeas corpus jurisdiction from the Supreme Court after the Civil War,[173] more recent moves to "adjust" the jurisdictional or remedial powers of the courts,[174] the explosion of a particular kind of litigation which could genuinely overwhelm a court system,[175] the failure to provide adequate court funding,[176] or the need to protect adequately those committed to the custody of the courts.[177] In each of these cases, the courts must determine whether their adjudicatory and protective functions have been impaired and must vigorously defend them. A few examples will suffice.

Only rarely does a legislative enactment concerning courtroom procedure pose a realistic threat to the power of the courts to adjudicate cases and protect the rights of citizens. In Mississippi, however, the legislature enacted a statute forbidding the judge from instructing the jury except upon request of the attorneys.[178] This was construed to include, in criminal cases, the definition of elements of the offenses charged. Thus, in the absence of requested points for charge, a defendant could be convicted by a jury that had no knowledge of the nature of the charges against him. Obviously, this situation deprives the court—as constituted by judge and jury together—of the ability to decide fairly a controversy properly before it. Thus in *Newell v. State*,[179]

171. Levin & Amsterdam, *supra* note 9, at 30-34.

172. "John Marshall has made his decision, not let him enforce it." *See generally* Burke, *The Cherokee Cases*, 21 STAN. L. REV. 500, 524-31 (1969). Burke suggests statutory mechanisms for enforcing judgments were deficient in Jackson's time.

173. *See generally Ex parte* McCardle, 73 U.S. (6 Wall.) 318 (1868).

174. Such bills have been frequent. In the 1920s they were aimed at divesting the court of power to examine economic and social legislation. Dean Wigmore, summarizing them, called the supporters of one of them "semi-bolshevist radicals." Wigmore, *Bad and Good Federal Legislation Pending*, 23 ILL. L. REV. 327, 329 (1928) (collecting legislative proposals limiting both jurisdiction and remedial powers). In more recent times, these proposals, whether aimed at remedies or jurisdiction, have focused around conservative attempts to restore power stripped from the states by the federal courts. E.g., S. 139 (98th Congress) (proposal to remove from federal courts power to use busing to remedy segregation); S. 26 (98th Congress) (proposing that federal court may not issue injunction or declaratory judgment against enforcement of antiabortion statute); S. 784 (98th Congress) (proposing that the Supreme Court be deprived of jurisdiction to hear school prayer cases).

175. *See* Pittsburgh Corning Corp. v. Bradley, 499 Pa. 291, 453 A.2d 314 (1982), discussed *supra* in text accompanying notes 154-156.

176. *See* cases discussed in note 95 *supra*.

177. *See, e.g.*, Jackson v. Hendrick, 457 Pa. 405, 321 A.2d 603 (1974) (court may devise creative remedies to protect rights of pretrial detainees); Commissioners v. Hall, 7 Watts 290 (Pa. 1838) (court may require funding for housing for those involuntarily called to jury duty to protect both jurors and criminal defendants). This writer represented the District Attorney of Philadelphia in later stages of *Jackson v. Hendrick*.

178. MISS. CODE ANN. §§ 11-7-155, 9-17-35 (1972).

179. 308 So. 2d 71 (Miss. 1975).

the Mississippi Supreme Court properly declared the statute unconstitutional as infringing upon the inherent powers of the judiciary. The court announced a nonreviewable Rule-making power,[180] but the basis of the decision properly goes deeper to the power of the judiciary to ensure due process to all those brought before the courts. Indeed, the court was clearly aware that a principle far more important than Rule-making was at stake and needed protection.[181]

Likewise, the Mississippi Supreme Court, in *Matthews v. State*,[182] held that the legislature could not require it to dispose of criminal appeals within ten days. This case, decided shortly before *Newell*, relies directly upon the separation of powers and the requirement that the judiciary be allowed to decide cases fairly, stating a claim of an inherent Rule-making power only on that basis. The Mississippi decision resembles a 1926 Oklahoma case, discussed at some length by Levin and Amsterdam, holding that the legislature could not compel a certain class of trial to be held within ten days of filing the answer, except that the latter did not discuss Rule-making authority at all.[183]

A more common threat to courtroom proceedings comes from the occasional suggestion that the legislature will deprive the courts of jurisdiction in cases in which it has disapproved of recent results. This practice has a long tradition in America, stretching back to the abolition of the equity jurisdiction in the early history of several states.[184] It continued through the Reconstruction period, as exemplified by the removal of Supreme Court jurisdiction over habeas corpus cases, and still bears fruit in the efforts to remove certain civil rights cases from the Supreme Court or all federal courts.[185] Yet the Rule-making power as generally set forth does not combat this problem.

