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Rule-Making Authority and Separation of Powers in Connecticut, The

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THE RULE-MAKING AUTHORITY AND SEPARATION OF POWERS IN CONNECTICUT

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It is a commonplace of the law that upon questions of procedure hang matters of grave importance in our systems of civil and criminal justice. It is, therefore, a matter of some concern where decisions as to rules of procedure are made. Since the different branches of government may decide these questions differently, the decision as to where the final authority with respect to procedure resides may necessarily determine the outcome of litigation in which critical interests in property and liberty are at stake.[1]

The subject of this article is the power to make rules governing practice and procedure in courts. Specifically, it is concerned with the allocation of that power between the legislative and judicial departments of government and the constitutional considerations which bear on that allocation. The focus of this examination will be upon the constitutional law of Connecticut as pronounced by the state supreme court in the recent case of *State v. Clemente.*[2] Since the opinion in *Clemente* contains the most complete exposition of the court's under-

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1. The border between matters of substance and procedure has been laboriously explored by the federal courts, *see, e.g.*, Hanna v. Plumer, 380 U.S. 460 (1965), and no attempt at a neat definition will be made here. The inquiry may, of course, be different depending on the purpose at hand. Guaranty Trust Co. v. York, 326 U.S. 99, 108-09 (1945). Even if it is conceded, however, that a given rule "concerns merely the manner and the means by which a right . . . is enforced," *id.* at 109, it may still present substantial or even insuperable barriers to a litigant's objective. This is particularly clear in the case of criminal procedure. *See* discussion of State v. Clemente, 36 CONN. L.J. No. 1, at 1 (July 2, 1974) at text accompanying notes 3-16 *infra*.

2. 36 CONN. L.J. No. 1, at 1.

standing of the constitutional status of the rule-making power, a review of that case presents an appropriate starting point for this study.

I. STATE v. CLEMENTE

Domenic Clemente was tried in the superior court on charges of indecent assault and conspiracy to commit rape, indecent assault, sodomy, robbery with violence, and aggravated assault.[3] After the testimony of certain prosecution witnesses, defense counsel requested the court to order production of a number of statements these witnesses had made to the police.[4] The request was made pursuant to § 54-86b of the Connecticut General Statutes,[5] which provides that after a prosecution witness has testified on direct examination, "the court shall on motion of the defendant order the prosecution to produce any statement oral or written of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified." The court denied defendant's motion under the statute, holding the legislature was without power to impose a mandatory rule of disclosure on the court.[6] It did, however, offer to examine the witnesses' statements for inconsistencies and turn over any appropriate material under the prestatutory procedure.[7] The defendant was convicted and appealed to the supreme court, citing as error the denial by the trial court of his motion for disclosure under the statute. In a 3-2 decision the supreme court affirmed.[8]

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3. *Id.*

4. *Id.* at 3.

5. The statute was modelled after the federal "Jencks Act," 18 U.S.C. § 3500 (1957), which was passed in the wake of Jencks v. United States, 353 U.S. 657 (1957), holding a defendant in federal court had a right to such statements. *See* Parley and White, *Expanding Criminal Discovery: Law and Tactics Under Public Act 680 of the Connecticut General Statutes*, 44 CONN. B.J. 335 (1970). The *Jencks* rule was promulgated pursuant to the Supreme Court's supervisory authority over the administration of justice in the federal courts in the absence of statute, and does not embody a constitutional right of defendants. Palermo v. United States, 360 U.S. 343, 345 (1959); Scales v. United States, 367 U.S. 203, 258 (1961). The meaning and uses of the Connecticut statute were canvassed in Parley & White, *supra.*

6. 36 CONN. L.J. at 6. Record at pp. 154-64.

7. In State v. Pikul, 150 Conn. 195, 202, 187 A.2d 442, 445 (1962), the court rejected the rule of *Jencks* for Connecticut, holding that the decision to order production of statements of prosecution witnesses was one within the discretion of the court. In 1972, after the *Clemente* trial, the superior court promulgated as a court rule a procedure modelled on the Federal Jencks Act giving defendants the right to examine statements of prosecution witnesses. CONN. PRACTICE BK. §§ 533M-533S (Supp. 1974).

8. The majority opinion was written by Justice Loiselle, and was concurred in by Chief Justice House and Justice McDonald. Justice Cotter filed a dissenting opinion

The court held that the legislature, in providing machinery for discovery of statements of prosecution witnesses, had attempted to exercise an inherently and exclusively judicial power in violation of the separation of powers provided in articles second and fifth of the Connecticut Constitution.[9] The court cited two recent cases for the proposition that "the General Assembly lacks any power to make rules of administration, practice or procedure which are binding on either the Supreme Court or the Superior Court . . . ."[10] Tracing the historical development of separation of powers in Connecticut, the court said that, prior to the 1818 Constitution,[11] all legislative, execu-

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in which he was joined by Justice Bogdanski, who also wrote a separate dissenting opinion.

9. CONN. CONST. art. 2 states:

(Distribution of powers).

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

CONN. CONST. art. 5, § 1 states:

The judicial power of the state shall be vested in a supreme court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law.

10. 36 CONN. L.J. No. 1, at 3, *quoting* State *ex rel.* Kelman v. Schaffer, 161 Conn. 522, 529, 290 A.2d 327, 331 (1971) and *citing* Adams v. Rubinow, 157 Conn. 150, 156, 251 A.2d 49, 56 (1968). It should be noted that the declaration of exclusive power over practice and procedure applies only to the supreme court and superior court. Only these two courts are specifically provided for in the constitution. CONN. CONST. art. 5, § 1. The significance of the constitutional nature of these courts was underlined in a case decided three weeks after *Clemente*. In Szarwak v. Warden, 36 CONN. L.J. No. 4, at 1 (July 23, 1974), the supreme court unanimously held that a legislative grant of jurisdiction to the statutorily created circuit court over all crimes punishable by a maximum fine of $5,000 or imprisonment for up to five years, or both, was an unconstitutional infringement on the jurisdiction of the superior court. The court held it impermissible to vest in lower courts any substantial duplication of "the essential characteristics" of the superior court as it existed at the time of the 1818 Constitution. It was the same regard for the inviolability of the inherent powers of the constitutional courts which underlay the decisions on rule-making authority under the separation of powers provision of the constitution. Rule-making for lower courts by the legislature was acknowledged as valid in the same opinion which asserted an exclusively judicial power over procedure in the constitutional courts. Adams v. Rubinow, 157 Conn. 150, 156, 251 A.2d 49, 56 (1968). While the questions of legislative power to make rules for the constitutional courts and legislative power to define the jurisdiction of those courts are distinct, and while it is the former which is the principal concern here, it should be noted that the issues flow out of the same case law and the same principles of judicial independence. *See* note 107 *infra*.

11. The relevant constitutional passages underwent only minor changes in the 1955 and 1965 revisions of the constitution. The court therefore deemed the eighteenth and nineteenth century experiences with separation of powers questions relevant to the

tive, and judicial power resided in the General Assembly. Furthermore, it noted that, in the court's opinion, the desire to create an independent judiciary was an important reason for the institution of the new constitutional system.[12] Although the court indicated that any regulation of matters of procedure would be invalid as a legislative exercise of judicial power, it did not rely entirely on the distinction between substance and procedure. Since the statute could not clearly be labeled as strictly procedural,[13] the court chose to rest its holding on the fact that the enforcement of discovery was "one of the original and inherent powers of a court of equity,"[14] and, as such, beyond regulation by the legislative branch.

In asserting the exclusivity of judicial authority over matters of procedure and other "inherent powers" of courts, the *Clemente* court acknowledged that a number of earlier cases had acceded to legislative regulation of similar questions. It concluded, however, that such issues must be reevaluated "in light of the ongoing evolution of judicial principles in the separation of powers area."[15] The court warned that continued deference to the General Assembly would make the court "little more than a judicial staff of the legislature. All pretense of independence would disappear and judicial power would again rest in the hands of the General Assembly as it did prior to the year 1818."[16]

The remainder of this paper will be devoted to a critical examination of the assertion of judicial control of rule-making in the constitutional courts of Connecticut. It will attempt to show that the doctrine cannot be justified as an extension of the case law of the state and that it is out of keeping with the general understanding of the meaning of separation of powers as reflected in the law of other jurisdictions. Finally, it will discuss the wisdom of such an allocation of powers and show that it is antithetical to the values protected by the doctrine of separation of powers.

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proper interpretation of the current provisions. State v. Clemente, 36 CONN. L.J. No. 1, at 3-6 & n.2.

12. *Id.* at 4. Early cases recognizing a plenary power in the legislature to exercise all powers not expressly denied it were repudiated in Norwalk St. Ry.'s Appeal, 69 Conn. 576, 37 A. 1080 (1897), which held that each department of government was constitutionally limited to the exercise of powers appropriate to it.

13. State v. Clemente, 36 CONN. L.J. No. 1, at 3. Justice Bogdanski, in dissent, treated the case as involving the power of the General Assembly to enact rules of practice and procedure, noting that such rules "may vitally affect substantive rights." *Id.* at 13, n.1.

14. *Id.* at 5 (citations omitted).

15. *Id.* at 4-5.

16. *Id.* at 6.

II. HISTORICAL DEVELOPMENT: FROM JUDICIAL INDEPENDENCE TO JUDICIAL SUPREMACY

A. *The Constitution of 1818 and Early Interpretation*

Unlike all but one of its sister states, Connecticut did not adopt a new constitution in the wake of independence from England.[17] Until 1818 it maintained a government within the outlines prescribed by the colony charter of 1662 granted by Charles II.[18] Under the charter government all power was vested in the General Assembly. Initially both executive and judicial branches were little more than committees of the legislature. Eventually the Assembly created a more formal and distinct court system, but it continued to be staffed by the governor and his councillors or assistants, who also comprised the upper legislative house. By the end of the eighteenth century a court system with independent personnel had been established, but the legislature retained power to alter the system, and was itself a court of final appeal over some causes.[19]

These governmental arrangements provoked some opposition by advocates of the political theory of separation of powers, which was then being embraced with vigor in the new federal government and in the other states.[20] In 1795 Judge Zephaniah Swift, the Connecticut Blackstone, warned of the dangers of legislative predominance over the courts in his *System of the Laws*.[21] Swift had further occasion to complain of judicial impotence in connection with *Peter Lung's Case*.[22] After the murder of Mrs. Lung, "suspicion fell on her husband, a good-for-nothing rascal who had the reputation of being a wife-beater."[23] Lung was indicted and arraigned without delay. His request for time to prepare his defense was denied. He was tried the next day, convicted, and sentenced to be hanged.[24] Rather than appeal to the Supreme Court of Errors, Lung petitioned the General Assembly, which found the pretrial proceedings sufficiently irregular

17. The other was Rhode Island. *See* Wright, *The Origins of Separation of Powers in America*, 13 ECONOMICA 169, 176 (1933).

18. J. TRUMBULL, HISTORICAL NOTES ON THE CONSTITUTIONS OF CONNECTICUT AND ON THE CONSTITUTIONAL CONVENTION OF 1818, at 14 (1901).

19. *See* Day, *Preface* to 1 CONNECTICUT REPORTS v-xx (1843); D. LOOMIS & J. CALHOUN, THE JUDICIAL AND CIVIL HISTORY OF CONNECTICUT 124-37 (1895).

20. *See* Wright, *supra* note 17.

21. 1 Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 76-77 (1795).

22. 1 Conn. 428 (1815).

23. Sullivan, *Biographies of Connecticut Judges: Zephaniah Swift*, 19 CONN. B.J. 181, 188-89 (1945).

24. *Id.*

to order a new trial.[25] Judge Swift, who had presided at the trial, was so disturbed by this invasion of the judicial power that he published a pamphlet denouncing the action. He insisted that continuing such power in the legislature would make it "one great arbitration, that would ingulf all courts of law, and sovereign discretion would be the only rule of decision—a state of things equally favorable to lawyers and criminals."[26]

The growing sentiment for institutionalizing the separation of powers was one of a number of forces which led to the convening of a state constitutional convention in August 1818.[27] Despite the court's intimations in *Clemente*, the question of judicial independence was one of the least controversial matters brought before the convention. The drafting committee reported to the convention an article on distribution of powers which consisted of two sections. The first contained what is essentially the current constitutional provision in article second and was adopted without prolonged debate.[28] Significantly, the convention deleted a second section recommended by the committee which read:[29]

> No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances herein after expressly directed or permitted.

The debate on article fifth establishing the judicial department was centered almost entirely on the proposal of life tenure for judges, which was adopted.[30]

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25. 1 Conn. 428 (1815). Sullivan, *supra* note 23, at 189.

26. Quoted in J. TRUMBULL, *supra* note 18, at 43, and Sullivan, *supra* note 23, at 189.

27. Although much emphasized in later cases, *see* Szarwak v. Warden, 36 CONN. L.J. No. 4, at 8 (July 23, 1974); State v. Clemente, 36 CONN. L.J. No. 1, at 5 (July 2, 1974); Styles v. Tyler, 64 Conn. 432, 448-49, 30 A. 165, 170-71 (1894), the drive for judicial independence was probably only a marginal factor in the convening of the convention. The major force was the growth of the Jeffersonian party and its desire to reform the electoral process and to disestablish the Congregational Church. *See* SCHATTSCHNEIDER, CONSTITUTIONAL HISTORY OF CONNECTICUT 2-3 (1946) (mimeo on file, Connecticut State Library); J. TRUMBULL *supra* note 18, at 32-36. The movement for a constitutional convention was vigorously opposed by the Federalists, including the independent judiciary's most prominent champion, Judge Swift, who argued that Connecticut already had a constitution in the Charter of 1662. *Id.* at 42; Sullivan *supra* note 23, at 189.

28. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1818, at 22, 78 (1901). *See* Hartford Weekly Times, Sept. 29, 1818, at 2.

29. JOURNAL OF THE CONSTITUTIONAL CONVENTION OF 1818, 78, 55 (1901).

30. *See* Hartford Weekly Times, Sept. 29, 1818, at 2.

Contrary to later judicial claims,[31] the convention does not seem to have been interested either in a particularly stringent version of separation of powers or in a careful restriction of the powers of the legislature. The convention struck the provision that would have expressly prohibited the officers of each department from exercising powers properly classified as belonging to another. Such explicit provisions were common in constitutions of other states being written at this time.[32] The experience of Connecticut as a colony may provide an explanation of why the framers of the 1818 Constitution preferred to omit this section. Connecticut was one of two colonies in which the legislature, representing the interests of the colonists, was not in continued confrontation with a governor representing the colonial proprietors or the English crown.[33] Given this tradition of harmony between executive and legislative departments, it may be that the convention did not feel the necessity for a strict expression of separation of powers. The constitution also gave the legislature a relatively free hand with respect to the organization and operation of the judiciary. Following the model of the Federal Constitution the convention vested the judicial power in the Supreme Court of Errors and the superior court and "such inferior courts as the general assembly shall, from time to time, ordain and establish: the powers and jurisdiction of which courts shall be defined by law."[34] The 1818 Constitution thus established a government with a flexible separation of powers and a distinctly dominant legislative branch.

This interpretation of the constitution is borne out by an examination of the cases decided by the Supreme Court of Errors in the first 75 years following the adoption of the Constitution of 1818. In

31. *See* Szarwak v. Warden, 36 CONN. L.J. No. 4, at 8 (July 23, 1974); Styles v. Tyler, 64 Conn. 432, 443-44, 30 A. 165, 168-69 (1894).

32. *See* MO. CONST. art II (1820); ILL. CONST. art I (1818); LA. CONST. art. I (1812). Of course, the most famous separation of powers provision is the unequivocal statement in the Declaration of Rights of the Massachusetts Constitution of 1780:

> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative or judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not men.

MASS. CONST. pt. 1, art. 30.

33. *See* Wright, *supra* note 17, at 172.

34. CONN. CONST. art 5, § 1 (1818). *See* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 122 (1973). It has been noted that the Connecticut Constitution more resembled the immediate post-revolutionary constitutions of the other states than it did the new constitutions which were being written at the same time in that it created a strong legislature, predominant over the other branches. *See* SCHATTSCHNEIDER, *supra* note 27, at 3.

1831, in *Starr v. Pease*, an action challenging the validity of a legislative divorce, it was contended that "[t]he legislature cannot exercise a power, partaking, in any degree of a judicial character" as a result of the constitutional provision on separation of powers.[35] The court upheld the divorce, noting that divorces had been granted regularly by the legislature, and rejected the claimed limits on legislative authority. The court stated that the legislature had all the power it had exercised prior to the constitution unless that document expressly indicated otherwise.[36] The preeminence of the legislature was made even plainer in *Wheeler's Appeal From Probate*,[37] decided in 1877, in which legislation extending the time of an appeal from probate was challenged. The court distinguished cases from other jurisdictions striking down such laws, noting "we have reserved a much larger field for legislative action."[38] The court explicitly affirmed the right of the legislature to exercise certain judicial functions.[39]

The same deference to legislative authority is apparent when one considers the exercise of rule-making power by the courts in this period. Even before the 1818 constitution, Judge Swift, the leading advocate of judicial independence, assumed such a power to be in the General Assembly.[40] In 1821 Swift served on a committee appointed by the state to conform the statutes to the new constitution.[41] The final product, the Public Statutes of that year, was largely Swift's work.[42] It contained in Title 2, "Actions Civil," a fairly detailed regulation of civil procedure, and in Title 38, the proper forms for various writs.[43] The judges of the Supreme Court of Errors continued to

35. 8 Conn. 540, 544 (1831) (argument of Smith and Storrs for defendant).

36. *Id.* at 547. Justice Peters, in a separate opinion, questioned the right of the legislature to grant divorces, but concurred on the grounds that a contrary opinion would have disastrous consequences for the many people who had relied on legislative divorces. *Id.* at 548. Legislative divorces were again upheld over a dissent in Day v. Cutler, 22 Conn. 625 (1853).

37. 45 Conn. 306 (1877).

38. *Id.* at 313.

39. *Id.* at 315-17. In this same period the court frequently upheld the right of the legislature to deprive the superior court of jurisdiction by vesting certain matters exclusively in lower tribunals. *See* State v. Davidson, 40 Conn. 281 (1873); State v. Pritchard, 35 Conn. 319 (1869); State v. Peck, 31 Conn. 466 (1863).

40. *See* Z. SWIFT, *supra* note 21, at 207, where Swift commented on the salutary effect of a statute simplifying the pleading of special defenses. At another point he bemoaned the difficulties encountered "for want of a statute to authorize amendments . . . ." *Id.* at 228.

41. Swift, Whitman, and Day, *Preface* to PUBLIC STATUTE LAWS OF CONNECTICUT (Rev. of 1821) at viii.

42. *See* Sullivan, *supra* note 23, at 191.

43. PUBLIC STATUTE LAWS OF CONNECTICUT, tit. 2, tit. 38 (Rev. of 1821). The su-

make rules regulating practice after this enactment. However, such rules were made pursuant to authority granted by the legislature,[44] and were limited to matters not controlled by statute. The most significant assertion of legislative authority over matters of procedure occurred in 1879 with the passage of "An Act to Simplify Procedure in Civil Causes, and to Unite Legal and Equitable Remedies in the Same Action."[45] This Practice Act took as its sources the New York Field Code of 1848 and the English Judicature Acts of 1871 and 1873.[46] It set out in broad terms a strikingly new system of pleading, leaving to the superior court power to promulgate more detailed rules[47] of implementation.

B. *The Emergence of Judicial Assertiveness*

If one man can be credited with the abandonment by the Connecticut Supreme Court of the attitude of absolute acquiescence toward the legislature evident in most of the nineteenth century, it was William Hamersley. Hamersley, a native of Hartford and a graduate of Trinity College and Harvard Law School, served for 20 years as the State's Attorney for Hartford County. In 1893 he was appointed to the superior court and in less than a year was elevated to the Supreme Court of Errors, where he sat for fourteen years.[48] Hamersley provided the major intellectual force for altering the court's view of itself and of the structure of constitutional government in Connecticut. His arguments may be illustrated by examining his two most celebrated opinions, each attempting to delineate clear borders between the legislative and judicial powers.

The first case, *Styles, v. Tyler*,[49] dealt with the validity of a statute creating a new procedure for appeals from trials of civil actions

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preme court has recently used the 1821 codification as a guide to the intentions of the drafters of the 1818 Constitution. *See* State v. Moynahan, 164 Conn. 560, 565-67 & n.2, 325 A.2d 199, 204-05 (1973).

44. *See* Maltbie, *The Rule-Making Powers of the Judges*, CONN. PRACTICE BK. at xi-xiv (1951 ed.); Rubin, *The Rule-Making Power of the Connecticut Courts*, 15 CONN. B.J. 367 (1942).

45. Law of March 28, 1879, ch. 83, Conn. Pub. Acts (January sess.).

46. *See* Clark, *The Connecticut Practice Book of 1934*, 9 CONN. B.J. 282 (1935).

47. Law of March 28, 1879, ch. 83, § 33, Conn. Pub. Acts (January sess.). Throughout this period (as afterwards) the courts applied legislatively ordained rules of evidence without question. *E.g.*, Eld v. Gorham, 20 Conn. 8 (1849) (qualifying parties to testify); Bissell v. Beckwith, 32 Conn. 509 (1865) (making records of deceased person admissible); Pixley v. Eddy, 56 Conn. 336, 15 A. 758 (1888) (making declarations of deceased persons admissible).

48. 12 CONNECTICUT MAGAZINE 322 (1908).

49. 64 Conn. 432, 30 A. 165 (1884).

heard by the trial court without a jury.[50] The statute provided that the trial judge make or refuse to make findings of fact filed by the parties, that such findings or refusals should be included in the record along with a report of all relevant evidence, and that the Supreme Court of Errors reverse the findings if "clearly against the weight of the evidence."[51] Justice Hamersley's opinion considered the question whether the Act could require the court to review "questions of pure fact"[52] decided by the superior court. In a long discussion of the constitutional history of the courts of Connecticut, he determined that it could not.

Hamersley concluded that review of questions of pure fact was beyond the jurisdiction of the Supreme Court of Errors. Such jurisdiction could not be altered by the legislature because, with respect to the supreme court and the superior court, "the character of their jurisdiction [is] described by the Constitution itself."[53] This last contention is moderately astonishing since article fifth of the constitution contains no jurisdictional discription at all. It merely establishes two courts and permits the legislature to establish inferior courts whose "power and jurisdiction . . . shall be defined by law."[54] In Hamersley's view, however, this article of the constitution was written, for the most part, between the lines. He traced the preconstitutional history of the Connecticut courts through the creation of the Supreme Court of Errors in 1784 and concluded that the original purpose behind the establishment of that court was to separate appellate review of issues of law from the determination of matters of fact.[55] It was, he declared, a policy judgment that the determination of questions of law should not be dissolved in a general "arbitration of the case." Having defined the jurisdiction of the courts at the time of the inauguration of the constitution, Justice Hamersley argued that by use of the names "Supreme Court of Errors" and "Superior Court" the framers of the constitution intended to make the jurisdiction of these courts identical to the jurisdiction[56] which existed at that time.

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50. Law of June 6, 1893, ch. 174, Conn. Pub. Acts (January sess.).

51. *Id.* at ch. 174, § 9.

52. 64 Conn. at 441, 30 A. at 168.

53. *Id.* at 450, 30 A. at 171.

54. The language is that of the 1818 Constitution. The minor changes made by the 1965 Constitution may be compared by examining its text at note 9 *supra*. The supreme court has proceeded on the assumption that these changes do not affect the meaning of the article. *See*, Szarwak v. Warden, 36 CONN. L.J. No. 4, at 9-10 (July 23, 1974).

55. 64 Conn. at 446-47, 30 A. at 170.

56. *Id.* at 450-55, 30 A. at 171-73. It is interesting that a practically parallel argument with respect to the constitutional powers of towns was rejected by the court only two

A major obstacle to this conclusion, of course, was the constitution's explicit direction that the jurisdiction of the courts was to be "defined by law." Hamersley was willing to assume, *arguendo*, that these words applied to the Supreme Court of Errors and the superior court as well as to the legislatively created inferior courts.[57] But he found the word "law" capable of bearing two meanings: With respect to the lower courts it meant statute law, but with respect to the constitutional courts it was the law of the constitution itself, which was beyond the reach of the General Assembly. With this rather blunt instrument, Hamersley struck down the major textual constitutional limitation on the independence of the judiciary.[58] In announcing the constitutionally limited nature of the jurisdiction of the supreme court, Justice Hamersley made a quantum leap in freeing the courts from the regulation of the legislature. *Styles*, however, may be viewed in retrospect as merely a rehearsal for the great constitutional case of *Norwalk Street Railway Co.'s Appeal.*[59]

In *Norwalk Street Railway* Justice Hamersley, writing for the court, again refused to accept a power which the legislature attempted to confer on the judiciary. In this case an 1895 statute[60] allowed an appeal to the superior court from decisions of municipal officials regarding proposed alterations to be made in street railways and gave to that court all the powers the municipal authorities had on their original decision. The Norwalk Street Railway Co. took such an appeal from the decision of the Norwalk mayor and council refusing to approve the company's plan for double tracking part of its line. The superior court, acting under the statute, reversed and approved a

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years later. In State *ex rel.* Bulkely v. Williams, 68 Conn. 131, 35 A. 24 (1896), the court held the legislature had practically unrestricted powers over towns. In dissent, Chief Justice Andrews argued that the constitution was in this respect "a recognition and re-enactment of an accepted system" and that the constitution guarantees the continuance of towns "with the same essential characteristics which towns at that time exercised . . . ." The reasoning is practically identical to Hamersley's in *Styles*.

57. 64 Conn. at 452, 30 A. at 172.

58. Justice Baldwin, in dissent, argued in favor of the plain meaning of this constitutional phrase. *Id.* at 469.

Having made his major point, Hamersley went on to decide the case in favor of the appellant. He construed the 1893 statute as a mere procedural statute to bring before the court a record which would be helpful in deciding certain questions of law. It permitted the court on the basis of the evidence reported to infer findings which, while material, were not made by the trial court. In this case they showed that the court had used an incorrect rule as to burden of proof and on that basis ordered a new trial. *Id.* at 462-63.

59. 69 Conn. 576, 37 A. 1080 (1897).

60. Law of July 2, 1895, ch. 283, Conn. Pub. Acts (January sess.).

somewhat modified plan. The appeal by the mayor and council brought before the Supreme Court of Errors the question of whether the superior court could exercise such jurisdiction consistent with the separation of powers.

