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Bruce L. Dean

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I. INTRODUCTION

The Texas courts are rarely perceived as legislative agencies; instead Texas courts are generally viewed as forums for adjudicating the rights of parties at the trial level or interpreting the status of the law at the appellate level. However, in appropriate circumstances, not only is it proper for the judiciary to assume a legislative role when promulgating court rules,[1] the Texas

1. *See* C. GRAU, JUDICIAL RULEMAKING: ADMINISTRATION, ACCESS AND ACCOUNTABILITY 3-4 (1978)(classification of different types of rules). Court rules may be divided into three classes including: (1) administrative (court calendars, judicial assignments, meeting times, and administrative procedures); (2) practice (state bar admission requirements, attorney discipline, judicial conduct, and professional responsibility); and (3) procedure (civil, appellate, and criminal). *Id.*; *see also* C. KORBAKES, J. ALFINE & C. GRAU, JUDICIAL RULEMAKING IN THE STATE COURTS 1-79 (1978)(examination of states' rule-making allocation, authority, process, and challenges); J. PARNESS & C. KORBAKES, A STUDY OF THE PROCEDURAL RULE-

Constitution demands it.[2] Since the promulgation of the Federal Rules of Civil Procedure in 1938,[3] there has been a national trend toward shifting the responsibility for court rule-making power from the state legislatures to their respective judicial branches, which Texas has joined.[4] A recent rule change by the Texas Supreme Court[5] that repealed a legislatively enacted court procedure[6] presents the question of the conflict of rule-making authority between these two branches of government.[7] The issue to be addressed in this paper is not the merits of either rule, but which branch of the government has the final word in the rule-making process.[8]

In July of 1987, pursuant to Article V, section 31 of the Texas Constitu-

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MAKING POWER IN THE UNITED STATES 3-67 (1973)(state by state analysis of rule-making); J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 3 (1977)(history and issues confronted in rule-making).

2. *See* TEX. CONST. art. V, § 31 (state supreme court given authority to prescribe rules of procedure and practice for proper administration of justice).

3. *See* Rule Enabling Act, ch. 651, §§ 1-2, 48 STAT. 1064 (1934)(currently codified at 28 U.S.C. § 2072 (1986)). The federal rules were transmitted in 1937 by an Order of the United States Supreme Court effective September 16, 1938. *See* Order of December 20, 1937, 302 U.S. 783 (1937)(Supreme Court adopting rules of procedure by transmitting those rules to Attorney General who reports rules to Congress); *see also* J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 67-68 (1977)(statutory history of Rules Enabling Act and events leading to promulgation of Federal Rules of Civil Procedure in 1938).

4. *See* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 448-50 (1985)(history of court rule-making patterns a "pendulum" with marked shift to state supreme courts after promulgation of Federal Rules of Civil Procedure); Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 4-5 (1958)(advocating court initiative in rule-making subject to legislative amendment or repeal); Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 7 (1978)(discussing rule-making process in Texas and delegation of power to Texas Supreme Court).

5. *See* TEX. R. CIV. P. 13 (current procedural rule regarding frivolous pleadings and signing of documents effective January 1, 1988).

6. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001 - 9.014 (Vernon Supp. 1988)(originally enacted as Tort Reform Act, ch. 2, § 2.01, 1987 Tex. Sess. Law Serv. 71-98 (Vernon)(sanctions for frivolous pleadings and claims)). The legislature apparently found former rule 13 inadequate to discourage frivolous suits. *See* TEX. R. CIV. P. 13 (no reported cases).

7. *See* TEX. CONST. art. V, § 31(a) (supreme court shall make rules of civil procedure consistent with state law); TEX. GOV'T CODE ANN. § 22.004(a) (Vernon 1988)(supreme court has full rule-making power over practice and procedure concerning civil actions, but promulgated rules cannot enlarge, abridge, or modify substantive rights).

8. *See* Benedetto & Keltner, *Changes in Pleading Practices — Frivolous Lawsuits,* in STATE BAR OF TEXAS, ST. MARY'S NINTH ANNUAL PROCEDURAL INSTITUTE: CIVIL PROCEDURE 1988 — RULES AND STATUTORY CHANGES F-2, F-10-11 (1987)(postulating Texas Supreme Court may have final determination in rule-making); Montford & Barber, *1987 Texas Tort Reform: The Quest For a Fairer and More Predictable Texas Civil Justice System*, 25 HOUS. L. REV. 59, 354-55 (1988)(supporting legislature as final arbiter of rule-making authority in Texas).

tion[9] and section 22.004(c) of the Texas Government Code,[10] the Texas Supreme Court amended Rule of Civil Procedure 13.[11] In doing so, the

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9. TEX. CONST. art. V, § 31. The Texas Constitution, article V, section 31 states:

(a) The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.

(b) The Supreme Court shall promulgate rules of civil procedure of all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts.

(c) The legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law.

Id. This article is similar to Texas Constitution, article V, section 25 which stated: "The Supreme Court shall have power to make and establish rules of procedure not inconsistent with the laws of the State for the government of said court and the other courts of this State to expedite the dispatch of business therein." *See* TEX. CONST. art. V, § 25 (1891, repealed 1985). Section 31 differs from old section 25 in that the former grants to the supreme court full rule-making authority whereas section 25 allowed the supreme court to promulgate rules only in areas not occupied by legislative enactment. *See* TEX. CONST. art. V, § 25, interp. commentary (Vernon 1955); *see also* Benedetto & Keltner, *Changes in Pleading Practices — Frivolous Lawsuits,* in STATE BAR OF TEXAS, ST. MARY'S NINTH ANNUAL PROCEDURAL INSTITUTE: CIVIL PROCEDURE 1988 — RULES AND STATUTORY CHANGES F-2, F-10-11 (1987).

10. TEX. GOV'T CODE ANN. § 22.004(c) (Vernon 1988). Section 22.004 of the Government Code is essentially a rules enabling act similar to the Federal Rules Enabling Act of 1934. *See* Act of June 19, 1934, ch. 651, 48 Stat. 1064, *as amended,* 28 U.S.C. § 2072 (1982); *see generally* Burbank, *The Rules Enabling Act of 1934,* 130 U. PA. L. REV. 1015, 1015-1197 (1982)(exhaustive history of federal statute). The Texas Rules Enabling Act passed in 1939, recodified in Texas Revised Civil Statutes Annotated article 1731a, relinquished all rule-making power to the supreme court subject to legislative veto. Act of May 15, 1939, ch. 25, § 1-6, 1939 Tex. Gen. Laws 201, 201-03, *repealed by,* Act of June 12, 1985, ch. 480, § 26(1), 1985 Tex. Gen. Laws 2048, 2048. The recodification of article 1731a to section 22.004 of the Government Code is virtually identical. *Id.* The pertinent sections of Texas Government Code Annotated section 22.004 state:

(a) The supreme court has the full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant.

(b) The supreme court from time to time may promulgate a specific rule or rules of civil procedure, or an amendment or amendments to a specific rule or rules to be effective at the time the supreme court deems expedient . . . . The rules and amendments to rules remain in effect unless and until disapproved by the legislature . . . .

(c) So that the supreme court has full rulemaking power in civil actions, a rule adopted by the supreme court repeals all conflicting laws and parts of laws governing practice and procedure in civil actions, but substantive law is not repealed . . . .

TEX. GOV'T CODE ANN. § 22.004 (Vernon 1988).

11. *See* TEX. R. CIV. P. 13 (amending rule 13); *see also* Tort Reform Act, ch. 2, § 2.01, 1987 Tex. Sess. Law Serv. 71-98 (Vernon)(codified as amended in TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001 - 9.014 (Vernon Supp. 1988)). While House Bill 287 died by filibuster in the first regularly called session of the seventieth legislature, Senate Bill 5 was the phoenix that

Texas Supreme Court expressly overruled in part chapter nine of the Civil Practice and Remedies Code, passed only a month earlier,[12] in which the Texas Legislature attempted to curtail the perceived problem of frivolous pleadings.[13]

To initially understand the validity of the Supreme Court's action, two different interpretations of rule-making authority in Texas may be derived from the constitution and Government Code.[14] The first gives the supreme court full rule-making power subject to three conditions: (a) procedural rules cannot expand or abridge the substantive rights of a litigant;[15] (b) rules may be subject to legislative disapproval at some future date;[16] and (c) rules cannot conflict with substantive law.[17] Thus, although the Texas Supreme Court initiates the rule-making process,[18] the legislature has ultimate ap-

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emerged from its ashes. *Id.*; *see also* Montford & Barber, *1987 Texas Tort Reform: The Quest For a Fairer and More Predictable Texas Civil Justice System*, 25 HOUS. L. REV. 59, 80-101 (1988)(legislative history to tort reform process). Following a renewed call by Governor Clements to pass tort reform legislation, Senate Bill 5 was reintroduced by Senator Montford and eventually passed. *Id.* at 99-101 (explaining history of Senate Bill 5). The Texas Supreme Court adopted an objective procedure to determine if sanctions are warranted for frivolous pleadings, but disregarded the due process protections contained in the legislative version. *Compare* TEX. R. CIV. P. 13 (judge on own motion or that of party may consider sanctions for frivolous suit or pleading) *with* TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.011 - 9.012 (Vernon Supp. 1988)(pleading must be "groundless" — no basis in fact or warranted by good faith argument for extension, modification or reversal — and brought in bad faith to harass or another improper purpose). A full examination comparing the differences between chapter 9 of the Civil Practice and Remedies Code and rule 13 has recently been written by Senator Montford who was the author of Senate Bill 5. *See* Montford & Barber, *1987 Texas Tort Reform: The Quest For a Fairer and More Predictable Texas Civil Justice System*, 25 HOUS. L. REV. 245, 342-56 (1988)(comparing strengths and weaknesses of Texas Rule of Civil Procedure 13 with Texas Civil Practices & Remedies Code Annotation sections 9.001 - 9.014); *see also* Benedetto & Keltner, *Changes in Pleading Practices — Frivolous Lawsuits,* in STATE BAR OF TEXAS, ST. MARY'S NINTH ANNUAL PROCEDURAL INSTITUTE: CIVIL PROCEDURE 1988 — RULES AND STATUTORY CHANGES F-2, F-10-11 (1987)(differences between chapter 9 Texas Civil Practices & Remedies Code and Rule 13).

12. *See* Tort Reform Act, ch. 2, § 2.01, 1987 Tex. Sess. Law Serv. 71-98 (Vernon)(codified as amended in Texas Civil Practices & Remedies Code Annotated sections 9.001 through 9.014).

13. *Id.* The thrust of the legislature's tort reform, which encompassed a provision for frivolous pleadings and claims, included findings of: (1) a "liability insurance crisis" currently existing in Texas; (2) adversely affecting its citizens and cities, counties, schools districts, professionals — especially physicians, charities, day care centers, business and industries; and (3) a lack of predictability in the Texas judicial system. *Id.* at 71-73.

14. *See* TEX. CONST. art. V, § 31 (rule-making power vested in supreme court); TEX. GOV'T CODE ANN. § 22.004 (Rule Making Act granting supreme court power to promulgate rules of civil procedure).

15. TEX. GOV'T CODE ANN. § 22.004(a) (Vernon 1988).

16. *Id.* at § 22.004(b).

17. *Id.* at § 22.004(c).

18. *See* TEX. CONST. art. V, § 31(b) (supreme court has responsibility to pass rules of

proval.[19] The second interpretation[20] shares the identical requirements of the first interpretation[21] but holds when a new rule meets the above require-

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civil procedure for all Texas courts not inconsistent with state law); TEX. GOV'T CODE ANN. § 22.004(a) (Vernon 1988)(supreme court has full rule-making power over procedure and practice in civil matters).

19. *See* TEX. CONST. art. V, § 31(c). Article V, section 31(c) of the constitution states: "The legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law." *Id.*; *see also* TEX. GOV'T CODE ANN. § 22.004(b) (Vernon 1988)(rules and amendments effective until disapproved by legislature). The constitution indicates that rule-making power rests with the legislative branch and is only delegated to the supreme court. *See id.*

20. *See* Newton & Wicker, *Personal Jurisdiction and the Appearance to Challenge Jurisdiction in Texas*, 38 BAYLOR L. REV. 491, 557-59 n.393 (1986)(test for valid court made rule is compliance with Rule Making Act, not if court rule conflicts with other legislative law). The view of Dean Newton shifts the focus from confrontation between a rule promulgated by the supreme court and a statute passed by the legislature to compliance with the requirements of the Rule Enabling Act. *See id.* at 557 n.393. Newton's analysis essentially places final rule-making power in the supreme court. *Id.*

21. *See* TEX. GOV'T CODE ANN. §§ 22.004(a)-(c) (Vernon 1988)(supreme court rules cannot expand or reduce substantive rights, are subject to legislative disapproval and cannot conflict with substantive law). The difficult phrase is section (a) which disallows procedural rule-making to expand, abridge or modify substantive rights. *See* Rothe v. Ford Motor Co., 531 F. Supp. 189, 191 (N.D. Tex. 1981)(Texas Rule of Procedure 4 cannot enlarge substantive rights of plaintiff by extending legislature's prior determination of statute of limitation); Texaco Ref. & Mktg., Inc. v. Sanderson, 739 S.W.2d 493, 495 (Tex. App.—Beaumont 1987, no writ)(purpose of rules of procedure explained in Texas Rule of Procedure 1). Texas Rule of Civil Procedure 1 states that "[t]he proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law." TEX. R. CIV. P. 1. Besides stating that there is a distinction to be made between rules of procedure and substantive law, Texas case law is not definitive on the subject. *See* Volvo Petroleum, Inc. v. Getty Oil Co., 717 S.W.2d 134, 138 (Tex. App.—Houston [14th Dist.] 1986, no writ)(evidence necessary to establish prima facie case for sworn account under Texas Rule of Civil Procedure 185 is procedural matter, not substantive); Purolator Armored, Inc. v. R.R. Comm'n of Texas, 662 S.W.2d 700, 702 n.4 (Tex. App.—Austin 1983, no writ)(rules of civil procedure are irrelevant to proceedings reviewing final orders of administrative agencies); King v. Dupuis, 649 S.W.2d 387, 389 (Tex. App.—Austin 1983, no writ)(Texas Rule of Civil Procedure 108 cannot lengthen Texas' long-arm jurisdiction statute). Commentators who have addressed the differences between substantive and procedural law make clear that simplified definitions are at best misleading. *See, e.g.*, Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M.L. REV. 407, 444-46 (1985)(New Mexico's exclusive judicial power over procedural rules renders substance/procedure debate outcome determinative); Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 451-53 (1985)(while exact definitions are impossible to create or maintain, effort to delineate between substantive and procedural law serves to keep sharp focus on rule-making); Giannelli, *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence and Rulemaking*, 29 CASE W. RES. 16, 35 (1978)(meanings of substance and procedure shift according to context); Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 14-24 (1958)(fail-

ments of the Rule Making Act, legislative review is superfluous because the requirements stated by the legislature for valid rule enactment have been met.[22] While this view does not outwardly challenge the Texas Legislature's ultimate power over rule-making, it subtly shifts final review to the supreme court upon meeting the legislative criteria.[23] Despite the fact that legislative review may be unnecessary if the second view is adhered to, the rule may still be challenged if the first view is followed.[24] In the latter scenario, it is clear that a potential perpetual circle consisting of the promulgation of a supreme court rule, repeal by the legislature, renewal of the supreme court rule and subsequent disapproval by the legislature cannot be allowed.[25] This

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ure to delegate rule-making power to supreme court is not because judges will enact substantive rules but substantive law and procedure inextricably interwoven); Peterson, *Rule-Making in Colorado: An Unheralded Crisis in Procedural Reform*, 38 U. COLO. L. REV. 137, 160-61 (1966)(definition of procedure and substance useless without examining underlying reasons beneath concepts of separation of powers and balance of powers between branches of government). In understanding the underlying reasons beneath the separation of powers, an understanding of procedure as inextricably interwoven with substantive law develops. *See* Peterson, *Rule-Making in Colorado: An Unheralded Crisis in Procedural Reform*, 38 U. COLO. L. REV. 137, 154 (1966)(understanding underlying concepts of separation of powers necessary for understanding distinction between procedure and evidence). Simple definitional statements of procedure as "affecting court room proceedings" or "that which pertains to and prescribes the practice and procedure or the legal machinery by which substantive law is determined or made effective" contrasted with definitions of substance as "effecting primary activity" or "that which creates duties, rights and obligations" alienate an understanding of rule-making authority between the legislature and court. *See* Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M.L. REV. 407, 444 n.4 (1985)(discussing definitions of substance and procedure); Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 452 (1985)(discussing definitions of substance and procedure).