Another threat to the ability of the courts to adjudicate cases that arise occasionally is the failure of the legislative authority, whether state or local, to provide adequate funding to the courts. Direct court requirement of funding has proven adequate to meet this challenge,[186] but the Rule-making authority is neither necessary nor sufficient to address this problem. Indeed, it is

180. *Id.* at 76.

181. *Id.* at 73-74, 76-78.

182. 288 So. 2d 714 (Miss. 1974).

183. Atchison, T. & S.F. Ry. v. Long, 122 Okla. 86, 251 P. 486 (1926), discussed in Levin & Amsterdam, *supra* note 9, at 31. The Oklahoma court relied upon cases from several other states. 251 P. at 488-90, the most closely analogous of which are Riglander v. Star Co., 98 A.D. 101, 90 N.Y.S. 722 (1904), *aff'd*, 181 N.Y. 531, 73 N.E. 1131 (1905), and Schario v. State, 105 Ohio St. 535, 138 N.E. 63 (1922). Oklahoma is one of the states in which the Rule-making authority has made little progress. The Oklahoma Rules of Civil Procedure are essentially interstitial, closing gaps in procedural statutes. Oklahoma, by statute, recently adopted a Practice Code based upon large portions of the Federal Rules of Civil Procedure.

184. *See generally* 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION 887-97 (1953). The devices that were used to get equitable principles into a system of law with no courts of chancery and no general power to grant injunctions are discussed in A. LAUSSAT, AN ESSAY ON EQUITY IN PENNSYLVANIA (1826; reprinted 1972).

185. See *supra* text accompanying notes 173-174.

186. See *supra* note 95 and accompanying text.

conceivable that at some point legislative frustration because of an inability to change an unwise Rule may lead to this type of fiscal confrontation.

Indeed, in a related kind of crisis, the explosion of litigation, Rule-making analysis and rhetoric, although conceivably appropriate, has been avoided by the courts. The Pennsylvania Supreme Court avoided Rule-making rhetoric in dealing with an administrative crisis in the Philadelphia Court of Common Pleas caused by a glut of complex asbestos tort cases.[187] The Michigan Supreme Court, faced with an explosion of its mandatory criminal appellate docket which threatened to overwhelm its ability to consider civil appeals, did not adopt Rule-making solutions, such as division into panels. Rather, when the legislature sought to provide relief through the creation of an intermediate appellate court, the Michigan Supreme Court expedited that process by advising the legislature concerning the constitutionality of the proposals before it.[188]

In summary, preservation of the heart of the judicial function seldom requires any Rule-making authority. It certainly does not require general legislative nonreviewability of Court Rules, nor does nonreviewability generally advance the courts to true independence. Other devices and doctrines, older and better established, are adequate and necessary for the preservation of judicial independence.

V. *A Proper Role for the Legislature*

Dean Pound's theoretical bases for a nonreviewable Rule-making authority are that courts have more expertise at devising court procedures and can be relied upon not to abuse the power.[189] It is impossible, as noted, to devise a system of effective procedural rules that would in no way affect matters of public policy that are properly reserved to—or at least reviewable by—the legislature. Moreover, there are some concrete examples of what can only be described as abuse of the Rule-making authority. What is perhaps most significant about these abuses is that they were committed by judges who certainly were acting in good faith. Furthermore, these examples come from a number of jurisdictions in which a nonreviewable authority exists, not from a single anomalous jurisdiction. Finally, most of these examples come from major litigation, not from hypothetical analyses of the text of rules.[190] It is certain that there are persons whose interests are in fact affected by the Rules herein criticized. Pound's system provides no majoritarian protection from these actions of the judiciary.