Justice Hamersley's opinion stated that in establishing a constitutional government the people of Connecticut had specified each and every power which that government could legitimately wield. By including the provision on distribution of powers they allocated those powers exhaustively among the three branches of government.[61] Hamersley expressly repudiated earlier cases which had recognized an unspecified elastic power in the legislature,[62] and held an attempted exercise by any department of any power not naturally associated with that department is not prescribed by the constitution and therefore is forbidden by it.[63] The question before the court, therefore, was whether the power to redetermine the decision of municipal authorities, which the statute attempted to confer on the superior court, was a judicial one, the only kind of power allowed by the constitution to the courts. It found the statutory power of review was legislative in that it involved "establishing regulations and conditions . . . which shall control all the street railways in the state, in the location, construction and operation of railways."[64] The statute, therefore, was unconstitutional because it tended to obliterate the line between the judiciary and other departments.[65]

61. 69 Conn. at 589, 592, 37 A. at 1084-85.

62. Specifically, the court overruled Wheeler's Appeal From Probate, 45 Conn. 306 (1877), discussed in text accompanying notes 37-39 *supra*, decided only twenty years earlier, which took the view that the legislature may exercise any powers not expressly denied it by the constitution—presumably including powers not strictly legislative. It also repudiated dicta to the same effect in Starr v. Pease, 8 Conn. 541 (1831), discussed in text accompanying notes 35-36 *supra*. The latter case was discounted as a case decided by judges who, owing to their long experience under the old system, could not fully understand the radical alteration in the distribution of powers effected by the 1818 Constitution. 69 Conn. at 590, 37 A. at 1084. It will be observed that the argument in *Norwalk St. Railway* is somewhat at odds with Justice Hamersley's reasoning in *Styles v. Tyler*. Since *Styles* stood for the proposition that the constitutional courts' jurisdiction was defined with reference to 1818, it would follow that the other institutions of government were also constitutionally vested with the powers they had developed up to 1818. This reasoning would indicate that the General Assembly would have been created with all the nonlegislative functions it had acquired at that time just as the Supreme Court of Errors' jurisdiction was fixed beyond legislative change in that year. Of course, it might be reasonably argued that the constitution, by instituting a separation of powers, necessarily divested the General Assembly of its nonlegislative functions while it was not a necessary result that the court's jurisdiction be altered.

63. 69 Conn. at 592-93, 37 A. at 1085.

64. *Id.* at 599, 37 A. at 1087-88.

65. *Id.* at 603, 37 A. at 1089. Hamersley recognized that in certain cases powers

In both *Styles* and *Norwalk Street Railway* the court, per Justice Hamersley, emulated the technique of Chief Justice Marshall in *Marbury v. Madison*:[66] it "took the engaging position of declining to exercise power which the Constitution withheld from it, by making the occasion an opportunity to assert a far more transcendant Power."[67] In *Norwalk Street Railway* it was clear that the question of what is and what is not judicial is one reserved for determination of the courts.[68]

Both *Styles* and *Norwalk Street Railway* asserted judicial power in a negative way by denying the General Assembly the power to expand judicial activity. In this sense, they announced limitations on the courts as well as the legislature. Therefore, the narrow issues involved were not questions of separation of powers. Not until Justice Hamersley had left the court did another line of cases emerge in which the court held that the legislature could not wield power properly exercised by the judiciary. In *Bridgeport Public Library v. Burrough's Home*,[69] the supreme court was called on to determine the power of trustees to sell certain devised land in the absence of any power to sell expressed in a will. The General Assembly had supplied this power through a special act. The court held the legislature was constitutionally incompetent to supervise the administration of charitable trusts. It found that jurisdiction over charitable trusts had historically resided in courts of equity, and, while legislative supervision had been recognized at one time, this was under the misconception of the nature of separation of powers prevailing prior to *Norwalk Street Railway*. If the trustees wished authorization to sell, the proper course was to apply to a court.

Through most of the first half of the twentieth century the

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appearing to be appropriate to one branch might properly be exercised by another when it was necessary to carry out the exercise of an undoubtedly proper function. Thus a legislature may summon and examine witnesses, a judicial power, as a necessary means to make law, an undisputed legislative power. *Id.* at 594-95, 37 A. at 1086. Applying this reasoning, Justice Hamersley was able to distinguish a line of cases which had upheld judicial review of decisions of numerous local and administrative agencies. *E.g.*, Central Ry. & Electric Co.'s Appeal, 67 Conn. 197, 35 A. 32 (1896); Hopson's Appeal, 65 Conn. 140, 31 A. 531 (1894). These cases, the court held, did not raise a question of separation of powers since the review involved was only the determination whether the agency had exceeded its powers. It was entirely proper for a court to adjudicate claimed legal injuries, and any orders resulting from such cases were auxiliary to the main purpose of providing redress for those injuries. 69 Conn. at 598-600, 37 A. at 1087.

66. 1 U.S. (1 Cranch) 368 (1803).

67. E. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 10 (1963).

68. 69 Conn. at 593-94, 37 A. at 1085-86.

69. 85 Conn. 309, 82 A. 582 (1912).

judiciary largely restricted its protection of judicial independence to the three specific subject areas represented by the *Styles*, *Norwalk Street Railway*, and *Bridgeport Public Library* opinions.[70] The court made almost no effort to define new areas in which the legislature was forbidden to act.[71] This was certainly true with respect to legisla-

70. With respect to the first two areas—the power to review findings of fact and to review administrative determinations—the court found the line between proper and improper judicial functions increasingly blurred and tended to permit itself an ever broader scope of review. In applying *Styles*, the court experienced difficulty in determining what is and what is not a finding of pure fact. Thus, *conclusions* drawn from facts could be reviewed if they were claimed to be illegal, illogical, or arbitrary. It is difficult to discover how basic a fact must be to avoid being a reviewable conclusion. *See, e.g.*, Dexter Yarn Co. v. America Fabrics, 102 Conn. 529, 537, 129 A. 527, 531 (1925); Hayward v. Plant, 98 Conn. 374, 379, 119 A. 341, 343 (1923); Kugel v. Angell, 74 Conn. 546, 549, 51 A. 533-34 (1902); Nolan v. New York, N.H. & H. Ry., 70 Conn. 159, 173, 39 A. 115, 120 (1898). *See* W. MALTBIE, CONNECTICUT APPELLATE PROCEDURE §§ 164-165 (1957). The rule emanating from *Norwalk St. Ry.* is also somewhat obscure owing to its recognition that courts may examine local or agency decisions for "illegality." *See, e.g.*, Malmo's Appeal, 72 Conn 1, 5-6, 43 A. 485, 486-87 (1894); Modeste v. P.U.C., 97 Conn. 453, 458, 117 A. 494, 496 (1922); *In re* Gilhuley, 124 Conn. 271, 280, 199 A. 436, 440 (1938); W. MALTBIE, *supra* at § 243. The cases on exclusive judicial control of charitable trusts have evolved a clearer and consequently more manageable rule. *E.g.*, Hartford v. Larrabee Fund Ass'n, 161 Conn. 312, 288 A.2d 71 (1971); Macy v. Cunningham, 140 Conn. 124, 97 A.2d 893 (1953); Second Eccles. Soc'y v. Attorney General, 133 Conn. 89, 48 A.2d 266 (1946).

71. However, two other cases deserve mention. In McGovern v. Mitchell, 78 Conn. 536, 63 A. 433 (1906), a challenge was made to legislation raising the salaries of the judges of the superior court and Supreme Court of Errors. It was alleged these increases were given in violation of a constitutional amendment prohibiting raises for incumbents in any public office. After deciding that the supreme court could hear the case on a waiver by all parties of any claim of disqualification, the court upheld the law by interpreting the constitutional provision to apply only to nonjudicial officers. In an opinion by Justice Hamersley the court found this interpretation consonant with the spirit of separation of powers which prevailed in the rest of the constitution. The legislature was under a *constitutional* duty to provide adequate, certain, and uniform salaries to all judges.

> A court, each of whose members depended for his livelihood, not upon a certain sum fixed by the legislative department in obedience to the Constitution, but upon occasional grants; not upon a sum fixed for each member in view of the equal services required of all, but upon a sum fixed for him in view of the discriminating value which the legislature for the time being might attach to his services, cannot be the independent judicial department created for the special purpose, among others, of giving an independent judgment as to the validity of the acts of its co-ordinate departments.

Id. at 547, 63 A. at 437.

In 1930 the court held, *inter alia*, that a validating act designed to cure the late signing of bills by the governor over a number of years could not have retroactive effect. The legislature may only say what the law shall be, not what it was. The latter is a judicial function. Therefore, the validating act could not change the law insofar as it governed prior transactions. Preveslin v. Derby & Ansonia Developing Co., 112 Conn. 129, 151 A. 518 (1930).

tion governing matters of procedure and practice. The validity of such legislation was acknowledged in the landmark opinions already discussed, in subsequent case law, in the judges' expressions in promulgating rules, and in the opinions of commentators.

Justice Hamersley, in *Styles*, contrasted the legislature's incompetence to alter the "essential characteristics" of the Supreme Court of Errors' jurisdiction with mere modification of forms of procedure by legislation.[72] In *Norwalk Street Railway* he distinguished the fact that legislation could not properly foist legislative duties on judges from the fact that the judicial power itself must be exercised in a manner which "must to a large extent be governed by legislation in respect to procedure."[73] It is very unlikely that Justice Hamersley, the father of the modern understanding of separation of powers in Connecticut, entertained any conception of that doctrine which would have excluded the legislature from the rule-making power. Hamersley was a member of the committee appointed by the legislature to reform Connecticut practice. That Committee drafted and recommended the Practice Act of 1879 to the General Assembly. The same committee drafted court rules for the judges under the authority of § 33 of that Act.[74] That legislation entirely reformed the procedure which was to govern litigation in Connecticut.

The same ideas of the rule-making authority are reflected in the case law which followed *Styles, Norwalk Street Railway Co.*, and *Bridgeport Public Library*. In an 1899 case, *Ockershausen v. New York, New Haven & Hartford Railroad*,[75] Justice Hamersley addressed the issue of whether a defendant could offer evidence of a

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It is also interesting to note that at the same time the court was developing the separation of powers doctrine to protect the independence of the judiciary, it felt less need to protect the integrity of the other departments. In a case involving the deadlocked election of 1890 in which the House and Senate could not agree in certifying the election returns, the supreme court held the superior court had jurisdiction to hear a petition to install one claimant as governor over another in the face of "an entire collapse in the legislative department." State *ex rel.* Morris v. Bulkeley, 61 Conn. 287, 372, 23 A. 186, 191 (1892). *Cf.* State v. Moynahan, 164 Conn. 560, 325 A.2d 199 (1973).

72. 64 Conn. at 454-55, 30 A. at 173. Moreover, the actual holding in *Styles* construed the challenged statute as one which merely controlled the contents of the record, "a matter of procedure [which] may be wholly within the legislative discretion." *Id.* at 461, 30 A. at 175. *See* note 58 *supra*.

73. 69 Conn. at 602, 37 A. at 1088-89. In *Norwalk St. Ry.*, Justice Hamersley gave the example of a court establishing rules of practice, an essentially legislative function, to illustrate the idea that it is sometimes proper for one department to use means appropriate to another in executing its proper functions. *Id.* at 595, 37 A. at 1086.

74. *See* CONN. PRACTICE BK. (Preface) (1879 ed.).

75. 71 Conn. 617, 42 A. 650 (1899).

defense without notice to the plaintiff under a recently passed statute. The statute authorized the superior court judges to promulgate rules to govern the filing of such notices. Since the action had been instituted after the effective date of the statute, but before the promulgation of rules, the defendant claimed the statute was not applicable. Justice Hamersley held that the statute was enforceable regardless of whether the rules had been promulgated and regardless of what the rules, if they had been promulgated, contained. Even if a rule is inconsistent with a statute, "it is the rule and not the statute that must give way."[76] And in an opinion written the following year expounding upon the use of forms and rules published by the court, he wrote: "Of course such rules cannot alter the [Practice] Act, they can only give effect to its real purpose."[77] The reports which followed are full of expressions of the court to the effect that the legislature may constitutionally create and regulate remedies for the invasion of various rights,[78] alter the burden of proof,[79] allocate costs of litigation,[80] and change the time limits for appeals.[81]

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76. *Id.* at 622, 42 A. at 651.

77. Dunnett v. Thornton, 73 Conn. 1, 6, 46 A. 158, 160 (1900).

78. *See* Braman v. Babcock, 98 Conn. 549, 120 A. 150 (1923) (legislature may establish procedure for declaratory judgment); Ackerman v. Union & New Haven Trust Co., 91 Conn. 500, 100 A. 22 (1917) (legislature may establish procedure to quiet title); Dawson v. Town of Orange, 78 Conn. 96, 61 A. 101 (1905) (same); Atwood v. Buckingham, 78 Conn. 423, 62 A. 616 (1905) (legislature may alter penalty for breach of duty by administrator). In the *Ackerman* case the court stated:

> Our courts have carefully avoided encroachments upon the functions of the legislature, and the rules of practice and procedure under the Practice Act and its amendments have been strictly limited to carrying this legislation into effect, and giving full practical operation force to its provisions.

91 Conn. at 505, 100 A. at 23. As late as 1955 the court held unambiguously that the manner in which an appeal could be brought before it was a matter constitutionally committed to the General Assembly. Lengel v. New Haven Gas Light Co., 142 Conn. 70, 111 A.2d 547 (1955). In 1963 it upheld a statute which required a judge to allow a party to call and examine an opposing party as a hostile witness. Mendez v. Dorman, 151 Conn. 193, 195 A.2d 561 (1963); *accord*, Martyn v. Donlin, 151 Conn. 402, 198 A.2d 700 (1964).

79. Johnson County Sav. Bank v. Walker, 79 Conn. 348, 65 A. 132 (1906).

80. Lew v. Bray, 81 Conn. 213, 217, 70 A. 628, 630 (1908) ("[t]he legislature unquestionably has the power to enact laws relating to procedure . . . .").