22. *See* Newton & Wicker, *Personal Jurisdiction and the Appearance to Challenge Jurisdiction in Texas*, 38 BAYLOR L. REV. 491, 557-58 (1986)(changes focus from conflict between rule and previously enacted statutes to compliance with requirements of Rule Making Act). A supreme court rule which complies with the requirements of the Rule Making Act renders the rule unnecessary for review because the requirements set forth by the legislature have been met. *See id.* at 557 n.393; *see also* TEX. GOV'T CODE ANN. § 22.004 (Vernon 1988)(legislative requirements of procedural rules must be met).

23. *See* TEX. GOV'T CODE ANN. § 22.004 (Vernon 1988)(legislative test prohibits court promulgated rule to abridge, modify or enlarge substantive rights of litigants or to effect substantive law).

24. *See* Newton & Wicker, *Personal Jurisdiction and the Appearance to Challenge Jurisdiction in Texas*, 38 BAYLOR L. REV. 491, 557-58 n.393 (1986)(if second view not adopted, court rules tested for conflict with previously enacted statutes).

25. *See* Winberry v. Salisbury, 74 A.2d 406, 408 (N.J.)(because ultimate rule-making authority rests with New Jersey supreme court legislature cannot subsequently pass statute(s) to overrule promulgated rules by supreme court), *cert. denied*, 340 U.S. 877 (1950); Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 27-28 (1958)(cyclical pattern of legislative veto, court promulga-

pattern defeats the objectives of both branches of government[26] and leaves the trial practitioner without any measure of predictability as to the applicable court rule which may ultimately affect the outcome of his lawsuit. Conversely, because substantive rights or public policy decisions are often expressed in procedural rules,[27] the supreme courts of states, who have declared their rule-making power unreviewable,[28] have disenfranchised the legislatures' power to influence the rule-making process and ultimately settle procedural disputes.

After exploring the history of rule-making, this comment will examine reasons that support judicial and legislative rule-making and show on balance that the current Texas constitutional and statutory framework which shares rule-making power between these two branches is to be favored over alternative resolutions which vest rule-making power exclusively in either.

II. HISTORICAL OVERVIEW OF RULE-MAKING POWER

A. *Rule-making in England and the United States*

Primary responsibility for rule-making has frequently shifted between the

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tion, new promulgation of rule and further legislative veto rejected in New Jersey as intolerable).

26. *See* Mays v. Fifth Court of Appeals, 31 Tex. Sup. Ct. J. 533, 534 (June 22, 1988) (Spears, J., concurring)(court must ferociously shield its ability to adjudicate independently and fairly); Morrow v. Corbin, 122 Tex. 553, 558, 62 S.W.2d 641, 644 (1933)(judiciary's power is to decide and pronounce judgments between adverse parties and carry those judgments into effect); TEX. CONST. art V, § 1, interp. commentary (Vernon 1955)(role of judiciary in Texas is to adjudicate disputes among litigants); *see also* Government Servs. Ins. Underwriters v. Jones, 368 S.W.2d 560, 563 (Tex. 1963)(power of legislature is plenary limited only by express or implied constitutional restrictions); TEX. CONST. art. III, § 1, interp. commentary (Vernon 1955)(legislature's primary function is to formulate state policy).

27. *See* Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M.L. REV. 407, 462 (1985)(unilateral rule-making by judiciary incorrect because not supported in history, destabilizes ability to function as independent branch of government and encourages conflict with legislature); Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 461-62 (1985)(since substance and procedure are so intertwined there is inevitable abuse of rule-making power that encroaches on legislature's right to make substantive law); Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234, 251 (1951)(state trend is to vest comprehensive rule-making in courts with legislatures accountable for rules in final analysis); Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 42 (1975)(when judicial rule-making power is beyond review there exists risk of abuse of power).

28. *See, e.g.*, State v. Clemente, 353 A.2d 723, 731 (Conn. 1974)(Connecticut supreme court declared exclusive inherent rule-making authority in itself based on separation of powers doctrine); State *ex rel.* Anaya v. McBride, 539 P.2d 1006, 1008 (N.M. 1975)(New Mexico supreme court has exclusive control over rule-making governing procedure or practice as matter of constitutional compulsion); *Winberry*, 74 A.2d at 414 (New Jersey supreme court has exclusive non-reviewable rule-making power in matters regarding procedure and practice).

legislature and the judiciary since the 1700's.[29] In the eighteenth century, the courts in both America and England controlled the design of judicial process.[30] The courts of this period established a highly technical system of pleading based on the common law "forms of action."[31] This formalistic approach was criticized as an impediment to justice[32] and set the stage for judicial reform by legislatures in each country.[33]

In the United States, Congress chose to delegate rule-making power to the Supreme Court in 1789, avoiding problems state courts would later experience.[34] Among the states, however, legislatures intervened to simplify the rule-making process by enacting sweeping changes.[35] Unfortunately, legisla-

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29. *See* Spitzer, *Court Rulemaking in Washington State*, 6 U. PUGET SOUND L. REV. 31, 40 (1982)(history of court rules operates in cyclical fashion).

30. *See* E. JENKS, A SHORT HISTORY OF ENGLISH LAW FROM THE EARLIEST TIMES TO THE END OF THE YEAR 1919, at 89-90 (2d ed. 1922)(prescribing rules of practice was judicial function before 19th century).

31. *See* Peterson, *Rule-Making in Colorado: An Unheralded Crisis in Procedural Reform*, 38 U. COLO. L. REV. 137, 138 (1966)(common law pleadings formed over centuries created complex procedural rules); Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 5 (1978)(English procedure became notoriously complex by 19th century). *See generally* F.W. MAITLAND, EQUITY AND THE FORMS OF ACTION AT COMMON LAW, 295-386 (1909)(collection of seven lectures on common law forms of action).

32. *See* Peterson, *Rule-Making in Colorado: An Unheralded Crisis in Procedural Reform*, 38 U. COLO. L. REV. 137, 138 (1966)(formalism impeded administration of justice as much as expediting it).

33. *See id.* (rigidity of court rules impeded wholesale legislative intervention in field of procedure and practice in United States and England); Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 5 (1978)(Parliament took initiative to alleviate complexity of court rules).

34. *See* Process Act of Sept. 20, 1789, ch. 21, § 2, 1 STAT. 93-94 (Act regulating courts of United States giving Supreme Court power over forms and mode of pleadings); *see also* J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 55-60 (1977)(origins of rule-making power of federal courts). Weinstein notes, however, that Congress had to prod the Supreme Court to use its rule-making power to reform or adopt rules at times. J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 65 (1977). When the Court would not act on its own, Congress enacted procedural rules such as Process Acts. *Id.*

35. *See* Spitzer, *Court Rulemaking in Washington State*, 6 U. PUGET SOUND L. REV. 31, 41 (1982)(dissatisfaction with technicalities regarding forms of action led to legislative reform movements and enactment of procedural rules). The first attempt at legislative reform by a state legislature was the Field Code promulgated in New York and copied by other jurisdictions. *Id.* (one state's statutory attempt to simplify common law forms of action subsequently adopted by 24 states by 1885). Dean Pound listed several reasons for legislative reaction to court rule-making including: (1) needless formality of the 18th century in combination with a conservative judiciary; (2) complacency with common law writ system by bar and judiciary; (3) courts had no other model or experience for rule-making procedure other than that already copied from Europe; and (4) American apprentice system bred a parochialism resisting change. *See* Pound, *The Rulemaking Power of the Courts*, 12 A.B.A. J. 599, 599-601 (1926).

Texas avoided the negative effects of the Field Code by rejecting the common law form of pleading and practice eight years prior to its promulgation due to the influence of Spanish law.

tive reform of judicial procedure itself became the problem to be corrected due to the minute detail subsequently added to the original simplistic statutory codes.[36] Compounding this complexity was legislative resistance to change, inexperience in technical judicial procedure, and susceptibility to political whim which defeated meaningful reform.[37]

This legislative stagnation was fertile ground for commentators to advocate a return of rule-making power to the courts.[38] On the federal level, a

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See McDonald, *The Background of the Texas Procedural Rules*, 19 TEX. L. REV. 229, 238-39 (1941)(rejection of common law forms of pleading); *see also* Butte, *Early Development of Law and Equity in Texas*, 26 YALE L.J. 699, 701-02 (1917)(after accepting English common law as "the rule of decision," Texas' legislature modified common law by introducing Spanish community system of marital property rights and abolishing common law rules of assignment of choses in action). In fact, Texas was the first state controlled by common law principles to reject the distinction between law and equity in its courts. *See* Underwood v. Parrott, 2 Tex. 168, 178 (1847)(proceedings "in all civil suits" in Texas having their origin in common law or chancery courts shall be conducted by petition and answer); McDonald, *The Background of the Texas Procedural Rules*, 19 TEX. L. REV. 229, 239 (1941)(rejecting distinction between law and equity in Texas courts); Texas Bar Association, *The Blending of Law and Equity*, 30 AM. L. REV. 813, 819 (1896)(J. Wheeler's opinion in *Underwood v. Parrott*, 2 Tex. 168, 178 (1847), makes clear that Texas rejected English distinction between law and equity in pleading and practice). The rejection of this distinction in Texas courts was committed to the Texas Constitution.

> The District Court shall have original jurisdiction . . . of all suits, complaints and pleas whatever, without regard to any distinction between law and equity, when the matter shall be valued at, or amount to one hundred dollars, exclusive of interest; and the said courts or the Judges thereof, shall have power to issue writs necessary to enforce their own jurisdiction and [to] give them general superintendence and control over inferior jurisdictions . . .

TEX. CONST. art. IV, § 10 (1845).

36. *See* McDonald, *The Background of the Texas Procedural Rules*, 19 TEX. L. REV. 229, 249 (1941)(plethora of amendments to Field Code defeated its original purpose to simplify common law forms of action). The New York Legislature misunderstood its role in the rule-making process producing 541 amendments over 25 years to the original 400 proclaimed in 1848. *Id.* The 1877 New York Code with 1496 sections later grew to an astounding 3400 sections. *Id.*; *see also* Peterson, *Rule-Making in Colorado: An Unheralded Crisis in Procedural Reform*, 38 U. COLO. L. REV. 137, 139 (1966)(legislative codes were extremely detailed leaving little room for adaption to unique cases).

37. *See* Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule-Making*, 55 MICH. L. REV. 623, 642 (1956)(procedural statutes result in injustice due to their rigidity); Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 10 (1958)(arguments favoring judicial rule-making caused by legislative incompetence in promulgating rules and influences of legislators pet projects).

38. *See* Pound, *The Rulemaking Power of the Courts*, 12 A.B.A. J. 599, 600-1 (1926)(advantages of regulating procedure by court rule). Dean Pound makes a historical argument that procedural rule-making has always been a judicial function as seen from English history. *Id.* at 601; *see also* Pound, *Regulating Procedural Details by Rules of Court*, 13 A.B.A. J. March 1927, Part II at 12-13 (court experience, legislature's disinterest, outside influence on legislators promote vesting rule-making power in courts). Dean Wigmore was the second major

cumulative effort[39] influenced Congress to pass legislation that empowered the United States Supreme Court to establish uniform rules of civil procedure.[40] The success of those rules and the continued effort of the American Bar Association has influenced several states to mirror the federal process by establishing rule-making authority in state courts.[41] Among the states, however, both the current lack of uniformity in the methods used to create rules of procedure and experiences with nonreviewable judicial rule-making have raised the question whether the courts or legislatures are best suited as the primary source of procedural rule-making.[42]

B. *Judicial Versus Legislative Rule-Making*

A basic understanding of the positive and negative elements inherent in the rule-making process is necessary to critically evaluate the proper place-

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force in advocating that the judiciary should be the sole source for procedural rule-making. *See* Wigmore, *All Legislative Rules for Judicial Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 276-79 (1928)(logic and policy considerations dictate that rules of procedure can only be promulgated by judiciary).

39. *See* Spitzer, *Court Rulemaking in Washington State*, 6 U. PUGET SOUND L. REV. 31, 41-42 (1982)(American Bar Association, American Judicature Society, and National Municipal league created impetus for new reform movement for court to share rule-making power with legislature).

40. *See* Act of June 19, 1934, ch. 651, §§ 1-2, 48 STAT. 1064 (Rules Enabling Act); *see also* J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 67-68 (1977)(tracing statutory history of Rules Enabling Act and initial sequence of events leading to promulgation of Federal Rules of Civil Procedure in 1938).

41. *See* J. PARNESS & C. KORBAKES, A STUDY OF PROCEDURAL RULE-MAKING POWER IN THE UNITED STATES 65-67 (1973)(listing different forms rule-making takes among the states). The various forms include: (1) legislative dominance over rule-making by statute; (2) full control over rule-making by supreme court; (3) supreme court initiation subject to legislative veto or revision; and (4) rule-making entrusted to conference or councils. *Id.*

42. *See* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 10 (1958)(terms which rule-making best entrusted to courts or legislative veto answered after probing advantages/disadvantages); Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 11 (1978)(raising question which branch is best suited for rule-making); *see also* Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M.L. REV. 407, 410-11 (1985)(following supreme court's pronouncement of nonreviewable rule-making power New Mexico Legislature sought to overturn decision by constitutional amendment placing final power to determine what was "procedural" in legislature); Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV.447, 462 (1985)(nonreviewable judicial rule-making power shows tendency of courts to expand meaning of "procedural rules" beyond reasonable limits encroaching on legislatures power over substantive law); Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN L. REV. 1, 34 (1975)(Connecticut supreme court must justify its nonreviewable rule-making power by showing necessity of complete and total legislative withdrawal from rule-making arena).

ment of ultimate rule-making power.[43] Reasons advanced supporting judicial rule-making power include: (1) judicial immunity from political pressures;[44] (2) judicial interest, expertise, and familiarity with procedural

43. *See* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 9-10 (1958)(any constitutional scheme accepting judicial rule-making must weigh positive and negative elements inherently involved in rule-making). Several commentators have already voiced opinions on this topic. *See, e.g.*, Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M.L. REV. 407, 462-73 (1985)(judiciary should have final rule-making power but adopt prudential constraints to reduce tension between it and legislature); Clark & Wright, *The Judicial Council and the Rule-Making Power: A Dissent and a Protest*, 1 SYRACUSE L. REV. 346, 362-64 (1950)(advocating rule-making power to be vested in supreme court to relieve bar from legislative inaction); Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 676-77 (1975)(United States Supreme Court lost public's confidence by neglecting rule-making power); Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 474-82 (1985)(supreme court rule-making power should be subject to legislative review); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 654 (1957)(courts must have rule-making power to effectively promote justice but must show interest and bear responsibility of actions); Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 33-43 (1975)(judiciary has failed to exercise restraint of power in asserting exclusive control over procedural rule-making necessitating legislative review); Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 37-42 (1958)(advocating shared power in rule-making); Means, *The Power to Regulate Practice and Procedure in Florida Courts*, 32 U. FLA. L. REV. 442, 442-44 (1980)(Florida's supreme court wrongfully foreclosed legislature from rightful role in determining questions of policy inherent in court procedures); Parness, *The Legislative Roles in Florida's Judicial Rulemaking*, 33 U. FLA. L. REV. 359, 360 (1981)(Florida supreme court's exclusive rule-making power does not mean legislature cannot assert voice in resolving policy issues within procedural rules); Spitzer, *Court Rulemaking in Washington State*, 6 U. PUGET SOUND L. REV. 31, 64-73 (1982)(court rule-making too important to be left to courts alone); Wigmore, *All Legislative Rules For Judicial Procedure are Void Constitutionally*, 23 ILL. L. REV. 276, 278-79 (1928)(any legislative intervention into court's domain to promulgate rules of procedure constitutionally void).

