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Court Rulemaking in Washington State

*Hugh Spitzer**

I. INTRODUCTION

Courts are not normally thought of as "legislating" agencies. They are either trial level institutions deciding individual cases, or they are appellate bodies interpreting the law. But what happens when state courts "legislate" rules[1] in advance to govern activities related to the judicial system? As Federal District Judge Jack Weinstein puts it: "Court rules have much the form and effect of legislative enactments."[2] Several recent controversies in Washington State raise the question whether a system of court-adopted rules of procedure is compatible with the "separation of powers" model of government.

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1. Court rules can be conveniently divided into three categories: (1) administrative rules (2) practice rules and (3) rules of procedure, the largest category. This classification is suggested in C. GRAU, JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS AND ACCOUNTABILITY 3-4 (1978).

Administrative rules include those rules governing court calendars, judicial assignments, the meeting times of the supreme court or the court administrator's operations. *See, e.g.*, WASH. SUP. CT. ADMIN. R.; WASH. CT. APP. ADMIN. R.; WASH. J. CT. ADMIN. R. Practice rules would include all rules governing admission to the Bar, discipline, and attorney ethics. *E.g.*, CODE OF PROFESSIONAL RESPONSIBILITY; WASH. ADMISSION TO PRAC. R.; WASH. DISCIP. R. Rules of procedure include civil, criminal and appellate rules that regulate access to the courts, control parties to a lawsuit, the shape of litigation and a range of judicial powers. *E.g.*, WASH. CIV. R.; WASH. CRIM. R.; WASH. APP. PROC. R.

Judicial bodies in most states write their own administrative rules, and practice rules are also commonly drafted by the courts themselves. But the third group, rules of procedure, are developed by a variety of methods: by courts, by legislators, by other government entities. *See infra* text accompanying notes 59-77 for examples. State-by-state descriptions of court rule promulgation are contained in J. PARNESS & C. KORBAKES, A STUDY OF THE PROCEDURAL RULE-MAKING POWER IN THE UNITED STATES (1973); and C. KORBAKES, J. ALFINI & C. GRAU, JUDICIAL RULEMAKING IN THE STATE COURTS (1978).

2. J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 3 (1977). Judge Weinstein's excellent and readable book on this subject carefully lays out the history and issues involved in court rulemaking, and develops many of the ideas presented in this article and applied here to Washington State.

One such controversy arose in 1980, when the supreme court for the first time required verbatim electronic recording of misdemeanor trials in municipal and district courts and abolished trials *de novo* in the superior courts for these offenses. Although the action was ostensibly at the command of the legislature,[3] municipalities objected that the rule went beyond the legislature's mandate, was too costly, and adopted too rapidly.[4] The purpose of the new requirement was to upgrade the quality of justice in courts of limited jurisdiction, but defense lawyers claimed that it infringed on certain jury trial rights,[5] exceeded state constitutional authority,[6] or abolished appeal rights guaranteed by state statutes.[7]

A different problem arose out of a 1973 supreme court speedy trial rule requiring that criminal defendants be brought to trial within sixty or ninety days "following the preliminary appearance" in court.[8] Because of recurring problems defining

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3. Washington's new RULES FOR APPEAL OF DECISIONS OF COURTS OF LIMITED JURISDICTION, 94 WASH. 2D 1140 (1980), followed from a 1980 legislative enactment, WASH. REV. CODE ch. 3.02 (1981). *But see infra* notes 105-113 and accompanying text, regarding the court's ambivalent attitude toward legislative direction on these rules.

4. SEATTLE OFFICE OF MANAGEMENT AND BUDGET, PROPOSED RULES FOR APPEAL OF DECISIONS OF COURTS OF LIMITED JURISDICTION: FINANCIAL IMPACT ON THE CITY OF SEATTLE (1980); *see also* Spitzer, *Impact of the New "Court of Record" Rules on Courts of Limited Jurisdiction in Washington State*, 397 LEGAL NOTES: PROCEED. ATTYS. CONF. WASH. A. MUN. ATTYS. 117 (1980).

5. WASH. REV. CODE § 2.36.050 (1981), amended at the same time the legislature provided for a record in lesser courts in Washington, now requires that juries in courts of limited jurisdiction must be "selected and impaneled in the same manner as in the superior courts." Some town and country judges continue to conduct *voir dire* of jurors themselves, despite attorneys' demands that they be allowed to personally conduct a *voir dire*, as they do in the superior courts. Defense attorneys further criticize the new court rules because the elimination of superior court trials *de novo* altogether abolishes access to a jury trial for persons charged in some lesser courts which have never used juries; in those jurisdictions, a jury trial could be obtained only on appeal to the superior court.

6. WASH. CONST. art. I, § 21, provides, *inter alia*, that "the legislature may provide for a jury of any number less than twelve in courts not of record. . . ." Criminal defense attorneys have asserted that the continuing practice of using six-person juries in courts of limited jurisdiction, despite the recording requirements of WASH. REV. CODE ch. 3.02 (1981), violates this provision of the Washington State Constitution.

7. When the Washington legislature provided for a record in courts of limited jurisdiction, WASH. REV. CODE ch. 3.02 (1981), the lawmakers evidently intended to abolish trials *de novo* in superior court. *See Testimony Before the House Judiciary Committee*, Jan. 15, 1980 (Tape H-46-JUD 91b and 91c on file at House Ethics, Law, and Justice Committee, Olympia, Wash.). But the legislature failed to repeal the explicit requirements of WASH. REV. CODE § 35.20.070 (1981) that trials *de novo* be available for appeals from the Seattle Municipal Court. Challenges based on this statutory conflict can be expected.

8. Former WASH. SUPER. CT. CRIM. R. 3.3, 82 Wash. 2d 1125 (1973), required an

which of several pretrial proceedings constituted the "preliminary appearance" contemplated in the rule, Washington's Judicial Council recommended a 1978 rewording of the rule that would require the speedy trial within sixty or ninety days of arraignment.[9] But the Judicial Council's draft did not define when an arraignment had to occur. The supreme court noticed this and entirely rewrote the rule, requiring a trial within sixty or ninety days of arrest, or from the point at which a defendant was "bound over" [transferred] from the jurisdiction of a district or municipal court to the superior court.[10] Because the supreme court rewrote the rule without involving Judicial Council staff or the Council's trial judge, attorney, or legislative members, the new version itself contained loopholes allowing prosecutors to delay trials past sixty or ninety days. Under the court's revised 1978 speedy trial rule, prosecutors frequently delayed the date of "bindover" of felonies from the district to superior courts in order to gain time before trial. When this practice became apparent, the court again rewrote the rule, this time with the extensive involvement of a special task force and the Judicial Council.[11] At roughly the same time, the supreme court was placed in the uncomfortable position of having to "rewrite" the meaning of the earlier version in the context of a specific criminal appeal. In so doing, they released a convicted rapist in a controversial case where prosecutors believed they had brought him to trial within a technically correct time period.[12]

These two instances illustrate two problems associated with court rulemaking. The criticisms made by the municipalities and defense lawyers in the first example above, whether valid or not, raise questions as to the proper extent of court authority over political issues with a significant budget impact. They also raise a question as to whether an appellate court, in its administrative capacity, should promulgate rules which may later be challenged in court and appealed to that same body on constitutional or

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opportunity for felony trial within sixty days for a defendant unable to gain pretrial release, and within ninety days for other defendants.

9. Letter of transmittal from Judicial Council Staff Attorney Thomas C. Hoemann to Supreme Court Clerk John J. Champagne (Mar. 3, 1978) (on file with the *University of Puget Sound Law Review*).

10. WASH. SUPER. CT. CRIM. R. 3.3, 90 Wash. 2d 1149 (1978) (adopted by order of the Washington Supreme Court on Nov. 9, 1978).

11. WASH. SUPER. CT. CRIM. R. 3.3, 93 Wash. 2d 1122 (1980) (adopted by order of the Washington Supreme Court on July 1, 1980).

12. State v. Edwards, 94 Wash. 2d 208, 616 P.2d 620 (Aug. 21, 1980).

statutory construction grounds. These questions indicate a breakdown or lack of clarity in the separation of powers doctrine[13] as applied to Washington rulemaking procedure. The second problem, that of the numerous speedy trial redrafts, argues for closer attention to internal procedural safeguards in the court rulemaking process.[14] More effective inclusion of people with varied experiences or representing interested institutions in the rulemaking process will help avoid such drafting oversights.

These case histories describe only two of several recent instances of interbranch conflict over court rules[15] and criticisms resulting from rules drafted too quickly[16] or without involve-

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13. *See infra* text accompanying notes 20-27.

14. *See infra* text accompanying notes 28-35.

15. A supreme court-legislature controversy developed from a late 1980 rule change that required towns and counties to be represented by an attorney in traffic court. WASH. J. CT. TRAFFIC INFRACTION R. 3.3(b), 94 Wash. 2d 1173 (1980) (adopted by order of the Washington Supreme Court on Dec. 2, 1980). See also WASH. REV. CODE § 46.63.080 (Supp. 1981), which gives the Washington Supreme Court the authority to promulgate rules of court for traffic infractions, and provides that any person subject to traffic court proceedings may be represented by counsel. Previously no prosecutors were used in smaller jurisdictions; instead, the police officer and citizen simply told their stories to the judge and a decision was rendered. This new requirement had been hotly and openly debated before the Judicial Council and through correspondence with the Supreme Court. *See, e.g.*, letter from Jeffrey Sullivan, President, Washington State Association of Prosecuting Attorneys, to Administrator for the Courts (Oct. 8, 1980)(on file with the *University of Puget Sound Law Review*); letter from George Mullins, President, Washington State Magistrates Association, to Michael Redman (Dec. 5, 1980)(on file with the *University of Puget Sound Law Review*); letter from Michael Redman to Chief Justice Utter (Dec. 10, 1980)(on file with the *University of Puget Sound Law Review*); letter from Chief Justice Utter to Michael Redman (Jan. 9, 1981)(on file with the *University of Puget Sound Law Review*). The argument did not cease with the rule's promulgation. The counties, towns and prosecutors promptly went to the legislature to obtain a statute overturning the court's dictate. *See* 1981 Wash. Laws ch. 19 § 2 [amending WASH. REV. CODE § 46.63.080 (1981)]. The local officials effectively argued that the attorney requirement was a budgetary and structural issue within the proper sphere of legislative control. The supreme court had modified, but had not rescinded its rule on this subject. WASH. J. CT. TRAFFIC INFRACTION R. 3.3(b), 95 Wash. 2d 1105 (1981) (adopted by order of the Washington Supreme Court on Mar. 11, 1981). But the legislature reaffirmed its position by revising the statute after the court's modification and there now exists a possibility of confrontation between the court and the legislature. This sequence of events underscores the ongoing tension and potential for direct conflict between the legislative and judicial branches over the promulgation of court rules, particularly rules that affect individual rights or create significant costs that must be borne by other government agencies.

16. An issue developed when the Washington Supreme Court, without issuing a draft for comment, increased testing requirements for lay judges. WASH. GEN. R. 8.1-8.5, 94 Wash. 2d 1103 (1980) (adopted by order of the Washington Supreme Court on Nov. 20, 1980). The new testing requirement is probably an excellent idea, but it took smaller jurisdictions by surprise, and interested parties were not afforded an opportunity to comment.

ment of interested parties.[17] This article will suggest that these Washington court rule controversies arose from the lack of a clear, constitutionally established apportionment of rulemaking powers between the legislative and judicial branches, and that there is a lack of procedures providing adequate internal safeguards or accountability. Although the supreme court has generally issued rules of high quality which have improved Washington's system of justice, the high court's insistence on sole ultimate control of procedural rules has caused practical problems and disputes between branches. These problems and disputes might be avoided if the court were not wedded to a politically and philosophically untenable theory of "inherent" power over rulemaking. A systematic sharing of rule promulgation would give better results.

This examination first reviews the classical separation of powers doctrine. That doctrine, which Washington's Supreme Court recently called "a fundamental principle of the American political system,"[18] is meant to discourage arbitrary government action and encourage better decisions by allowing people grouped in separate institutional power centers to check each other. Then the discussion focuses on internal procedural safeguards that also serve within each power center to discourage arbitrary or ill-considered action.