187. See *supra* text accompanying notes 154-157.

188. *In re* Court of Appeals, 372 Mich. 225, 125 N.W.2d 719 (1964).

189. *See generally* Pound, *Procedure, supra* note 7; Pound, *Rule-Making Power, supra* note 7.

190. The author has not attempted to canvass the political struggles that have gone into the making of Rules and statutes in these states. Judge Weinstein believes that one such struggle, over Rules of Evidence in New Jersey, indicates a political realization that the nonreviewable Rule-making power may not be pushed too far. WEINSTEIN, *supra* note 4, at 80-82. Certainly this is correct, but, as we have seen, Judge Weinstein is overly optimistic when he calls the existence of a nonreviewable Rule-making power "illusory." *Id.* at 82.

Pound and Vanderbilt are subject to criticism even when there is no clear abuse of the Rule-making power. One can hardly deny that the principal effect of a rule granting a right to waive a jury trial is "procedural"; it is merely a choice of which of two presumptively fair fact-finders will hear a case. Yet the intuition persists that the legislature ought to be involved in the determination of which parties shall have the choice of choosing or waiving a jury. This manifests itself, given the prevailing conceptualization, when those judges call the right to demand or to waive a jury trial "substantive"[191] or "substantial,"[192] despite the fact that they change neither the rules of primary human conduct nor the sanctions for violating those rules. Practically, this intuition allows judges and legislators to share the leadership role in devising new remedial patterns for disputes.[193]

If we abandon for the moment the terminology of substance and procedure, it becomes easy to see why some courts have allowed legislatures to retain their power over this question. When a court makes Rules, it acts like a legislature. It is providing a general code of conduct, applicable to a broad class of cases.[194] It is doing so outside the context of a particular piece of litigation, with its adversary presentation of two (or more) sides of the particular issue under consideration. Most judges—with the possible exception of the late Justices Black and Douglas[195]—will not hesitate to exercise the Rule-making authority as a quasi-legislature, within certain limits. Where a court feels that the issue is of sufficient importance, however, it may feel uneasy about acting quasi-legislatively and may well look to the legislature for action.[196] This is particularly true where the legislature is or appears to be deprived by court action of the power to revise the Rule propounded. Important nonconstitutional policy decisions are no less policy decisions because they concern the workings of the courts.

Indeed, this is a major point of the series of cases dealing with the inelegantly named subject of "procedural due process."[197] In a few of these cases, the legislature has created a right and commanded that certain procedures be followed before that liberty or property interest may be denied to, or removed from, a person.[198] In these cases, the courts have considered that the legislature, in defining the procedures that will be used to protect the right, has defined the right itself. A view is thereby attributed to the legislature that the procedure prescribed is part of the substance of the right granted.

191. See *supra* text accompanying notes 102-103, 112-125.

192. Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952).

193. See text and notes 66-67, 109, 130-134, *supra*.

194. Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406, 411-12 (1950).

195. These justices found the Rules Enabling Act of 1934 to be unconstitutional.

196. *See* Singletary v. State, 290 So. 2d 116 (Fla. App.), *cert. dismissed*, 293 So. 2d 361 (Fla. 1974); Commonwealth v. Hall, 291 Pa. 341, 140 A. 626 (1928).

197. Try to imagine a process which is not procedural.

198. *See* Paul v. Davis, 424 U.S. 693 (1976) (state may define procedures for vindicating property or liberty interest in reputation); Bishop v. Wood, 426 U.S. 341 (1976) (employee removability "condition[ed] . . . on compliance with certain specified procedures.").