44. *See* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV.1, 11 (1958)(legislators subject to pressures other than motives for efficient administration of justice); Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 7 (1978)(efficiency of procedural rules lost when diluted by political compromise); Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 44-45 (1952)(improper motive such as key legislator's ill-advised pet project or disgruntled lawyer seeking rule change after losing case on procedural gap intolerable); Wigmore, *All Legislative Rules for Judicial Procedure are Void Constitutionally*, 23 ILL. L. REV. 276, 278 (1928)(judiciary is disinterested body). *But see* Brennan, *Nonpartisan Election of Judges: The Michigan Case*, 40 SW. L.J. (Special Issue), May 1986, 23, 23-24 (partisan elections at odds with impartiality, alienates best qualified candidates and undermines confidence in judiciary); Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. (Special Issue), May 1986, 31, 36-37 (elections force judges to bow to temporary public whim rather than protecting enduring legal principles which is antithetical to judicial independence from social, economic or political pressures); Krivosha, *Ac-*

problems;[45] (3) avoidance of legislative delay to enact needed procedural changes;[46] (4) public expectation of judicial accountability for the efficient administration of justice;[47] (5) willingness to constantly review procedural methods;[48] (6) ability to make minor changes in individual rules without embarking on wholesale procedural or judicial reform;[49] (7) less cumbersome enactment process;[50] 8) decreased litigation resulting from application of court-made rules over legislative codes because of legislative inability to clarify ambiguity once rules are promulgated[51] and; (9) consistent interpre-

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quiring Judges by the Merit Selection Method: The Case for Adopting Such a Method, 40 SW. L.J. (Special Issue) May, 1986, 15, 19-20 (partisan elections forcing judges to solicit and accept campaign contributions creates appearance of impropriety and forces identification with special interest groups while alienating notion of impartiality); Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers,* 86 MICH. L. REV. 382, 385-86 (1987)(prior political campaign contributions by attorney to judge may deprive opposing party of impartial forum under due process clause).

45. *See* Wigmore, *All Legislative Rules for Judicial Procedure are Void Constitutionally,* 23 ILL. L. REV. 276, 278 (1928)(judiciary aware of needs of trial lawyers due to experience as practitioners). Wigmore also unequivocally shows his disdain for the inferior knowledge of the legislature in the rule-making process. *See id.* The most qualified group in the legislature for rule-making, the judiciary committee, does not necessarily have the most qualified personnel on it. Further, lawyers on that committee are not necessarily the most knowledgeable of procedure. *Id.*

46. *See* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision,* 107 U. PA. L. REV.1, 10 (1958)(even procedures of paramount importance are long delayed due to legislatures slow response time); Wigmore, *All Legislative Rules for Judicial Procedure are Void Constitutionally,* 23 ILL. L. REV. 276, 278 (1928)(current political pressures and slow moving machinery cause infrequent and inconsistent legislative amendment to procedural rules).

47. *See* Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making,* 55 MICH. L. REV. 623, 643 (1956)(courts responsible for administration of justice); Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision,* 107 U. PA. L. REV. 1, 10 (1958)(legislature does not perceive need to review procedural methods).

48. *See* Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making,* 55 MICH. L. REV. 623, 643 (1956)(courts exercising rule-making power periodically review rules to eliminate inequalities).

49. *See* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision,* 107 U. PA. L. REV. 1, 11 (1958)(maintaining court procedure best effected by courts with uncomplicated machinery); Pound, *Procedure Under Rules of Court in New Jersey,* 66 HARV. L. REV. 28, 28-29 (1952)(rule changes can be made periodically as needed by courts whereas legislative change infrequent and complicated).

50. Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision,* 107 U. PA. L. REV. 1, 12 (1958)(court rules flexible in application, easy to clarify and amend where legislative change difficult due to short, busy, infrequent sessions).

51. *See* Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Mak-*

tation of rules by the same body who created them.[52]

In opposition, arguments advanced favoring legislative rule-making include: (1) judicial resistance to change;[53] (2) judges' bias favoring their own preferences;[54] (3) judges who are out of touch with the needs of litigants and members of the bar;[55] (4) the perception that the legislature better reflects the public will;[56] and (5) concern that judicial rule-making will restrict or create substantive rights.[57]

Although the Texas Supreme Court currently promulgates rules subject to legislative disapproval, examination of how history has shaped the positions of these two branches of government is necessary to make an informed choice whether the current alignment of power is correct.

C. *Factors Significant to Texas Rule-Making*

There are three factors essential to an understanding of the history of rule-

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ing, 55 MICH. L. REV. 623, 643 (1956)(courts with rule-making authority have fewer cases turning on procedural questions whereas legislative codes tend to foster litigation).

52. *See id.* at 644 (consistent interpretation of rules increases when court initiates rule-making); Pound, *The Rulemaking Power of the Courts*, 12 A.B.A. J. 599, 602 (1926)(consistency in interpretation increases when judiciary alone in charge of rule-making process).

53. *See* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 13 (1958)(judges with rule-making power have reached age where change difficult); Warner, *The Role of Courts and Judicial Councils in Procedural Reform*, 85 U. PA. L. REV. 441, 451 (1937)(some judges too old to accept or initiate change).

54. *See* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 13 (1958)(judges more likely to yield to own convenience in procedural matters such as briefs or reducing litigation costs rather than those of litigants); Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 8 (1978)(judges adopt rules suiting own convenience).

55. *See* Warner, *The Role of Courts and Judicial Councils in Procedural Reform*, 85 U. PA. L. REV. 441, 451 (1937)(judges tenure on appellate bench renders them ex-officio experts on needs of lower courts).

56. *See* Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 7-8 (1978)(legislature primary body reflecting public's will and accountable to populace by election).

57. *See* Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 40 (1975)(legislature must have power to review court rules due to potential for court to enact substantive law through promulgation of procedural rules); Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 39-40 (1958)(concurrent power over rule-making between legislature and judiciary decreases potential errors of court enacting substantive law by legislative review of court rules); Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 8-9 (1978)(entanglement of procedure and substantive law demands cooperation between courts and legislature in rule-making); Spitzer, *Court Rule-Making in Washington State*, 6 U. PUGET SOUND L. REV. 31, 58-59 (1982)(legislature as policy making body must be given opportunity to approve/disapprove court rules that encompass substantive character).

making in Texas:[58] the constitutional creation of an independent judiciary in Texas which cannot be destroyed by the legislature;[59] a strong tradition of the separation of powers doctrine derived from the Republic of Texas;[60] and the popular election of supreme court justices.[61] The election of judges and the creation of an independent judiciary are further expressions of the importance and central role of the separation of powers doctrine.[62] These factors distinguish the Texas court system from the federal judiciary and provide a uniqueness which will effect the ultimate resolution of the rule-making question in Texas. Although there is a strong argument for nonreviewability of rule-making based on these three factors and others,[63]

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58. *See* TEX. CONST. art. II, § 1 (separation of powers); *id.* art. V, § 1 (creation of independent judiciary); *id.* art. V, § 2 (election of judges). Separation of powers is the foundation for the independent judiciary embodied in article V, section 1, and the election of judges stated in article V, section 2 of the Texas Constitution. *See* TEX. CONST. art. V, § 1, interp. commentary (Vernon 1955)(independent judiciary flows from separation of powers doctrine); *id.* art. V, § 2, interp. commentary (Vernon 1955)(elected judiciary reaction to executive's power to appoint members of court). The independent judiciary and the election of judges are further embodiments of the separation of powers principle. *Id.*

59. *See* TEX. CONST. art. V, § 1 (1876, amended 1981)(creation of independent judiciary).

60. *See* Morrow v. Corbin, 122 Tex. 553, 561, 62 S.W.2d 641, 645 (1933)(legislature's act allowing advisory opinions in appellate courts found unconstitutional because constitution alone grants appellate courts their jurisdiction); TEX. CONST. art. II, § 1 (separation of powers). The exact language currently used in article II, section 1 is derived from the Constitution of 1845 which had its roots in the Republic's Constitution of 1836. *Compare* TEX. CONST. art. II, § 1 (1845)(powers of Government "shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy") *with* TEX. CONST. art 1, § 1 (1836) ("powers of this government shall be divided into three departments . . . which shall remain for ever separate and distinct"). It is noted, however, that daily practice of governmental officials defied these constitutional words. *See* Paulsen, *A Short History of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 237, 283-84 (1986)(only patriotism of Republic's first Congress and unsettled nature of populace can excuse legislature's abuse of power in electing justices to supreme court to exclusion of population). Though independent justices were to run the courts, the appointment practice by joint ballot of Congress clearly reveals at a minimum a legislative impropriety with the legislature appealing to overly influence the judiciary. *Id.* at 294.

61. *See* TEX. CONST. art. V, § 2 (election of judges).

62. *See* Mays v. Fifth Court of Appeals, 31 Tex. Sup. Ct. J. 533, 534 n.2 (June 22, 1988) (Spears, J., concurring)(creation and derivation of power in Texas Courts by article V, section 1 of Texas Constitution sets Texas judiciary apart from United States judiciary whereas United States Constitution merely implies separation of powers); TEX. CONST. art. V, § 1, interp. commentary (Vernon 1955)(article V, section 1 of Texas Constitution [creation of courts] is derivative of separation of powers doctrine); TEX. CONST. art. V, § 2, interp. commentary (Vernon 1955)(1850 amendment to constitution provided for selecting judges by popular election in conjunction with movement for popular sovereignty).

63. *See* Ammerman v. Hubbard Broadcasting, 551 P.2d 1354, 1358-59 (N.M. 1976)(legislative creation of statutory privilege for newsmen invalid encroachment on rule-making power of supreme court), *cert. denied*, 436 U.S. 906 (1978); Winberry v. Salisbury, 74 A.2d 406, 419

this view is ultimately untenable because of the underlying public policies that are often enmeshed in the fabric of procedural and administrative rules.[64]

With the exception of the 1836 Constitution of the Republic of Texas,[65]

(N.J.)(New Jersey Supreme Court declared rule-making power unreviewable by interpreting constitutional language "subject to law" in article VI, section 2 equivalent to "substantive law" eliminating legislature's power to override supreme court rules), *cert. denied*, 340 U.S. 877 (1950). The New Jersey constitutional language on which *Winberry* was decided stated: "[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts . . . ." N.J. CONST. art. VI, § 2, ¶ 3. Several other states have adopted rule-making schemes similar to New Jersey's constitutional construction. *See, e.g.*, ARIZ. CONST. art. VI, § 5 (5); COLO. CONST. art. VI, § 21; DEL. CONST. art. IV, § 13; ILL. CONST. art. II, § 1, art. VI, §§ 4, 6, 16; MICH. CONST. art. VI, §§ 3, 5; N.H. CONST. pt. II, art. 73-A; N.D. CONST. art. VI, § 3; PA. CONST. art. V, § 10; W. VA. CONST. art. VIII, §§ 3, 8. In addition to New Mexico, Connecticut's supreme court has found exclusive rule-making power in itself by reinterpreting article II (distribution of powers) and article V, section 1 (vesting of power in particular courts) of the Connecticut Constitution. *See* State v. Clemente, 353 A.2d 723, 728-29, 731 (Conn. 1974); *see also*, Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 28-29 (1952)(nonreviewable rule-making power in supreme court important constitutional interpretation leading to improved judicial administration); Wigmore, *All Legislative Rules For Judicial Procedure are Void Constitutionally*, 23 ILL. L. REV. 276, 276 (1928)(attempts by state legislatures or Congress to control court proceedings inherently unconstitutional interference with judicial functions). *But see* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 450 (1985)(Dean Pound's analysis erroneous and leads to problems despite judge's good faith in promulgating rules); Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 37-42 (1958)(legislative review of court rulemaking essential for public policy reasons).

64. *See* Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M.L. REV. 407, 462-73 (1985)(no support for unreviewable supreme court rule-making power); Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234, 241-45 (1951)(New Jersey supreme court's promulgation of nonreviewable rule-making power erroneous constitutional interpretation); Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 35 (1975)(legislative exclusion must be based on legislative incompetence not judicial competence to promulgate rules).

65. TEX. CONST. art. IV, § 1 (1836). The constitution of the Texas Republic duplicated the language of article III, section 1 of the United States Constitution. *See* U.S. CONST. art. III, § 1 (vesting of judicial power in one supreme court and such other courts as congress later creates). The constitution of the Republic of Texas vested judicial power solely in the supreme court with further creation of lesser courts left to the legislature to establish. *See* TEX. CONST. art. IV, § 1 (1836)(legislature's power to create other courts). The 1836 Constitution, however, laid the framework for the present court system adopted in 1876. *Id.* Though judicial power was vested only in the supreme court, article IV, section 1 of the 1836 Constitution provided for the Republic to be divided into at least three but not more than eight districts, with a judge sitting in each district so created. This constitution also provided for a county court in each county as well as justice courts as the legislature should so provide. *Id.* Each court created by the Constitution of the Republic of Texas is currently part of the Texas judi-

the Texas Constitution has always provided for an independent judiciary.[66] As early as 1877, the supreme court declared that all judicial power of the state had been vested in the courts created by the state constitution so that jurisdiction was not subject to change by the legislature except where expressly provided by the constitution.[67] Constitutional amendments subsequently allowed the legislature to create new courts, but never to destroy the jurisdiction of courts already created by the constitution.[68] Because Texas

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cial system. *See* TEX. CONST. art. V, § 1, interp. commentary (Vernon 1955)(providing for supreme, appellate, district, county and justice courts).

66. *See* TEX. CONST. art. IV, § 1 (1845). Judicial power which had been vested solely in the supreme court in the Republic of Texas was expanded to include district courts when statehood was achieved. *See id.* Though no change was reflected in the Confederate Constitution of 1861, the 1866 constitution adopted for readmittance to the Union added county courts and corporation courts to those already vested with power from prior constitutions. *See* TEX. CONST. art. IV, § 1 (1866)(adding county and corporation courts). When the 1866 constitution did not meet the approval of the U.S. Congress, Texas officials who were then in power were removed by the military government and new officials appointed. Texas was then readmitted to the Union under the 1869 Constitution. *See* BONER, A REFERENCE GUIDE TO TEXAS LAW AND LEGAL HISTORY 10 (1976)(readmission of Texas into Union). The 1869 constitution withdrew county and corporation courts from article IV, section 1 and was replaced by the language of the 1861 constitution. *Compare* TEX. CONST. art. IV, § 1 (1866, repealed 1869)(judicial powers vested in one Supreme Court, district courts, county courts, corporation courts and others as legislature may establish) *with* TEX. CONST. art. V, § 1 (1869)(judicial power vested in one Supreme Court, district courts and such courts created by legislature or 1869 constitution). Finally, the 1869 constitution was superseded by the constitution of 1876 which stated: "The judicial power of this State shall be vested in one Supreme Court, in a Court of Appeals, in District Courts, in County Courts, in Commissioners' Courts, in Courts of Justices of the Peace, and in such other courts as may be established by law . . . ." TEX. CONST. art. V, § 1.

67. *See Ex parte* Towles, 48 Tex. 413, 439 (1877)(framers intended to form complete and permanent judicial system not subject to change by legislature except where constitutionally stated); Coombs v. State, 38 Tex. Crim. 648, 663, 44 S.W. 854, 861-62 (1898)(where constitution vests judicial power in courts, legislature has no right to invade court system unless specifically authorized by constitution). *Coombs* specifically made clear that "the legislature has no authority to change the organization of the judicial system, nor can that body, under the guise of creating 'other courts,' divest the district court or the justices of the peace courts of their constitutional jurisdiction." *See Coombs*, 38 Tex. Crim. at 663, 44 S.W. at 861-62. Though the legislature has had the power to create other courts as it deems necessary since 1845, it has never had authority to destroy the jurisdiction of constitutionally created courts because judicial power "has been distributed by the organic law, and is beyond legislative control." *Id.* at 663, 44 S.W. at 862.

68. *See* TEX. CONST. art. V, § 1 (1876, amended 1891). The major addition to article V, section 1 of the 1876 constitution was the creation of a court of criminal appeals. *See* TEX. CONST. art. V, § 1, interp. commentary (Vernon 1955)(outstanding feature of judiciary article was creation of appellate criminal court). The 1891 revision of this article further allowed the legislature to create courts it deemed necessary and to conform the jurisdiction of the constitutional district and inferior courts to those courts it may create. That section states: "The Legislature may establish such other courts as it may deem necessary and prescribe the juris-

courts are not "dependent" on a legislative grant of power for their existence or jurisdiction like the federal courts but share power equally with the legislative and executive branches, the independent nature of the judiciary is one factor to be considered in determining which branch of government should have the final word in procedural rule-making.[69]

The meaning attributed to the separation of powers principle has remained essentially unchanged since the Constitution of the Republic of Texas in 1836.[70] This doctrine makes explicit the need to avoid centralization of power in any governmental branch.[71] The formation of the Texas judiciary is an outgrowth of the desire to establish in each branch of government the power to carry out its constitutionally delegated functions.[72] This desire for independence is embodied in the Texas Constitution which provides that "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."[73] This provision embodies the Texas separation of powers doctrine, yet implicitly recognizes the need for flexibility in an area such as rule-making which characteristically is legislative in nature.[74]

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diction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto." TEX. CONST. art. V, § 1 (1876, amended 1891).