Washington's Supreme Court takes the position that it has inherent power over all varieties of court rules,[19] and that while

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17. A controversy developed when Washington's Supreme Court enacted a rule change in connection with the decriminalization of traffic offenses. WASH. J. CT. CRIM. R. 4.09, 94 Wash. 2d 1128 (1980) (adopted by order of Washington Supreme Court on Nov. 20, 1980). The new rule, promulgated without being widely published in draft form beforehand, had the effect of requiring that a breathalyzer test machine be separately certified by an expert each time its results were to be admitted at a drunk-driving trial. Previously, breathalyzers were periodically checked and certified as operating correctly, but there was not a requirement of a certification that the machine, and the actual test, had been properly carried out each time. The earlier WASH. J. CT. TRAFFIC INFRACTION R. 3.05, while requiring a general certification of breathalyzer maintenance, had not called for a separate expert operator certification for each use of the machine, as newly required by WASH. J. CT. CRIM. R. 4.09(c)(1). The new rule caused a great deal of additional work—needless work according to prosecutors and most others connected with the criminal justice system. The Washington Supreme Court later changed back to the old system but many argue that the incident should never have occurred, and would not have occurred if the supreme court had printed a proposed rule first, or if the court or the Judicial Council, which approved the rule change, were in better touch with the day-to-day workings of the traffic courts.

18. Hagan v. Kassler Escrow, Inc., 96 Wash. 2d 443, 453, 635 P.2d 730, 736 (1981).

19. *See supra* note 1 and accompanying text.

the involvement of other branches in rulemaking may be desirable, those other institutions have no automatic rights or powers in this field. In order to better examine the logical coherency of this principle, and its sense from a policy standpoint, we must review the history of court rulemaking in Washington and in other jurisdictions; it appears that the assertion of "inherent" court power of rulemaking cannot be founded solely on past practice because many courts, including Washington's both in the past and today, have *de jure* or *de facto* shared rulemaking power with the legislature. This article suggests that from a logical view, the scope of sole judicial power over rulemaking should be limited to control of those rules necessary to the very existence and functioning of the courts; beyond that, policy considerations argue for a recognized legislative role: specifically, a limited "legislative veto" over court rules.

Finally, this article urges that court rules would be better drafted and better reflect competing institutional needs if they were regularly promulgated according to a fixed procedure by an independent Judicial Council rather than by the state supreme court. This approach would both save the justices' time for appellate work and protect the integrity of the court as an appellate body when it is called upon to review the constitutionality of court rules.

A. Separation of Powers: Theory and Practice

In America's classical theory of separation of powers, the executive, legislative, and judicial branches have separate jobs to do, and they also function in different ways: the executive carries out policy through command; the legislative branch passes laws prescribing general policy in advance; the courts interpret the law and resolve conflicts on a case-by-case basis, and they protect individual rights and the general structure of government by blocking unconstitutional or statutorily unauthorized actions by other branches.[20]

In the view of the Framers, the judiciary was inherently the

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20. *See* A. VANDERBILT, THE DOCTRINE OF THE SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE (1953); M. VILE, CONSTITUTIONALISM AND SEPARATION OF POWERS (1967); Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 RUT. L. REV. 449 (1958); Sharp, *The Classical American Doctrine of Powers*, 2 U. CHI. L. REV. 385 (1935). *See also* Justice Utter's scholarly analysis of separation of powers in *In re Salary of Juvenile Director*, 87 Wash. 2d 232, 236-43, 552 P.2d 163, 166-70 (1976).

weakest branch. Alexander Hamilton wrote in the Federalist No. 78:

> The judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment . . . .[21]

(Emphasis in original.)

Yet many Americans knew at the time the Constitution was written, or have since learned, that the courts can be quite powerful.[22] Most of the Constitution's drafters also knew that the mixing and sharing of different kinds of power between the various branches was unavoidable;[23] in many instances it has come to appear desirable.[24] Over time it has become clear that "separation of powers" really means separate but often overlapping power centers, each with its own peculiar instruments of authority that can be called forth and played as trumps when another branch is being oppressive or overreaching its authority. These instruments, coming either directly or indirectly from constitutional powers, enable the branches of government jealously to guard their independence and assert a core of "inherent" powers when pressed.[25] For example, legislatures can (and do) refuse

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21. THE FEDERALIST No. 78 at 465 (A. Hamilton) (Mentor ed. 1961).

22. One anti-Federalist, in a tract attacking the proposal for a new fundamental law for America, charged that "the Supreme Court under this constitution would be exalted above all other powers in the government, and subject to no control . . . . In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself." Robert Yates, *Brutus No. XV*, *quoted in* A.T. MASON, THE STATES RIGHTS DEBATE 112 (2d ed. 1972).

23. *See* Sharp, *supra* note 20, at 416-19, 434-36.

24. K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE (2d ed.) §§ 2.5 and 2.6, at 72-82.

25. One of the best discussions of the fluctuating and overlapping "twilight zones" between the branches appears in Justice Jackson's concurring opinion in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 634-55. See also Zylstra v. Piva, 85 Wash. 2d 743, 748-57, 539 P.2d 823, 826-31 (1975), where the Washington Supreme Court held that juvenile court employees have a dual status: they are considered regular county

appropriations to executive, regulatory or judicial agencies whose policies they dislike or fear.[26] Through statutes, legislatures also can negate or "revise" the high court's statutory interpretations.[27] Executives, for their part, *veto* bills; they may also appoint judges to their liking. The courts may void either executive or legislative actions by finding them unconstitutional.

B. Internal Procedural Safeguards

In addition to the textbook system of "checks and balances," each branch has developed or been forced to develop additional internal procedural safeguards for protecting other institutional interests as well as those of private citizens. Thus executive action is now channeled by an assortment of administrative procedure acts,[28] freedom of information and public disclosure laws,[29] and "government in the sunshine" or open meetings laws.[30] The basic purposes of these enactments is to allow access to the lawmaking and regulatory process so individuals and groups can make their views known; to prevent the development of secret administrative rules; and to make officials accountable. Similarly, local legislative bodies are often covered by various open government requirements;[31] lawmakers, indeed employees of all three branches, are forced to abide by ethics codes to insure that they are acting in accordance with public

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employees as far as their wages are concerned, and can negotiate with the county commissioners under the Public Employees Collective Bargaining Act, WASH. REV. CODE ch. 41.56 (1981); but as to matters of hiring, firing and working conditions they are employees of the judicial branch and are not covered by the public employees bargaining law. *See also In re* Salary of Juvenile Director, 87 Wash. 2d 232, 552 P.2d 163 (1976).

26. *See, e.g.*, Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360 (1980). Parnell describes two instances of congressional prohibitions on the use of IRS funds to enforce tax laws concerning fringe benefits, tax-exempt status of private schools, and deductibility of contributions made to private schools. One way to enforce its prohibition was to fund only a limited number of IRS field agents.

27. *See, e.g.*, the 1972 amendments to Longshoremen's and Harborworker's Compensation Act, Pub. L. No. 92-576, 86 Stat. 1251, *amending* 33 U.S.C. §§ 901-50 (1972). The legislative history shows a clear congressional intent to overrule a series of Supreme Court decisions relating to longshoremen. H.R. No. 1441, 92d Cong., 2d Sess. 3, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 4698, 4702-05.

28. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1976); Washington Administrative Procedure Act, WASH. REV. CODE ch. 34.04 (1981).

29. *See* Freedom of Information Act, 5 U.S.C. § 552 (1976); Washington Public Disclosure Law, WASH. REV. CODE §§ 42.17.250-.340 (1981).

30. Government in the Sunshine Act, 5 U.S.C. § 552b (1976); Washington Open Public Meetings Act, WASH. REV. CODE ch. 42.30 (1981).

31. *See, e.g.*, WASH. REV. CODE § 42.30.020(1) (1981).

and institutional interests rather than individual interests.[32]

The courts, for their part, have a full range of internal procedures to insure that their fact-finding and decisions are rendered fairly. Some are prescribed by statute, and some by rule. Examples include formal charges and pleadings, discovery, examination and cross-examination, jury trials, oral and written arguments on legal issues, formal findings of fact and conclusions of law, and written appellate opinions. These safeguards, which we take for granted, were tailored over the years to fit the needs of individual case determinations or the development of new law through appellate decisions in hard cases. These particular procedures are, generally speaking, peculiar to the courts. A trial by jury is not what one usually sees in a legislature.[33] Formal examination and cross-examination are used in limited circumstances in legislative and administrative rulemaking processes[34]—this is because trial-type examination is a time-consuming process better suited to adducing and gleaning the specific facts in a contested case than to generating the background information needed to make policy or promulgate rules of general applicability.[35]

Hence we have two distinct types of protections against a government body acting in an arbitrary or overreaching way: (1) the structural "checks and balances" between branches, built into both federal and state constitutional law; and (2) internal procedural devices within each branch, meant to force agencies to act in a fair and open manner. The two in concert significantly augment our constitutional and statutory limitations on

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32. *See, e.g.*, U.S. CONST. art. II, § 4, art. III, § 1; 18 U.S.C. §§ 201-24 (1976); Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (to be codified at 28 U.S.C. §§ 331, 332, 372, and 604); WASH. CONST. art. V, art. IV, § 31; WASH. REV. CODE chs. 42.18, 42.40, 42.21, 42.22, 42.23 (1981); WASH. REV. CODE § 42.17.130, .240-.243 (1981).

33. The closest legislative equivalent of a trial by jury is an impeachment proceeding. *See, e.g.*, U.S. CONST. art. I, §§ 2-3; WASH. CONST. art. V.

34. Trial-type procedures are, of course, commonly encountered in contested hearings before administrative law judges. They are also allowed in administrative rulemaking proceedings "on the record" where the technical nature of the facts sought warrant a more formal approach to taking evidence. 5 U.S.C. §§ 553, 556-57 (1976). *See also* WASH. REV. CODE ch. 34.04 (1981).

35. A distinction is commonly made between (1) "legislative facts," or general information on a subject needed by policymakers and hence the subject of direct testimony or written materials submitted to a legislative committee; and (2) "adjudicative facts," *i.e.*, specific information about a specific occurrence which is best gathered by a fact-finder through the process of rigorous examination and cross-examination. *See generally* K. DAVIS, 2 ADMINISTRATIVE LAW TREATISE (2d ed.) §§ 12.3-12.9.

government power.

II. A Short History of Court Rulemaking

A. The Cyclical Nature of Rulemaking History

Conflicts about rulemaking have arisen time and again during the last two hundred years. Indeed, if one wished to argue that history operates in a cyclical fashion, one surely would find marvelous evidence in the record on court rules. The issues of whether the judiciary is the appropriate seat of procedural rulemaking, what power the legislature has over court rules, and how the public should be involved in the process have often arisen.[36] The history of control over rulemaking "is inextricably intertwined with attitudes about the function of courts in relation to other branches of government and about the limits of judicial independence."[37]

B. From Courts to Codes and Back Again

If we start our examination of court rule history in the 18th century, we find independent-minded English and American colonial judiciaries with a great deal of control over the complicated and at times artificial forms of legal process.[38] In America's new national government, the tradition of common law judicial rulemaking from English law combined with the considerable congressional control of the federal courts granted by the Constitution. The result was a joint legislative-judicial approach to rulemaking in the nation's first Judiciary Act of 1789[39] and in the subsequent Process Acts.[40]

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36. Controversy over the control of court rules is nothing new. The Roman official Appius Claudius (better known for financing the Appian Way) is credited with destroying a patrician monopoly over legal procedure by allowing his secretary to publish Rome's hitherto secret judicial rules in 304 B.C. This led to a role for the plebeian Assembly in the formulation of procedure; formerly, patrician priest-magistrates had controlled rule-promulgation. M. Grant, History of Rome 81 (1978); H. Jolowicz, Historical Introduction to the Study of Roman Law 88 (2d ed. 1952).

37. J. Weinstein, *supra* note 2, at 21.

38. *Id.* at 24, 55. *See also* E. Jenks, A Short History of English Law 189-90, 346-57 (1912); S. Rosenbaum, The Rule-Making Authority in the English Supreme Court 3 (1917); Paul, *The Rule-Making Power of the Courts*, 1 Wash. L. Rev. 163, 164-69 (1926).

39. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73. *See also* J. Weinstein, *supra* note 2, at 55-60; 1 J. Goebel, Jr., History of the Supreme Court of the United States, 477-88 (1971).