This last view is not particularly remarkable. The only substantial criticism of it has come from those who believe that the protection of certain legislatively granted rights may often constitutionally require a stronger set of procedures than those legislatively specified.[199] It surely demonstrates, however, the legitimacy of deep legislative interest in the processes of adjudication. This simply cannot be reconciled with the views of those courts who have agreed with the Pennsylvania Supreme Court in holding that the legislature is—and ought to be—"*without power to control procedure.*"[200] Such a view, if taken seriously, would require the legislature, if it has any interest in defining primary rights in terms of the procedural protections to be given them, to multiply administrative adjudicatory bodies, where it would, presumably, have the ability to control procedures.[201]

The problems raised by the nonreviewability of Court Rules include interference of Court Rules with primary rights, interference with the power of the legislature to define rights by defining the scope of protection afforded them, and interference with the legislature's interest in procedures. All these problems raise questions of legitimacy: whether these Rules may properly govern conduct in a democratic Republic.[202] This type of question is, of course, not new to our court system; it has been with us since *Marbury v. Madison.*[203]

The issue of legitimacy, however, tends to distort the decision-making process, particularly where it is the legitimacy of a prior act of the decision-maker that is being questioned. On the one hand, where two rules conflict, one legislative and one judicial, a decision based upon who is the legitimate lawgiver draws attention away from the task of determining the just result for the litigants. Thus, ironically, in *Commonwealth v. Wharton*,[204] we feel that Justice Roberts' discussion of the merits of the court's Jury Trial Rule is out of place, and this discussion disappears when his position was accepted by the majority of the court in *Commonwealth v. Sorrell.*[205] Principled decision-making requires the court in this sort of case to consider only the proper allocation of powers between the legislature and the judiciary: the parties and the just resolution of the case have become incidental. On the other hand, judges may subconsciously determine the question of power on the basis of the perceived desirability of result. Thus Justice Roberts was able to urge

199. *See, e.g.*, Cleveland Bd. of Educ. v. Loudermill, 105 S.Ct. 1487, 1491-93 (1985), rejecting the plurality opinion of Arnett v. Kennedy, 416 U.S. 134 (1974).

200. *In re* 42 Pa. C.S. § 1703, 482 Pa. 522, 394 A.2d 444, 448 (1978). *Accord,* State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1974); Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

201. *But cf.* LA. CONST. art. X, §§ 10, 12, and Smith v. Department of Health, 416 So. 2d 94 (La. 1982) (giving the Civil Service Commission a nonreviewable procedural Rule-making authority).

202. *Cf.* U.S. CONST. art. IV, § 4 (the nearly moribund republican form of government clause).

203. 5 U.S. (1 Cranch) 137 (1803).

204. 495 Pa. 581, 435 A.2d 158, 166-68 (1981).

205. 500 Pa. 355, 456 A.2d 1326 (1982).

judicial restraint concerning a Rule he had previously opposed,[206] but he refused to support the legislature in a case in which he felt the judicial Rule was more just.[207] Finally, in deciding these cases, judges subconsciously tend to favor the expansion of their own power, contrary to Pound's suggestion.[208] Cases such as *Arneson v. Olson*[209] and *Ammerman v. Hubbard Broadcasting, Inc.*[210] require this explanation, if one is not to view them simply as bald-faced grabs for power.

Abuses of power may, of course, occur even when correctable by the legislature. This does not create a crisis of legitimacy in the same way, however. If a Court Rule should substantially affect a substantive right, and if the legislature should allow the Rule to take effect, one might reasonably conclude that the legislature has deemed a Rule a wise one. This is little different than legislative acceptance of a decisional modification of the common law or a questionable interpretation of a statute. So long as the Rule is seen as a good one, the people's representatives may choose to overlook the irregularity of its promulgation. What creates the ability of the legislature tacitly to accept the Rule, and therefore avoid the crisis of legitimacy, is the legislative power to reject. Thus, when the United States Supreme Court upheld the grant to the government, through a Rule of Criminal Procedure, of the right to demand a jury over the defendant's objection, it relied on congressional action to demonstrate that it was not taking a valuable procedural device, waiver of jury, away on its own.[211] Similarly, even if *Sibbach v. Wilson & Co.* was wrongly decided, the power of Congress to protect the bodily integrity of those who, voluntarily or not, come to court, is intact.[212] Conversely, even if evidentiary privileges are appropriate for Rule-making, the inability of the legislature in New Mexico to provide statutory protection for newsgatherers robs the legislature of a portion of its proper power.[213]

This argument of tacit acceptance is, of course, proportionately weakened

206. Laudenberger v. Port Auth., 496 Pa. 52, 436 A.2d 147, 155 (1981), *app. dismissed*, 456 U.S. 940 (1982) (Roberts, J., dissenting).