69. *See* LeCroy v. Hanlon, 713 S.W.2d 335, 338 (Tex. 1986)(judiciary is constitutionally established equal and separate branch of government). *Compare* TEX. CONST. art. II, § 1 (independent judiciary) *and* TEX. CONST. art. V, § 1, interp. commentary (Vernon 1955)(role of judiciary in Texas) *with* U.S. CONST. art. III, § 1 (judicial power vested in one supreme court and other courts Congress may establish) *and* U.S. CONST. art. III, § 2, cl. 1 (jurisdiction of federal courts).

70. *Compare* TEX. CONST. art. I, § 1 (1836) (powers of government are divided between executive, legislative and judicial "remaining forever separate and distinct") *with* TEX. CONST. art. II, § 1 (no one department of government shall exercise power attached to another except as expressly provided by constitution). *See generally* J. SAYLES, THE CONSTITUTIONS OF THE STATE OF TEXAS 155-603 (3d ed. 1888)(collection of all Texas constitutions). The current wording of the separation of powers doctrine embodied in article II, section 1 has appeared in all prior Texas Constitutions. *See* TEX. CONST. art. II, § 1, interp. commentary (Vernon 1955)(exact wording of article II, section 1 incorporated in all state constitutions).

71. *See* TEX. CONST. art. II, § 1, interp. commentary (Vernon 1984)(fear of power in centralized group influenced creation of doctrine).

72. *See* Houston Tap & Brazoria Ry. Co. v. Randolph, 24 Tex. 317, 335-36 (1859)(article II, section 1 contemplates employees of each branch competent to discharge constitutional duties without aid or interference from employees of another branch); Lytle v. Halff & Bro., 75 Tex. 128, 132-33, 12 S.W. 610, 611 (1889)(three branches shall co-exist without encroaching, destroying or restricting another).

73. TEX. CONST. art. II, § 1.

74. *See* TEX. CONST. art. II, § 1, interp. commentary (Vernon 1984)(practical necessities require constitution to grant to each branch certain powers which do not characteristically belong to it). One example where the supreme court utilizes a natural legislative function is rule-making. *Id.*

The election of supreme court justices is another outgrowth of the separation of powers principle.[75] With the advent of statehood in 1845,[76] Texas initially utilized a system of appointment in selecting its supreme court judges which was modeled after the United States Constitution.[77] An 1850 amendment[78] changed the system of appointment to one of popular vote.[79] Except for a short return to a system of gubernatorial appointment,[80] judicial elections have been the norm since 1876.[81] The impetus to return to elected judicial officials followed a period of political abuse when the gover-

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75. *See* TEX. CONST. art. V, § 2 (currently voters elect three of nine supreme court justices every two years for a six year term).

76. *See* TEX. CONST. art. IV, § 9 (1836)(election of judges). The first Texas constitution provided that all judges would be elected by joint ballot of the Senate and House. *Id.*

77. *Compare* TEX. CONST. art. IV, § 5 (1845)(governor nominates and with advice and consent of two-thirds of senate appoints judges of supreme and district courts) *with* U.S. CONST. art. II, § 2, cl. 2 (president nominates and with advice and consent of senate appoints supreme court justices).

78. *See* TEX. CONST. art. IV, § 5 (1845, amended 1850)(judges and other named officials elected by voters when terms of office completed or vacated); J. SAYLES, THE CONSTITUTION OF THE STATE OF TEXAS 134, 222 (3d ed. 1888)(1850 amendment provided for election of judges and certain other officials). *See generally* Comment, *Selection and Discipline of State Judges in Texas*, 14 HOUS. L. REV. 672, 676 (1977)(discussing historical influences on judicial elections in Texas).

79. *See* TEX. CONST. art. IV, § 5 (1845, amended 1850)(expiration of judicial term will be filled by election of State voters); Mullinax, *Judicial Revision — An Argument Against the Merit Plan of Judicial Selection and Tenure*, 5 TEX. TECH L. REV. 21, 21-22 (1973)(dissatisfaction with federal method of judicial appointment led to popular election of judges); Comment, *Selection and Discipline of State Judges in Texas*, 14 HOUS. L. REV. 672, 676 (1977)(substitution of voter choice over gubernatorial selection influenced by popular sovereignty ideals of Jacksonian Democratic Movement). One populist ideal promoted by the Jacksonian Democratic Movement was rejection of the federal method of selecting judges by presidential appointment. *See* Comment, *Selection and Discipline of State Judges in Texas,* 14 HOUS. L. REV. 672, 676-77 (1977)(Jacksonian influence on election of judges).

80. *See* TEX. CONST. art. V, § 2 (1869)(supreme court justices appointed by governor with advice and consent of senate to nine year terms between 1867-1875). The system of appointed judges was prominent during the period of reconstruction. *See* Norvell, *Oran M. Roberts and the Semicolon Court,* 37 TEX. L. REV. 279, 281-84 (1958)(supreme court justices appointed by Governor with advice and consent of senate for nine year terms); *see also* TEX. CONST. art. V, § 2, interp. commentary (Vernon 1955)(constitution of 1869 allowed appointment of supreme court justices by governor with senate approval).

81. *See* TEX. CONST. art. V, § 2 (1876, amended 1980)(supreme court justices elected at general election for 6 year term). The 1876 and 1980 articles are substantially the same, differing only in details which include: the number of justices comprising the court; what constitutes a quorum; requirements to run as justice of the supreme court; and salary. *Compare* TEX. CONST. art. V, § 2 (1876, amended 1908)(three justices comprise supreme court, two constitute quorum, and must be thirty years old practicing or acting as judge for seven years to run) *with* TEX. CONST. art. V, § 2 (1876, as amended 1980)(nine justices on court, five constitute a quorum, and must be thirty-five years to run and practice ten years as a lawyer or judge).

nor appointed members of the supreme court.[82] Returning power to the voters to elect judges dispelled the fear of concentrated power in one branch of government.[83] This background of Texas history as embodied in the separation of powers and an independent, elected judiciary must be utilized to understand the past and future of rule-making in this state.

D. *Rule-Making in Texas*

Rule-making in Texas may roughly be divided into three periods.[84] The first occurred between 1876 and 1891 when the supreme court had sole authority to promulgate procedural rules for Texas courts.[85] Although all Texas constitutions prior to 1876 provided the supreme court with power to make procedural rules,[86] the court had failed to take control of the rule-making process.[87] An 1876 constitutional amendment, however, consolidated the court's power enabling it to pass rules of substantial scope in 1877 for all state courts.[88] Although critics argued that the 1877 procedural en-

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82. *See* M. BONER, A REFERENCE GUIDE TO TEXAS LAW AND LEGAL HISTORY 29 (1976)(following Texas' rejection of being readmitted into Union following Civil War, General Sheridan replaced all state officials with own appointees); Norvell, *Oran M. Roberts and the Semicolon Court,* 37 TEX. L. REV. 279, 279-303 (1959)(reconstruction court and *Ex parte Rodriguez* allowed Governor Davis to continue in office despite end of legal term).

83. *See* Mullinax, *Judicial Revision — An Argument Against the Merit Plan for Judicial Selection and Tenure,* 5 TEX. TECH L. REV. 21, 33-34 (1973)(elected judiciary upholds court's credibility, promotes judicial accountability, and protects people from appointed justices with life tenure and despotic power). *Id.* Currently, there are 11 states with partisan elections, 13 with non-partisan elections and 27 states with judges appointed by the governor on advice and consent of the senate. *See* San Antonio Express News, January 29, 1988, at D-1, col. 2.

84. *See* Benedetto & Keltner, *Changes in Pleading Practices — Frivolous Lawsuits,* in STATE BAR OF TEXAS, ST. MARY'S NINTH ANNUAL PROCEDURAL INSTITUTE: CIVIL PROCEDURE 1988 — RULES AND STATUTORY CHANGES F-2, F-10-11 (1987)(three periods emerge granting supreme court power to promulgate rules from constitution).

85. *See* TEX. CONST. art. V, § 25, interp. commentary (Vernon 1955)(court of 1876 recognized rule-making power of supreme court).

86. M. BONER, A REFERENCE GUIDE TO TEXAS LAW AND LEGAL HISTORY 41(1976)(supreme court could not pass rules of procedure inconsistent with "the laws" prior to 1876 thus hampering serious rule-making); Pope & McConnico, *Texas Civil Procedure Rule Making,* 30 BAYLOR L. REV. 5, 9 (1978)(constitutions before 1876 empowered supreme court to make rules not inconsistent with laws of legislature). Until 1876, the prior constitutions made no mention of rule-making authority other than mentioning that trials shall be conducted according to "rules and regulations prescribed by law." W. HARRIS, RULES OF THE COURTS 7 (2d ed. 1921).

87. *See* M. BONER, A REFERENCE GUIDE TO TEXAS LAW AND LEGAL HISTORY 41 (1976)(even when constitution of 1876 omitted restriction that court rules could not contradict legislative acts, court adopted only minimal rules); W. HARRIS, RULES OF THE COURTS 7 (2d ed. 1921)(though supreme court had rule-making power prior to constitution of 1876, no initiative taken to use it).

88. *See* Order of Supreme Court of Texas, December 1, 1877, 47 Tex. 597, 597-641

actments invaded the legislative domain,[89] the rules were nevertheless upheld by the supreme court as a valid exercise of its rule-making authority pursuant to the 1876 Constitution.[90] This assertion of the court's power went unchallenged until an amendment to article V, section 25 was approved in the 1891 Constitution,[91] which began the second period of rule-making in Texas.

As a result of this constitutional amendment, from 1891 to 1939, the rule-making power continued to be vested in the supreme court, but only in areas not occupied by legislative enactment.[92] Adhering to the letter of the 1891 Constitution, the supreme court repeatedly held that when a statutory and court-made rule conflicted, the statutory rule would control.[93] Despite constitutional authorization to promulgate rules, the supreme court's influence

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(1877)(initial promulgation of rules of civil procedure by Texas Supreme Court controlling trials in supreme and district courts).

89. *See* Benedetto & Keltner, *Changes in Pleading Practices — Frivolous Lawsuits,* in STATE BAR OF TEXAS, ST. MARY'S NINTH ANNUAL PROCEDURAL INSTITUTE: CIVIL PROCEDURE 1988 — RULES AND STATUTORY CHANGES F-2, F-10 (1987)(after extensive rules promulgated by supreme court in 1876, rules attacked as unconstitutional intrusion into legislative power).

90. *See* Texas Land Co. v. Williams, 48 Tex. 602, 603-04 (1878)(seminal case stating supreme court's constitutional power to make rules and regulations for purpose of expedient judicial transactions intended to remedy prior inadequate rules); *see also* Poland v. Porter, 44 Tex. Civ. App. 334, 336, 98 S.W. 214, 215 (1906, no writ)(disregard for procedural rules intended to bring uniformity to court system will yield in reversal); Cage v. Tucker's Heirs, 25 Tex. Civ. App. 48, 49, 60 S.W. 579, 580 (1901, no writ)(without compliance to rules court will not hear appeal because rules intended to simplify questions to appellate courts, not perpetuate stagnation).

91. TEX. CONST. art. V, § 25 (1891, repealed 1985).

92. *See* TEX. CONST. art. V, § 25, interp. commentary (Vernon 1955)(constitutional amendment in 1891 to article V, section 25 allowed the supreme court to make rules only where legislature not acted). Article V, section 25 as amended in 1891 reads: "The Supreme Court shall have power to make and establish rules of procedure not inconsistent with the laws of the State for the government of said court and the other courts of this State to expedite the dispatch of business therein." TEX. CONST. art. V, § 25 (1891, repealed 1985); *see also* Pope & McConnico, *Texas Civil Procedure Rule Making,* 30 BAYLOR L. REV. 5, 10 (1978)(supreme court retained rule-making authority subject to legislative enactment).

93. *See* M. K. & T. Ry. Co. v. Beasley, 106 Tex. 160, 170, 155 S.W. 183, 187 (1913)(legislative enactment prevails over court rule in conflicting situation); St. Louis I. M. & S. Ry. Co. v. West Bros., 159 S.W. 142, 146 (Tex. Civ. App.—San Antonio 1913, no writ)(supreme court cannot set aside statutes by rules); Childress v. Robinson, 161 S.W. 78, 80-81 (Tex. Civ. App.—Galveston 1913, writ dism'd)(supreme court rules have same force and effect as statutes except when in conflict with legislative enactment where statute controls); *see also* Note, *Appeal and Error-Application of Rule 62A Since* Golden v. Odiorne, 13 TEX. L. REV. 338, 344 (1935)(court must not violate constitutional mandate to promulgate rules inconsistent with Texas law); Recent Case, *Appeal and Error—Motion for New Trial-Conflict of Court Rule with Statute,* 15 TEX. L. REV. 369, 369-70 (1937)(when statute and court rule conflict, statute prevails).

over civil procedure was effectively eliminated.[94] During this time frame, procedural rules were frequently enacted by the legislature with particularity ultimately creating a procedural morass.[95] The legislature's rules were rarely codified,[96] sharply criticized,[97] and highly complex.[98] Dissatisfaction with the prevailing rule-making procedures and the inability of the legislature to place the rules into an accessible form ultimately led to a campaign designed to return rule-making power to the supreme court.[99]

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94. *See* McDonald, *The Background of the Texas Procedural Rules*, 19 TEX. L. REV. 229, 239 (1941)(under 1891 constitutional amendment supreme court's willingness to promulgate rules waned resulting in lack of liberalism in civil procedure from 1900-1940); Wilson, *The Texas Rules of Civil Procedure*, 29 TEX. L. REV. 766, 766-67 (1951)(legislature's involvement in rule-making effectively eliminated court's efforts in area prior to 1939).

95. *See* Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 10 (1978)(Texas procedure became increasingly more complex during legislature's active period of rule-making); Wilson, *The Texas Rules of Civil Procedure*, 29 TEX. L. REV. 766, 767 (1951)(stagnation, dissatisfaction and complexity of legislative rule-making for court system was impetus for investing supreme court with full rule-making power). Judge Combs of the Beaumont Court of Appeals expressed the frustration with legislative rule-making:

> Our courts seem to have lost, in recent years, this ability to do justice except as a mere incident of following meticulously, an elaborate and increasingly more complicated set of rules . . . . A litigant who . . . suffers the remand of his case on such apparently trivial grounds must regard us as devoid of all sense of right.

Traders & General Ins. Co. v. Rudd, 102 S.W.2d 457, 459 (Tex. Civ. App.—Beaumont 1937, no writ)(Combs, J. concurring).

96. *See* Benedetto & Keltner, *Changes in Pleading Practices — Frivolous Lawsuits,* in STATE BAR OF TEXAS, ST. MARY'S NINTH ANNUAL PROCEDURAL INSTITUTE: CIVIL PROCEDURE 1988 — RULES AND STATUTORY CHANGES F-2, F-10-11 (1987)(rules enacted by legislature between 1891-1939 confusing and rarely codified to aid trial lawyers).

97. *See* M. BONER, A REFERENCE GUIDE TO TEXAS LAW AND LEGAL HISTORY 42 (1976)(dissatisfaction with statutory rules led legislature to relinquish rule-making power to supreme court).

98. *See* TEX. CONST. art. V, § 25, interp. commentary (Vernon 1955)(piecemeal legislative rule-making over years created technical body of procedural law based on old common law forms); Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 10 (1978)(complexity of Texas procedure during period of increased legislative activity ultimately led to reform).

99. *See* McDonald, *The Background of the Texas Procedural Rules*, 19 TEX. L. REV. 229, 239-246 (1941)(reform movement that began in 1905 finally bore fruit with legislature enacting article 1731a shifting rule-making power to supreme court in 1939). McDonald traces the national reform movement that returned rule-making power to the courts and shows how Texas generally followed and was influenced by the same national leaders. *Id.* For example, the American Bar Association in 1912 formally began a campaign for the United States Congress to recognize the United States Supreme Court's rule-making power. *Id.* at 241. In the same year, the Committee on Judicial Administration of the Texas Bar Association recommended to the Texas Legislature that the Texas Supreme Court be granted similar rule-making power. *See id.* at 241-42; *see also Texas Bar Association Proceedings of the Thirty-First Annual Session*, 31 TEX. BAR ASS'N 77, 77-103 (1912)(adoption of Roscoe Pound's recommendation to shift rule-making power from state legislatures to highest court).

The third period in Texas rule-making was initiated by the Texas Bar Association and the Texas Civil Justice Council.[100] The reforms proposed by these groups induced the 46th Legislature to authorize the supreme court to promulgate rules of civil procedure for all courts in the state.[101] With the passage of the Rule Making Act,[102] Texas joined the national trend to return rule-making power and responsibility for the efficient administration of justice to the courts.[103]

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100. *See* Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 10 (1978)(former Chief Justice Pope designates Texas Bar Association, Texas Civil Judicial Council and Texas Law Review as significant players in shifting rule-making power to supreme court); Wilson, *The Texas Rules of Civil Procedure*, 29 TEX. L. REV. 766, 767 (1951)(names Texas Bar Association and Texas Advisory Civil Judicial Council significant parties in shifting rule-making power to supreme court).