40. Process Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93; Process Act of May 8, 1792,

At the federal level, Congress was content to shift much of its share of rulemaking power toward the courts during the late eighteenth and nineteenth centuries.[41] This was not typical of all lawmakers, however. In England[42] and in many American states, popular dissatisfaction with the frustrating technicalities of forms of action led to legislative movements for reform and the enactment of codes of court procedure.[43] New York's Field Code, copied in other jurisdictions, was a statutory attempt to consolidate, systematize, and simplify American common law forms of action and court procedures.[44]

The twentieth century saw a swing back to court control over rulemaking because the public and practitioners alike found that the skeletal "reform" codes themselves had been expanded and reworked so as to be too complex and contradictory. Legislatures were also criticized as being too resistant to change, too inexperienced in technical judicial procedure, and too susceptible to direct political pressure and delay.[45] Dissatisfaction with the code system led to a new reform movement aimed at court sharing of rule promulgation with the legislatures. Impetus for this push came from the American Bar Asso-

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ch. 36, § 2, 1 Stat. 275. *See also* J. WEINSTEIN, *supra* note 2, at 59-60.

41. J. WEINSTEIN, *supra* note 2, at 59-61. But Weinstein says that Congress occasionally had to push the courts to adopt or reform rules, or to itself enact judicial procedures by law when the courts were unwilling to do so. *Id.* at 65.

42. *Id.* at 24-25.

43. Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599 (1926). Pound suggests that the nineteenth century "legislative hegemony" over rulemaking was due to: (1) a reaction to ultra-formal court procedures and a conservative judiciary; (2) legislatures were exceptionally strong power centers during the early and mid-nineteenth century; (3) courts had no model for remaking procedures, and they were busy enough in the field of substantive law; (4) American lawyer apprenticeships centered on important local procedures that were viewed as quite substantive.

44. Paul, *supra* note 38, at 166-67. Paul asserts that by 1885, twenty-four American states and several British colonies had adopted the main features of the Field Code. *Id.* at 167, n.18. But Charles Cook, in THE AMERICAN CODIFICATION MOVEMENT, A STUDY IN ANTEBELLUM LEGAL REFORM (1981), points out that David Dudley Field's proposed *substantive* law codes failed to gain legislative approval in New York because of vigorous opposition from common law advocates. The bench and bar also attempted to subvert implementation of his procedural code, although there was never any contention that the New York legislature lacked the constitutional power to prescribe court rules. *Id.* at 192-94.

45. Levin & Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 10 (1958); Paul, *supra* note 38, at 167-68; Pound, *supra* note 43, at 601-02; Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 31-32, 44-46 (1928); Wigmore, *All Legislative Rules for Judiciary Procedures are Void Constitutionally*, 23 ILL. L. REV. 276 (1928).

ciation beginning in 1912,[46] the American Judicature Society in 1917,[47] and the National Municipal League in 1920.[48] In the 1920's there was a flurry of law review articles[49] and a nationwide push both for court-dominated rulemaking and the establishment of judicial conferences or councils to provide lawyers and judges with joint participation and control over the reform of rules of procedure.[50] The effort was redoubled at the beginning of the New Deal, spreading to the federal level. This led to an act empowering the Supreme Court to prescribe uniform rules of civil procedure for the district courts that would supersede inconsistent statutes.[51] The new Federal Rules of Civil Procedure[52] were developed by an advisory committee and promulgated by the Supreme Court in 1938.[53] The success of the new federal rules then encouraged the Bar Association to push for similar court-promulgated regulations in more states, and there was yet another effort to encourage state legislatures to cede blanket authority in this field to state supreme courts.[54]

C. The Current Scene: A Patchwork Quilt

While the multi-year effort for court-dominated rulemaking has led to more uniform rules of procedure nationwide, it has not been accompanied by a uniform method of promulgating those rules. Quite the opposite is true—there are nearly as many means of court rulemaking as there are governments.[55]

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46. See Clark & Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 388 (1935), where the authors note that originally the American Bar Association was interested only in uniform procedures, regardless of whether they were mandated by courts or legislatures. It was some years later that the A.B.A. turned to court rulemaking as the more effective means to procedural reforms. J. PARNESS & C. KORBAKES, *supra* note 1, at 7-8.

47. J. PARNESS & C. KORBAKES, *supra* note 41, at 5.

48. *Id.* at 6-7.

49. *See supra* notes 43-46.

50. Paul, *The Judicial Council Movement*, 1 WASH. L. REV. 101 (1925); Sutherland, *The Regulation of Procedure by Rules Originating in the Judicial Council*, 10 IND. L.J. 202 (1925); Warner, *The Role of Courts and Judicial Councils in Procedural Reform*, 85 U. PA. L. REV. 441 (1937). The authors of the latter two articles were skeptical as to whether the courts had inherent power over rulemaking, but were enthusiastic about the usefulness of judicial councils.

51. Act of June 19, 1934, ch. 651, 48 Stat. 1064. *Cf.* 28 U.S.C. § 2072 (1976). *See also* J. WEINSTEIN, *supra* note 2, at 67-68.

52. FED. R. CIV. P., 28 U.S.C.

53. 308 U.S. 645-766.

54. Levin & Amsterdam, *supra* note 45, at 4.

55. *See* C. KORBAKES, J. ALFINI & C. GRAU, *supra* note 1. *See also* A. ASHMAN & J.

At the federal level, the Supreme Court prescribes rules upon the recommendation of the Judicial Conference,[56] but the Court must file new rules with Congress ninety days before their effective date; Congress can amend them.[57] On at least one occasion the legislators caused a thorough rewrite: because of criticism from the bar and the general public about the procedural and policy impacts of new rules of criminal procedure and rules of evidence, Congress forced long delays and substantial changes in those proposals.[58]

Rulemaking in the states includes a few jurisdictions where legislatures dominate court procedures through statute,[59] and some where supreme courts exercise full control.[60] In many other states, supreme courts make rules subject to legislative veto or revision.[61] Some states have systems that entrust rulemaking to judicial conferences or councils, with or without legislative or supreme court involvement.[62] Finally, there is an incredible vari-

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ALFINI, USES OF THE JUDICIAL RULE-MAKING POWER (1974), and Ashman, *Measuring Judicial Rule-Making Power*, 59 JUDICATURE 215 (1976), all American Judicature Society studies that detail the varying categories of rules promulgated in different jurisdictions.

56. The Judicial Conference is established at 28 U.S.C. § 331 (1976). At least one commentator believes that the conference was established in part to prod the Supreme Court into a continuous reworking of procedure. J. WEINSTEIN, *supra* note 2, at 11.

57. 28 U.S.C. § 2072 (1976).

58. J. WEINSTEIN, *supra* note 2, at 11, 70-75. The Supreme Court can promulgate criminal rules under 18 U.S.C. § 3771 (1976), subject to congressional review and revision. The Court's power over evidentiary rules is much less clear, and Congress has firmly exercised its control over this category of court procedures. J. WEINSTEIN, *supra* note 2, at 72-73.

59. *E.g.*, Louisiana, whose codes of civil and criminal procedure are discussed at J. PARNESS & C. KORBAKES, *supra* note 1, at 36. The legislature also exercised strong control of rulemaking in Oregon until quite recently. Kirkpatrick, *Procedural Reform in Oregon*, 56 ORE. L. REV. 539, 563-64 (1977). In Nevada, the legislature writes the criminal rules, while the court controls civil procedure. NEV. REV. STAT. §§ 2.120, .169-.189 (1980); J. PARNESS & C. KORBAKES, *supra* note 1, at 45.

60. New Jersey and Illinois are well-known examples. *See*, People v. Jackson, 68 Ill. 2d 252, 371 N.E.2d 602 (1977); Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1980); New, *The Bounds of Power: Judicial Rule-Making in Illinois*, 10 LOY. U. CHI. L.J. 100 (1978).

61. *See, e.g.*, IOWA CONST. art. V, §§ 1, 4, 14; IOWA CODE §§ 18, 19 (1975) discussed at J. PARNESS & C. KORBAKES, *supra* note 1, at 33; CONN. GEN. STAT. § 51-14 (1977), discussed at J. PARNESS & C. KORBAKES, *supra* note 1, at 27. About one-half of the states have some form of direct legislative veto of court rules. *Id.* at 65.

62. New York's Constitution, for example, gives the legislature the power "to alter and regulate the jurisdiction and proceeding in law and in equity," and to delegate that power "in whole or in part" to a court, board or judicial conference. N.Y. CONST. art. VI, § 30. By statute, the Chief Justice of the New York Court of Appeals, after consultation with the administrative board of the courts, has the power to establish general policies and procedures for the New York court system. *See*, N.Y. JUD. LAW §§ 210-12. The legis-

ety of hybrids.[63]

The Pacific Coast states exhibit the same variation in rulemaking plans. For example, Alaska's 1959 constitution establishes a judicial council of three attorneys, three lay people, and the chief justice as chair; this body recommends court rules or amendments to the supreme court, which may alter them, and then issues the rules subject to a veto of two-thirds vote of each house.[64] This explicit constitutional delineation of rulemaking power between the separate branches is rare.[65]

Oregon has a new approach to court rules. For many years Oregon had been a "code state" where court rules were prescribed by the legislature; that body was unwilling to cede rulemaking to the supreme court on the grounds that the latter was too removed from trial court practice and was busy enough rendering appellate decisions. Legislators also feared the court might enact *en masse* the Federal Rules of Civil Procedure, then unpopular among many Oregon attorneys because of the tough-minded application of those rules by some of the state's federal judges.[66] Enacted in 1977 after a long and hard-fought effort by legislators, judges and members of the bar,[67] the new Rule Council on Court Procedures was composed of two appellate judges, eight trial court judges, one lay person, and twelve attorneys at least one of whom must be a law professor.[68] The Council was charged with revising civil rules only, and enacting them subject to a ninety-day legislative review period.[69] The first half of a comprehensive revision was issued December 2, 1978, and modestly revised by the legislature;[70] the second group of changes

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lature has reserved its power to regulate court proceedings under the state constitution. *Id.* § 211(1)(b).

63. C. KORBAKES, J. ALFINI & C. GRAU, *supra* note 1, includes a comprehensive state-by-state analysis of rulemaking procedures. *See also* J. PARNESS & C. KORBAKES, *supra* note 1, at 22-64.

64. ALASKA CONST. art. IV, §§ 8, 15. *See also* Zeege v. Martin, 379 P.2d 447, 450 (Alaska 1963).

65. *See* J. PARNESS & C. KORBAKES, *supra* note 1, at 53.

66. Kirkpatrick, *supra* note 59, at 563-66; interview with Multnomah County Circuit Court Judge Jack Beatty (Jan. 26, 1981); interview with University of Oregon Professor Fredric R. Merrill (Jan. 23, 1981).

67. Kirkpatrick, *supra* note 59, at 563-66; interview with Circuit Court Judge Beatty, *supra* note 66; interview with Professor Merrill, *supra* note 66.

68. OR. REV. STAT. §§ 1.725-750 (1981). The Council on Court Procedures is staffed by a University of Oregon law professor and funded by the legislature, *supra* note 66.

69. OR. REV. STAT. § 1.735 (1981).

70. OR. R. OF COURT, p.11 (West 1980); interview with Professor Merrill, *supra* note 66.

was completed and sent to the lawmakers for review in 1981.[71]

California promulgates its court rules by means of a constitutionally established Judicial Council.[72] Legislative review is not spelled out in the constitutional provision establishing the Judicial Council; the section simply gives the Council authority to "adopt rules for court administration, practice and procedure, *not inconsistent with statute,* and perform other functions prescribed by statute."[73] (Emphasis added.) But the legislature uses its statute-making power to alter proposed court rules,[74] continues to prescribe many trial court rules by statute,[75] and gives some explicit statutory direction to the council to issue rules in some areas.[76] The grant of explicit authority to the Judicial Council on certain subjects results in rules that supersede contrary earlier legislative enactments.[77]

D. Washington's Rulemaking History: Legislative Control Ceded to the Courts

Washington State's rulemaking history is as "typical" as any, given the wide variety nationally in approaches to the development of court procedures. Washington has witnessed the same historical cycles, has developed the same practical compromises, and, as we shall see, has exhibited some of the ideological confusion evident in other jurisdictions.

Washington Territory's birth in 1853[78] occurred just when the reform of the Field Code's approach to rulemaking was gaining popularity, particularly in the west.[79] In 1854, the first territorial legislature swept away the previously used common law forms of procedure.[80] Thereafter, the legislature prescribed

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71. Interview with Professor Merrill, *supra* note 66.