81. State v. Caplan, 85 Conn. 618, 84 A. 280 (1912). Furthermore, the court continued to apply statutory rules of evidence without question. *E.g.*, Sheary v. Hallock's of Middletown, Inc., 149 Conn. 188, 177 A.2d 680 (1962) (business entries admissible); Graybill v. Plant, 138 Conn. 397, 85 A.2d 246 (1951) (declarations of deceased persons admissible); Borucki v. MacKenzie Bros., 125 Conn. 92, 3 A.2d 224 (1938) (business entries admissible); Eva v. Gough, 93 Conn. 38, 104 A. 238 (1918) (public records admissible; judicial notice of law of other jurisdiction); Mulcahy v. Mulcahy, 84 Conn. 659, 81 A. 242 (1911) (declaration of deceased person admissible). The court also ap-

This judicial understanding of the source of the rule-making authority is further evidenced in the various editions of the Practice Book, the compilation of court-made rules issued by the superior court. The 1908 edition reprinted the preface to the 1879 edition, which acknowledged statutory authority for rule-making.[82] The same was true of the 1922 edition.[83] That of 1934 contained an historical account of the various statutes conferring the rule-making power on the courts.[84] In his preface to the 1951 Practice Book, Chief Justice Maltbie included a similar discussion and asserted an "inherent" rule-making power in courts only "in the absence of controlling legislation."[85]

The legal literature of the time evinces the same understanding. Even the most avid proponents of judicial rule-making assumed that such authority would have to be delegated to the court by the General Assembly. While favorably disposed to Dean Wigmore's suggestion that legislatively ordained rules of court were unconstitutional,[86] one writer conceded that counsel urging such a proposition in Connecticut "would not get to first base."[87] The official reporter of the Connecticut Supreme Court of Errors, in urging a broader delegation to the court of rule-making authority, acknowledged that the General Statutes "are full of procedural provisions which the Court would not think of changing or abrogating without specific authority."[88] In 1943, Judge Clark, arguing the same point and calling for a simplified procedure, pointed out that the judicial rule-making power is "distinctly subordinate to legislative action."[89] Between this state of the law and

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plied and interpreted statutes in the following instances: (1) requiring judgment to be rendered within a certain period after trial, Hurlbutt v. Hathaway, 139 Conn. 258, 93 A.2d 161 (1952); Whitaker v. Cannon Mills, 132 Conn. 434, 45 A.2d 120 (1945); Simpson v. YMCA, 118 Conn. 414, 172 A. 855 (1934); Spelke v. Shaw, 117 Conn. 639, 169 A. 787 (1933); *see* discussion of Creative Eye, Inc. v. Raum in text accompanying note 128 *infra*; (2) creating presumptions from evidence, Leitzes v. F.L. Caulkins Auto Co., 123 Conn. 459, 196 A. 145 (1937); (3) regulating motions for new trials and attachment of real estate, Milestan v. Tisi, 140 Conn. 464, 101 A.2d 504 (1953); and (4) reopening old defaults, Testa v. Corralls Hamburger System, 154 Conn. 294, 224 A.2d 739 (1966).

82. CONN. PRACTICE BK. (Preface) (1908 ed.).

83. CONN. PRACTICE BK. (Preface) (1922 ed.).

84. CONN. PRACTICE BK. (Preface) at 6, 9-10 (1934 ed.).

85. Maltbie, *The Rule-Making Power of the Judges*, CONN. PRACTICE BK. at xi, xvii (1951 ed.).

86. *See* text accompanying notes 181-82 *infra*.

87. Berry, *Appeal from Jury Verdicts*, 15 CONN. B.J. 83, 89 (1941).

88. Phillips, *Full Rule Making Power for the Superior Court*, 22 CONN. B.J. 198 (1948).

89. Clark, *Simplified Pleading in Connecticut*, 16 CONN. B.J. 83 (1942). Some writers in this period attempted a constitutional argument for an exclusively judicial rule-

State v. Clemente there plainly yawns a wide chasm. But the declaration of judicial authority did not arrive with a dramatic leap. Instead, it slipped up almost unnoticed.

C. *The Era of Judicial Domination*

In considering how the Connecticut Supreme Court came to assert a supreme and exclusive role over matters of practice and procedure it is necessary to review the extent of judicial rule-making activity in the past. Courts long had an active role in rule-making although always under the aegis of a legislative grant of authority.[90] Moreover, the court has on a number of occasions in this century defended the right of judges to act without specific legislative authority. All courts, it was claimed, had "inherent power" to take such measures as are necessary to carry out judicial functions. At first this "inherent" power was exercised on an ad hoc basis, usually to compel disclosure of some matter at trial when the statutory discovery mechanisms were ineffective.[91] In 1950, however, the supreme court, in *In re Appeal of Datillo*,[92] upheld a general superior court rule making case histories and other records admissible in hearings on appeal from the juvenile court. Although the opinion by Chief Justice Maltbie held that the rule was properly made under a statutory grant of rule-making power,[93] the opinion went on to say that, even without legislative authority, the judges possessed inherent power to make rules of procedure.[94] But the opinion as a whole made clear that this inherent power was deemed to be a supplementary one, subordinate to legislative rules which might preempt the subject matter. This is demonstrated by the fact that the chief justice took pains to note that statutory provisions did not prescribe the procedure to be followed in appeals from juvenile court, and that the challenged rule did not con-

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making power, but it seems clear they were not presenting the accepted doctrine. *See* Berry, *supra* note 80. Even when such constitutional arguments were made they were limited to matters affecting the ability of the courts efficiently to administer justice and did not extend to matters of procedure generally. *See* Rubin, *The Rule-Making Power of the Connecticut Courts*, 15 CONN. B.J. 367 (1942). On the distinction between administrative matters and procedure in general, see note 142 *infra*.

90. *See, e.g.*, Public Statute Laws of Connecticut, tit. 21, § 5 (Rev. of 1821); Law of March 28, 1879, ch. 83, § 33, Conn. Pub. Acts (January sess.). *Cf.* Clark, *The Connecticut Practice Book of 1934*, 9 CONN. B.J. 282 (1935).

91. *See* Pottetti v. Clifford, 146 Conn. 252, 150 A.2d 207 (1959); Peyton v. Werhane, 126 Conn. 382, 11 A.2d 800 (1940); Banks v. Connecticut Ry. & Lighting Co., 79 Conn. 116, 64 A. 14 (1906).

92. 136 Conn. 488, 72 A.2d 50 (1950).

93. *Id.* at 492, 72 A.2d at 52.

94. *Id.* at 492-93; 72 A.2d at 52.

flict with any statute.[95] The chief justice's opinion is consistent with his explicit statement in the preface to the 1951 Practice Book, in which he said the inherent power of judges could be exercised only in the absence of controlling legislation.[96]

The first judicial statements that this inherent authority might involve something more were made in cases dealing with the right of the judicial department to control matters touching on the regulation of the practice of law. In *State Bar Association v. Connecticut Bank & Trust Co.*,[97] the court held that the statutes granting fiduciary powers to banks and trust companies did not authorize those institutions to act as attorneys. In dicta it stated that even if the statutes could be so interpreted, the attempt would fail as an unconstitutional violation of the doctrine of separation of powers by the legislature. Citing *Datillo*, the court reasserted its inherent common law power to make rules of procedure and then announced that the Supreme Court of Errors had "the inherent power independent of and *despite any statute* to make rules governing procedure before it."[98] This pronouncement is the first, naked assertion of judicial immunity to legislative regulation of procedure in the constitutional history of the state. The claim was unaccompanied by any citation. The point was made more elaborately three years later in *Heiberger v. Clark*,[99] which struck down statutory standards for admission to the bar inconsistent with court rules on the same subject. Again the court held such legislation to be unjustifiable meddling in the affairs of the judicial department, and declared that "[i]rrespective of legislation, the rule-making power is in the courts," this time incorrectly relying on *Datillo*.[100]

While the *Connecticut Bank & Trust Co.* and *Heiberger* cases used sweeping language, the actual holdings need not have presaged the complete transfer of final rule-making power to the courts. Regulation of the bar and admission to the practice of law represent a peculiar area, separate from more general questions of practice and procedure. Indeed the exclusive power of the courts in that area has

95. 136 Conn. at 493, 495, 72 A.2d at 53.

96. Maltbie, *supra* note 85, at xvii. Later cases discussing the inherent rule-making powers show the same limitations. Stanley v. City of Hartford, 140 Conn. 643, 103 A.2d 147 (1954); Kelsall v. Kelsall, 139 Conn. 163, 90 A.2d 878 (1952); Miffitt v. Statler Hilton, Inc., 28 Conn. Supp. 32, 248 A.2d 581 (Super. Ct. 1968).

97. 145 Conn. 222, 140 A.2d 863 (1958).

98. *Id.* at 232, 140 A.2d at 864 (emphasis supplied).

99. 148 Conn. 177, 169 A.2d 652 (1961).

100. *Id.* at 185, 169 A.2d at 656.

been recognized in most American jurisdictions, including the great majority which reject a similar power with respect to procedure generally.[101]

The judges soon made plain, however, that no such limited interpretation was intended. In 1957 legislation removed the rule-making power from the judges of the superior court and vested it in the justices of the Supreme Court of Errors.[102] The statute also called for publication of proposed rules, for public hearings, and for the reporting of approved rules to the General Assembly, which could veto any such rule. Notwithstanding this firm assertion of legislative authority, the judges of the superior court in 1963 published a new compilation of rules in the Practice Book of that year. The introduction made no reference to legislative authority for the rules. Instead, it noted that the judges had for the first time adopted as rules of court "such procedural statutes as appeared desirable, with any necessary changes in phrasing."[103] While put as a matter of convenience allowing "all matters of procedure, so far as possible, [to be] governed by rules of court appearing in a single volume,"[104] this cavalier treatment of legislative enactments on procedure, combined with total disregard of the statute governing rule-making, indicated that the judges did not intend to remain under the supervision of the General Assembly with regard to matters of practice and procedure.[105]

An unambiguous statement of judicial supremacy followed in

101. *Compare* Martin v. Davis, 187 Kan. 473, 357 P.2d 782 (1960) *with* Schoof v. Byrd, 197 Kan. 38, 415 P.2d 384 (1966). *Compare* Opinion of the Justices to the Senate, 279 Mass. 607, 108 N.E. 725 (1932) *with* Mountfort v. Hall, 1 Mass. 443 (1805). *Compare* Meunier v. Bernich, 170 So. 567 (La. Sup. Ct. 1936) *with* Kinchen v. Royal Exch. Assurance, 12 La. App. 8, 124 So. 844 (1929). Comment, *Admission to the Bar and the Separation of Powers*, 7 UTAH L. REV. 82 (1960).

102. Pub. Acts 1957, ch. 651, § 27, codified at CONN. GEN. STAT. § 51-14.

103. CONN. PRACTICE BK. (Preface) at iii. (1963 ed.).

104. *Id.* at iii-iv.

105. The rule-making statute had been recognized in the *Connecticut Bank & Trust Co.* case, but only insofar as it gave the court power to make rules for the lower courts established by the legislature. State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 232-33, 140 A.2d 863, 869 (1958). The legislature has shown a somewhat schizophrenic attitude toward the court's assertion of sole rule-making authority. Despite the broad claim of authority manifested by CONN. GEN. STAT. REV. § 51-14 (1975) and a variety of other procedural statutes, it has also continued to provide for publication of the court-made rules promulgated in violation of the mandate CONN. GEN. STAT. REV. § 51-19 (1975). Perhaps most indicative of the legislative confusion as to where the final authority resides is CONN. GEN. STAT. REV. § 51-15a (1975), which provides for annual consultation between members of legislature's Judiciary Committee and the Rules Committee of the Superior Court to discuss practice, procedure, and pending legislation affecting the courts.

1968 in *Adams v. Rubinow*[106] when the supreme court reviewed a statute reorganizing the probate courts. It rejected an argument that separation of powers precluded the General Assembly from tampering with the procedure of any courts, but stated that such a limitation was appropriate with respect to the constitutional courts: the supreme court and the superior court.[107] With regard to these courts, the efficacy of statutory rules was held to depend on acquiescence by the judges of the affected court, either informally or by adoption as a rule of court. Even with respect to nonconstitutional courts, legislative regulation which interfered with the "orderly operation of the court" would run afoul of the separation of powers.[108] In *State ex rel. Kelman v. Schaffer*,[109] an expedited appeal was sought under both a statutory procedure provided by Connecticut General Statutes § 52-265a and under the court-made rule in Connecticut Practice Book § 762. The statute provided for the appeal on approval by the chief justice while the rule required the concurrence of the court. Although the plaintiffs apparently could have qualified under both methods, the court went out of its way to indicate that it heard the appeal only under the rule. It declared the doctrine that the legislature may not make rules of procedure binding on the supreme or superior courts was one which "can no longer be doubted."[110] The court noted that the rule was adopted to accomplish the purposes of

106. 157 Conn. 150, 251 A.2d 49 (1968).