101. Act of May 15, 1939, ch. 25, §§ 1-6, 1939 Tex. Gen. Laws 201, 201-03, *repealed by,* Act of June 12, 1985, ch. 480, § 26 (1), 1985 Tex. Gen. Laws 2048, 2048. Article 1731a as originally enacted gave the supreme court power to promulgate rules of civil procedure for the Texas trial courts subject to the legislature's right to reject the drafted rules. *See* M. BONER, A REFERENCE GUIDE TO TEXAS LAW AND LEGAL HISTORY 42 (1976)(though legislature has right to refuse drafted rules by supreme court, never exercised this power); Wilson, *The Texas Rules of Civil Procedure*, 29 TEX. L. REV. 766, 767 (1951) (rule-making dominance retained by legislature but never exercised). Additionally, article 1731a repealed all inconsistent statutes that had procedural effect. *See* Wilson, *The Texas Rules of Civil Procedure*, 29 TEX. L. REV. 766, 767 (1951)(article 1731a repealed all legislative procedural rules effective September 1, 1941). In this regard, 1731a directed the supreme court to provide a list of procedural statutes that would be superceded by the court's new rules. The entire process of rewriting the civil rules and creating the list of repealed statutes was to be completed by December 1, 1940 with the filing of these documents with the Secretary of State. *Id.* An extended discussion on the panel appointed to the Supreme Court Advisory Committee and their extensive work is provided by Wilson. Wilson, *The Texas Rules of Civil Procedure*, 29 TEX. L. REV. 766, 768-83 (1951).

102. *See* Rule Making Act, 1939 Tex. Gen. Laws 568, 568-70 (currently codified in TEX. GOV'T CODE ANN. § 22.004 (Vernon 1988)). The Rule Making Act was originally passed as H.B. 108 in the 46th Legislature on May 15, 1939, effective that same day. *Id.*

103. *See* Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 10 (1978)(Texas joined nationwide trend delegating rule-making responsibility to courts). The transition to court rule-making with subsequent legislative review completely renovated civil procedure in Texas. *See id.* at 11-12 (advisory committee on rules of civil procedure aiding supreme court held 51 institutes throughout Texas to explain expansive rule changes and underlying philosophy); *see also* Wilson, *The Texas Rules of Civil Procedure,* 29 TEX. L. REV. 766, 770-71 (1951)(because fight with legislature to regain rule-making control so arduous, supreme court advisory committee understood role to completely revamp rules of civil procedure to meet expectations of bar and legislature). The advisory committee was divided into two main subcommittees. *See id.* at 771. One group was to decipher which statutes were procedural and recommend further subcommittees that would need to be created. Five separate subcommittee's were actually created to scrutinize the proposed rules. The five groups included: (1) procedures up to trial; (2) procedures during trial; (3) appellate procedure; (4) ancillary proceedings (attachment, executions, garnishment, injunctions); and (5) special proceedings (forcible entry and detainer actions, trespass to try title). *Id.* at 772. The second group was charged with identifying and enunciating the "policy" of the rule-making process,

Since the passage of the Rule Making Act in 1939, two modifications to the documents on which the rule-making process is based have occurred. First, article 1731a has been recodified into the Texas Government Code.[104] While recodification has not substantively changed the supreme court's prominence over rule-making,[105] the legislature's continued delegation of rule-making power to the supreme court implies that it has plenary power over the rule-making process.[106] Second, article V, section 25 of the Texas Constitution was repealed and replaced by article V, section 31.[107] The promulgation of article V, section 31 accomplished three things; it retained procedural rule-making power in the supreme court;[108] elevated to

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soliciting input from the bar to possible changes in procedural rules, and publicizing the results of the main committee. *Id.* at 771. Additionally, the reform movement provided mechanisms to change procedural rules in the future. *See* TEX. REV. CIV. STAT. ANN. art. 1731a (Vernon 1987)(supreme court given power to subsequently change rules originally validated September 1, 1941 with later amendments if notice requirements of 1731a met); *see also* Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 11 (1978)(while court-made rules or subsequent amendments do not need express approval of legislature, legislature may disapprove both rules proclaimed and/or their amendments). Numerous sources presently can initiate a rule change within the Texas court system. *See id.* at 12-22. These sources include the: (1) Texas Legislature (practical accommodation between legislature and court is essential for the former's role in developing the substantive policy decisions that often lie behind a procedural rule); (2) Texas Judicial Council (legislative creature designed to continually study the organization, rules, practice of Texas judiciary and formulate methods of simplifying judicial procedure); (3) Committee on Administration of Justice (Rules and Statutes subcommittee reports suggestions to the committee on Administration of Justice which is a standing committee of the State Bar of Texas); (4) Supreme Court Advisory Committee (main role is recommendation of policy and submitting specific language of rules to be included in amended rules); (5) Texas judiciary (supreme court may make minor corrections to rules on its own without prior submission to Supreme Court Advisory Committee or other agency for study); (6) federal courts (federal court decision declaring a Texas Rule of Civil Procedure unconstitutional compels review of the pertinent rule); (7) local bar associations (local associations may propose changes in existing rules); and (8) members of the bar (individual practitioners may submit changes to one of the standing committees for review). *Id.*

104. *See* TEX. GOV'T CODE ANN. § 22.004 (Vernon 1988)(recodified by Act of June 12, 1985, ch. 480, § 1, 1985 Tex. Gen. Laws 1720, 2048, effective September 1, 1985).

105. *See* Act of June 12, 1985, ch. 480, § 27, 1985 Tex. Gen. Laws 1720, 2049 (recodification without substantive revision of statutes relating to judiciary).

106. *See* TEX. GOV'T CODE ANN. § 22.004(b) (Vernon 1988)(rules of court effective until disapproved by legislature).

107. *Compare* TEX. CONST. art. V, § 25 (1891, repealed 1985)(supreme court has power to promulgate procedural rules not inconsistent with state law) *with* TEX. CONST. art. V, § 31 (supreme court responsible for administration of judiciary, shall promulgate rules not inconsistent with state law and legislature may delegate other power to state's highest courts to promulgate other rules).

108. *See* TEX. CONST. art. V, § 31(b) (supreme court shall create procedural rules not inconsistent with state law).

constitutional status authority to promulgate rules of administration;[109] and reserved the legislature's right to extend further rule-making power to the supreme court in the future.[110] While the legislative history to article V, section 31 clarifies the legislature's intent to strengthen the supreme court's authority to draft its own rules of administration and procedure,[111] it is not apparent that the legislature intended to abdicate its role in the rule-making process as ultimate arbiter.[112] That tension between delegation and final review of court rule-making power must now be addressed.

III. ARGUMENTS SUPPORTING NON-REVIEWABILITY OF SUPREME COURT RULES

A. *The New Jersey Distinction Between Substantive and Procedural Rules: Procedural Independence*

In 1950, the supreme court of New Jersey declared its procedural independence from the legislature in *Winberry v. Salisbury.*[113] The New Jersey Supreme Court held that a procedural court rule, validly enacted pursuant to its constitutional rule-making power, could not subsequently be modified or repealed by the legislature.[114] Since *Winberry*, nine other states have adopted constitutional provisions expressly granting their supreme courts exclusive rule-making power,[115] and one state court has adopted exclusive

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109. *See id.* § 31(a) (supreme court has responsibility for judicial administration in Texas and shall create administrative rules for all courts).

110. *See id.* § 31(c) (legislature may delegate to Supreme Court power to create other rules prescribed by law or constitution).

111. *See* SELECT COMMITTEE ON THE JUDICIARY, 69TH LEGISLATURE, FINAL REPORT AND RECOMMENDATIONS 22-23 (1985)(committee recommendations to amend constitution to vest supreme court with explicit powers over administration of judicial branch and allow legislature to delegate rule-making authority). The committee report specifically encourages the supreme court to promulgate administrative rules in setting policies and guidelines while simultaneously carrying forth the duties of articles 2328b and 5966 which created and defined the Office of Court Administration. *Id.*

112. *See* TEX. CONST. art. V, § 31(a) (supreme court shall promulgate rules of administration not inconsistent with laws of State); *id.* § 31(b) (supreme court shall promulgate rules of civil procedure not inconsistent with laws of State); TEX. GOV'T CODE ANN. § 22.004(a) (Vernon 1988)(court has full rule-making power but shall not abridge, enlarge or modify substantive rights of litigant); *id.* § 22.004(b) (rules and amendments remain effective until legislative disapproval).

113. 74 A.2d 406 (N.J.), *cert. denied,* 340 U.S. 877 (1950).

114. *Id.* at 414; *see also* Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234, 244-45 (1951)(constitutional convention history shows evidence contrary to court's holding).

115. *See* ARIZ. CONST. art. VI, § 5 (5); COLO. CONST. art. VI, § 21; HAWAII CONST. art. VI, § 7; ILL. CONST. art VI, § 16; KY. CONST. § 116; MICH. CONST. art. VI, § 5; N.D. CONST. art. VI, § 3; PA. CONST. art. V, § 10; W. VA. CONST. art. VIII, § 3. *See generally,* Browde &

judicial rule-making power based upon the separation of powers doctrine.[116] Aside from the controversy *Winberry* engendered,[117] the decision embodied a "pure" notion of separation of powers distilling rule-making as an exclusive judicial function.[118]

The court's decision in *Winberry* turned upon its interpretation of the words "subject to law" in the judicial article of the state constitution.[119] The

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Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M.L. REV. 407, 477-78 (1985)(jurisdictions in which procedural rule-making exclusive judicial function). For comparative purposes, the text of representative state constitutional provisions granting their supreme courts rule-making power are provided below. "The Supreme Court shall have . . . [p]ower to make rules relative to all procedural matters in any court." ARIZ. CONST. art. VI, § 5 (5). "The Supreme Court shall make and promulgate rules governing the administration of all courts and shall make and promulgate rules governing practice and procedure in civil and criminal cases, except that the general assembly shall have the power to provide simplified procedures in county courts for claims not exceeding five hundred dollars and for the trial of misdemeanors." COLO. CONST. art. VI, § 21. "The Supreme Court shall have the power to proscribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and make rules of practice and procedure for the Court of Justice . . . ." KY. CONST. § 116. "The Supreme Court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state." MICH. CONST. art. VI, § 5. "The [supreme] court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law." W. VA. CONST. art. VIII, § 3.

116. *See* Ammerman v. Hubbard Broadcasting, Inc., 551 P.2d 1354, 1359 (N.M. 1976)(separation of powers basis for exclusive rule-making function of supreme court), *cert. denied*, 436 U.S. 906 (1978).

117. *Compare* Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234, 241-45 (1951)(criticizing exclusivity of rule-making in New Jersey) *with* Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 28-29 (1952)(nonreviewable rule-making power in supreme court important advance in recognizing court's role).

118. *See* Winberry v. Salisbury, 74 A.2d 406, 410 (N.J.)(supreme court's rule-making power not subject to overriding legislation but confined to practice, procedure and administration), *cert. denied*, 340 U.S. 877 (1950); *see also* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 29 (1958)(accepting court obligated to make rules but rejecting rule-making isolated in supreme court). *But see* Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 33 (1952)(rule-making made judicial by New Jersey's Constitution, not by legislative delegation).

119. *See* Winberry v. Salisbury, 74 A.2d 406, 408-11 (N.J.)(examining history and meaning of "subject to law"), *cert. denied*, 340 U.S. 877 (1950); *see also* N.J. CONST. art. VI, § 2, ¶ 3. Prior drafts to the final version of the contested constitutional phrase contained the identical language but positioned the controversial phrase differently. *See* Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234, 241-45 (1951)(relating history of constitutional convention and proposed judicial article). Associate Justice Arthur Vanderbilt, who would later become chief justice and the author of the majority's decision, attempted to persuade the Committee on the Judiciary to delete the phrase "subject to law" to ensure unfettered rule-making power in the

1947 New Jersey Constitution stated: "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts . . . ."[120] Though the history of the article's formulation indicated the troubled phrase meant "subject to the overriding power of the Legislature with respect to practice and procedures . . .,"[121] the *Winberry* court interpreted "subject to law" to mean subject to substantive law alone.[122]

In essence, the New Jersey Supreme Court found procedural rule-making to be an integral part of the operation of the courts that could not be altered by the legislature.[123] The *Winberry* court evidently assumed that the legislature could be safely excluded from the procedural domain without the court encroaching upon the legislature's right to proclaim substantive rights and duties.[124] Notwithstanding the criticisms of this position,[125] states adopting

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supreme court. *See* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 24-25 (1958)(judiciary committee persuaded to alter "subject to law" language for fear of legislative reversal). In the chief justice's opinion for the court, no mention is made of the convention's history, nor recognition of his own letter before the convention's judiciary committee that the phrase "subject to law" meant the rule-making power of the supreme court was made subject to legislative control. *See id.* at 25-26.

120. N.J. CONST. art. VI, § 2, ¶ 3.

121. Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234, 242 (1951)(citing New Jersey Constitutional Convention of 1947, *Report of the Committee on the Judiciary* 8 (Aug. 26, 1947)). The committee further clarified what it intended the provision to mean by stating, "[r]esponsibility for administration, practice and procedure in all the courts of the State is vested in the Supreme Court but the Legislature may revise or repeal the rules of practice and procedure, or initiate new provisions on the subject . . . ." *Winberry*, 74 A.2d at 416. After passage in the committee, the vice-chairman of the judiciary committee presented the approved version of the article to the convention floor:

> You will note that the Supreme Court is given comprehensive power to adopt rules of practice and procedure for all courts in the State, a power analogous to that possessed now by the United States Supreme Court. However, the Legislature would have power under the Committee Proposal to alter those rules of practice, analogous to the power now possessed by the Congress of the United States.

Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234, 243 (1951)(citing I N.J. CONSTITUTIONAL CONVENTION OF 1947, CONVENTION PROCEEDINGS 146-47).

122. *Winberry*, 74 A.2d at 410 ("subject to law" can only mean subject to substantive law as distinguished from practice and pleading).

123. *See id.* at 409 (rule-making essential to operation of integrated judicial system).

124. *See id.* at 411 (grant of complete power to judiciary to make rules necessarily excludes concepts of legislative override). Commenting on the Judiciary Commission's report at the Constitutional Convention, the *Winberry* court noted when the supreme court is given complete power to make rules in administration, pleading and practice, "complete power and responsibility in the judiciary are concepts quite inconsistent with the notions of overriding legislation." *Id.*; *see also* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits*

the New Jersey view have realized the benefits of a centralized and streamlined court system.[126] Courts in these jurisdictions are able to respond immediately and with flexibility to current problems, as opposed to legislative interventions which tend to be rigid and unresponsive to change.[127]

The *Winberry* court did not base its decision of exclusive nonreviewable rule-making on the inherent powers of the court to promulgate rules.[128] Rather, the holding was based on the state constitution and the separation of

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of Separation of Powers, 38 OKLA. L. REV. 447, 453 (1985)(*Winberry* adopts Dean Pound's theory that courts have more expertise on court procedure and should not allow legislature to tinker with resulting product).

125. *See* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 453-55 (1985)(summarizing and criticizing Chief Justice Vanderbilt's theory that rule-making can safely be entrusted to courts without fear that court will invade legislature's domain of substantive law). Vanderbilt's proposition elicits the greatest criticism of unreviewable court rule-making power: the court will expand its own authority at the expense of the legislature when it creates procedural rules by encroaching on or making substantive law. *See id.* at 454-55, 461-62. This is not to say the court will usurp legislative power or that judiciary will become a tyrant. *Id.* at 461-462. The encroachment on the legislature's domain to create substantive rights occurs in minute steps. *Id.* Subsequent cases from New Jersey illustrate this point. *See* State v. Leonardis, 375 A.2d 607, 613 (N.J. 1977)(separation of powers should not prevent supreme court from adopting rules which have some effect on executive and legislative functions); Suchit v. Baxt, 423 A.2d 670, 680 (N.J. Super. 1980)(supreme court rule can be both procedural in determining how a judgment is obtained and substantive when dealing with evidence affecting outcome of judgment). In rejecting the judicial-legislative rule-making approach, New Jersey utilizes a sole outcome test. *Id.* The distinguishing element in classifying whether a rule is substantive or procedural is determined by inquiring whether the rule is the "sole outcome" of the proceedings by itself or if it is but "one step in the ladder to final determination and can effectively aid a court function." If the rule is the "sole outcome" of the controversy, the rule is substantive. If the rule is only part of the process of final disposition of a controversy, the rule is procedural. *Id.*

126. Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 36 (1958). *But see* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 455-61 (1985)(abuse of exclusive rule-making power has been demonstrated in usurpation of power to define primary substantive rights, rules modifying substantive rights, and rules affecting substantive rights collateral to cause of action).