72. CAL. CONST. art. VI, § 6; CAL. CIV. PROC. CODE §§ 404.7, 575, 901, 1034, 1089 (West 1980); CAL. CIV. CODE § 4001 (West 1980); CAL. PENAL CODE § 1247(k) (West 1980).

73. CAL. CONST. art IV, § 6.

74. Interview with California Judicial Council staff member Steven Birdlebough (Jan. 23, 1981).

75. *Id.*

76. *See supra* note 72.

77. *See, e.g., In re* Marriage of McKim, 6 Cal. 3d 673, 678 n.12, 493 P.2d 868, 870 n.12, 100 Cal. Rptr. 140, 142 n.12 (1972).

78. An Act to Establish the Territorial Government of Washington, ch. 90, 10 Stat. 172 (1853).

79. C. COOK, *supra* note 44, at 197-98; Paul, *supra* note 38, 1 WASH. L. REV. pt. 2, at 227.

80. "All forms of pleading heretofore existing in civil action, inconsistent with the

almost *all* court rules, including many internal administrative procedures.[81] The Washington Supreme Court recognized legislative preeminence in this field, ruling in *State ex rel. King County v. Superior Court*[82] that common law procedures were valid only when they were not inconsistent with statute.

As in many other jurisdictions, the Washington court procedure codes gradually became more complicated and more difficult to amend efficiently.[83] This led to a local reform movement similar to those in other parts of the country resulting, in 1925, in a legislative vote to get out of the business of rulemaking. With that vote, the state legislature delegated most of its power over procedure to the supreme court,[84] and established a Judicial Council to help develop simple, straightforward rules of court.[85]

In the end this reform was quite successful in reaching its goals: the supreme court did enact rules in a format much improved over the old code.[86] Since that time the structure and content of the modern Federal Rules of Civil Procedure have

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provisions of this act, are abolished, and hereafter the forms of pleading, and the rules by which the sufficiency of the pleadings is to be determined, shall be those prescribed by statute." 1854 Wash. Laws, ch. 5, § 36, *quoted in* Paul, *supra* note 38, at 227.

81. *See, e.g.*, Pierce's Code (1923) Vol. II, §§ 8560-687. But note that control of administrative rules concerning the supreme court's own docket was given to that body by means of 1890 Wash. Laws ch. 11, § 12, now codified at WASH. REV. CODE § 2.04.180 (1981).

82. 102 Wash. 268, 273, 176 P. 352, 354 (1918).

83. *See supra* text accompanying note 45.

84. 1925 Wash. Laws, 1st ex. sess., ch. 118, § 1; WASH. REV. CODE § 2.04.190 (1981), states:

> The Supreme Court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts and justices of the peace of the state. In prescribing such rules the supreme court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

85. 1925 Wash. Laws, 1st ex. sess., ch. 45, § 1; WASH. REV. CODE ch. 2.52 (1981). The Judicial Council is currently chaired by the chief justice, who serves with three other appellate judges, four trial judges, eight legislators, eight practicing lawyers, the attorney general, a county clerk, and the deans of each recognized law school in the state—a total of twenty-nine members.

86. *Cf.* WASH. SUP. CT. RULES, GEN. R. SUPER. CTS. (1931); REM. REV. STAT. § 1 (1932).

greatly influenced Washington rules, and the state now has an extensive judicially promulgated "code" of regulations governing most aspects of procedure.[87]

III. A Hodge Podge of Rulemaking Theory

A. Most Theories Follow Practicality

The constitutional and doctrinal rationales for the control of court rules vary as widely as the forms of rulemaking. Few jurisdictions clearly divide rulemaking powers between the legislatures and the courts.[88] At the federal level the theory requiring delegation of rulemaking to the Supreme Court recognizes Congress' ultimate authority over judicial procedure, an authority Congress consciously shares with the judiciary.[89] A similar delegation doctrine exists in one form or another in many states.[90] A few supreme courts, however, assert that rulemaking is, by virtue of the separation of powers doctrine, solely within their "inherent jurisdiction."[91] Such clarity is rare, however.

Most tribunals shy away from the political confrontations that can result from a high court playing an "inherent power" trump in a game with the legislature. The lawmakers, after all, control the purse strings of the judiciary.[92] Hence the actual power to make court rules is usually shared. While certain categories of rules, such as appellate procedure and attorney discipline, are widely viewed as being within the courts' inherent jurisdiction,[93] and others, like evidence, tend to be heavily controlled by legislatures,[94] the ideology is usually flexible enough to allow legislatures to influence most types of rules if policy or financial considerations are strong.[95] Whatever the ideology, the

87. *See* Wash. Ct. R. (West 1980).

88. *See supra* text accompanying note 65.

89. Sibbach v. Wilson, 312 U.S. 1, 9-10 (1941); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825).

90. *See* J. Parness & C. Korbakes, *supra* note 1.

91. *See supra* note 60. For a critique of the "inherent jurisdiction" theory, see Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois*, 47 Nw. U.L. Rev. 443, 449-54 (1952).

92. *See, e.g.*, Leahy v. Farrell, 362 Pa. 52, 54, 66 A.2d 577, 578-79 (1949).

93. A. Ashman, Uses of the Judicial Rule-Making Power 5, 10-12, 90-92 (1974).

94. *Id.* at 5; J. Weinstein, *supra* note 2, at 70-75, 99-102.

95. J. Parness & C. Korbakes, *supra* note 1, at 22-64. One commentator suggests that "the courts have avoided friction . . . by a diplomatic assertion that the rule-making power is "neither exclusively legislative nor judicial' or that such power is "both statutory and inherent.' " Note, *The Judiciary and the Rule-making Power*, 23 S.C.L.

practical result is usually some form of concurrent powers.[96] This attitude, while confusing and occasionally conducive to intra-governmental skirmishes, on the whole reflects the practical approach to separation of powers doctrine that distinguishes our democratic system from other systems of government.[97] Put another way, the most successful systems of court rulemaking are founded on finesse. Open conflict between the legislative and judicial branches is likely to occur only where one of the parties is unable or unwilling to find a ground for political or doctrinal compromise.

B. Theory of Washington Court Rulemaking: Delegation Yields to "Inherent" Power

Washington State court rulemaking also has been characterized by political and doctrinal compromise. Recently, however, the state supreme court has compromised only grudgingly. Because of practical considerations this dichotomy between stated rationale and action could soon result in open conflict between the legislature and the high court. The court has been unwilling to yield ideologically what it has yielded *de facto.*

Historically, the theoretical rationale for court rulemaking in Washington has followed, rather than actively guided, practices current at any given time. The distinctive feature of the recent history of rulemaking theory is the supreme court's gradual assertion of an "inherent" power to govern procedures, following the long-term devolution of that power to the judicial branch.

The state's highest tribunal earlier had recognized clearly the legislature's power to control court rules.[98] Therefore when

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REV. 377, 381 (1971) [quotes respectively from State v. Gibson, 239 Ind. 394, 399, 157 N.E.2d 475, 477 (1958); Skettles v. State, 209 Tenn. 157, 352 S.W.2d 1 (1961)].

96. C. GRAU, *supra* note 1, at 15.

97. As Judge Weinstein aptly states in a chapter entitled "Ideology Succumbs to Practicability: Courts and Legislatures Both Have a Role in Rulemaking":

> The history of rule-making at the federal level . . . shows a practical accomodation between the legislature and the courts.
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> . . . .
>
> It is the good sense to avoid intolerable conflicts by refusing to push the notion of independent branches of government to its logical conclusion that has made it possible for our government to survive.

J. WEINSTEIN, *supra* note 2, at 77-78.

98. *See supra* note 82 and accompanying text. But see *In re* Lambuth, 18 Wash. 478, 480, 51 P. 1071, 1072 (1898); and *In re* Bruen, 102 Wash. 472, 476, 172 P. 1152, 1153 (1918), concerning the court's right to control the admission and disbarment of

reformers in the 1920's advocated court rule-promulgation on the ground of efficiency and flexibility, they had to argue that rulemaking *was not inherently legislative,* but was an activity that was inherently *shared* with the court.[99] That approach was soon adopted by the Washington Supreme Court in *State ex rel. Foster-Wyman Lumber Co. v. Superior Court,*[100] where the court chided the judiciary for having let such an important common law power slip through its fingers to another branch.[101] The opinion then emphasized that although the legislature had been the source of rules of practice for years, there was nothing exclusively legislative about that risk; the function could be transferred back to court.[102] In fact, the opinion in *Foster-Wyman Lumber* did not conceptualize the 1925 legislative cession of rulemaking power as a strict "delegation," but rather as a "transfer" of power.[103] This was in accord with the idea, then popular among reformists,[104] that the nineteenth century legislative assumption of control over court rules had been an illegitimate usurpation of court power, now being sensibly returned to its rightful holder. *Foster-Wyman* stated no reasons for the notion that control of court rules was intrinsically a judicial prerogative. Carefully woven into the opinion, however, is enough deference to then-strong legislative power to forestall any legislative backlash from the elected lawmakers.

Later Washington decisions were not so carefully crafted; they wander back and forth conceptually. One stated that the court exercised rulemaking power "by virtue of" a statute;[105] another said the legislature "provides" for court control over rules;[106] a third spoke in terms of a "legislative grant of authority to the supreme court."[107] These opinions never offered a serious or explicit rationale for placing rulemaking in one branch rather than another.

Though more recent decisions talk about an "inherent power" of the judicial branch over residual rulemaking rights of

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attorneys.

99. Paul, *supra* note 38, at 223-24.

100. 148 Wash. 1, 267 P. 770 (1928).

101. *Id.* at 4-6, 267 P. at 771-72.

102. *Id.* at 9, 267 P. at 773.

103. *Id.*

104. *See supra* note 43.

105. State v. Pavelich, 153 Wash. 379, 381, 279 P. 1102, 1103-04 (1929).

106. Ashley v. Superior Court, 83 Wash. 2d 630, 636, 521 P.2d 711, 715 (1974).

107. State v. Turner, 16 Wash. App. 292, 298, 555 P.2d 1382, 1385-86 (1976).

the legislature, none identifies the source of that power. In *State v. Smith,*[108] for example, the court upheld a lower court's refusal to grant bail to a defendant pending appeal. The supreme court relied on its own criminal rule; the opinion held that the rule superseded a statute requiring bail in most such instances. The court asserted that "the promulgation of rules of procedure is an inherent attribute of the Supreme Court and an integral part of the judicial process, [and] such rules cannot be abridged or modified by the legislature." But the opinion then noted, perhaps as a politically expedient afterthought, a "second and alternative rationale, but not the principal or basic one": *i.e.,* that the legislature had delegated rulemaking power to the court by means of its 1925 enactment.[109] It cited the provision of state law which had granted the supreme court "the power to . . . regulate and prescribe by rule the forms for . . . *practice and procedure* to be used in all suits. . . ."[110] (Emphasis in original.) But the opinion failed to suggest why prisoners' bail opportunities were a matter of court "practice and procedure," nor did it offer any account for the origin of the supreme court's "inherent" jurisdiction over this sort of rule.

In *State v. Smith,* as in other pronouncements,[111] the court exhibited a schizophrenic approach to rulemaking authority. Perhaps it may be said that the court has unconsciously recognized that separation of powers is a doctrine always somewhat tenuous in practice, dependent as it is upon cooperation among the branches of government. There is a sense of uneasiness in the *Smith* court's grudging recognition of legislative delegation. It is as though the court cannot quite reap the benefit of the conceptual groundwork for full court control, laid fifty years before in *Foster-Wyman Lumber.* This is because of both the need for a coherent theory of judicial rulemaking power—if one indeed exists—and the justices' awareness of the practical political necessity of living with a legislature which can resort to budget cuts or constitutional amendments in disagreements with

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108. 84 Wash. 2d 498, 501-03, 527 P.2d 674, 677-78 (1974).

109. *Id.* at 502, 527 P.2d at 677.