107. *Id.* at 156. The special status of these two constitutional courts arises from two articles of the constitution. The argument for judicial independence has two aspects based on these articles: The traditional separation of powers based in article second and the inviolability of the constitutional courts established by article fifth and exemplified by the reasoning of the *Styles* case discussed in text accompanying notes 49-58 *supra*. The aspects are seen combined in *Adams* where the special status of these two courts prohibited legislative interference in any procedural matters while the general separation of powers protected all courts from regulation which interfered with proper judicial functions. The special status of the constitutional courts was expanded upon in Osborn v. Zoning Bd. of Appeals, 11 Conn. Supp. 489 (Super. Ct. 1943), in which Judge Cornell held unconstitutional an act expanding the jurisdiction of the court of common pleas as a violation of the constitutional requirement that legislatively created courts be inferior to the superior court. In Walkinshaw v. O'Brien, 130 Conn. 122, 32 A.2d 547 (1943), the supreme court rejected this contention, holding that the legislature could apportion jurisdiction between the superior court and lower courts. However, it warned that the legislative extension of jurisdiction to lower courts had almost reached unconstitutional encroachment on the jurisdiction of the superior court. *Id.* at 143-44, 32 A.2d at 556. It was this rationale which underpinned the holding in Szarwak v. Warden, 36 CONN. L.J. No. 4, at 1 (July 23, 1974), discussed in note 10 *supra*.

108. 157 Conn. at 156-57, 256 A.2d at 226-27.

109. 161 Conn. 522, 290 A.2d 327 (1971).

110. *Id.* at 527, 290 A.2d at 331.

the statute in a constitutionally proper manner.[111] Thus the court came around to a position exactly opposite to that adopted in *Ockershausen v. New York, New Haven & Hartford Railroad*[112] in 1899. In case of a conflict between statute and court rule the rule was to govern.

D. *Reconciling Inconsistent Precedents*

The majority opinion of Justice Loiselle in *Clemente* treats judicial supremacy over questions of practice and procedure as a matter long settled by the constitutional history and decisional law of Connecticut. But it was only in *Clemente* itself that the court finally struck down a procedural statute on the general grounds that it infringed on the exclusive power of the judicial department. Judicial authority over procedure had been the basis of only one prior holding, *Heiberger v. Clark*,[113] a case which might more easily be explained on the basis of exclusive control of the courts over the regulation of the practice of law. All the other expressions on the subject on which the court relied, those in *Connecticut Bank & Trust Co.*, *Adams*, and *Kelman*, were dicta. The older cases on separation of powers, which were copiously cited, cases such as *Styles*, *Norwalk Street Railway*, and *Bridgeport Public Library*, stood for far narrower propositions. They were products of an era in which the final legislative authority over matters of practice and procedure was never questioned.

If the alteration of the constitutional law in this area can be traced to a single point it must be the erroneous, unsupported, and unexplained statement in *Connecticut Bank & Trust Co.* that the inherent rule-making power of the courts exists not only apart from, but in spite of the actions of the General Assembly.[114] Rather than confine this bald departure from stare decisis to the area of regulation of the bar, the court chose to emphasize it and expand upon it in *Adams* and *Kelman* and finally to hold as it did in *Clemente*. It is particularly disturbing that this mode of arriving at the rule permitted the court to avoid admitting the radical character of the change it was making. Since the court did not acknowledge the novelty of its holding, it spared itself the task of articulating the reasons of constitu-

111. *Id.* at 529-31, 290 A.2d at 331-32.

112. 71 Conn. 617, 42 A. 650 (1899), discussed in text accompanying notes 75-6 *supra*.

113. 148 Conn. 177, 169 A.2d 869 (1964), discussed in text accompanying notes 99-101 *supra*.

114. 145 Conn. at 232, 140 A.2d at 861.

tional theory or of public policy which made the innovation necessary. Nevertheless, there were two indications in the opinions of the court of ways the new developments might be reconciled with the court's longstanding recognition of legislative authority. One was an assertion of a policy of voluntary judicial acquiescence in legislative rules of procedure. The second involved an evolution in the constitutional concept of separation of powers.

In *Adams v. Rubinow* the court noted that a constitutional court might choose to acquiesce in a rule of procedure prescribed by the General Assembly, and that such acquiescence need not require so formal an act as adoption of the statute as a rule of court.[115] It is impossible however to dismiss the prior 150 years of judicial submission to legislatively ordained rules as mere acquiescence. The language of the court's own decisions is quite explicit in recognizing the allocation of functions such as rule-making as a matter of power, not of comity.[116] The court did not acquiesce; it submitted.

The doctrine of acquiescence is not only historically unsound; it is practically unsatisfactory as well. A comparison of the old cases in which the court presumably acquiesced and the later cases in which it did not provides no indication of what general considerations guide the courts in choosing whether or not to acquiesce.[117] Thus, neither legislators nor litigants can know what matters are or can be settled by legislation, and what matters the court will find exclusively within judicial control.

The second attempt to account for inconsistent prior case law may be observed in the *Clemente* opinion's frequent collisions with contrary authority. For example, the court relied heavily on *Norwalk Street Railway* despite its strong language upholding legislative power over judicial procedure. The *Clemente* court dismissed this inconvenient language on the grounds "that the evolution of judicial thought as to the content of the judicial function did not cease with that opinion."[118] In dealing with an earlier opinion stating that judicial control of discovery could be barred by legislation the court again

115. 157 Conn. at 156, 156 A.2d at 226.

116. *See* text accompanying notes 75-81 *supra* and cases cited at note 78 *supra*.

117. The court in *Clemente* spoke only of "clear invasion" of the judicial function by the legislature and guarding against "gradual invasion." *State v. Clemente*, 36 CONN. L.J. No. 1, at 6 (July 2, 1974). In McMahon v. Weber, 29 Conn. Supp. 195, 278 A.2d 468 (Super. Ct. 1971), the court declined to strike down a statute authorizing discovery of insurance limits, saying that even if the statute invaded the powers of the superior court, that court had acquiesced by frequent application of the statute.

118. 36 CONN. L.J. No. 1, at 4.

retreated to "the ongoing evolution of judicial principles in the separation of powers area."[119]

The problem with this attempt, of course, is that there has been no evolution. Subordination of legislation on procedure to judicial rule-making was never mentioned until the *Connecticut Bank & Trust Co.* dictum in 1958. If the cases on bar regulation are excluded, the doctrine appeared only in 1968 when it emerged full blown (although again in dicta) in *Adams v. Rubinow.* Between that case and *Clemente* there is only the *Kelman* case in 1971. The principles involved underwent no gradual change or reconsideration. These abrupt developments were far more revolutionary than evolutionary.

Furthermore there is an incongruity, if not an inconsistency, in simultaneously basing the doctrine upon the historical fact of the understanding of separation of powers of the framers of the 1818 Constitution and upon an "ongoing evolution of judicial principles."[120] Similarly inconsistent logic was displayed in the *Clemente* court's adoption of an historical approach to show that discovery was a traditional attribute of equity courts. It was thus a judicial power not susceptible to constitutional regulation by the legislature. But the court had to slough off judicial recognition of legislative authority in cases it cited as historical casualties of judicial evolution.[121] This reasoning contrasts with Justice Hamersley's insistence in *Styles* and *Norwalk Street Railway* on a single fixed meaning of the constitution based on the intention of the drafters. To Hamersley it was necessary, in considering earlier cases, either to reconcile them with the constitution as he interpreted it or to demonstrate their mistakes and overrule them.[122] The overruling of the sizeable body of case law which would have been required by applying this approach to *Clemente* was a task the modern court chose to avoid, involving as it would the rejection of parts of many of the cases it cited as authority. The result was the court's picking and choosing at its pleasure those expressions which reflected historical facts of constitutional significance and those which would be safely discarded as subject to the more enlightened consid-

119. *Id.* at 5.

120. *Compare* the court's discussions at *id. with* that at *id.* at 4. The analysis of separation of powers in historical terms with reference to the labeling of functions as they existed at the time of the adoption of the constitution has been long recognized. *See, e.g.*, Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 ILL. L. REV. 163, 170 (1915).

121. 36 CONN. L.J. No. 1, at 4.

122. *See* Styles v. Tyler, 64 Conn. 432, 443, 30 A. 165, 168 (1894); Norwalk St. Ry. Co.'s Appeal, 69 Conn. 576, 590-93, 37 A. 1080, 1082-85 (1897).

eration of modern courts. The criteria employed in that selection remain obscure.

E. *The Current State of the Law*

One consequence of the court's failure to deal with and explain the changes in the law it was making is that the area over which judicial supremacy extends remains unclear. Since the court shunned policy explanations in favor of a supposedly inflexible constitutional mandate, the reason for the rule provides no discoverable limit to its application. The attempts at generalization in the *Clemente* opinion are unenlightening. For example, in acknowledging that the functions of government cannot be definitively distributed among the three branches, the court concluded that "[t]o be unconstitutional in this context, a statute must not only deal with subject matter which is within the judicial power, but it must operate in an area which lies exclusively under the control of the courts."[123] This answer obviously only restates the question. The manner of arriving at the particular decision in *Clemente* provides no additional help. The court noted the existence of the independent power of equity courts to order discovery, minimized past recognition of the power of the legislature in discovery matters "in light of the ongoing evolution of judicial principles,"[124] recalled that the statute in question was an attempt to overrule an earlier case,[125] and concluded that, since the statute "would infringe upon the Superior Court in prohibiting its exercise of discretion,"[126] it was unconstitutional. Few statutes would be immune to such an analysis.

The uncertainty of the current state of the law is compounded by the court's continued inconsistency in its treatment of procedural legislation. In 1971, long after *Adams*, the court strictly applied a statute specifying the reasons for which a *lis pendens* could be released, and admonished a referee, acting as superior court trial judge, for releasing one for "equitable" reasons as he might have done in the absence of the statute.[127] In 1975, almost a year after *Clemente*, the court reviewed a superior court judge's refusal to set aside a verdict voidable under a statute because it was rendered after the end of the session following the commencement of the action. The supreme

123. 36 CONN. L.J. No. 1, at 4.
124. *Id.* at 5.
125. *Id.*
126. *Id.* at 6.
127. Ravitch v. Stollman Poultry Farms, Inc., 162 Conn. 26, 291 A.2d 213 (1971).

court, in an unanimous per curiam opinion without reference to any constitutional issue, reversed: "The [superior] court's conclusion regarding a Dickensian assertion concerning General Statutes § 51-29 may or may not be a valid observation, but such considerations are for the legislature."[128] This is hardly the language of voluntary acquiescence.

The apparent failure of the court to hew closely to the prior constitutional decisions on the rule-making power is subject to differing interpretations. Since it has been demonstrated that the constitutional cases present an anomaly in the law of Connecticut, it may be proper to regard them as aberrations from the mainstream of cases that recognize the validity of procedural legislation. Under this view, the most recent cases indicate the continuing vitality of this mainstream doctrine.[129] On the other hand, the emphatic language of the constitutional cases, combined with the fact that the constitutional issues were not squarely before the court, may indicate the later cases, showing deference to the legistature, were instances of inadvertence that cannot be read to undermine or reverse the rule of judicial supremacy. Even if this is the case, however, they are instructive because their very inadvertance reveals how deeply the Connecticut judiciary is conditioned by prior practice and decisions to accept the legislature's role in procedure.

Even so, it is safe to say that the court has asserted a potential claim to exclusive authority, which *at least* includes control over matters of practice and procedure. The language of *Adams* is unambiguous on this point[130] and in *Clemente* the court found the statute offensive despite an argument that it conferred substantive rights on the defendant. It stated that, if a clear categorization as procedural or substantive were possible, further analysis would be unnecessary.[131] Thus, any matter which the court may reasonably label as procedural is liable to be claimed as part of the exclusive judicial domain.[132]

128. Creative Eye, Inc. v. Raum, 36 CONN. L.J. No. 49, at 15 (June 3, 1975).

129. Particularly with respect to State v. Clemente, 36 CONN. L.J. No. 1, at 1 (July 2, 1974), the one case in which the rule of judicial supremacy provided the *ratio decidendi*, one may wonder what effect the particularly gruesome factual background might have had on the court's decision. *Clemente* might be regarded as an example of the traditional maxim that hard cases make bad law.

130. 157 Conn. at 156, 251 A.2d at 56.

131. 36 CONN. L.J. No. 1, at 3. In dissent, Justice Bogdanski asserted that Conn. Gen. Stat. § 54-865 created new rights to enable defendants to execute more effectively their constitutional right of confrontation and that the creation of that right was an appropriate function of the legislature. *Id.* at 13.

132. This raises particularly the question of whether the General Assembly is with-

The constitutional rule by which the courts exercise this power has been shown to be an anomaly in the development of the law of Connecticut. To assess it more fully it is also necessary to examine the reasoning accepted in other jurisdictions as to the proper constitutional allocation of the rule-making powers.

III. THE RULE-MAKING AUTHORITY IN CONTEXT[133]

Primary or exclusive control over rules of practice and procedure by the judiciary is not at all unusual in American jurisdictions. It is generally agreed, however, that during most of the nineteenth century rules were under the final and frequently the immediate supervision of state legislatures.[134] After the turn of the century,

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out power to legislate rules of evidence. While there are quibbles over certain subjects, the general understanding is that evidence is a matter of procedural or adjective law. *See* Reidl, *To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 601, 604-607 (1940); Green, *To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?*, 26 A.B.A.J. 482, 486-88 (1940); Williams, *The Source of Authority for Rules of Court Affecting Procedure*, 22 WASH. U.L.Q. 459, 462 (1937). Although the new Federal Rules of Evidence as finally approved were enacted as statute law. Act of January 2, 1975, Pub. L. 93-595, 43 U.S.L.W. 137 (Jan. 14, 1975), they were initially promulgated by the Supreme Court under the Rules Enabling Act, 28 U.S.C § 2072 (1966), which delegated to the court power to make rules of procedure. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, A PRELIMINARY REPORT ON THE ADVISABILITY OF DEVELOPING UNIFORM RULES OF EVIDENCE FOR THE UNITED STATES DISTRICT COURTS, 30 F.R.D. 73, 100-05 (1972); *See* Goldberg, *The Supreme Court, Congress, and Rules of Evidence*, 5 SETON HALL L. REV. 667 (1974). Moreover, the law of evidence has traditionally been and, in Connecticut, largely remains a subject left to common law formulation. B. HOLDEN & J. DALY, CONNECTICUT EVIDENCE § 3 (1966). Nonetheless, the legislature has for more than a century seen fit to enter this area with numerous reforms and the court has on every occasion applied these statutes without question or cavil. *See* notes 47 and 79 *supra*. This practice has not changed in the most recent period. *See, e.g.*, State v. Hall, 165 Conn. 599, ___ A.2d ___ (1974) (prior convictions); State v. Vennard, 159 Conn. 385, 270 A.2d 837 (1970), *cert. denied*, 400 U.S. 1011 (1971) (statements of deceased persons); Kelly v. Sheehan, 158 Conn.281, 259 A.2d 605 (1969) (business entries). However, there is nothing in the latest case law to prevent the invalidation of statutes on evidence occurring at any time.