207. Commonwealth v. Wharton, 495 Pa. 581, 435 A.2d 158, 166-68 (1981).

208. As Professor Davis has stated in another context: "The problem is not blended power. The problem is unchecked power." K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 109 at 68 (2d ed. 1978).

209. 270 N.E.2d 125 (N.D. 1978).

210. 89 N.M. 307, 551 P.2d 1354 (1976).

211. *See* Singer v. United States, 380 U.S. 24 (1965) (pointing out that Congress may be deemed to have accepted a rule of procedure).

212. 312 U.S. 1 (1941). *But see Sibbach*, 312 U.S. at 18 (Frankfurter, J., dissenting). As a matter of political theory, Justice Frankfurter is correct that one cannot usually assume that most members of Congress approve of any give Rule or even know of the Rule's existence. This argument proves too much, at least in a world where courts must make the common law and interpret statutes, and inevitably do so in ways that do not please everyone.

213. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976). For another view disagreeing with *Ammerman* on this point, *see* WEINSTEIN, *supra* note 4, at 71-73, 80-82.

where a "supermajority" is required to overturn a Rule.[214] To the extent that a Rule goes beyond the grant of the Rule-making power, it is legitimate, on this analysis, only so long as an ordinary majority of the legislature may correct it. Under a supermajority scheme, the prejudgment interest rules discussed above might be overturned only if overwhelming sentiment against them developed,[215] or a party with a sentiment against the Rule developed an overwhelming majority. An ordinary law-making majority, however, might be powerless, leaving the court action unchecked.

Similarly, provisions such as Ohio's and Montana's procedures allowing legislative review for a limited time reduces, but does not eliminate, the problem of legitimacy.[216] In Ohio, at least, this provision has apparently had the salubrious effect of encouraging judicial self-restraint. These provisions, however, have the paradoxical effect of limiting legislative review to the time at which it may be least useful: the time before Rules go into effect and one can see how they operate.

To force upon judges the role of being the people's final voice in matters of procedure is impossible where judges are appointed and is highly destructive of their proper role as neutral, occasionally countermajoritarian, arbiters where they are elected. Rather, in terms of Rule-making, the judiciary may be seen as analogous to an administrative agency. Its members are legitimately chosen for their expertise in handling courtroom proceedings. Even where elected on the basis of issues other than courtroom skills, judges without doubt are usually chosen from the class of competent courtroom lawyers. They may therefore reasonably be entrusted with the initial responsibility for devising courtroom procedures. Where those procedures impinge upon the interests of the people, as perceived by their representatives, however, the latter interests must be allowed to prevail. As the commentators have pointed out, the legislature should exercise restraint in determining which intuitively procedural rules should be reviewed.[217] However, defining medical malpractice liability so as to ensure the availability of health care,[218] defining the confidentiality of communications between reporter and source,[219] and defining the right of access of the people or the government to various modes of judicial proceeding[220] are all tasks that ultimately ought to be the prerogative—and the responsibility—of the legislature. The examples of rights defined in part by the procedures available to enforce them demonstrate the inadvisability

214. Levin & Amsterdam, *supra* note 9, at 39-40, 42. *Accord,* ALASKA CONST. art. IV, § 15; FLA. CONST. art. V, § 2(a).

215. *See supra* notes 56-63 and accompanying text.

216. MONT. CONST. art. V, § 2(3); OHIO CONST. art. IV, § 5(B).

217. *See* Levin & Amsterdam, *supra* note 9, at 39; WEINSTEIN, *supra* note 4, at 147-48.

218. *See* Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

219. *See* Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976).