110. WASH. REV. CODE § 2.04.190 (1981), quoted *supra* note 81.

111. *See, e.g.,* Introduction to the Super. Ct. Mental Proc. Rules, 83 Wash. 2d 1121, 1121-22 (1973) (letter on file with the *University of Puget Sound Law Review*); letter from Chief Justice Robert F. Utter to Judge Stephen Schaefer (July 23, 1980) (letter on file with the *University of Puget Sound Law Review*); letter from Chief Justice Robert F. Utter to Harold F. Vhugen (Oct. 17, 1980) (letter on file with the *University of Puget Sound Law Review*).

the supreme court.[112] Another reason for this schizophrenic approach is that the Court occasionally profits from the theory of joint control of rulemaking by blaming unpopular consequences on the other branch.[113]

A final explanation for the court's ambivalence in *State v. Smith* might be its own awareness of the dangers of any branch, here the judiciary, judging the extent of its own power, particularly when the power in question is not based on an explicit constitutional provision. It is one thing to stand aloof and referee disputes between the executive and legislative branches;[114] it is another to risk perception as an institution reaching for power which has in fact been shared at other times, in other circumstances and in other jurisdictions.

IV. Providing a Coherent Rationale for "Inherent" Court Rulemaking Powers

This article will now attempt to provide an adequate theoretical framework within which issues regarding court rulemaking powers can be thoughtfully reasoned.[115] It will then suggest a policy approach to rulemaking that takes into account the concerns for protecting the proper sphere of each governmental branch, the practical needs and capacities of the judiciary and legislature, and the procedural requirements of rulemaking governed by internal safeguards.

A. The Limits of "Inherent," "Implicit" or "Implied" Powers

Each branch in our system of government has special

112. In 1980, over the objections of some members of the Washington Supreme Court, the legislature submitted and the voters approved a constitutional amendment governing judicial discipline. Wash. Const. art. IV, § 31, amend. 71 (Supp. 1982). The court's need for a cooperative relationship with the legislature is also exemplified by its hard work to obtain funding for a statewide judicial computer system. S.B. 3117, 47th Wash. Leg., Reg. Sess. (1981).

113. In Chief Justice Utter's letters cited *supra* note 111, he deflects criticism of the new "court of record" rules, *supra* note 3, by asserting that the supreme court promulgated the rules at the legislature's direction.

114. *See, e.g.*, the United States Supreme Court's decisions on the executive's impoundment of funds authorized by Congress. Train v. Campaign Clean Water, Inc., 420 U.S. 136 (1975); Train v. City of New York, 420 U.S. 35 (1975).

115. Other critiques of theories of "inherent" judicial rulemaking powers appear at Trumbull, *The Responsibility for Regulating Practice and Procedure in Illinois*, 47 Nw. U.L. Rev. 443, 449-54 (1952), and Kay, *The Rule-making Authority and Separation of Powers in Connecticut*, 8 Conn. L. Rev. 1, 33-43 (1975).

responsibilities. More important, the division of responsibilities into separate power centers gives each one the ability to render ineffective the others' exercise of arbitrary or overreaching power. But the branches of government do overlap in their responsibilities, both because it is convenient and because there is really no practical alternative. The courts, for example, *must* be able to engage in internal administration, an "executive" task, simply because they cannot function otherwise.

But in order for separation of powers to work in any manner and for all branches to operate effectively and to protect their existence, each division must maintain some exclusive "trumps" to play against the others when pressed. Explicit constitutional powers such as executive appointment, legislative budget control, or judicial enforcement of statutes[116] can function as trumps used by a branch to protect itself. Explicit powers also give rise to "implicit" or "implied" powers, or "inherent" powers, which by definition are dependent on explicit powers.[117] In America,[118] these dependent implicit powers are both necessary for a branch's exercise of explicit powers and tightly limited by the scope of those explicit powers. For example, when, in 1927, the United States Supreme Court upheld a Congressional use of subpoena and contempt powers, it stated: "[T]he two houses of Congress . . . possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective."[119] But the Court said those auxiliary powers were "limited" rather than "general," *i.e.*, limited to the extent necessary to carry out the legislative branch's function. Later, in *Watkins v. United States*,[120] the Supreme Court stressed that "no inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress."[121]

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116. *See supra* text accompanying notes 25-27.

117. "Implicit" and "implied," which are often used to define each other in English dictionaries, both come from the Latin *implicare*, to enfold, entwine or envelope, such that whatever concept is "enfolded" is dependent upon the concept into which it is folded. "Inherent" comes from *haerere*, to stick or cling to; hence an inherent concept is one dependent for its existence upon the concept onto which it clings.

118. Contrast the much less limited use of inherent powers by the British Parliament in past history, discussed at Watkins v. United States, 354 U.S. 178, 188-92 (1957).

119. McGrain v. Daugherty, 273 U.S. 135, 173-74 (1927).

120. 354 U.S. 178 (1957). Both *McGrain* and *Watkins* said that the exercise of implicit powers, like explicit powers, are subject to restraints imposed by other Constitutional provisions such as due process or the right against self-incrimination.

121. 354 U.S. at 187.

The explanation for this self-restraining characteristic of implicit powers—their necessity and limited scope both being dependent on apparent explicit power—is obvious. Unlike explicit grants of power, these auxiliary powers are not first discussed, agreed upon and committed to writing; they are not easily defined. Because "inherent" powers are unwritten, their location and shape are likely to be elusive and mushy. Hence the sharp criticism of the 1819 expansion of general federal powers in *McCulloch v. Maryland*.[122] The Supreme Court took a more restrained view of the extent of an individual branch's inherent authority in *Anderson v. Dunn*,[123] an 1821 decision upholding certain implicit Congressional contempt powers. In *Anderson*, Mr. Justice Johnson wrote that "such a power, if it exists, must be derived from implication, and the genius and the spirit of our institutions are hostile to the exercise of implied powers."[124] Justice Johnson said he would rather that human faculties allowed all government powers to be explicitly delineated; but this was impracticable. Therefore the implied power to hold people in contempt was a necessary evil. The opinion suggested that any implicit power should be limited to "the least possible power adequate to the end proposed."[125]

The United States Supreme Court has generally restricted auxiliary, or "inherent" judicial power assertions to those designed to: (1) maintain the judiciary's process powers, such as the ability to issue process subsequent to judgment,[126] or to subpoena documents;[127] (2) regulate day-to-day internal business of the courts;[128] or, (3) protect the courts from misuse by

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122. 17 U.S. (4 Wheat.) 400 (1819). *See* contemporary criticism at JOHN MARSHALL'S DEFENSE OF MCCULLOGH V. MARYLAND (G. Gunther, ed. 1969). *McCullogh* at least had some text on which to base its enlargement of powers inherent in the central government: the "necessary and proper" clause of Article I, section 8. No such language exists in Article III, which may explain the United States Supreme Court's reticence about expanding "inherent" judicial powers beyond those absolutely needed to preserve that branch's existence and operations.

123. 19 U.S. (6 Wheat.) 204, 225 (1821).

124. *Id.* at 225.

125. See also Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980), which quotes United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812) to the effect that inherent judicial powers should be limited to those "necessary to the exercise of all other [powers]."

126. Central Nat'l Bank v. Stevens, 169 U.S. 432, 464-65 (1898).

127. United States v. Nixon, 418 U.S. 683 (1974).

128. Washington-Southern Navigation Co. v. Balt. & P.S.B. Co., 263 U.S. 629 (1923).

litigants.[129]

The Washington Supreme Court, in one instance, endorsed in principle the idea of restricted judicial assertion of "inherent" power. In *In re Salary of Juvenile Director*,[130] the Lincoln County Superior Court had ordered the County Commissioners to increase the salary of a juvenile services employee who was appointed by that court. The supreme court reversed the lower tribunal on the ground that it had not shown the existing salary level truly threatened the superior court's ability to function.[131] Justice Utter's opinion held that while the judiciary must "be able to ensure its own survival when insufficient funds are provided by the other branches,"[132] courts should limit incursions into the legislative domain of money matters because such interference "outside the normal political process could have an adverse effect on working relations between other branches of government and weaken public support for the judiciary."[133]

When the powers of a government branch come into direct conflict with those of another, the dispute is often resolved in one of three ways: the problem is "finessed" through compromise; two of the branches combine against the third, such as the threat of impeachment of a President who refuses to obey a court subpoena; or the judiciary may resolve the matter by a declaration as to whose inherent authority is paramount.

The problem with the courts' delineating certain implicit or inherent powers as exclusively their own is that judges may be as susceptible to institutional bias as officials in any other branch, and they might come under attack for garnering someone else's authority to themselves. The lack of specific constitutional provisions on a matter concerning a court's auxiliary power, the lack of an explicit constitutional core of justification for a power being "inherent," and the seriousness of a claim to exclusivity, make it all the more necessary for the judiciary to provide a carefully developed account of the origin and need for

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129. Roadway Express, Inc. v. Piper, 447 U.S. at 766.

130. 87 Wash. 2d 232, 552 P.2d 163 (1976).

131. *Id.* at 252, 552 P.2d at 174-75.

132. *Id.* at 245, 552 P.2d at 171.

133. *Id.* at 247-48, 552 P.2d at 172. *In re Salary of Juvenile Director* has a certain "Marburyesque" aspect, in that the specific result favored the political branch, while the theory developed in dicta laid a groundwork for greatly increased judicial power at some point in the future. Here, while the court reversed the order raising the juvenile director's salary, it in effect warned the legislature that if funds became too short, it would use equitable powers to force an increase.

such a power. Without such a justification, the assertion of "inherent," exclusive power may not be acknowledged by the other branches. This can lead to open interbranch conflict.

Thus, when a court feels compelled to assert judicial power over a subject matter affecting its own interests, and no explicit justification for judicial control exists, a court should, first, ascertain that the "inherent" auxiliary power to be asserted is truly necessary for that body to carry out its established functions and offer a justification showing that other reasonable approaches to handling that subject matter are impracticable and, second, narrow the scope of the asserted power in the manner suggested by Justice Johnson in *Anderson v. Dunn—i.e.*, to "the least possible power adequate to the end proposed."[134] This system will help preserve respect for the court concerned, engender confidence in its determination, and minimize interbranch conflict.

B. Applying a "Necessary and Narrow" Test to Court Rulemaking

If we apply this "necessary and narrow" test to the judiciary's auxiliary power over rulemaking, the scope of inherent court control of those rules will certainly be smaller than the all-encompassing power asserted without careful justification by Washington's high court in *State v. Smith*, and more in line with the restricted use of the inherent power the court claimed it subscribed to in *In re Salary of Juvenile Director*. Though there may be excellent *policy* reasons for assigning broad control over rulemaking to the courts themselves (such as judicial knowledge and experience, or reasons of speed and efficiency) assignments of responsibility for policy reasons are properly made through direct inter-branch negotiations, or by means of positive enactments such as constitutions or statutes. Within the procedure accompanying those methods the issues can be debated and various interests can come to an explicit agreement on the apportionment of powers.

When the courts' "inherent" rulemaking authority is limited to situations that can be justified by a "necessary and narrow" test, we find that judicial control over some rules is readily defensible: for example, control of those relating to internal judi-

134. 19 U.S. (6 Wheat.) at 231.

cial administration and courtroom decorum. Such rules are absolutely necessary for courts to function, and no other entity is the appropriate one to issue them.

The next category, rules governing admission to practice before the courts, is less defensible but arguably within the "necessary" test. In *Hagan v. Kassler Escrow, Inc.*,[135] the Washington Supreme Court recently barred the statutory licensing of escrow agents on the ground that it intruded into judicial control over admission to practice law. The court reiterated its long-standing assertion that the Washington Constitution's article IV, § 1 entrustment of "the judicial power" to the supreme court, included an "inherent" right to regulate lawyering.[136] Throughout the country, the judiciary has taken the position that lack of control over attorneys would undermine the courts; after appellate procedure, attorney discipline is ultimately controlled by appellate courts in the largest number of states (forty-six), and court exercise of attorney discipline in fact causes few interbranch conflicts.[137] On the other hand, the Washington Supreme Court's opinions repeating its authority over the practice of law[138] offer remarkably few logical arguments as to why lawyers should not be regulated by an independent state licensing board, similar to the regulation of doctors, real estate agents, funeral directors, and other professionals.

Judicial promulgation of rules in the third category, such as those concerning class actions, discovery, or bail on appeal is difficult to justify as an auxiliary power absolutely necessary for maintaining the courts' basic responsibilities. Although such procedural rules affect the courts, they do not affect their existence. Courts functioned effectively for years with limited discovery and without class actions. Furthermore, from the historical and comparative perspective given above, it should be apparent that courts in many jurisdictions, and at many times in history, have functioned successfully with control over these rules in the hands of legislatures, independent judicial councils

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135. 96 Wash. 2d 443, 635 P.2d 731 (1981).