133. The research necessary for this section was performed by Mr. William York, a third year student at the University of Connecticut School of Law.

134. There has been some disagreement as to the exact balance. *Compare* Sunderland, *The Exercise of the Rule-Making Power*, 12 A.B.A.J. 548, 549 (1926) *with* Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599, 600 (1926). There has also been some debate over which branch was in charge of procedural rules in England and America in the eighteenth century and earlier. Commentators have found little evidence that courts in these years felt they had the power to make rules in the teeth of contrary legislation or that legislatures were powerless in this area. Parliamentary modifications of procedure were common and unchallenged from the fifteenth century. *See* Warner, *The Role of Courts and Judicial Councils in Procedural Reform*, 85 U. PA. L. REV. 441, 442 (1937); Williams, *supra* note 129, at 489-91; Tyler, *The Origin of the*

and particularly in the 1920's, a powerful reform movement seeking to transfer the rule-making power to the courts arose with the support of the American Bar Association and under the guidance of Roscoe Pound. But with some exceptions to be considered later,[135] the reformers' arguments were based not upon constitutional theory, but upon considerations of public policy. They were addressed either to the legislature, where the final power was assumed to reside, or to the constitution-making or -amending authority, whose action was assumed necessary to make the reform in the face of a recalcitrant legislature.[136]

These efforts were stunningly successful. Today the promulgation of rules of practice and procedure is ordinarily under the control of the judicial branch in 46 states. The most common source for this rule-making authority is an explicit legislative delegation.[137] This is the situation in the federal government where the rule-making power has been explicitly delegated by Congress to the Supreme Court by the Rules Enabling Act.[138] The fact that courts make rules in these jurisdictions as a matter of legislative grace carries with it the implication that rules so made are subordinate to inconsistent legislation and are subject to critical examination and invalidation by the legislature.[139] The next most frequent arrangement is some more or

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Rule-Making Power and Its Exercise by Legislatures, 22 A.B.A.J. 772, 774 (1936). Dean Pound was fond of noting that the United States Supreme Court was making rules for itself as early as 1792 when, in response to an inquiry of the Attorney General, it declared it would adhere to the practice of the Court of Kings Bench and of Chancery in England subject to proper alterations by the Court. 2 U.S. (2 Dall.) 411 (1792). *See* Pound, *supra* at 602; Pound, *supra* note 120, at 170. What he failed to mention, however, was that the Supreme Court was expressly authorized to alter modes of procedure in the Judiciary Act passed earlier in 1792. 1 Stat. 676.

135. *See* text accompanying notes 181-2 *infra*.

136. *See* Pound, *supra* note 134, at 602. Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 34-36 (1952).

137. ALA. CODE tit. 13, § 17(2) (Supp. 1973); ARK. STAT. ANN. §§ 22-242, 22-245 (Supp. 1973); GA. CODE ANN. § 24-106 (1971); IOWA CODE ANN. § 684.18 (1964); IOWA CODE ANN. §§ 684.3, 684.21 (Supp. 1975); KAN. STAT. ANN. §§ 60-2607, 22-4601 (1964); KY. REV. STAT. ANN. § 447.151 (1971); ME. REV. STAT. ANN. tit 4, §§ 8-9 (1964); MASS. GEN. LAWS ANN. ch. 211, § 3, ch. 213, § 3 (Supp. 1973); NEV. REV. STAT. ANN. § 2.120 (1973); N.H. REV. STAT. ANN. §§ 490:4, 491:10 (1968); N.D. CENT. CODE ANN. §§ 27-02-08 to -09 (1974); R.I. GEN. LAWS ANN. §§ 8-6-2 to -4 (Supp. 1974); UTAH CODE ANN. §§ 78-2-4, 78-7-6, (1953); W. VA. CODE ANN. § 51-1-4 (1966); WIS. STAT. ANN. § 251.18 (1971); WYO. STAT. ANN. §§ 5-18 to -20 (1957). In some of these states the legislature is explicitly empowered by the constitution to control rules of procedure. GA. CONST. art. VI, § 2, para. 4; IOWA CONST. art. V, § 14; MINN. CONST. art. VI, § 14; UTAH CONST. art. VI, § 26; W. VA. CONST. art. VI, § 39; WYO. CONST. art. III, § 27. Elsewhere this legislative prerogative has been assumed.

138. 28 U.S.C. § 2072 (1971).

139. *See, e.g., Ex parte* Leeth Nat. Bank, 251 Ala. 498, 38 So. 2d 1 (1948); Dawson v.

less explicit constitutional division of rule-making authority between the courts and legislatures. Ordinarily some court or courts are vested by the state constitution with the power to make rules of procedure subject to disapproval or modification by the legislature.[140] In two relatively recent constitutions the balance has been altered slightly in favor of the courts by requiring legislative disapproval of court-made rules to be by a two-thirds vote.[141] In a third, smaller group of states the power of the judiciary over rules of practice and procedure is, as in Connecticut, exclusive and supreme, but, unlike Connecticut, that power is explicitly conferred by a provision of the state constitution.[142]

Hensley, 423 S.W.2d 911 (Ky. 1968); American Sodium Co. v. Shelly, 51 Nev. 26, 267 P. 497 (1928); *In re* Constitutionality of Statute Empowering Supreme Court to Promulgate Rules Regulating Pleading, Practice, and Procedure in Judicial Proceedings, 204 Wis. 501, 236 N.W. 717 (1931).

A case in point is the recently enacted Federal Rules of Evidence. Originally promulgated by the Supreme Court under the delegated rule-making power, the proposed rules met sharp opposition when submitted to Congress, which altered the proposed rules and finally enacted them as statute law. Act of Januray 2, 1975, Pub. L. 93-595, 43 U.S.L.W. 137 (Jan. 14, 1975). *See* Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

140. MD. CONST. art IV, §§ 18, 18A; MO. CONST. art V, § 5; MONT. CONST. art. VII, § 2, para. 3 (Supp. 1974); NEB. CONST. art V, § 25; S.C. CONST. art. V, § 5; S.D. CONST. art V, § 12; TEX. CONST. art V, § 25; VT. CONST. ch. II, § 30 (Supp. 1975); VA. CONST. art VI, § 5.

141. ALA. CONST. art. IV, § 15; FLA. CONST. art V, § 2(a). This solution was proposed in a thoughtful article on the proper constitutional balance. Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 39-40 (1958). In two other states the constitutional allocation of rule-making power is more difficult to classify. In New Mexico, the supreme court inferred judicial rule-making power from a constitutional grant of supervisory control over inferior courts, but acknowledged that the legislature may have rule-making authority as well. There was no need to decide the question since the legislature by statute delegated what power it had to the court. State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936). In North Carolina the constitution gives the rule-making power over appellate courts to the supreme court and over trial courts to the legislature. N.C. CONST. art. IV, § 13(2). The latter power has been delegated by statute to the supreme court. N.C. GEN. STAT. § 7A-34 (1969).

142. ARIZ. CONST. art. 6, § 5, para. 5; COLO. CONST. art. VI, § 21; DEL. CONST. art. IV, § 13, para. 1; HAWAII CONST. art. V, § 6; MICH. CONST. art. VI, § 5; N.J. CONST. art. VI, § II, para. 3; OHIO CONST. art. IV, § 5(B); PA. CONST. art. V, § 10(c). The Colorado provision was passed only after the supreme court had already asserted its exclusive power over rules as a derivative of the separation of powers provision. Kolkman v. People, 89 Colo. 8, 300 P. 575 (1931). The New Jersey provision grants the court rule-making power "subject to law." In a doubtful interpretation the New Jersey Supreme Court held this to be only a prohibition against infringement on substantive law. Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1950); *see* Kaplan & Green, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234 (1951); Pound, *supra* note 136. In five states it appears that court-made rules of procedure play a distinctly minor rule, yielding to fairly thorough legisla-

Finally, in five states the judiciary has, from more or less general provisions of the constitution, inferred a judicial power over matters of procedure, independent of and superior to the legislature. Although the Connecticut opinions under discussion cited no out-of-state authority, these foreign cases deserve examination because of the similarity of these jurisdictions' experience to the recently announced rule in Connecticut.

The Idaho Constitution contains an article giving the legislature power to provide methods of proceeding in courts "when necessary," but also prohibiting the legislature from depriving "the judicial department of any power or jurisdiction which rightly pertains to it."[143] The Supreme Court of Idaho interpreted the article as creating only a limited rule-making power in the legislature.[144] The court reasoned that the qualified grant of power to the legislature was an indication that matters of procedure were normally a power pertaining to the judiciary and beyond legislative regulation. However, the constitutional reservation of the right to provide modes of procedure when necessary did permit the legislature to act where the courts had not and to modify outmoded court rules. Thus, the court left a vague but obviously wide scope for constitutional legislation on procedure.[145]

In a 1952 case the Supreme Court of Illinois struck down a statute requiring notice to adversely affected parties before an action could be dismissed for want of prosecution.[146] The court stated that the judicial power assigned to courts through the constitutional distribution of powers included the regulation of procedure. Acknowledging that the legislature had been active in this field, the court appeared to limit the sphere of judicial supremacy to matters involv-

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tive codes of procedure. CAL. CIV. PRO. CODE (West 1964); CAL. PENAL CODE, pt. 2 (West 1970); LA. CODE CIV. PRO. (1968); LA. CODE CRIM. PRO. (1967); OKLA. STAT. tit. 12, §§ 1 *et seq.* (1960); ORE. REV. STAT. §§ 1.001 *et seq.* (1973); N.Y. CIV. PRAC. LAW, (McKinney 1970); N.Y. CRIM. PRO. LAW (McKinney 1971). In Tennessee the legislature has empowered the supreme court to make rules of procedure, but the rules do not become effective until approved by the legislature. TENN. CODE ANN. §§ 16-112 to -116 (1965).

143. IDAHO CONST. art. V, § 13.

144. R.E.W. Const. Co. v. District Court, 88 Idaho 426, 400 P.2d 390 (1965). In a later case, in a questionable opinion, the court held that a statute prohibiting judges from suspending sentence in particular types of convictions was invalid because it deprived the court of a power (although not a procedural one) which "rightly pertains to it." State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971). This case is criticized in 8 IDAHO L. REV. 379 (1972) and in 29 WASH. & LEE L. REV. 164 (1972).

145. R.E.W. Const. Co. v. District Court, 88 Idaho 426, 437, 400 P.2d 390, 397 (1965).

146. Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952).

ing "intimate details" of the administration of justice or impinging directly upon the "power to adjudge, determine and render a judgment."[147] Since the statute in issue had the effect of directing "how cases shall be decided," it was invalid. This case appears to be the only instance in which legislative regulation of procedure has been held offensive to separation of powers in Illinois.[148]

Washington is another state in which there has been only a single case expounding an exclusive judicial role in matters of procedure as an incident of the separation of powers. Despite earlier recognition of legislative preeminence,[149] the supreme court in 1974 chose to follow a court rule rather than a statute specifying the conditions for bail after conviction pending appeal.[150] Deciding this was a procedural question, and thus an inherently judicial one, the court held the legislature was without power to modify the court's determinations. However, the court found an alternative rationale in a statute, which purported to give the court power to make rules superseding contrary statutes.[151] It is interesting that in a later case, not involving a direct conflict between statute and rule, the court justified its rule-making power first on the legislative mandate and only secondarily on "inherent" power.[152]

While the three states mentioned have limited or tentative doctrines of judicial supremacy, two others seem to have taken a more

147. *Id.* at 148-50, 105 N.E.2d at 715. The court appeared to be making a distinction between ordinary rules of procedure, which are appropriate subjects of legislation, and rules "for the administration of justice," which are an exclusively judicial concern. Numerous commentators have drawn the distinction, defining the latter rules as those affecting the internal operation of courts on such things as personnel, scheduling, the format of briefs and opinions, etc. It may be argued that the legislature has no legitimate interest in such matters and the independence of the branches demands that each department tend to these things for itself. *See, e.g.*, Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623 (1957); Levin & Amsterdam, *supra* note 141, at 30-31; Tyler, *Rule Making Power*, 4 CONN. B.J. 41, 43-44 (1930); Williams, *supra* note 132, at 475-76. A satisfactory explanation of which matters are ordinary procedure and which are matters of administration would seem hard to formulate. The distinction has been rejected by one court. *In re* Constitutionality of Statute Empowering Supreme Court to Promulgate Rules Regulating the Pleading, Practice, and Procedure in Judicial Proceedings, 204 Wis. 501, 236 N.W. 717, 721 (1931).

148. The court has struck down legislation interfering with the supreme court's right to promulgate rules of appeal. That right is explicitly granted the court by ILL. CONST. art. VI, § 4(c). *See, e.g.*, People *ex rel.* Stamos v. Jones, 40 Ill. 2d 62, 237 N.E.2d 491 (1968).