220. *See, e.g.,* Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952); Commonwealth v. Sorrell, 500 Pa. 355, 456 A.2d 1326 (1982); Parker v. Children's Hosp., 483 Pa. 106, 394 A.2d 932 (1978).

of setting aside any particular area of Rule-making as nonreviewable by legislative action.[221]

The analogy to administrative agencies also shows the inadvisability of placing the Rule-making process beyond reasonable legislative regulation. Just as the public has an interest in helping shape administrative regulations before promulgation, it also has a legitimate interest in, for example, the openness of judicial Rule-making.[222] Indeed, such involvement may well avoid later constitutional confrontations between the legislature and the judiciary.[223]

At least one aspect of the Rule-making debate has turned out to be less important than imagined: the claim that reviewability of the Rule-making power might lead to endless go-rounds, with Rule-makers and legislators each trying to trump the other.[224] Quite simply, there is no evidence that this has been a problem.[225] The conflicts between Congress and the judiciary concerning the Federal Rules of Evidence and other matters have shown, if anything, the desire of the combatants to resolve, however slowly and painfully, underlying matters of public policy, rather than to struggle incessantly over the locus of power. Similarly, except for one dictum of the Indiana Supreme Court,[226] all of the cases examined have tacitly accepted the proposition that legislative review implies in some political sense a legislative superiority that is to be respected. Before modern judicial Rule-making, there may well have been a morass of statutes; however, no evidence exists to suggest there has been any "morass of dual authority."[227]

Levin's and Amsterdam's suggestion that the courts be constitutionally prohibited from tampering with statutes for six (but only six) years is unnecessary as well.[228] In the absence of any evidence that a court will, by Rule, tamper with new statutes before it is politically reasonable to do so, court power to make Rules, though it involves the power to suspend statutes, should simply be left unimpaired. In those rare instances in which a legislature foresees court tampering, the burden should be placed directly upon the legislature to prohibit the court from suspending any given statute for an appropriate period of time. One might, however, wish to limit the period during which the legislature may oust Court Rule-making authority from a particular area to five years, or some other reasonable time. This would prevent legislative jealousy from permanently paralyzing judicial reform.

By allowing the courts to reconsider "procedural" statutes either at their discretion or within a legislatively set time, another problem feared by Levin

221. See *supra* notes 196-199 and accompanying text.

222. See *supra* notes 100-109, 142-151, and accompanying text.

223. This suggests that, even where courts have asserted a right to operate free of sunshine laws, they would do well to make Rules openly and after public participation.

224. *See* State v. Bridenhager, 257 Ind. 699, 703, 279 N.E.2d 794, 796 (1972).

225. The closest example to a continuing struggle for power is the series of jury trial cases, statutes, and Rules in Pennsylvania. See *supra* notes 100-117 and accompanying text.

226. State v. Bridenhager, 257 Ind. 699, 703, 279 N.E.2d 794, 796 (1972).

227. *Id.*

228. Levin & Amsterdam, *supra* note 9, at 40-41.

and Amsterdam will not arise. They state that "Statutes accumulate," and conclude that easy legislative review will lead to a slow recalcification of procedure through statutes enacted as review.[229] The legislative review allowed under the Federal Rules Enabling Acts has not tended to a statutory ossification of procedures. One need not agree with all congressional revisions of Rules to realize that the evolution of court procedures has not been prevented by obstacles in the form of immovable statutes. Once again, the power of the Rule-makers to suspend statutes tends to prevent ossification without fostering judicial usurpation of power.

These considerations refute the contention that "the continuing exercise of dual powers within the procedural realm would allow at best an unstable symmetry of system."[230] Rather, the system set forth here permits ongoing reform of procedure with sufficient definition of powers to prevent instability.

In attempting to minimize the problems of legitimacy and self-review, the proposal here suggests a nearly complete interpenetration of authority in the normal course of business. The courts must, under this scheme, take care that they do not make a great deal of substantive law through Rules. Because of the availability of legislative correction, however, the spectre of any "effect" whatsoever on substantive rights need not deter the making and enforcing of important Rules. Similarly, the legislature ought to exercise restraint in review, but can vigorously defend important rights.