136. *Id.* at 452, 635 P.2d at 735.

137. A. ASHMAN & J. ALFINI, *supra* note 55, at 6-7.

138. *See* cases cited at Hagan v. Kessler Escrow, Inc., 96 Wash. 2d 443, 452, 635 P.2d 731, 735. A typical case is *In re* Schatz, 80 Wash. 2d 604, 497 P.2d 153 (1972), where, in holding that the supreme court had the "inherent" and "exclusive" power to regulate bar admissions, the opinion exhibited a characteristic uneasiness with having to square that implicit authority with a statute purporting to *delegate* bar admissions to the court.

or other institutions.[139] Court control of this category of procedural rules is not "inherently" necessary for judicial functioning or judicial survival. Such control is not only difficult to logically justify; it is politically infeasible, as demonstrated by the Washington legislature's continued assertion of power over this category of rules. Washington's court has been forced *de facto* to recognize that power.[140]

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139. A. ASHMAN & J. ALFINI, *supra* note 55, at 6-7.

140. A final category of rules, those concerning a court's geographical or subject matter jurisdiction, is rarely asserted to be subject to implicit court power. Jurisdiction itself determines the scope of the explicit responsibilities that rules are meant to help carry out, and implicit power cannot define explicit power. As Justice Brandeis observed in Washington-Southern Navigation Co. v. Balt. & P.S.B. Co., 263 U.S. 629, 635 (1924) (not a case construing the Rules Enabling Act, 48 Stat. 1064): "[N]o rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law." It is sometimes suggested that a demarcation between "substantive" and "procedural" rules would provide a simple boundary between legislative and judicial authority over court rulemaking. The idea is that instead of worrying about notions of "inherent" power, lawmakers would concern themselves with rules about "substance," and the judges would be limited to matters of "process." *See, e.g.*, State v. Fields, 85 Wash. 2d 126, 129-30, 530 P.2d 284, 286 (1975). Also note the intent to restrict rulemakers to substantive matters in Oregon and California. CAL. CONST. art. VI, § 6; OR. REV. STAT. § 1.735 (1981). This distinction has some analytical usefulness, but it breaks down on several counts when applied to court rulemaking. First, the courts regularly concern themselves with the development of substantive law. Like it or not, the common law system in America gives the judiciary a great policymaking power, albeit a power that can be counterbalanced by statutory action or constitutional amendment. Second, procedural rights such as service of process may be *substantial* though not *substantive*, and as noted below are appropriate for legislative concern. This distinction is made in Heat Pump Equip. Co. v. Glen Alden Corp., 99 Ariz. 361, 364, 380 P.2d 1016, 1017-18 (1963).

Even if the courts were said to restrict themselves to issuing rules of procedure, they find it practically difficult to distinguish procedure from substance, at least in the opinion of dissenting justices who regularly attack court action as invading the "substantive" realm better suited to legislation. Note, *supra* note 95, at 388-92; *see also* Justices Black and Douglas' dissent to the promulgation of civil procedure amendments, 374 U.S. 861, 866 (1963). Today's dissenters may write tomorrow's majority opinion and label another court action as simply procedural; hence "virtually everyone concedes that "rational separation [between substance and procedure] is well-nigh impossible.' " Levin & Amsterdam, *supra* note 45, at 14-15 (quoting Cohen v. Beneficial Loan Corp., 337 U.S. 541, 559 (1949) (Rutledge, J., dissenting)). *See also* STANDARDS RELATING TO COURT ORGANIZATION, §§ 1.30-.31 comments (1974).

Finally, the substantive-procedural distinction is almost always controlled exclusively by just one of the actors—the judiciary—for that branch holds the ultimate power of interpretation in our system. Rather than depending on a linguistic tool to make a distinction when it is commonly used here to rationalize an action *post hoc*, courts should instead limit themselves to the "narrow and necessary" test urged earlier, for delineating inherent powers over rulemaking.

V. A Policy Based Division of Court Rulemaking Powers

When "implicit" or "inherent" power justifications restrict courts' legitimate sphere of exclusive control over rules of courtroom decorum and admission to practice, there remains a policy question of how the largest group—that of procedural rules—should be treated.[141] At the outset, the difficulty of resolving conflicts over this subject matter argues for an explicit apportionment of authority by constitutional provision as in California, Alaska, and some twenty other states.[142] Next, in order to develop a sensible and mutually acknowledged sharing of court rulemaking powers that satisfies the needs of each division of government, we should examine the interests and special capabilities of each branch in the court rule process. Then we can construct an approach to make best use of those capabilities.

A. Executive Interest in Court Rules

The executive, for its part, has the least concern with court rulemaking and the least to offer directly. In theory, executives are meant to carry out policy developed by a legislature. Their main interest in court rules is limited to severe or unexpected impacts on financial or personnel resources or unexpected interference with administrative objectives or efficiency. Hence, an executive needs advance information about court rulemaking, and the opportunity to express its view of budget or administrative effects of certain rules. A chief executive's powers to propose budgets, to veto legislation and to appoint judges provide sufficient "trumps" to protect an administration's fundamental interests.

B. The Legislative Role in Court Rulemaking

The legislature is generally viewed as the prime policymak-

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141. As used here, "policy" means a standard or direction that is set in order to improve some economic, political, administrative or social aspect of the community, which is developed for general application, but which is fixed outside the context of a specific law case involving contending parties. *Compare with* R. Dworkin, Taking Rights Seriously 22 (1978).

142. A. Ashman & J. Alfini, *supra* note 55, at 15. Unfortunately the Ashman and Alfini analysis is limited to appellate courts' own assessments of whether conflicts exist with other branches concerning rulemaking. Nevertheless they report a lower occurence of conflict where rulemaking is governed by constitutional provisions. The most notable exception is New Jersey. *See* N.J. Const. art. 6, § 3, construed in Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950).

ing branch; this is a separation-of-powers idea that Washington courts have clearly recognized.[143] Development of new programs or benefits through statutes, and the structure and budget for existing ones, are among a legislature's "explicit" powers. Historically the Congress and state legislatures have taken the leading role in determining the number, jurisdiction, and funding of courts.[144] This is because the courts are a service which, though constitutionally guaranteed to the public, is regularly adjusted to reflect the needs of different times, current philosophies, and fiscal conditions. Matters such as court costs and venue have such a substantial effect on the general structure of the justice system that they are commonly considered appropriate areas of legislative concern.[145] These are "procedural" issues, yet they can have a radical impact on the community, might frustrate other community goals, and certainly are of great interest to the elected lawmakers.[146] Indeed it could be argued that the legislature has some "inherent" powers regarding court rules to the extent that those rules might interfere with the lawmakers' exercise of explicit constitutional budget authority. Whether based on "inherent power" or policy considerations, the elected legislature should and does have a clearly recognized role in the development of court rules.

But this is not to say the legislatures should write court rules. They should not. Legislatures ceded American courts varying degrees of rulemaking authority because they found it practical, sensible, and efficient—not because of a suddenly discovered "inherent power."[147] *Foster-Wyman Lumber* was decided in Washington *after* the legislature had formally delegated rulemaking to the supreme court, not before. But as noted above, in most jurisdictions court rulemaking power has been shared, *de jure* or *de facto*, between courts and legislatures.[148]

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143. The Washington court has often stated that the legislature, not the judiciary, should determine the content and reasonableness of a statute. *See, e.g.*, State v. Chinook Hotel, Inc., 65 Wash. 2d 573, 578-80, 399 P.2d 8, 12-13 (1965); Graffell v. Honeysuckle, 30 Wash. 2d 390, 401, 191 P.2d 858, 864-65 (1948); State v. Nelson, 146 Wash. 17, 26-27, 261 P. 796, 800 (1927); State v. Carey, 4 Wash. 424, 429-30, 30 P. 729, 730 (1892).

144. *See* U.S. CONST. art. III, § 1; WASH. CONST. art. IV, § 1.

145. 28 U.S.C. § 1391 (1976); WASH. REV. CODE Chs. 4.28, 4.84 (1981); Levin & Amsterdam, *supra* note 45, at 15-18.

146. Levin & Amsterdam, *supra* note 45, at 17-18.

147. *Id.* at 37-39; J. PARNESS & C. KORBAKES, *supra* note 1, at 22-64.

148. J. WEINSTEIN, *supra* note 2, at 4; England's Parliament also has the power to scrutinize rules of court, although it is rarely exercised. *Id.* at 31.

Washington is no exception. Practical politics, together with the legislature's explicit authority over structural and budget matters, dictate a continuing role for that branch in court rules.

Concurrent responsibility for court rules makes sense not only because policy matters are at stake, but also because the courts should be no more immune from checks and balances than anyone else. As one commentator has observed, even those who think the judiciary is unlikely to abuse its rulemaking power, "may still sense that, in the very act of abjuring immunity from correction when it lays down a general rule, the court strengthens its moral force as an instrument of adjudication."[149]

Concurrent jurisdiction over court rules means that both branches should have an explicit role in making those regulations. Each branch's role, while established according to such criteria as experience and efficiency, should not be constructed in such a way as to interfere with the explicit or true implicit powers of the other. Although the boundaries of "total judicial autonomy are difficult to locate with precision," Leo Levin and Anthony Amsterdam have correctly stated that "such a place of sanctuary exists," and "whenever courts have felt themselves too tightly pressed by legislative regulation they have found in the doctrines of judicial independence a large reservoir of integral supremacy."[150] Levin and Amsterdam recommend a constitutional draft that reserves ultimate authority over court rules to the legislative branch. They also assert, however, that courts will nevertheless remain vigilant and effective "watchdogs of their own freedom."[151]

In accordance with Levin and Amsterdam's suggestion, a *de jure* recognition of joint power would be useful, preferably through a state constitutional provision. This would make clear the fundamental allocation of court rulemaking power between the branches, and eliminate the current potential for an outright constitutional conflict between the legislature and the judiciary.

Levin and Amsterdam suggest that Alaska's approach best meets these goals.[152] This author agrees. In Alaska, a two-thirds

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149. J. WEINSTEIN, *supra* note 2, at 79, quoting Kaplan and Greene, *The Legislature's Relation to Judicial Rule-Making, An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 254 (1951).

150. Levin & Amsterdam, *supra* note 45, at 33.

151. *Id.*

152. *Id.* at 39.

vote of each house is required to overturn a court rule.[153] Although making it more difficult for the legislature to intervene, "the effect of this provision is to discourage rash and too-facile intervention in the business of the courts . . . . [T]he place of the legislature in the field of judicial administration and procedure should be that of a reserved ultimate reviewing power, not that of a frequently intervening supervisory force."[154] This approach is similar to that provided in the federal system.[155]

New court rules and rule changes should be promulgated in groups, at set times, except when an emergency requires a temporary adjustment.[156] Submission of rules to the legislature at a specific date, with a time limit for action, gives that branch, and the public, clear notice of impending rule changes, and forces the lawmakers to act expeditiously allowing the court system to get on with its business.

C. *The Bar's Interest in Court Rulemaking*

One element of the "public" with special interest in court rulemaking is the bar.[157] The ability of practicing lawyers to efficiently manage their cases, as well as their personal sanity, depend on court rules being understandable, practical, and generally acceptable to practitioners. Lawyers do not have "inherent rights" to participate in the drafting of court rules, but policy considerations strongly suggest that they, like the executive, ought to have adequate notice of rule changes, and an opportu-

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153. ALASKA CONST. art. IV, § 15.

154. Levin & Amsterdam, *supra* note 45, at 39. The authors also suggest that when the legislature reviews court rules, the Chief Justice should be given ample opportunity to be heard. They propose that legislative enactments revising rules of procedure be given an automatic "unfreezing" date of six years, so that the courts can revise a rule within a reasonable period of time. *Id.* at 40.

155. *See supra* text accompanying notes 56-58.

156. The Washington court recently promulgated a "Supreme Court Rule-Making Procedure," GEN. R. 9, 97 Wash. 2d 1101-03 (adopted by order of the Washington Supreme Court on Mar. 9, 1982), which *inter alia* fixes the normal issuance of rules at a single date each year with a fixed procedure for notice and comment on all proposed rules. *See infra* notes 162-77 and accompanying text.