127. *See id.* at 453 (familiarity with court procedures allow judiciary to produce better rules and impervious to political pressures that distort legislative judgment); Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of* Winberry v. Salisbury, 65 HARV. L. REV. 234, 248 (1951)(court's rule-making power not exhausted by first promulgation of rules but allows further revision); Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 38 (1958)(legislative intervention frustrates judicial rule-making while court management of internal procedures allows rapid self-revision).

128. Winberry v. Salisbury, 74 A.2d 406, 409-10 (N.J.)(exclusive nonreviewable rule-making power of supreme court found on construing N.J. CONST. art. VI, § 2, ¶ 3), *cert. denied*, 340 U.S. 877 (1950).

governmental powers.[129] One state, however, has used the inherent power rationale to reach the same result.[130]

B. *Inherent Power as a Basis of Rule-Making*

All courts in an independent court system have the inherent power to declare legislative enactments invalid that transgress the boundary separating judicial from legislative power[131] or that constitute a "palpable encroachment upon the independence" of the judiciary.[132] Although inherent power is authority possessed without being explicitly derived from another source of authority,[133] actions taken by a court based on this doctrine are necessarily dependent on the constitution creating the court charging it with the efficient administration of justice.[134] Inherent powers of a court are

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129. *Id.* ("subject to law" in N.J. CONST. art. VI, § 2, ¶ 3 cannot mean subject to legislation enabling legislature to override supreme court's constitutional duty to make rules). The court further supported its rationale in explaining that the intent of the people in ratifying the new constitution was to establish an integrated judicial system which necessitated centralization of rule-making power. *Id.* at 410.

130. *See* Jennings v. State, 633 S.W.2d 373, 374 (Ark.)(rule enabling act recognizes and harmonizes with court's inherent power to promulgate rules of criminal procedure), *cert. denied*, 459 U.S. 862 (1982).

131. *See* McGrain v. Daugherty, 273 U.S. 135, 173-74 (1927)(each branch of government possesses not only powers expressly granted by constitutional authority but also auxiliary powers necessary to make express power effective); United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1872)(Congress' withdrawal of supreme court jurisdiction to hear writ of habeas corpus and mandate to make impotent presidential pardon cross boundary of separation of powers rendering action void); Mays v. Fifth Court of Appeals, 31 Tex. Sup. Ct. J. 533, 534 (June 22, 1988)(Spears, J., concurring)(to adhere to contrary view would allow legislative power to make judiciary inoperative or subordinate branch of government).

132. Houston v. Williams, 13 Cal. 24, 25 (1859). This decision states the basic underlying rationale for judicial inherent power: control over the judiciary by the legislature impeding the judicial constitutional mandate to administer justice is intolerable. *Id.* The idea that the legislature has power to dictate to the courts how it will make its decisions or the mode and manner which the judiciary is to discharge its official functions does not exist and cannot be sanctioned by any court which has respect for its own independence and dignity. *Id.*; *see also* Burton v. Mayer, 118 S.W.2d 547, 549 (Ky. Ct. App. 1938)(court refused to be bound by statute denying courts right to issue decision in case already adjudicated where delay renders judgment futile).

133. *See* Eichelburger v. Eichelburger, 582 S.W.2d 395, 398-99 (Tex. 1979)(inherent power not derived from constitutional provision or legislative grant of power but from fact that court created and empowered with specific responsibilities and duties). The definition of inherent power from Black's Law Dictionary states: "[a]n authority possessed without its being derived from another. A right, ability, or faculty of doing a thing, without receiving that right, ability, or faculty from another." BLACK'S LAW DICTIONARY 703 (5th ed. 1979).

134. *See* Spitzer, *Court Rulemaking in Washington State*, 6 U. PUGET SOUND L. REV. 31, 52 (1982)(implicit, implied or inherent power dependent upon explicit constitutional power by definition). Spitzer states that "implicit" and "implied" powers are both derived:

> from the Latin *implicare*, to enfold, entwine or envelope, such that whatever concept is "enfolded" is dependent upon the concept into which it is folded. "Inherent" comes from

those "which it may call upon to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity."[135]

The use of the judiciary's inherent power is limited by definition[136] to compel specific action or invalidate external attempts to dictate how judges should make their decisions.[137] In Texas, inherent power has been utilized to compel payment for process servers from Commissioner's Court,[138] compel the salaries of essential judicial employees,[139] define standards for the regulation of the practice of law,[140] correct judicial entries in its own min-

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haerere, to cling or stick to; hence an inherent concept is one dependent for its existence upon the concept onto which it clings.

Id. at n.117; *see also* McGrain v. Daugherty, 273 U.S. 135, 173-74 (1927)(supreme court upholding congressional use of subpoena and contempt powers necessary to make express constitutional powers effective); Watkins v. United States, 354 U.S. 178, 187 (1957)(auxiliary powers limited to extent necessary to carry out legislature's function). The *Watkins* court further commented on Congress' inherent power to conduct investigations in the legislative process stating, "[n]o inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress." *Watkins*, 354 U.S. at 187.

135. *Eichelburger*, 582 S.W.2d at 398; *see also* Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial*, 72 GEO. L.J. 73, 75 (1983)(inherent power of courts speaks to questions not specifically authorized by legislative enactment necessary for judiciary's accomplishment of constitutional mandate). Orders by courts based on inherent power are calculated to efficiently adjudicate controversies and serve the public interest. *Id.*

136. *See McGrain*, 273 U.S. at 173-74 (though each branch of government has explicit and auxiliary powers, auxiliary powers limited to make express power effective). The U. S. Supreme Court would later narrow the use of auxiliary powers by requiring their use to be limited to the extent necessary to carry out that branch's function. *See Watkins*, 354 U.S. at 187 (inherent investigatory power must be in furtherance of legitimate function of Congress).

137. *See* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 32 (1958)(statutes that violate minimum functional integrity of courts clearly offend constitutional scheme and will be held unconstitutional based on separation of powers).

138. *See* Vondy v. Comm'r's Court of Uvalde County, 620 S.W.2d 104, 109-10 (Tex. 1981)(court has inherent power to compel payment of county constables serving process to allow proper function of state judicial system).

139. *See* Mays v. Fifth Court of Appeals, 31 Tex. Sup. Ct. J. 533, 534 (June 22, 1988)(Spears, J., concurring)(court has inherent power absent statutory authority to compel expenditure of public funds for essential court personnel so court may fulfill constitutional function); District Judges of 188th Judicial Dist. v. County Judge, 657 S.W.2d 908, 909-10 (Tex. App.—Texarkana 1983, writ ref'd n.r.e.)(courts have inherent power to compel legislature to allocate funds for judicial personnel and facilities necessary to perform constitutional functions); *Vondy*, 620 S.W.2d at 109 (district court has inherent power to appoint probation personnel and set compensation if necessary for effective administration of justice); TEX. GOV'T CODE ANN. § 52.051 (Vernon 1988)(official district court reporter paid salary set by judge of that court ministerially approved by commissioner's court of each county).

140. *See, e.g.*, Unauthorized Practice Comm. v. Cortez, 692 S.W.2d 47, 50-51 (Tex. 1985)(supreme court has inherent power to determine what constitutes unauthorized practice

utes,[141] control its judgments,[142] compel witnesses to appear and testify,[143] and to hold individuals in contempt of court.[144] In each of the above examples, the court's use of its inherent power is necessarily grounded in an essential judicial function that enables it to fulfill its constitutional duty of administering justice.[145]

In the rule-making context, each court also has the inherent power to promulgate rules necessary for the efficient administration of justice.[146] The Texas Supreme Court could employ this rationale when promulgating rules

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of law); State Bar of Texas v. Heard, 603 S.W.2d 829, 831 (Tex. 1980)(supreme court promulgated State Bar Act as exercise of inherent power to regulate practice of law); Scott v. State, 86 Tex. 321, 323, 24 S.W. 789, 790 (1894)(inherent power to disbar attorney); Burns v. State, 76 S.W.2d 172, 174 (Tex. Civ. App.—Fort Worth 1934, no writ)(legislative action yields to supreme court's inherent power to regulate attorneys pursuant to TEX. CONST. art. II, § 1 for hindering essential judicial function), *rev'd on other grounds*, 129 Tex. 303, 103 S.W.2d 960 (Tex. Comm'n App. 1937, op. adopted).

141. *See* Nevitt v. Wilson, 116 Tex. 29, 33, 285 S.W. 1079, 1082 (1926)(inherent power to correct judicial entries in court minutes).

142. *See* Coleman v. Zapp, 105 Tex. 491, 494, 151 S.W. 1040, 1041 (1912)(inherent power to correct mistakes in court record by order nunc pro tunc independent of statute or motion of party); Cohen v. Moore, 101 Tex. 45, 46-47, 104 S.W. 1053, 1054 (1907)(court has plenary power to set aside own judgment within court's same term).

143. *See* Burttschell v. Sheppard, 123 Tex. 113, 116, 69 S.W.2d 402, 403 (1934)(inherent power to summon witness for administration of justice); Cleveland v. State, 508 S.W.2d 829, 831 (Tex. Crim. App.—Fort Worth 1974, no pet.)(court may use inherent power to hold witness in contempt for failure to testify).

144. *See Ex Parte* Barnette, 600 S.W.2d 252, 254 (Tex. 1980)(inherent power to punish party refusing to obey court order); *Ex Parte* Brown, 543 S.W.2d 82, 86 (Tex. 1976)(inherent power to hold party in contempt for refusing to obey court order); *Ex Parte* Myrick, 474 S.W.2d 767, 769 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ)(inherent power to enforce judgment by contempt).

145. *See* Mays v. Fifth Court of Appeals, 31 Tex. Sup. Ct. J. 533, 534 (June 22, 1988)(Spears, J., concurring)(courts' inherent power preserves judicial branch of government, preserves citizens freedom and security and provides check on abuse of authority by other branches of government). The *Mays* court stated, "[i]f the courts are to provide that check, they cannot be subservient to the other branches of government but must ferociously shield their ability to judge independently and fairly. This is the essence of our very existence." *Id.*; *see also Eichelburger*, 582 S.W.2d at 398-99 (inherent power to enable courts to effectively perform judicial functions and to protect dignity, independence and integrity); *cf.* Watkins v. United States, 354 U.S. 178, 187 (1957)(auxiliary power of Congress must be related to and further express legitimate tasks). The mandate of Texas courts to further its constitutional duty of administering justice is derived from the Texas Constitution itself. *See* TEX. CONST. art. V, § 31(a)(b) (supreme court responsible for efficient administration of judicial branch and shall promulgate rules of procedure necessary for "efficient and uniform administration of justice").

146. *See* State v. Clemente, 353 A.2d 723, 731 (Conn. 1974)(enforcement of discovery inherent power of court and beyond regulation by legislature); Jennings v. State, 633 S.W.2d 373, 374 (Ark.)(court has inherent power to promulgate rules of criminal procedure), *cert. denied*, 459 U.S. 862 (1982).

of procedure so long as the rule would be essential to the continuing effective administration of court business.[147] Closely allied to this end is the use of inherent power to strike down a statute that encroaches on an exclusively judicial function.[148] This confrontation raises the issue of separation of powers.[149] The Connecticut Supreme Court relied upon both the court's inherent power and the doctrine of separation of powers in holding its legislature had intruded on the exclusive rule-making function of the judiciary.[150]

In *State v. Clemente*,[151] the defendant relied on a statute that would compel the prosecution to produce oral or written statements in possession of the prosecution relating to the subject matter the witness testified to on direct examination.[152] The Connecticut Supreme Court ruled the legislative statute that compelled discovery was in violation of the separation of powers doctrine.[153] By this ruling, the Connecticut Supreme Court granted itself the power to be the final arbiter of court rules.[154] The court initially examined the legislative statute by a two-step test.[155] First, if the rule could be established as procedural, it would lie within the exclusive domain of the judiciary.[156] If the rule was substantive, it would lie in the proper domain of the legislature. Unable to classify the statute in issue as exclusively procedural or substantive, the court moved to a second test by examining the

147. *See* Vondy v. Comm'r's Court of Uvalde County, 620 S.W.2d 104, 109 (Tex. 1981)(inherent power to protect proper administration of judiciary); *Eichelburger*, 582 S.W.2d at 398 (inherent power not derived from legislative or constitutional grant but by fact court constitutionally created).

148. *See Clemente*, 353 A.2d at 731 (legislative statute on discovery unconstitutionally intruded on judicial power under court's exclusive control).

149. *Id.* (separation of powers provides court with exclusive rule-making authority which legislature cannot invalidate); State v. Smith, 527 P.2d 674, 677-78 (Wash. 1974)(procedural rule-making inherent power of supreme court necessary for smooth judicial process and cannot be abridged or modified by legislature).

150. *See Clemente*, 353 A.2d at 728-29, 731 (rule-making within court's exclusive domain which legislature cannot enter by virtue of separation of powers and which judiciary can exclude legislature by inherent power for encroaching on judiciary's exclusive subject-matter).

151. 353 A.2d 723 (Conn. 1974).

152. *See Clemente*, 353 A.2d at 731-32.

153. *See id.* at 731 (statute would infringe upon superior court's discretion to control discovery within court's inherent powers). In declaring the legislative statute unconstitutional, the court perceived a gradual invasion of the legislature on the judiciary's exclusive domain eventually rendering the latter little more than a judicial staff of the legislature. *Id.*

154. *See* Note, *Court Rule-Making in Connecticut Revisited — Three Recent Decisions*: State v. King, Steadwell v. Warden, *and* State v. Canady, 16 CONN. L. REV. 121, 127 (1983)(potential effect of *Clemente* court's decision to utilize exclusive rule-making authority without legislative review whatsoever).

155. *See* State v. Clemente, 353 A.2d 723, 727-28 (Conn. 1974)(initial two-step substantive/procedural test to define effect of statute on court proceedings if statute fits within one of categories).

156. *Id.*

practice in issue and the developing doctrine of separation of powers.[157] After determining that the statute invaded the judiciary's power to utilize its discretion in controlling discovery, it was struck as an unconstitutional encroachment of what is the judiciary's exclusive domain.[158] While the court's decision was criticized on other grounds,[159] the unanswered issue remains whether absolute control over rule-making by the judiciary undermines the separation of powers doctrine by prohibiting review by another branch of government.[160]

IV. ARGUMENTS SUPPORTING LEGISLATIVE REVIEW OF COURT RULES

A. *Institutional Incompetence?*

It has been argued that nonreviewable judicial rule-making, absent a constitutional provision, must demonstrate the reason the legislature should be excluded rather than share power with the court.[161] Despite the fact that

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157. *Id.* at 728. The second prong of the test was enunciated as:

> While necessity and right of each department [of the government] to use the means requisite to its unfettered operation is clear, it is equally clear that when one department not only uses the means appropriate to another, but uses them for the purpose of executing the functions of that other department, it is not in the exercise of its granted power . . . [t]he test of constitutionality of a statute which imposed additional duties on a judge of the Superior Court was whether the "duties interfere with the orderly performance by the Superior Court of its judicial functions" [citations omitted].

Id.

158. *Id.* at 731.

159. *See id.* at 735 (Cotter, J., dissenting), 741 (Bogdanski, J., dissenting). Justice Cotter criticized the majority's conclusion that discovery was an exclusive judicial function based on the fact that discovery was not an inherent common law power of the court. *See id.* at 736-37.