149. State *ex rel.* Foster-Wyman Lumber Co. v. Superior Court, 148 Wash 1, 3-4, 267 P. 770, 771 (1928).

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

151. *Id.* at 502-03, 527 P.2d at 677.

152. State v. Fields, 85 Wash.2d 126, 530 P.2d 284 (1975).

firm and general position. The first is Indiana, where the court, in a series of brief, acerbic, and unsupported statements in cases decided around 1920, rebuked the legislature for tinkering in matters of procedure which were an exclusively judicial concern.[153] However, since that time, the court has chosen to rely on a 1937 statute granting the court full power to make rules controlling over inconsistent statutes.[154] Nevertheless, the court has on occasion reaffirmed its rule-making authority as constitutional and independent of legislative authority.[155] While the legislature continued to enact statutes on court procedure, and while the court has held these to be valid until superseded by court-made rules,[156] even the legislature has acknowledged the ultimate supremacy of the court in this area.[157]

The most recent convert to judicial supremacy over procedure is the Supreme Court of Mississippi, which, after a long era of deference to legislation,[158] recently held unconstitutional a one hundred-year-old statute prohibiting a trial judge from giving instructions other than those submitted by counsel.[159] In a candid reexamination of its past practices the court found that, since the statute forbade a judge to instruct the jury as to the correct state of the law, it interfered with his constitutional duty to see justice done. The court stated that under the separation of powers the courts had inherent power over their own procedure. However, the court pledged to accede voluntarily to legislative "suggestions" which "coincide with fair and efficient administration of justice."[160] Like the Connecticut court's willingness to "acquiesce" in some unspecified legislation, this approach leaves the extent of future conflict between court and legislature unclear.

This brief survey demonstrates that some judicial control over matters of practice and procedure in spite of inconsistent legislation, based on a general notion of separation of powers, is not unique to

153. *E.g.*, Gray v. McLaughlin, 191 Ind. 190, 131 N.E. 518 (1921); Robert v. Donahue, 191 Ind. 98, 131 N.E. 33 (1921); Solimeto v. State, 188 Ind. 170, 122 N.E. 578 (1919).

154. IND. STAT. ANN. § 34-5-2-1 (Burns 1973); *see* State *ex rel.* Blood v. Gibson Cir. Ct., 239 Ind. 394, 157 N.E.2d 475 (1959).

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

156. *E.g.*, Neeley v. State, 305 N.E.2d 434 (Ind. 1974).

157. IND. STAT. ANN. § 35-5-1-2 (Burns 1973). On the balance of responsibility in Indiana, *see generally* Note, *The Court vs. the Legislature: Rule-making Power in Indiana*, 36 IND. L.J. 87 (1960).

158. *E.g.*, Bogle v. State, 155 Miss. 612, 125 So. 99 (1929).

159. Newell v. State, 308 So.2d 71 (Miss. 1975).

160. *Id.* at 76-77.

Connecticut. However, the relatively timid versions of this doctrine in Idaho and Illinois and the only partial reliance on constitutional considerations in Washington are far less sweeping than the Connecticut court's blanket claims in *Adams* and *Clemente*. Even in Indiana the court has explicitly affirmed the validity of legislation unless inconsistent with a particular court-promulgated rule. Only the embryo doctrine in Mississippi appears capable of meeting the breadth of the Connecticut rule.[161]

IV. EVALUATION OF THE RULE OF JUDICIAL SUPREMACY

It has been demonstrated that the Connecticut Supreme Court's recently formulated doctrine, asserting final judicial authority over matters of practice and procedure in the constitutional courts, is supported by neither the constitutional history nor decisional law of the state. Further, it has been shown that it is out of keeping with the understanding of the source of the rule-making authority prevalent in the great majority of American jurisdictions. It remains to be considered, however, whether the doctrine is defensible in its own right. The opinions of the court are not helpful in understanding why the court believed the rule comported with the requirements of constitutional government or with the proper allocation of governmental functions. This section will examine two possible justifications for the rule: 1) that it is appropriate to the efficient administration of justice, and 2) that it is a necessary protection for the values embodied in the concept of separation of powers.

A. *The Utility of Final Judicial Authority*

In considering whether the Connecticut doctrine is conducive to the efficient administration of justice, it is well to keep in mind the extreme nature of that doctrine. Few would contend that the judiciary should have no role, or even less than a substantial role, in the determination of questions of procedure. Indeed the formulation of such rules is the normal function of the courts in the federal system and in the vast majority of state governments. Under the Con-

161. It should also be noted that four of the five states discussed have constitutions with a "strong" separation of powers clause. That is, they explicity prohibit the offices of one department from exercising the functions of the others. This is the type of provision the 1818 convention struck from the proposed Connecticut constitution. *See* text accompanying note 29 *supra*. Washington, on the other hand, has no separation of powers clause at all, but the doctrine has been inferred from the constitutional system by the courts. *E.g.*, State *ex. rel.* Hagan v. Chinook Hotel, Inc., 65 Wash.2d 573, 399 P.2d 8 (1965).

necticut rule, however, nothing less than the final role is constitutionally required. The question then is not whether court-made or legislative rules are preferable. To justify the Connecticut doctrine it is necessary to show that the complete withdrawal of the legislature from any role at all in formulating procedure, either as initiator or supervisor, enhances the performance of the judicial function.

It has been noted that the regulation of procedure in litigation was considered a normal and appropriate legislative task throughout most of the nineteenth century. In the second and third decade of this century a strong movement developed to transfer the rule-making function to the courts. Prominent lawyers and legal scholars denounced the tangled, esoteric systems of pleading and practice that had grown up under legislative rule-making. They insisted that procedure should be simplified in order to serve as a means for arriving at the real merits of a controversy rather than as an obstacle to that end. Roscoe Pound, the movement's foremost advocate, summarized these feelings when he objected to a procedural system which was responsible for a "sporting" theory of justice.[162]

The culprit in this situation was the promulgation of procedure by the legislatures. Instead of placing the responsibility for this difficult matter in the most expert hands available, those of the judges, our governments had entrusted it to incompetent legislators.[163] The latter group was sometimes well-meaning and sometimes partisan and unscrupulous, but was always inept at rule-making. The result was the procedural disaster in which bench and bar found itself. The remedy was obvious—turn the rule-making over to the judges. The reasons why the judges were better qualified for this task were repeated constantly. Judges were most experienced with the problems of procedure; they experienced continual feedback from lawyers; they were flexible and could continuously refine and correct errors; and they were free of narrow partisan interests. Legislators, on the other hand, were amateurs; they were motivated by a large number of irrelevant political considerations; and they were rigid, incapable of

162. Pound, *The Causes of Dissatisfaction with the Administration of Justice*, reprinted at 35 F.R.D. 273, 281-82. The paper was originally delivered to the American Bar Association in 1906.

163. Pound found four reasons for this unfortunate development: 1) the atmosphere of legislative supremacy prevailing in the first half of the nineteenth century; 2) the unwillingness of bench and bar to take an active role in formulation of procedure: 3) the absence of an outside model of successful judicial rule-making, and 4) the apprentice-type training of the bar, which often identified law with procedural questions and led to an attitude which saw the legislature as the proper lawmaking body. Pound, *supra* note 134, at 599-600.

making the delicate adjustments which were required.[164] Principally relying on these judgments of institutional competence, the procedural reform movement was a sweeping success, culminating in the passage of the Rules Enabling Act[165] in the federal system in 1934 and in the statutory and constitutional grants of rule-making, discussed earlier, in many states.[166]

But the argument of institutional competence cannot reasonably be marshalled in support of the Connecticut rule. Judicial expertise may still be used in a system in which the legislature retains final authority. Such a system works harmoniously and productively in the federal government and in many state governments. The doctrine of the Connecticut Supreme Court, which excludes legislative participation, must be defended not by arguments of judicial competence, but by arguments of legislative incompetence. Moreover, that incompetence must be so severe that not only can the legislature not be trusted to draft rules of procedure, but it cannot be trusted even to retain power of supervision and disapproval.

In fact, there are persuasive arguments for the opposite proposition that the rule-making process stands to benefit from some legislative input. First, one may doubt that judges are totally disinterested in the product of rule-making. The fact that judges will have to live with procedural rules on a daily basis may provide experience and expertise, but it may also provide an incentive for rules which emphasize speed and convenience at the expense of ones which more fully ensure the complete examination of the merits of a case and protect the rights of litigants.[167] To some extent judges making rules

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164. On the relative rule-making competence of courts and legislatures see, Levin & Amsterdam, *supra* note 141, at 10; A. Vanderbilt, THE DOCTRINE OF SEPARATION OF POWERS AND ITS PRESENT-DAY SIGNIFICANCE (Bison ed. 1953); Pound, *supra* note 134, at 602; Sunderland, *supra*, note 134, at 550; *Symposium——Judicial Versus Legislative Determination of Rules of Practice and Procedure*, 6 ORE. L. REV. 36, 36-41 (1926); Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 277 (1928); Pound, *supra* note 120. The disdain in which the reformers held the legislators is evident from this observation of one writer on the absence of legal talent in the legislatures:

> It is the unusual lawyer who goes to the state legislature except at the beginning of his career, in which case he is without experience, or at the end of it, in which case it is a confession of futility.

Tyler, *supra* note 134, at 775. The argument from relative competence has not lost its charm for some commentators. *See* Friedanthal, *supra* note 139, at 673-75.

165. Act of June 19, 1934, ch. 651, 48 Stat. 1064, codified at 28 U.S.C. § 2072 (1966).

166. *See* text accompanying notes 136-7 *supra*.

167. [T]he basic trouble with judges is not that they are incompetent or venal beyond other men; it is just that they get used to it. And it is easy indeed to get

are judges in their own causes and the possibility of review and disapproval by the legislature may have a salutary effect on their work.[168]

Second, while judges may have the competence to initiate procedural reforms, there is a danger that they lack the taste for it. It is perfectly natural for judges working under one system of procedure to become accustomed to it and to be distrustful of any proposal for change. The immunity from political interests of which judicial rule-making advocates boast may also insulate judges from legitimate public dissatisfaction with the procedural aspects of the judicial system.[169] If the movement to court-made rules in the first half of this century represents the second great reform in American procedure, the first and manifestly the greater reform was the replacement of common law pleading with code pleading in the middle of the nineteenth century and the attendant abolition of the forms of action and of the distinction between law and equity. This development, initiated by the adoption of the Civil Procedure Code of David Dudley Field in New York in 1848,[170] was a distinctly legislative phenomenon, which spread rapidly across the nation. There is little doubt that under the current doctrine of the Connecticut Supreme Court, the Field Code or its Connecticut counterpart, the Practice Act of 1879, would be struck down as an unconstitutional invasion of the judicial power.

The example of the constructive contributions to procedure made by legislation does not, however, meet a more basic objection to legislative activity in this area. Certainly, Pound and his associates in the campaign for judicial rule-making did not view the example of the Field Code and its progeny as militating in favor of legislative in-

used to a particular procedural system. What is familiar tends to become what is right.

Schaefer, *Federalism and State Criminal Procedure,* 70 HARV. L. REV. 1, 7 (1956).

168. *See* Warner, *supra* note 134, at 449.

169. *See* Levin & Amsterdam, *supra* note 141, at 11. While the content of Connecticut's rules of procedure is beyond the scope of this paper, it should be noted that these rules, almost entirely the product of judicial action and inaction, have been strongly criticized as outdated and overly complicated. Dean, later Judge, Charles Clark spent over 30 years urging the judges of the state to use the power they had to modernize Connecticut practice. *See, e.g.,* Clark, *Simplified Pleading In Connecticut,* 16 CONN. B.J. 83 (1942); Clark, *The Practice Book of 1951,* 26 CONN. B.J. 24 (1952). *See also* Costas, *The 1970's: Will We Respond to the Need to Modernize Connecticut's Judicial System,* 44 CONN. B.J. 465, 505-06 (1970). One writer commenting upon the complexity of the appellate rules challenged any reader to find three consecutive issues of the Connecticut Law Journal in which there was no case in which the court noted an appeal had been taken not in conformity with the rules. Letter from Lester E. Blank to Connecticut Bar Journal, Dec. 23, 1968, reprinted at 43 CONN. B.J. 186 (1969).

170. See, L. FRIEDMAN, *supra* note 34, at 340-41.

volvement in rule-making. While acknowledging the unacceptable state of affairs which led to codes of civil procedure, Pound considered the legislative cure far worse than the disease. He liked to point out that the short, concise, and simple Field Code quickly gave way in New York to the monster Throop Code of 1886 with thousands of sections of inscrutable minutiae.[171] Moreover, he contended this was not a quirk of local origin, but an endemic characteristic of legislative rule-making. Any attempt to construct a rational, a priori code of civil procedure was bound to run up against hundreds of small, unpredictable, but inevitable, changes in the law. Unlike court-made rules, which could easily be replaced, adapted, and interpreted to mesh with these changes, the rigid and cumbersome legislative responses could only be expected to create deformities like the Throop Code.[172]

Of course, this criticism of legislative rules of procedure is equally applicable to statutes of substantive law. Here too, legislative law may lack the flexibility and responsiveness of judicial law and result in anachronistic and artificial rules. Indeed, Pound's objection to the Field Code of Procedure was in keeping with his hostility toward codification of law in general and his partiality toward court-made law.[173] Pound saw the growth of the law in most areas as a movement from a set of rigid detailed rules, mechanically applied, to a set of general principles to be applied to individual cases as common sense, time, and circumstances indicated.[174] Particularly in private law, the judicial "hand-made" product was far superior to the "machine-made" codes of the legislature. In this respect, his views were the heirs to the anticodification thinkers of the nineteenth century who denounced the proposed codes as inflexible, inequitable, and incapable of approaching the technical, intellectual, and aesthetic perfection of judicially formulated law.[175] Their argument was based

171. 3 R. POUND, JURISPRUDENCE 709-10 (1959); R. POUND, LAW FINDING THROUGH EXPERIENCE 49-50 (1960).