157. One area of concern to the bar is interest-bearing client trust fund accounts. Proposals have been made that the supreme court, using its rulemaking authority, should earmark the interest from these accounts to fund public legal services. The British Columbia Law Foundation is funded in this manner. The Law Foundation is a public corporation that funds legal services to the poor, special research projects, and the British Columbia Law Library. B.C. REV. STAT. ch. 26., §§ 72-76 (1979). The Law Foundation concept works well, but the size of the concept and the interests affected call for legislative action rather than a court rule.

nity to contribute their special knowledge to the shaping of those rules.

D. The Need for "Internal" Safeguards in Court Rulemaking

Giving various interests and the public an opportunity to learn of and contribute to court rulemaking is desirable not only because it allows the separate branches to effectively exercise their responsibilities, but also because it protects institutions and individuals from arbitrary government edicts. As pointed out above, the rulemaking process is in fact an administrative or quasi-legislative process. Sound policy, if not the requirements of due process, dictates that the same internal procedural safeguards that protect citizens from arbitrary action by other administrative agencies govern court rule promulgation as well. These safeguards, such as the Administrative Procedure Act, are standard parts of the American policy-making and administrative processes.

In the few states where legislatures control court rulemaking there is ample—perhaps too ample—opportunity for public participation in the process. But, on the other hand, judicially controlled rulemaking often does not allow the opportunity for public participation. Discussion leading to judicial decisions is usually private. The public is rarely aware of a rule until it is adopted, and, in the case of local rules, until they are applied. Moreover, sometimes rules are never published, as is the case with higher court guidelines. In those cases the public is not even aware of the decisionmaking criteria.[158] This can be easily remedied, for "[t]here is no reason why the courts should have lower standards for their own rulemaking than they require of administrative agencies. In recognition that important legislative considerations are involved, a full oral hearing, not merely the right to submit written statements, should be afforded."[159]

In Washington State the supreme court usually but not always[160] publishes proposed rules in advance. The court's Rules Committee reviews comments submitted. In the past, rule changes have been published piecemeal in the advance sheets, though the newly adopted procedure would limit most rule pro-

158. *Cf.* J. WEINSTEIN, *supra* note 2, at 6-7.
159. *Id.* at 114.
160. *See supra* notes 15-17.

mulgation to a single date each year.[161] The inconsistent and fragmented nature of publishing makes it difficult for interested parties to keep track of all proposed rule changes and to respond promptly.

The court's recent issuance of General Rule 9 was a large step forward.[162] The new regulation, meant to correct some of the problems discussed above, establishes a schedule for rulemaking. Proposed rules appear each January,[163] interested parties may comment on the proposals by April 30, and those comments are available for public inspection.[164] The schedule calls for annual adoption of rules, effective September 1, unless the court believes an emergency warrants another date.[165] Though the court has said it can ignore the procedure if it chooses,[166] there is no reason for thinking the court will not follow General Rule 9.

Public access to the rulemaking process would be further improved if the Washington Administrative Procedure Act applied to this process as it does to rulemaking by other state agencies.[167] This would require publishing all proposed rules, except emergency regulations, in the Washington State Register as well as in court advance sheets. All citizens should be made aware of the opportunity to comment on all draft court regulations, and to give oral testimony on any rule of significant concern.[168] General Rule 9 now includes a vague reference to public hearings,[169] but states no commitment by the Court to hold hearings on important or controversial rules, nor on standards

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161. *See supra* note 156.

162. GEN. R. 9, 97 Wash. 2d 1101 (1982).

163. *Id.* at (f).

164. *Id.*

165. *Id.* at (d).

166. *Id.*

167. WASH. REV. CODE §§ 34.04.020-.070 (1981). The Act now exempts the judicial and legislative branches from the state's Administrative Procedure Act. *Id.* at § 34.04.010(1). *Accord* 5 U.S.C. § 551(1)(B) (1981).

168. WASH. REV. CODE § 34.04.025(c) (1981) requires an oral hearing only on proposed "substantive" rules, if requested by twenty-five people, by an agency, or by an association of more than twenty-five members. OR. REV. STAT. § 1.740(2) (1981) requires Oregon's Council on Court Procedures to hold public hearings in each of that state's congressional districts between regular legislative sessions, to provide opportunities for oral comment on proposed rules. Many people associated with the Council believe that the multiple hearing requirement is unnecessarily repetitious, and some hearings have been sparsely attended. Interview with Circuit Court Judge Beatty, *supra* note 66; interview with Professor Merrill, *supra* note 66.

169. GEN. R. 9, 97 Wash. 2d 1101, at (g).

concerning when public testimony is appropriate.

In addition to a formal system for public notice and comment in rulemaking, the institutions developing the rules should be fully open to public observation. The new General Rule 9 is unclear on this point. Meetings of the Judicial Council, the Supreme Court Rules Committee, and the full supreme court should be public, and accountable to the public, when those or any other rulemaking bodies are working in administrative capacity.[170] Most federal agencies are subject to "government in the sunshine laws," and commentators have argued cogently for opening the federal court rulemaking process in that same manner.[171] The argument is all the more powerful in Washington, which is noted for its strong open meetings law.[172]

Despite initial trepidation, the benefits and the workability of the open meetings law have been generally recognized in Washington State. The success of that statute and its usefulness in assuring advance knowledge about rules,[173] speak for an application to the court rulemaking process such as in Oregon.[174] The open meetings law should be extended to that area by statute or court adoption.

Washington's Public Disclosure Act, providing access to almost all public records, seems to govern documents associated with court rulemaking.[175] The Washington Supreme Court and

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170. Washington's Judicial Council meetings are currently public. Supreme Court Rules Committee sessions are not.

171. J. WEINSTEIN, *supra* note 2, at 114-15, 134-35; D'Alemberte, *Let the Sunshine In: The Case for An Open Judicial System*, 59 JUDICATURE 60, 67 (1974); Lesnick, *The Federal Rule-Making Process: A Time For Re-Examination*, 61 A.B.A. J. 579, 580 (1975).

172. WASH. REV. CODE ch. 42.30 (1981); *See* Hauth & Davenport, *Open Public Meetings Act in Washington*, 13 WILLAMETTE L.J. 443, 445 (1977) which states:

> The assumption underlying Washington's Open Public Meetings Act is that public involvement in governmental decision-making can come only through public awareness of the decision-making process and of the use of that process in a particular instance. As an important sidelight, the Act serves as a check upon the motives and actions of elected and appointed public officials. If public confidence in governmental processes is to be fully restored, the concept of open public meetings must play a vital role.

(Footnotes omitted.)

173. Hauth & Davenport, *supra* note 172, at 453.

174. OR. REV. STAT. § 1.730(3)(b) (1981).

175. WASH. REV. CODE §§ 42.17.020(1), .250, .340 (1981). *But cf.* the Federal Administrative Procedure Act, 5 U.S.C. § 551(1)(b) (1976), exempting the federal courts from the purview of the Freedom of Information Act, 5 U.S.C. § 552 (1976 & Supp. 1981). *Query* whether the Judicial Conference of the United States, established at 28 U.S.C. § 331 (1976), is a "court" and hence exempt from the Freedom of Information Act.

Judicial Council have made such records available to interested citizens,[176] and should continue to do so. General Rule 9 now makes comments on proposed rules available,[177] but does not cover other documents associated with rulemaking. If the public is to protect itself from arbitrary administrative action, and to participate fully in actions that affect the entire community, availability of written materials helps as effectively as access to the meetings where decisions are made.

There are credible arguments against a supreme court being made subject to the full gamut of open government laws: (1) it is unseemly for the justices to be viewed quibbling among themselves over administrative rules, and such quibbling would lower respect for the judiciary; (2) the openness of a court in its administrative capacity contrasts too starkly with the privacy of deliberations on individual cases, and this contrast causes an unacceptable tension; (3) judges should be held accountable to the electorate for their judicial decisions, but should not be individually subject to challenge for their positions on simple administrative rules.

Regardless of these arguments' merit, they do not argue against the need for open rulemaking proceedings. They suggest not so much that administrative rulemaking for the judiciary should be secret, but rather that appellate courts are not the appropriate agency to make these rules. The courts' adjudicative function may be incompatible with a rulemaking function. That is the next contention.

E. Court Rulemaking and the Integrity of the Appellate Process

In our system of government, based on separate power centers, the courts—particularly the appellate courts—have evolved to protect the Constitution and the legal system as a whole by interpreting statutes and by refusing to enforce unconstitutional laws.[178] In its appellate capacity then, the judiciary provides indispensable protection to the constitutional structure, to legal rights, and to political liberties.

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176. Interview with Chief Justice Robert Brachtenbach (Jan. 21, 1981); interview with Judicial Council Executive Secretary Professor Luverne Rieke (Jan. 7, 1981).

177. GEN. R. 9, 97 Wash. 2d 1101, at (f).

178. *See* THE FEDERALIST, *supra* note 21, at 466; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

In *The Federalist No. 78,* Hamilton warned that while "liberty can have nothing to fear from the judiciary alone . . . [it] would have everything to fear from its union with either of the other departments."[179] Hamilton's statement was directed at a political merger of the judicial branch with either the legislative or the executive, for both combinations had existed in English history. But his proposition argues as effectively against a merger of the functions of appellate courts with too broad executive or legislative functions. Granted, functions are constantly mingled between the branches; still, mingling is limited, and reserve powers in other sectors of government remain as an insurance policy against arbitrary or oppressive action. When legislative and executive functions are merged into an appellate court, as is the case with rulemaking in many states including Washington, the built-in protections disappear. It is all too easy for a supreme court, with its own institutional interests and bureaucratic concerns,[180] to issue rules that seem to reflect those interests alone and to use its adjudicatory power to block challenges from another branch.

The legislative review and "internal" administrative safeguards suggested above serve as partial checks on arbitrary court power in rulemaking. The first provides an institutional balance to political overreaching by the judiciary when it issues rules; the second encourages public participation, accountability of the rulemakers, and better informed decisions. But neither guarantees independent, impartial appellate review of specific rules as applied to specific cases. When citizens argue that rules transforming municipal and district courts into virtual courts of record are statutorily deficient or unconstitutional, those citizens must be assured that the appellate body ruling on their assertions does so free of institutional self-interest. A court deeply involved in managing judicial bureaucracy, or committed to a policy or program backed by one or another interest in that bureaucracy,[181] may not be able to promise impartiality. Perhaps

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179. THE FEDERALIST, *supra* note 21, at 466.

180. For interesting pictures of courts as political entities, see J. SCHMIDHAUSER, JUDGES AND JUSTICES: THE FEDERAL APPELLATE JUDICIARY (1979); Cohodas, *When Federal Judges Lobby, Congressmen Usually Listen;* CONG. Q., Oct. 18, 1980, at 3167; Sheldon, *An Interpretation of the Judicial Process: The Washington Supreme Court As A Small Group,* 13 GONZ. L. REV. 97 (1977).

181. The requirement of attorney representation of towns before Washington traffic courts, *see supra* note 15, was heavily lobbied by the Washington State Magistrates Association, representing the interests of municipal and county district courts. *See, e.g.,*

a supreme court that controls development of rules of procedure can separate its appellate capacity from its administrative role and render a fair decision on a difficult case involving a specific application of court rules.[182] But the temptation to rationalize legally its prior actions can be so great that many people would not be confident that the court was deciding the issues dispassionately. Because the public's faith in the fairness of the court is the judiciary's greatest protection, loss of such confidence is dangerous.

Justices Black and Douglas suggested a simple solution when faced with a similar conflict between court functions on the federal level. They proposed that the United States Supreme Court remove itself from rulemaking, and that the "[t]ransfer of the function to the Judicial Conference would relieve [the Court] of the embarrassment of having to sit in judgment on the constitutionality of rules which [it has] approved and which as applied in given situations might have to be declared invalid."[183]

In Washington State, authority for approving procedural

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letter from George Mullins to Michael Redman (Dec. 5, 1980) (on file with the *University of Puget Sound Law Review*).

182. Numerous political and moral philosophers, including Locke and Kant, have argued that *a priori* it is impossible for humans to serve as judges in their own affairs. *See, e.g.*, THE FEDERALIST No. 10 at 79 (J. Madison) (Mentor ed. 1961); I. KANT, PHILOSOPHY OF LAW § 44 (2d ed. Edinburgh 1884) (1st ed. 1796-97); J. LOCKE, THE SECOND TREATISE OF GOVERNMENT ch. 2, para. 13 (6th ed. London 1764) (1st ed. London, 1690).