160. *See* Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 27-41 (1975)(criticized holding as substantial departure from meaning of separation of powers and invalid extension of Connecticut case law); Note, *Court Rule-Making in Connecticut Revisited — Three Recent Decisions*: State v. King, Steadwell v. Warden, *and* State v. Canady, 16 CONN. L. REV. 121, 122, 138 (1983)(despite Connecticut Supreme Court's failure to adequately address scope of courts rule-making authority, legislature cannot participate in rule-making enactment and review). The essential criticism of the majority's opinion in *State v. Clemente* is that when rule-making is an inherent power exclusive to the judiciary, independent review of court promulgated rules is an impossibility. This is because implicit in rule-making enacted pursuant to inherent power is the presumption of constitutional legitimacy. *See* Note, *Court Rule-Making in Connecticut Revisited — Three Recent Decisions*: State v. King, Steadwell v. Warden, *and* State v. Canady, 16 CONN. L. REV. 121, 138 (1983)(*Clemente* court offered no constitutional principles underlying limits to judicial rule-making raising presumption that court's acts are constitutional). Hence, the ultimate source on defining the limits of inherent power is not the constitution, but the court itself. *Id.*

161. *See* Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 35 (1975)(Connecticut supreme court rule excluding legislative participation or supervision must be defended by arguments of legislative incompetence not judicial competence). Professor Kay emphatically states his point in noting that [legislative] "incompetence

legislative rule-making ran afoul in the twentieth century amid the cry of legislative incompetence,[162] judicial independence to promulgate rules does not require legislative withdrawal to preserve the necessary balance of power between these two branches of government.[163] Since 1941, the Texas judiciary has regularly made swift and efficient adjustments to practical problems facing the court system, obviating legislative incompetence and lethargy without eradicating the legislature's role.[164] Should the Texas Supreme Court nevertheless find that exclusive rule-making power resides in the judiciary, it must justify why complete removal of such power from the legislature enhances judicial performance. Compelling reasons for this conclusion include the reforms legislatures have historically instigated as well as the need for continued examination of court-made rules to ensure the balance of powers in government.

Although some state courts believe that the legislature has no place in formulating rules of procedure, rule-making actually benefits from legislative input.[165] While judges exert their legal expertise on rule-making, daily contact with procedural rules may influence judges to pass rules which promote speed and administrative efficiency at the expense of rules which illuminate the merits of a controversy and protect the rights of litigants.[166] Addition-

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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." *Id.* The argument then is not whether judicial or legislative rules are preferable, but if complete withdrawal of the legislature from any role enhances the judicial function. *Id.* at 34; *see also* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 474 (1985)(legislative review of court rule-making essential to preservation of balance of powers).

162. *See* Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 34-35 (1975)(early twentieth century government placed rule-making in hands of legislators who were always well-meaning but also always inept).

163. *See id.* at 35-36 (rule-making with legislative participation benefits courts primary role by ensuring substantive right of litigants protected over judicial expediency); *see also* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 35 (1958)(judicial independence does not require immunity that would remove legislature from all power to adjust state courts to citizen needs).

164. *See* Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 10-12 (1978)(court rewrote all civil rules of procedure at first promulgation in 1941 and since has amended numerous times). There were 99 amendments to the Texas Rules of Procedure in the 1987 revision. *See Order of Supreme Court of Texas, Adopting and Amending Texas Civil Rules of Civil Procedure*, 50 TEX. B.J. 850, 850 (1987).

165. *See* Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 35 (1975)(rule-making benefits from legislative input as opposed to implication of incompetence by exclusive rule-making power in courts); Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 17-20 (1958)(legislative review prohibits judicial encroachment on substantive law).

166. *See* Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 35 (1975)(judges get overly attached to particular procedural system).

ally, familiarity with one method of procedure may induce resistance to change and distrust of new proposals.[167] While legislative attempts at rule-making may be perceived as interfering with a judicial function,[168] suggestions for change can encourage judicial action.[169] For example, it was only after the Texas Legislature passed chapter 9 of the Civil Practice and Remedies Code that the Texas Supreme Court rewrote Rule of Civil Procedure 13.[170] Initial judicial complacency in the area of frivolous pleadings motivated the legislature to enact its own solution to the perceived problem and, in turn, spurred judicial action in rewriting Rule of Civil Procedure 13.[171]

B. *The Substantive/Procedural Distinction*

If it is decided that the judiciary possesses authority over rule-making as

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167. *Id.* at 36 (while judges competent to initiate procedural change danger lies in judiciary's lack of will to initiate).

168. *See* Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 113-14 (1921)(legislative action in rule-making often mars when it would mend). Justice Cardozo's stance of legislative involvement in rule-making is plain from his comment: "The Legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advise as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend." *Id.*

169. *Compare* TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001-.014 (Vern. Supp. 1988)(Texas Legislature's frivolous pleadings and claims statute) *with* TEX. R. CIV. P. 13 (Texas Supreme Court's frivolous pleading rule repealing legislature's frivolous pleading statute). Though the time sequence is not conclusive in itself, the Supreme Court Advisory Committee's meeting of June 26-27, 1987 recommending passage of Rule 13, shows an attempt by the Texas Supreme Court to regain rule-making power from the Texas Legislature. *See* Supreme Court Advisory Committee, Transcript of Meeting of June 26-27, 1987, Vol. II. 110-12, 211-12 (available at Texas State Law Library, Austin, Texas). Chairman Soules stated: "We've got to do something to supplant that statute or concede now that we've let the legislature get in the rule-making business." *Id.* at 110. Mr. Spivy interjected: "[I]f what you were addressing . . . was that the attempt by the legislature is not just a use of the court's function, but at the same time it is an attempt to use the discretion of the court's function. And I think we ought to be a little bit careful not just to react on that basis, number one. Number two, not to make it appear that we're reacting on that basis." *Id.* at 111-12. Chairman Soules later remarked: "This legislature is the first legislature that has ever intruded on the Supreme Court's rule-making power, and there are a lot of reasons for that. And the next time if we [the Supreme Court Advisory Committee] get started on the right foot, maybe it won't happen." *Id.* at 211-12.

170. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001 - 9.014 (Vernon Supp. 1988)(frivolous pleadings enactment by legislature); Supreme Court of Texas Advisory Committee, Transcript of Meeting of June 26-27, 1987, Vol. II, at 110-12 (available at Texas State Law Library, Austin, Texas)(passage of Rule 13 court reaction to legislative enactment of chapter 9, Civil Practice and Remedies Code).

171. *See* Supreme Court of Texas Advisory Committee, Transcript of Meetings of June 26-27, 1987, Vol. II, at 110-12 (available at Texas State Law Library, Austin, Texas)(promulgation of rule 13 in reaction to legislature's passage of frivolous pleadings statute only days earlier).

an outgrowth of the separation of powers principle,[172] it is natural to protect that control over rule-making by guaranteeing the judiciary final power over its own procedure.[173] Examination of this thesis reveals that the real issue is the balance, not separation, of powers among the three divisions of government.[174] Whether a court arrives at the position of independent rule-making power by constitutional interpretation as in *Winberry*,[175] or as a

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172. *See* Pound, *The Rulemaking Power of the Courts*, 12 A.B.A. J. 599, 601 (1926)(from either historical or analytical perspective rule-making belongs to courts not legislature); Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 32-33 (1952)(New Jersey correctly brought to fruition modern system of justice by implanting rule-making power in supreme court); Wigmore, *All Legislative Rules for Judicial Procedure are Void Constitutionally*, 23 ILL. L. REV. 276, 276 (1928)(legislature exceeds constitutional power when it proclaims rules of procedure which judiciary must implement).

173. *See* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 471 (1985)(supporters of judicial rule-making suggest nonreviewability of court made rules guarantees judicial independence); Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 32-33 (1952)(remedy for legislative tinkering in rule-making is to vest full power over rule-making in judiciary).

174. *See* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 471 (1985)(legislative review of court rules does not damage heart of judicial function adjudicating controversies and enforcing orders). Gallant's view challenges Dean Wigmore's theory that legislative action in the rule-making sphere is constitutionally void if an absolutist and rigid approach to the separation of powers doctrine is adhered to. *See id. But see* Wigmore, *All Legislative Rules for Judicial Procedure are Void Constitutionally*, 23 ILL. L. REV. 276, 279 (1928)(procedural rule-making properly within judiciary's domain while procedural rules enacted by legislature void). Gallant maintains that only when the heart of the judicial function is impaired is legislative review of court rules void. *See* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 471 (1985)(legislative rules do not impair court's role unless courts ability to adjudicate controversies and enforce own orders hindered); Gibbons, *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 SETON HALL L. REV. 435, 436 (dispersal of decisional responsibility ensures protection against "tyrannical exercise of power" when second independent branch concurs); Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 41 (1975)(real value behind separation of powers doctrine are checks and balances between branches of government). The real threat to the judiciary is the exercise by the executive or legislative branch that removes judicial power to review controversies or discourages its operation. *See* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 471 (1985)(real threat to judiciary exists outside legislative review of procedural rules). Historical examples of this threat are not manifested in legislative revision or review of procedural rules, but from attacks on fundamental judicial power. *See* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 29-33 (1958)(exclusive domain of judicial power are matters essential to its integrity and dignity); *see also* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV.447, 472 (1985)(examples include withdrawal of habeas corpus jurisdiction from U.S. Supreme Court, explosion of particular litigation overwhelming court system, failure to adequately fund court system, and attempts to divest court of power to examine social or economic legislation).

175. Winberry v. Salisbury, 74 A.2d 406, 411 (N.J.)(interpretation of New Jersey consti-

matter of a court's inherent power as in *Clemente*,[176] the effect of this position weakens the balance of powers by precluding review of those rules by an independent branch of government.[177]

The problem in distinguishing between substantive and procedural law and using these definitions to allocate the proper scope of rule-making authority stems from the inherent imprecision of the boundary that separates the two concepts.[178] Former Chief Justice Terrell of the Florida Supreme Court illustrated this difficulty when he wrote:

> The limits of procedural and substantive law have not been defined and no two could agree where one leaves off and the other begins. There is also between the two a hiatus or twilight zone that has been constantly entered by the courts and the Legislatures . . . .
>
> Another element that lends confusion to the situation is that the current of substantive law and procedural law often coalesce. What is re-

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tution established rule-making power in supreme court not subject to legislative veto but confined to administration, practice and procedure), *cert. denied,* 340 U.S. 877 (1950).

176. State v. Clemente, 353 A.2d 723, 731 (Conn. 1974)(exclusive judicial power over procedure results from court's inherent power which legislature cannot intrude into).

177. *See* Spitzer, *Court Rulemaking in Washington State,* 6 U. PUGET SOUND L. REV. 31, 60 (1982)(courts should no more be immune from checks and balances than any other branch); *see also* Note, *Court Rule-Making in Connecticut Revisited — Three Recent Decisions*: State v. King, Steadwell v. Warden, *and* State v. Canady, 16 CONN. L. REV. 121, 127 (1983)(absolute judicial authority over rule-making undermines separation of powers doctrine by precluding review by independent branch). The separation of powers doctrine is maintained by two dependent theories: (1) by an absolute distribution of power between three coequal branches; (2) distribution of power with review granted to other branches to protect against an excessive accumulation of power in one branch that decreases actual power in the other two. *Id.* at 128.

178. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)(procedural definition). The *Sibbach* court defined procedure as "[t]he judicial process for enforcing rights and duties recognized by substantive law and justly administering remedy and redress for disregard or infraction of them." *Id.* Unfortunately, this definition is only helpful if substance and procedure were two "mutually exclusive categories with easily ascertainable contents." *Id.* at 17 (Frankfurter J., dissenting). Brooks v. Texas Employers Ins. Ass'n, 358 S.W.2d 412, 414 (Tex. Civ. App.—Houston [1st Dist.] 1962, writ ref'd n.r.e.)(procedure so broad that it is misunderstood, difficult to define and seldom used as term of art); Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?,* 26 A.B.A. J. 482, 483 (1940)(procedural law vaguely defined). Green stated:

> Procedural law can only be vaguely defined; it is adjective law, it is auxiliary to the substantive law and provides the method of enforcing substantive rights; a given rule may be treated as dealing with a substantive right in one case and with procedure in another, because of the difference between the ultimate questions in the two cases. The answer to the question, "What is procedure?" depends upon the answer to another question, "Why do you want to know?"

Id.; *see also* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision,* 107 U. PA. L. REV. 1, 14-15 (1958)(rational separation between substance and procedure near impossible).

> garded as substantive law today may become procedural law tomorrow and vice versa. Conflicts on this point have given rise to powers that are said to be not strictly legislative or judicial and when this is the case, the power of the Legislature is dominant.[179]

Despite the inherent difficulty in definitively delineating what properly belongs within the domain of rule-making, proponents that advocate nonreviewable judicial rule-making[180] have assured their critics that the judiciary may be entrusted not to cross the line separating substantive and procedural law.[181] Notwithstanding this assertion, the separation of powers is not

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179. *In re* Florida State Bar Ass'n for Promulgation of New Florida Rules of Civil Procedure, 199 So. 57, 59 (Fla. 1940). Texas Courts have been satisfied with the definitions of procedural and substantive law found in *Corpus Juris Secundum*. *See Brooks*, 358 S.W.2d at 414 (defining procedure and substantive law). Those definitions state:

> Procedure is the machinery for carrying on the suit, and it includes pleading, process, evidence, and practice, whether in the trial court or the appellate court, or in the processes by which causes are carried to appellate courts for review, or in laying the foundation for such review; in fact, procedure includes every step which may be taken from the beginning to the end of a case.

Id. (quoting 72 C.J.S. *Practice* (1951)). Substantive law "includes those rules and principles which fix and declare primary rights of individuals as respects their persons and their property, and quite generally fix the type of remedy available in case of invasion of those rights. . . ." *Id.* at 414-15 (quoting 52 C.J.S. *Law* (1947)); *see also* Lubbock Indep. School Dist. v. Bradley, 579 S.W.2d 78, 80 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.)(substantive law includes rules and principles that fix and declare rights of individuals respecting their person and property rights and remedy for invasion); Cass v. McFarland, 564 S.W.2d 107, 110 (Tex. Civ. App.—El Paso, 1978, no writ)(substantive law is positive law of duties and rights which may rise to cause of action); Exxon Corp. v. Brecheen, 519 S.W.2d 170, 183 (Tex. Civ. App.—Houston [1st Dist.])(procedure is machinery for carrying on suit which includes process, evidence, pleadings and practice), *rev'd on other grounds*, 526 S.W.2d 519 (Tex. 1975).

180. *See* State v. Clemente, 353 A.2d 723, 731 (Conn. 1974)(statute unconstitutional for infringing on courts inherent power to control procedure); Winberry v. Salisbury, 74 A.2d 406, 414 (N.J.)(supreme court's rule-making power not subject to legislative override but confined to administration, procedure and practice), *cert. denied*, 340 U.S. 877 (1950); Ammerman v. Hubbard Broadcasting, Inc., 551 P.2d 1354, 1359 (N.M. 1976)(legislature lacks constitutional power to prescribe rules of evidence and procedure within exclusive domain of judiciary), *cert. denied*, 436 U.S. 906 (1978); State *ex rel.* Anaya v. McBride, 539 P.2d 1006, 1008 (N.M. 1975)(statutes purporting to regulate procedure and practice for judiciary not binding because exclusive constitutional power for rule-making vested in supreme court); Pound, *The Rulemaking Power of the Courts*, 12 A.B.A. J. 599, 601 (1926)(procedure for courts belongs within sphere of judiciary, not legislature); Wigmore, *All Legislative Rules for Judicial Procedure are Void Constitutionally*, 23 ILL. L. REV. 276, 276 (1928)(legislature exceeds constitutional authority in any attempt to proscribe rules that control judicial duties).

181. *See* Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 46 (1952)(threatened abuses by judiciary in rule-making that infringe on substantive rights "too small to be taken seriously"). *But see* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV.447, 450 (1985)(Dean Pound's assertion of court abuse in rule-making remains predominantly untested).

maintained solely by the distribution of power among the three branches.[182] Ensuring legislative review of judicial court rule-making power provides an alternative avenue of redress in a particular dispute as well as ensuring that the judiciary remains within its rule-making authority.[183]

Historically, numerous examples have been noted where nonreviewable rule-making power has been exercised to usurp power to define substantive rights,[184] modify substantive rights,[185] and effect substantive rights collat-

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182. *See* Note, *Court Rule-Making in Connecticut Revisited — Three Recent Decisions*: State v. King, Steadwell v. Warden, *and* State v. Canady, 16 CONN. L. REV. 121, 128 (1983)(separation of powers assured by absolute distribution of powers among three branches of government and by distribution of review to guard against excessive accumulation of power in one branch). More is needed than a demarcation on paper of the limits the United States (or state) Constitution extends to each branch. *See* THE FEDERALIST, No. 48, at 343 (J. Madison) (W. Dunne ed. 1901)(mere demarcation on parchment not sufficient to guard against encroachments which may lead to concentration of governmental power in same branch).

183. *See* Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints,* 15 N.M.L. REV. 407, 463-64 (1985)(supreme court's constitutional grant of power to supervise lower courts is all it requires to prevent legislative encroachment on judiciary authority over procedure); Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers,* 38 OKLA. L. REV. 447, 480 (1985)(legislative review permits continuous reform of procedure by cautioning judiciary not to create substantive rights through rule-making); Note, *Court Rule-Making in Connecticut Revisited — Three Recent Decisions*: State v. King, Steadwell v. Warden, *and* State v. Canady, 16 CONN. L. REV. 121, 128 (1983)(legislative review of court rule-making power provides forum for redress and ensures judiciary remains within limits of rule-making power).