To recognize explicitly the roles of both the legislature and the courts in the Rule-making process is to encourage creativity in developing new solutions to the problems of dispute resolution. Under the analysis proposed here, either the legislature or the judiciary may take the lead in proposing programs to divert cases out of the court system. Both the legislature and the judiciary ought to be developing these solutions without the fear that a false step will lead to a crisis of legitimacy. For example, given the nonreviewable Rule-making authority of the New Jersey courts, this author had little option but to criticize the court creation of a criminal pretrial diversion program without legislative consent.[231] With the possibility of review, the chance of some temporary usurpation of legislative power by Rule-making becomes less offensive. Thus, a controversy over legitimacy, seldom useful in examining the practical merits of a program, can be avoided in the development of alternatives of full-blown court adjudication. In short, theory and experience demonstrate the need for and wisdom of legislative reviewability of Court Rules.

Conclusion

The Federal Rules Enabling Act provides a sound model for the introduction of court reform from within the judiciary.[232] Many, if not most, states,

229. *Id.* at 39.

230. *Id.* at 38.

231. See *supra* notes 64-66 and accompanying text, criticizing State v. Leonardis, 73 N.J. 360, 375 A.2d 607 (1977).

232. 28 U.S.C. § 2072 (1982).

however, have already gone beyond this type of statutory scheme and embodied the Rule-making authority within the framework of the state constitution.[233] Where the Rule-making authority is statutory, it should remain so; but courts should exercise it vigorously and without fear. Congressional review of Rules proposed by the United States Supreme Court has not always been easy.[234] Nonetheless, it has allowed the political system, in which some of the participants do not have ready access to the Supreme Court, to focus on important issues.

Constitutional drafters should remember that the slogan, "separation of powers," does not signify an end in itself. Rather, it signifies an institutional arrangement that is useful only when the institutions whose powers are separated operate to embody another great slogan of American politics, "checks and balances." In this context, the latter principle defines not only the purpose of having a separate judiciary, it also points out that the total independence of the courts need go no farther than necessary to allow the courts to play their appointed roles. In other respects, to prevent conscious or unconscious usurpation of the power of other branches of government, or to prevent limitation or maladjustment of rights by incorrect decisions, the acts of the courts ought to be subject to review.

Rule-making in this respect is no different from any exercise of power by any of the branches of government. If constitutional drafters choose not to rely upon state Rules-enabling acts, they should make the constitutional Rule-making authority fully subject to legislative review. While a move to legislative review in a state in which it does not exist would doubtless reduce the power of judges, it would not serve to remove from them or the courts the essence of their proper power. Therefore, judges in such states should not place themselves in the political position of opposing a healthy system of checks and balances.

Finally, in those states in which a nonreviewable Rule-making authority is firmly entrenched, the courts should act with great care and self-restraint. Sensitivity to the goals of the legislature, as shown regularly by the Ohio Supreme Court and frequently, if sporadically, by others, can forestall confrontation. As important, such sensitivity recognizes the role of what are normally called "procedures" in the definition of both private and public rights. In the absence of legislative enactment, this need not lead to a timid refusal to exercise the Rule-making authority. Self-restraint should, however, remind the court to search carefully for the purposes of apparently "procedural" legislative acts and to give broad scope to them wherever some effect on

233. *See generally* J. PARNESS & C. KORBAKES, A STUDY OF THE PROCEDURAL RULE-MAKING POWER IN THE UNITED STATES 22-65 (Am. Jud. Soc'y 1973), and the various later documents put out by the American Judicature Society. *E.g.*, D. PUGH et al., JUDICIAL RULEMAKEING: A COMPENDIUM (Am. Jud. Soc'y 1984). In examining these compilations, however, one must take care to examine the functional effects of the constitutions, statutes, and cases cited. Discrepancies exist between the analysis of the sources made by Parness and Korbakes and the analyses made by Judge Weinstein and this author.

234. *See generally* Burbank, *supra* note 2, at 1018-20 & nn.3-13.

"substantive" rights of their enforceability can be discerned. This will occasionally require the invalidating or modification of a Court Rule, but this is a low price to pay for a sound adjustment of the powers of court and legislature.