172. Pound, *The Canons of Procedural Reform*, 12 A.B.A.J. 541 (1923); Pound, *supra* note 134, at 602. *See* A. VANDERBILT, *supra* note 164, at 106-07; Sunderland, *supra* note 134, at 550.

173. *See* Pound, *supra* note 134, at 602; Pound, *supra* note 120, at 166. *But see* 3 R. POUND, JURISPRUDENCE 732-38 (1958).

174. See R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 49-70 (Rev. ed. 1953).

175. *See* REPORT OF THE MASSACHUSETTS COMMISSION APPOINTED TO CONSIDER AND REPORT UPON THE PRACTICABILITY AND EXPEDIENCY OF REDUCING TO A WRITTEN AND SYSTEMATIC CODE, THE COMMON LAW OF MASSACHUSETTS (1837), generally understood to have been written by Joseph Story; Porter, *Review of Reports of Cases Argued and Determined in the Circuit Court of the United States for the Second Circuit* (1828), reprinted in THE LEGAL MIND IN AMERICA, 160-75 (P. Miller ed. 1962).

on a Burkean appreciation of law as the product of organic growth, nurtured by the experience of the times in which it develops. This viewpoint has always been at odds with the Benthamite conception of law as a rational, a priori system of rules.[176] The same conflict seems to have underlain the twentieth century debate over the source of the rule-making authority. In each case the anticodifiers were confronted with the argument of the codifiers based on democratic political theory. There is a fundamental objection to judges as a source of law.[177] If rule-making is lawmaking, it is improper, in this scheme, to put it beyond the reach of the legislature. This argument, however, is unrelated to the question of practical fitness of different branches to produce rules of procedure. Rather, it is a question of the proper allocation of rule-making power within the context of the constitutional separation of powers.

B. *The Relevance of Separation of Powers*

While the Connecticut Supreme Court has treated the constitutional question of authority to make rules of procedure as one raising the proper limits of the legislative power, historically the matter has been considered in exactly the reverse terms. When the movement arose to reform procedure by vesting the rule-making power in the courts, a constitutional objection was raised. Since the power to prescribe rules of procedure was generally believed to be a legislative one, how could it validly be delegated to the judiciary without violating the separation of powers?[178] The proponents of judicial rule-making were quick to reply by denying that the power to prescribe rules of procedure was clearly legislative. Pound forsook any strict analytical approach, and argued that the separation of powers ques-

176. *Compare* E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 57, 138-42 (Methued ed. 1905) *with* J. BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED 331-43 (Everrett ed. 1945). That the roots of the controversy over the rule-making authority may be traced back to this basic disagreement about the proper source of law in general is illustrated by the assertion of one particularly angry zealot for judicial rule-making: "Much of the blame for legislative meddling and muddling is directly traceable to Jeremy Bentham, who desired to become the Newton of the Law." Robinson, *Self-Help or Self-Destruction? The Rule-Making Power*, 9 ROCKY MT. L. REV. 122, 129 (1937).

177. The codification controversy was one of the most persistent legal issues in the nineteenth century. It appears as a pervasive theme in the essays collected in P. MILLER, *supra* note 175. The codifiers' argument against judge-made law may be observed in Sampson, *An Anniversary Discourse* (1824), reprinted in P. MILLER, *id.* at 119; Rantoul, *Oration at Scituate* (1836), *id.* at 220, and Field, *Reform in the Legal Profession* (1855), *id.* at 274.

178. Walsh, *supra* note 169, at 13.

tion must be largely an historical one.[179] He then demonstrated that courts in this country and England had been regulating procedure and practice in one form or another for hundreds of years. From this viewpoint rule-making was at least as judicial as legislative, and there was no constitutional reason why authority over rules might not be delegated to the courts.[180] As thus formulated (and Pound never really committed himself to going further), the argument was essentially a defensive one. Its logic, however, suggested that inevitably it would be extended. It was left for Dean Wigmore to take the final leap. In an editorial he argued that since the making of rules of practice and procedure was a judicial function, the legislature, not the courts, was constitutionally forbidden to trespass upon the realm of procedure. Thus all legislation on the matter was constitutionally void.[181] Although Wigmore's seriousness in advancing this argument has been questioned,[182] it is logically impeccable once it is assumed that the rule-making function has been properly categorized as judicial.

But the ability to make such classifications with any certainty is very doubtful. Since the adoption of the constitution, it has been understood that governmental functions do not fall easily into three neat categories.[183] Even in *Clemente*, which so facilely labeled the power to make rules of discovery as judicial, lip service was paid to the wavering lines between the departments. The historical approach fails to provide any conclusive answers to the proper classification of rule-making.[184] A logical approach does not yield any clearer answers. Rules of procedure are certainly "judicial" in that they are to be ap-

179. Pound, *supra* note 120, at 170; Pound, *supra* note 134, at 601-02.

180. *See* authorities cited note 164 *supra*.

181. Wigmore, *supra* note 164.

182. One article contended, "Wigmore's omnibus argument is better taken as the jeu d'espirit of a master than as a serious constitutional analysis." Kaplan & Greene, *supra* note 142, at 251. *But see* Pound, *supra* note 136, at 37. Perhaps the best explanation is that Wigmore was merely trying to remove the separation of powers weapon from the hands of the opponents of judicial rule-making, and was not seriously promoting the affirmative argument. *See* Joiner & Miller, *supra* note 147, at 627.

183. THE FEDERALIST No. 47 at 302-04 (C. Rossiter ed. 1961) (J. Madison); Springer v. Government of the Philippine Islands, 277 U.S. 189, 210-11 (1927) (Holmes, J., dissenting); 2 J. STORY, COMMENTARIES ON CONSTITUTIONAL LAW § 539 (1833); Frankfurter & Landis, *Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1016 (1924). One long utilized maxim is that when a particular power is of doubtful classification, it is for the legislature to assign it. T. COOLEY, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 49 (4th ed. 1931); Pound, *supra* note 136, at 34-35.

184. *See* authorities cited note 134 *supra*.

plied and utilized in the proceedings of that department. But there are attributes of those rules which are redolent of the legislative function. They are general rules formulated in the abstract to apply to people and situations not specified.[185] This is in contrast to the classic judicial function of applying such general rules to concrete individual situations. Arguments back and forth on this question are not likely to lead to a consensus on the proper denomination of rules of procedure. Indeed, such rules have often been cited as an example of the futility of such attempted classifications.[186]

More importantly, promulgation of rules of procedure is lawmaking of the most serious and significant kind. The final lawmaking authority in our constitutional system is allocated to the legislature, which is designed to be most responsive to the electorate.[187] It is beyond question that courts as well as legislatures make law, but (with the exception of the law of the Constitution) court-made law is subject to revision by statute. The final responsibility for making law must, under this scheme, rest with the popularly elected legislature. This presents a persuasive reason for presuming that, if the rule-making function resides in only one branch, that branch is the legislature.[188]

Madison saw clearly that the point of the separation of powers was not some aesthetically pleasing distribution of every government function but the effective dispersal of power among separate, and to some degree antagonistic, parties. The object of the constitutional arrangement was to prevent the tyranny which would follow the accumulation of too much power in any one set of hands.[189] The division of government was intended to prevent what Judge Swift feared might become "one great arbitration over the state [which] would throw everything afloat on the wide ocean of whim and caprice."[190] To achieve this object separation alone is not the crucial element.

185. *See* COOLEY, *supra* note 183, at 49-50. For an instructive discussion of the distinction between legislative and judicial functions *see* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.01 (1948).

186. *See* Wayman v. Southard, 23 U.S. (10 Wheat) 1, 43 (1825) (Marshall, C.J.); Springer v. Government of the Phillipine Islands, 277 U.S. 189, 209, 210-11 (1927) (Holmes, J., dissenting); T. COOLEY, *supra* note 177, at 49.

187. See Levin & Amsterdam, *supra* note 141, at 14; Warner, *supra* note 134, at 447. *Cf.* Green, *supra* note 132 at 486.

188. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962); Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810 (1974).

189. THE FEDERALIST No. 47 (C. Rossiter ed. 1861) (J. Madison).

190. Z. SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 78 (1795).

Separation of power must be coupled with the requirement that all significant actions of any department undergo review by an independent department. "Ambition must be made to counteract ambition."[191] Such checks and balances necessarily mean that more than one department has a role in the exercise of the various governmental powers.[192] It is in the protection against uncircumscribed power in any department of government that the real value of the separation of power lies.[193]

It is just this danger of unchecked power which is presented by the doctrine of judicial supremacy over matters of procedure. As announced by the Connecticut Supreme Court there is no review of a judicial rule once made. Particular legislative enactments are subject to judicial review for constitutionality, and legislators themselves are subject to the periodic checks of reelection. Judicial rule-making, on the other hand, is not subject to any independent scrutiny by another branch, and judges have been deliberately insulated from political checks. The lawyer or litigant who finds a court-made rule inconvenient, irrational, or unconstitutional has no disinterested forum in which to take his complaint. Moreover, the absence of even a potential review must to some extent diminish the care and restraint which might otherwise be present in the rule-making process. Thus viewed, the application of separation of powers to the rule-making authority is more properly concerned, not with the intrusion of the legislature into the judicial department, but with the questionable wisdom of the judiciary, without limit or review, making rules of procedure.[194]

CONCLUSIONS

The surprising and, in terms of history and precedent, unaccountable emergence of judicial supremacy over matters of practice and procedure in Connecticut illustrates poignantly Justice Jackson's warning: "We are not final because we are infallible, but we are infallible only because we are final."[195] But for better or worse, the constitutional law of Connecticut appears to have established the final

191. THE FEDERALIST No. 51, at 311 (C. Rossiter ed. 1961) (J. Madison).

192. "[The Constitution] enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring), *quoted* in United States v. Nixon, 418 U.S. 683, 707 (1974).

193. *See* Gibbons, *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 SETON HALL L. REV. 435, 436 (1974).

194. *See* Kaplan & Green, *supra* note 138, at 252.

195. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

and complete authority of the supreme and superior courts to establish their own rules of procedure.[196]

There is, of course, one alternative: the passage of a constitutional amendment retrieving the power of the legislature. In the 1975 session of the General Assembly such an amendment passed the House of Representatives, but was postponed in the Senate until the next annual session.[197] Thus, it will soon come before the legislature again. Following the model of a number of state constitutions, the amendment would vest the rule-making power for appellate courts in the judges of the supreme court and for lower courts in the judges of such courts. Such rules would be subject to disapproval by the General Assembly.[198] It would thus strike a balance of authority between the branches. Given the constitutional case law against which it would be adopted, however, it is likely that it would be interpreted to prohibit the legislature from initiating any statutory law on practice and procedure. The legislative power would be limited to passing upon proposals presented to it by the judiciary. If, as has been argued, one of the chief advantages of legislative participation in rule-making is the potential to stimulate reform, this would be a serious drawback to the proposed system. It would be simple enough to maintain instead a constitutional power to legislate matters of practice and procedure and for the legislature, as a matter of convenience, to vest the principle rule-making authority in the courts.[199] Alternatively, the amendment might vest a rule-making power in the judiciary expressly subordinate to legislation.[200]

Courts occupy a critical, yet potentially dangerous role in our constitutional system. As the interpreters and guardians of the constitution they stand between governments and the unwarranted exercise of power. But as a department whose decisions are frequently beyond review, they, themselves, present a particular risk of abuse of power. Hamilton correctly noted that the judiciary has neither force nor will, but only judgment, and that it is ultimately dependent on

196. *But see* text accompanying note 129.

197. H.R.J. Res. 5 (1975) (File No. 805), Senate Journal, May 30, 1975, p. 1771. The amendment would also eliminate the limitations on the legislature's power to prescribe the jurisdiction of lower courts announced in Szarwak v. Warden, 36 CONN. L.J. No. 4, at 1 (July 26, 1974), discussed *supra* at notes 10 and 106, by eliminating any constitutional mention of the superior court. It would also empower the General Assembly to create an intermediate appellate court.

198. H.R.J. Res. 5 (1975) (File No. 805). *See* MD. CONST. art. IV, § 18; MO. CONST. art. 5, § 5; S.D. CONST. art. V, § 12; VT. CONST. ch. II, § 37.

199. *See, e.g.*, IOWA CONST. art 5, § 14; IOWA CODE ANN. § 684.18 (1950).

200. *See, e.g.*, NEB. CONST. art 5, § 25.

the other branches.[201] But it is not quite as plain that "liberty can have nothing to fear from the judiciary alone."[202] Particularly in a time when legal solutions are sought for almost every variety of social problems, there is a real danger that the courts will assert their unreviewable judgment over matters more properly dealt with, or shared in, by other branches. Such encroachment is no less harmful because the other branches acquiesce in it. Certainly the best safeguard to the proper balance between the courts and the other departments of government lies in the responsibility of judges to exercise restraint and temperance in deciding questions touching upon their own power. In the assertion of exclusive and supreme power over matters of practice and procedure, the Connecticut Supreme Court has failed in that responsibility.

201. THE FEDERALIST No. 78 (C. Rossiter ed. 1961) (A. Hamilton).
202. *Id.* at 466.