183. 374 U.S. 861, 870 (1963). Judge Weinstein states that Justice Frankfurter and Chief Justice Warren agreed with Justices Black and Douglas' general approach on this issue, J. WEINSTEIN, *supra* note 2, at 96-97. Weinstein supports a system where

> the rules were adopted by another judicial agency, without limiting the flexibility of the Supreme Court to depart from the rules where it believed the Constitution required different state standards or where congressional statutes or the Court's power to control lower federal courts required modifications to meet special problems not foreseen or adequately dealt with by the rule-makers. The Court would not be inhibited in criticizing the rules since it did not promulgate them. The Court's input into the complex of law making through cases could, when desirable, be reflected in subsequent amendments to the rules. The Court would stand above and apart from lawmaking, doing what it does best, adjusting the law to a complex of constitutional provisions, statutory amendments, rules, prior decisions, and changing societal and institutional needs in the light of particular problems presented in an adversarial setting. There is too much risk when the Supreme Court adopts rules almost blindly, as it must, that it will needlessly sap two of its great institutional strengths—flexibility and dispassionate uninvolved decision-making.

Id. at 103-04. *See also* Justice Harlan's concurring opinion in Hanna v. Plumer, 380 U.S. 460 (1965), raising the issue of the Court invalidating one of its own rules: "Since the members of the Advisory Committee, the Judicial Conference and this Court who formulated the Federal Rules are presumably reasonable men, it follows that the integrity of the Federal Rules is absolute." *Id.* at 476.

rules should be transferred by statute or by constitutional amendment[184] to the Judicial Council. That body, with its twenty-nine members,[185] would, however, be unwieldly for this purpose. It should be reduced in size, retaining the same even balance between practicing lawyers, legislators, and judges chosen by their colleagues at each jurisdictional level.[186] Attorney membership provides an appropriate opportunity for participation by that especially interested group, and perhaps it is appropriate for the Governor to appoint a member or members to represent executive policy and budgetary interests.[187]

As in California,[188] Oregon,[189] and New York,[190] an independent court rulemaking body would provide an administrative agency, structurally independent of appellate functions. It could issue all statewide rules of procedure, guidelines for local rules,[191] and guidelines for purely administrative rules of the appellate courts, which are in a sense local rules. Council-issued regulations would be subject to full and impartial review by the

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184. A transfer of rulemaking to the Judicial Council would preferably be accomplished by constitutional amendment. The transfer would be effective by statute only if the supreme court were willing to accede to the shift of power, given its current position in *State v. Smith* that the court has "inherent" power over rule promulgation. The Council is enough a part of the judicial branch to provide the rationale for a smooth transfer of rulemaking from one agency to another within that branch. Were that theoretical basis for a change not acceptable to the supreme court, a constitutional amendment would be necessary.

185. WASH. REV. CODE § 2.52.010 (1981).

186. Another issue of Judicial Council structure concerns who should chair the body. Retaining the chief justice as chair would provide stature and unity to the Council. But Lesnick, *supra* note 171, at 581-82, argues for a different chair:

> It is less appropriate for such power to be centralized in an individual who, for all his necessary functions as the chief administrative officer of the federal judicial system, nonetheless remains primarily one of the nine justices of the Supreme Court with the duty to hear and decide cases and controversies within its jurisdiction, including those involving the validity or interpretation of the rules.

187. If legislative review of rulemaking were provided for, legislative membership on the Council might be less appropriate because the House and Senate would have their opportunity to scrutinize rules later in the process. On the other hand, experience suggests that legislative participation in court rulemaking is sensible because it educates the lawmakers involved to the practical problems, and helps gain concurrence by the legislative branch.

188. *See supra* notes 72-77 and accompanying text.

189. *See supra* notes 66-71 and accompanying text.

190. *See supra* note 62.

191. California's recommended courts standards, while not formally binding on local courts, are generally followed. *See, e.g.*, STANDARDS OF JUDICIAL ADMINISTRATION RECOMMENDED BY THE JUDICIAL COUNCIL, *reprinted in* WEST'S CALIFORNIA RULES OF COURT 391 app. (1982).

Washington Supreme Court, and it would properly be subject to the full gamut of internal safeguards: the Administrative Procedure Act, Open Public Meetings Act, and the Public Disclosure Law.

Transfer of court rulemaking authority to the Judicial Council would, then, counter the infirmity inherent in giving an appellate body power to write the rules it must itself review. If the Council were subject to the same open government procedures applied to other administrative agencies, the public could be all the more secure that court rules were promulgated according to a fair and accessible procedure.

A further benefit of Judicial Council rule promulgation is that it would free most justices from the burdensome task of rule writing. The pressure of the appellate caseload is so great that many, perhaps all of the court's members, would see a benefit from being relieved of the rulemaking function.

F. The Judicial Council's Suitability as Washington's Court Rulemaking Body

A final argument for making Washington's Judicial Council the rulemaking authority, rather than merely an advisory body, is the Council's broad composition of people involved in the justice system. Supreme court rulemaking was in fact a great improvement over legislated codes, and early criticisms of court-controlled rule promulgation gradually vanished because of the efficiency and flexibility of the new system, installed in the 1920's.[192] But a supreme court cannot avoid seeing rules from a removed perspective; appellate life is very different from the rough-and-tumble world of trial courts. Even former trial judges may lose their first-hand knowledge of the courtroom after years on the appeals bench. The rule on municipal and district court record requirements, and the speedy trial rule, might have been different, and criticized less, if the Judicial Council had been fully responsible for gathering information and reaching a balanced judgment on each of those regulations. The Council would in a sense be forced to act even more responsibly than it already does; it would have to apply the frontline experience of its members, and could not avoid controversy by passing on tough questions to the supreme court's more distant decisionmaking.

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192. Levin & Amsterdam, *supra* note 45, at 12.

If judicial rulemaking were transferred to the Judicial Council, that body's staff would have to be adequately financed. In its search for ways out of Washington's fiscal crisis, the legislature recently eliminated the Council's entire budget for fiscal year 1982-83.[193] The legislature ordered that costs associated with the Council be borne by the Administrator for the Courts, but the legislature neither set a required support level nor appropriated any additional funds for maintaining the Council's operations. Thus, the agency was forced to lay off its two staff attorneys and clerical workers.[194] These events are disastrous for quality rulemaking in Washington, and if the Council is to serve in the new role suggested above, its budget will have to be restored at least to its former level. A higher level of funding may even be necessary because the proposal assigns to the Council the final drafting work now done by the Administrator for the Courts. It has been amply shown that adequate funding, staff, and administrative leadership are absolute prerequisites to Judicial Council effectiveness.[195]

VI. Conclusion

Court rulemaking is important—too important to be left to the courts alone, unrestricted by the constitutional and policy requirements of other actors in the system. But we have the ability to design a mechanism for issuing court rules that best balance institutional interests, practical needs, and current sensibilities.

Court rulemaking was once dominated by the judiciary, then by the legislative branch for eighty-five years, and then again by the courts, at least in most jurisdictions. But the power over court rules generally has remained shared, in some jurisdictions *de jure,* in others, *de facto.* A legal rationale that openly recognizes the concurrent authority of the courts and legislature, and the legitimate concerns of the executive and the bar, must truly be preferable to a system where the *de jure* and the *de facto* are at odds. That rationale should provide for thoughtful, experienced rulemaking, should allow for a responsible legisla-

193. 1982 Wash. Laws 1st Ex. Sess. Ch. 50, § 10.

194. *Id.*

195. *See* Stolz & Gunn, *The California Judicial Council: The Beginnings of an Institutional History,* 11 Pacific L.J. 877 (1980); Wheeler & Jackson, *Judicial Councils and Policy Planning: Continuous Study and Discontinuous Institutions,* 2 Just. Sys. J. 121, 136-39 (1976).

tive balance to the judicial branch's power, and should guarantee impartial appellate review. Such a system would best be provided by a constitutional amendment that delineates the rulemaking role of each institutional interest. A constitutional provision would provide both a clear, practical guide to the court rule process, and an explicit constitutional rationale that eliminates the need to rely on shaky "inherent power" doctrines.

Any of the single modifications suggested in this article would help improve rulemaking; they can be adopted in whole, in part, or in tandem with other approaches. A comprehensive set of changes is embodied in the draft constitutional amendment presented in the appendix. Its major provisions can be summarized as follows:

1. *The legislature should have a formal but limited role in court rulemaking,* preferably by means of automatic review of new judicial system regulations. The legislature should have power to change new rules by a two-thirds vote of each house. Rules, once changed, should be subject to revision within or after a set period.

2. *The State's Administrative Procedure Act, Open Public Meetings Act, and Public Disclosure Law* should govern the court rulemaking process. Rulemaking procedures should permit oral testimony, where appropriate.

3. *The Judicial Council should be the primary court rule rulemaking body in Washington,* subject to limited legislative review and the procedural safeguards proposed above. The Council should be reduced in size to improve its effectiveness, and must be properly funded and staffed.[196]

196. Judge Weinstein arrives at similar conclusions in his proposals for federal rules promulgation. J. WEINSTEIN, *supra* note 2, at 147-53.

APPENDIX

Proposed new section of Article IV, Washington State Constitution

NEW SECTION:

(a) There shall be a judicial council consisting of the chief justice and other members who shall include representatives of the judiciary, the legislature and the bar. The number, terms and selection of the members of the judicial council shall be prescribed by statute. The judicial council shall be chaired by the chief justice, and shall act according to rules which it shall adopt.

(b) The judicial council shall conduct studies and make recommendations for improvement of the administration of justice; shall appoint an administrator for the courts who serves at its pleasure; and shall perform such other responsibilities assigned by law. The judicial council shall promulgate and amend rules governing procedure in cases before the courts of this state. Except for emergency rules which shall be valid for no more than six months, all rules or amendments to rules shall take effect no sooner than six months after they have been reported to the legislature at the beginning of a regular session, during which six month period the legislature may by resolution disapprove or amend the rules, in whole or in part, by two-thirds vote of the members elected to each house. The Governor shall have no power to veto a resolution amending or disapproving proposed rules.

(c) Nothing in this section shall limit, supersede or repeal any rule of procedure previously prescribed by the supreme court or the legislature, until such rule has been altered or repealed by the judicial council.

Notes to draft constitutional provision:

1. This draft is based on constitutional and statutory provisions of Alaska, Oregon, California, New York and the United States, referred to in *supra* notes 32, 52, 62, 64, 68 and 72.

2. This proposal is drafted according to the peculiarities of Washington's current constitution, one of which is to include more than one matter in a section, without adequate or logical

subdivision. A much better arrangement could be proposed as part of a general revision of the constitution or the judicial article.

3. This section would give the Judicial Council a constitutional status it does not currently possess in Washington. The importance of the Council's non-rulemaking responsibilities lend weight to the proposal giving it constitutional standing, but a discussion of the benefits of such an action are beyond the scope of this article.

4. This draft section charges the Judicial Council with appointing an administrator for the courts. The administrator is currently appointed by the state supreme court. Although a detailed discussion of this issue is beyond the scope of this article, it should be noted that the administrator's breadth of responsibility is now somewhat limited by trial court concerns about central administration and appellate court direction of that administration. Making the administrator responsible to a broadly based judicial council would enhance central coordination, as well as relieving the supreme court, as an entity, from time-consuming administrative responsibilities. *Cf.* CAL. CONST. art. VI, § 6.

5. There are other matters that should be the subject of revision of the judicial article in Washington, including responsibility for internal administration of the courts and legislative control of court jurisdiction, size and location. These matters are, however, also beyond the scope of the present discussion.

6. This draft specifies that the Judicial Council would promulgate "rules governing procedure in cases before the courts" of Washington. This language is meant to exclude Judicial Council responsibility for rules of internal court administration or admission to practice, unless development of such rules is delegated to the Council by the courts.

7. Section (a) of the proposal provides that the Judicial Council shall act according to previously adopted rules, but does not prescribe the content of those rules. Such internal Council rules would presumably include "internal safeguards" of the sort found in the Administrative Procedure Act, the Public Disclosure Act, and the Open Meetings Act. But detailed provisions such as these are not the proper subject of a constitutional provision.