184. *See* Laudenberger v. Port Authority of Allegheny Co., 436 A.2d 147, 155 (Pa. 1981)(court rule upheld creating prejudgment interest in certain cases though defendant's substantive rights effected by increasing amount owed to plaintiff), *appeal dismissed,* 456 U.S. 940 (1982). The *Laudenberger* court supported its decision that the prejudgment interest was procedural by stating the rule was to encourage prompt settlement and reduce court dockets. *Id.* at 150-51. Further support was garnered by the fact that the law of damages was deemed procedural and concerns administration of rights acknowledged by substantive law. *Id.* at 155. Although the court recognized the rule may create a substantive right to interest in the plaintiff, refusal to make rules that eventually reverberate on substantive rights would cripple the constitutional authority of the court to make rules. Hence, the constitutional prohibition against promulgation of rules that abridge, modify or enlarge substantive rights could not be read too narrowly. *Id.*; *see also* Note, *Courts — Rules of Court — Prejudgment Interest Rule Upheld — Expanding Courts Rule-Making Power Beyond "Practice and Procedure,"* 27 RUTGERS L. REV. 345, 351-52 (1974)(*Laudenberger* plurality favors administrative efficiency in rule-making over strict adherence to substantive — procedural distinction). Although the issue of creating a substantive right in the plaintiff was not raised by the Texas Supreme Court in its 1985 ruling granting prejudgment interest, that criticism may be what prompted the Texas Legislature to change the time when prejudgment interest begins to accrue. *Compare* Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 553-54 (Tex. 1985)(plaintiff may recover prejudgment interest compounded daily on damages accrued by time of judgment as matter of law) *with* TEX. REV. CIV. STAT. ANN. art. 5069-1.05 § 6 (Vernon Supp. 1988)(prejudgment interest for wrongful death, property and personal injury damages accrues 180th day after defendant receives written notice of suit or on date suit filed, whichever occurs first and

eral to the cause of action brought.[186]

As an example of the second category, the North Dakota Supreme Court in *Arneson v. Olsen*[187] held that a statute limiting the doctrine of *res ipsa loquitur* in medical malpractice actions violated the procedural rule-making powers of the supreme court which included authority to promulgate rules of evidence.[188] Because *res ipsa loquitur* was found by the court to be a rule of evidence, the legislature had no authority to modify the doctrine.[189]

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ending day before judgment entered); *see also* State v. Leonardis, 375 A.2d 607, 614 (N.J. 1977)(pretrial intervention program created by court rule allowing certain defendants to avoid criminal trial by serving successful probation program upheld as constitutional). The *Leonardis* court concluded "absolute prohibition against rules which merely affect substantive rights or liabilities, however slight such effect may be, would seriously cripple the authority and concomitant responsibility which have been given to the Court by the Constitution." *Id.* This stance has been criticized for creating substantive rights in criminal defendants to evade a judgment against them and abridging the State's right to seek such a judgment. *See* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers,* 38 OKLA. L. REV.447, 456 (1985)(most important aspect of court program is substantive by relieving first offenders from criminal liability, not administrative in relieving crowded court dockets).

185. *See* Arneson v. Olsen, 270 N.W.2d 125, 132 (N.D. 1978)(statute restraining use of *res ipsa loquitur* in medical malpractice suits violated supreme court's rule-making power over procedure); State v. Edwards, 616 P.2d 620, 623 (Wash. 1980)(procedural rule upheld requiring mandatory release of criminal defendant if trial had not begun within 100 days without regard to evidence of defendant's guilt for administrative purposes); *see also* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers,* 38 OKLA. L. REV. 447, 459 (1985)(*Edwards* court legislated state's right to obtain criminal convictions in particular areas while simultaneously granting defendant right to freedom).

186. *See* Ammerman v. Hubbard Broadcasting, Inc., 551 P.2d 1354, 1357 (N.M. 1976)(legislature's creation of evidentiary privilege allowing press to gather and broadcast news without divulging sources unconstitutional for violating supreme court's rule-making power of regulating procedure), *cert. denied,* 436 U.S. 906 (1978).

187. 270 N.W.2d 125 (N.D. 1978).

188. *Id.* at 132.

189. *Id.* The North Dakota constitution grants its supreme court rule-making power by declaring "[t]he supreme court shall have authority to promulgate rules of procedure, including appellate procedure, to be followed by all courts of this state . . . . " N.D. CONST. art. VI, § 3. Citing to case law from other states, the court reasoned it also had power over evidentiary matters which were within the scope of procedure. *See Arneson,* 270 N.W.2d at 131 (procedure includes evidence); *accord* People v. Aguindaldo, 39 P.2d 505, 506 (Cal. 1934)(generally defined, procedure includes pleading, evidence and practice); Hunt v. Rosenbaum Grain Corp., 189 N.E. 907, 911 (Ill. 1934)(procedure includes pleading, practice and evidence); Dyer v. Keefe, 198 A.2d 159, 161 (R.I. 1964)(procedure includes evidence, pleading and practice). While *res ipsa loquitur* may be characterized as a rule of evidence, it does not involve admitting evidence. *See* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers,* 38 OKLA. L. REV. 447, 457 (1985)(*res ipsa loquitur* not usual rule concerning admissibility of item into evidence). Rather, the doctrine concerns itself with a plaintiff's burden of proof and burden of coming forward with sufficient proof to make out a prima facie case for the jury. *Id.*

While the legislature's intent was to modify a substantive right by changing the definition of negligence in medical malpractice actions by increasing the plaintiff's burden of proof before recovery was possible,[190] the court perceived the legislature's action as an encroachment on its rule-making authority.[191] The court's action negated the North Dakota Legislature's attempt to decrease questionable medical malpractice claims in its response to the perceived medical liability cost crisis,[192] while increasing the availability of low cost medical and hospital services.[193] This example shows that legislative review of court rules is just as necessary as judicial review of a legislature's procedural enactments to maintain each branch's proper domain.[194] When

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190. *See Arneson*, 270 N.W.2d at 132 (legislative purpose of statute was to limit doctrine of *res ipsa loquitur* previously available in medical malpractice actions to establish necessary element of duty); N.D. CENT. CODE § 26-40.1-07 (1978)(repealed by S.L. 1983, chapter 82, section 154)(liability not found in medical malpractice causes of action unless expert medical testimony or admission of fault showing deviation from standard of care and causation of alleged death or injury); *see also* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV.447, 457 (1985)(statute attempted to change tort of medical malpractice from situation where negligence could be inferred from negative result to necessity of producing direct evidence of improper surgical procedure to reduce nonmeritorious claims and promote availability of low cost health care).

191. *See Arneson*, 270 N.W.2d at 132 (legislature's attempt to establish rules of joinder and admissibility of evidence unconstitutional in light of judiciary's exclusive control over evidence).

192. *See id.* at 130 (states reacted to "medical malpractice crisis" by statute); N.D. CENT. CODE § 26-40.1-01 (1978) (repealed by S.L. 1983, chapter 82, section 154)(statute's purposes included providing methods to eliminate expense involved in nonmeritorious medical malpractice claims in response to medical malpractice crisis).

193. *See* N.D. CENT. CODE § 26-40.1-01 (1978) (repealed by S.L. 1983, chapter 82, section 154)(statute was to assure availability of sufficient hospital and medical services to North Dakota citizens at reasonable costs by decreasing insurance premiums of medical providers and to attract and maintain qualified physicians to North Dakota so long as physician qualified).

194. *Compare Arneson*, 270 N.W.2d at 132 (legislative encroachment on court rule-making power constitutionally void) *and* Ammerman v. Hubbard Broadcasting, Inc., 551 P.2d 1354, 1357 (N.M. 1976)(statute unconstitutional for violation of supreme court's exclusive domain over rule-making), *cert. denied*, 436 U.S. 906 (1978); *with* State v. Leonardis, 375 A.2d 607, 614 (N.J. 1977)(absolute prohibition against court rules merely affecting substantive rights of litigants would disable supreme court's constitutional authority and responsibility over rule-making) *and* Laudenberger v. Port Authority of Allegheny County, 436 A.2d 147, 155 (Pa. 1981)(procedural rule's effect on substantive rights of parties does not mean rule inappropriate subject for supreme court rule-making), *appeal dismissed*, 456 U.S. 940 (1982). *See also* Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M.L. REV. 407, 463 (1985)(while supreme court can and must have ultimate responsibility over rule-making, can do so without resorting to claim of exclusive judicial power); Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 478-79 (1985)(substantive rights partially defined by procedures to enforce those rights show inexpediency of protecting particular area of rule-making nonreviewable by legislative activity); Kay, *The*

the judiciary acts to override the legislature's assertion of the public interest in changing a substantive right, the court itself acts in a manner unsupported by its constitutional edict to adjudicate the rights of litigants.[195]

V. THE TEXAS MODEL: SHARED RESPONSIBILITY

A. *Procedural Independence?*

The Texas model of rule-making sets forth the rights and duties of the judiciary and legislature in the rule-making process.[196] The Texas Constitution provides for the supreme court to initiate rule-making in areas of practice and procedure[197] in accordance with the Rule Making Act. The

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Rule-Making Authority and Separation of Powers in Connecticut, 8 CONN. L. REV. 1, 40 (1975)(ultimate responsibility for making law final effect of judicial rule-making must rest with legislature).

195. *See* N.D. CONST. art. VI, § 3 (supreme court has authority to promulgate rules of procedure binding on all courts of this state); N.D. CENTURY CODE § 27-02-10 (1974)(no court rule promulgated for pleading, procedure or practice may modify, enlarge or abridge substantive rights of any litigant in any manner); *see also* TEX. CONST. art. V, § 31(a)(b) (supreme court empowered to promulgate rules of civil procedure not inconsistent with state law necessary for efficient administration of justice); TEX. GOV'T CODE ANN. § 22.004(a) (Vernon 1988)(supreme court has full rule-making power over civil procedure and practice but shall not enlarge, abridge or modify substantive rights of any litigant).

196. *See* TEX. CONST. art. V, § 31 (supreme court shall promulgate rules of administration and civil procedure not inconsistent with laws of state necessary for efficient administration of justice); TEX. GOV'T CODE ANN. § 22.004(a),(b),(c) (Vernon 1988)(supreme court has full rule-making power over civil procedure and practice with rules remaining effective until disapproved by legislature).

197. *See* TEX. CONST. art. V, § 31(a) ("supreme court *shall* make rules of civil procedure not inconsistent with the laws of the state" (emphasis added)). The passage of the Rule Making Act by the legislature in 1939 allowed the supreme court to preempt the field of procedural rule-making. *See* Bar Ass'n of Dallas v. Hexter Title & Abstract Co., 175 S.W.2d 108, 113 (Tex. Civ. App.—Fort Worth, 1943)(Rule Making Act demonstrates legislature's will to relinquish rule-making power to supreme court), *aff'd*, 142 Tex. 506, 179 S.W.2d 946 (1944); Garrett v. Mercantile Nat'l Bank at Dallas, 140 Tex. 394, 397-98, 168 S.W.2d 636, 638 (1943)(rule making act confers upon and relinquishes to supreme court full rule-making power in civil procedure repealing all other laws governing same); Beach v. Runnels, 379 S.W.2d 684, 686 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.)(rule-making power invested solely in supreme court by grant of authority by legislature); Op. Tex. Att'y Gen. No. WW-100 (1957)(all rule-making power now resides in supreme court from delegation by legislature). The *Garrett* court demonstrates the supreme court's sole responsibility to initiate procedural rule changes:

> The rule-making power bill by Section 1 confers upon and relinquishes to the Supreme Court "full rule-making power in civil judicial proceedings," and repeals "all laws and parts of laws governing the practice and procedure in civil actions," the repeal to be effective on and after September 1, 1941. Section 2 of the same act repeats that the Supreme Court is "hereby invested with the full rule-making power in the practice and procedure in civil actions." The broad and sweeping language thus used by the Legislature evidences an intent to invest in the Supreme Court complete authority to prescribe all rules of procedure in civil actions and that all statutes relating to civil procedure should be

supreme court has repeatedly utilized this process in promulgating rules of civil procedure[198] and, recently, in the field of evidence.[199] The "laws of the

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inoperative on and after September 1, 1941. This was broad enough to evidence an intention that all procedural statutes, including those passed at the same session of the Legislature, should become inoperative on and after September 1, 1941. Any contrary holding would deprive the Supreme Court of the "full rule-making power," so specifically provided for in the rule-making power bill and would not result in a repeal of "all laws and parts of laws governing the practice and procedure in civil actions," as provided forth therein.

Garrett, 140 Tex. at 397-98, 168 S.W.2d at 638. Although article 1731(a) (Rule Making Act) has since been recodified in the Government Code, no substantive change was intended. *See* TEX. CONST. art. III, § 43(a)(b) (legislature shall provide for recodification of civil and criminal laws but without substantive change); TEX. GOV'T CODE ANN. § 1.001(a) (Vernon 1988)(revision of general and permanent statutory law without substantive change). The only subsequent change to *Garrett* was the repeal of article V, section 25 of the Texas Constitution and the enactment of article V, section 31. *Compare* Tex. S.J. Res. 14, § 9, 69th Leg., 1985 Tex. Gen. Laws 3355, 3359 (repealing TEX. CONST. article V, section 25 (1891)(rule-making provision) *with* TEX. CONST. art. V, § 31 (current rule-making provision). Pertinent parts of article V, section 31 state:

> (a) The Supreme Court is responsible for the efficient administration of the judicial branch and shall promulgate rules of administration not inconsistent with the laws of the state . . . .
>
> (b) The Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state . . . .
>
> (c) The legislature may delegate to the Supreme Court or Court of Criminal Appeals the power to promulgate such other rules as may be prescribed by law or this Constitution, subject to such limitations and procedures as may be provided by law.

TEX. CONST. art. V, § 31. Although one may read section 31(c) to allow the legislature to reemerge as a co-equal branch of government constitutionally empowered to promulgate rules of civil procedure, the more reasonable interpretation construes section 31(c) with section 22.004 of the Government Code which delegates any power the Texas Legislature may have to the Texas Supreme Court. *See* TEX. GOV'T CODE ANN. § 22.004(a),(c) (Vernon 1988)(supreme court has full rule-making power in practice and procedure in civil actions). Thus, the legislature is not to have any hand in the promulgation of rules of civil procedure or act as imprimatur to rules prescribed by the supreme court. *Id.* Rather, the legislature possesses a veto power over rules enacted pursuant to the constitution and the Rule Making Act. *See id.* § 22.004(b) (supreme court rules or amendments remain effective until and unless disapproved by legislature).

198. *See, e.g.*, Supreme Court of Texas Order, 725 S.W.2d XXXI, XXXI-LXXII (1987)(order adopting and amending Texas Rules of Civil Procedure and published in judicial supreme court reporter pursuant to Government Code § 22.004(d)). Ironically, there is currently no "official reporter" of the supreme court in which to publish rule changes. *See* Hambleton & Paulsen, *The "Official" Texas Court Reports: Birth, Death and Resurrection*, 49 TEX. B.J. 82, 82-83 (1986)(failure of Texas legislature to pass legislation allowing supreme court to designate any reporter deemed advisable as "official" reporter of Texas Supreme Court in 1963 leaves court currently without such forum despite requirements of Texas Government Code section 22.004); *see also* Hambleton & Paulsen, *The "Official" Texas Court Reports: The Rest of the Story*, 49 TEX. B.J. 842, 842-43 (1986)(Texas Government Code sections 22.008 and 22.104 requiring "official" publication of decisions from state's two highest courts is currently

state"[200] to which the rule-making authority of the supreme court is subject, requires the supreme court to supply a list of statutes it deems repealed when promulgating court rules.[201] In the event of a conflict between the legisla-

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placed in recodified Government Code "in case" legislature should decide to fund "official" reporters in future).

199. *See* Supreme Court of Texas Order, 641 S.W.2d XXXV, XXXV-LXVIII (1982)(order adopting Texas Rules of Evidence effective September 1, 1983).

200. TEX. CONST. art. V, § 31(a),(b).

201. *See* TEX. GOV'T CODE ANN. § 22.004(c) (Vernon 1988)(to ensure supreme court has full rule-making authority rules adopted or amended by court repeal conflicting law governing procedure and practice in civil actions). While the supreme court cannot create, enlarge, modify or abridge substantive rights of litigants, the legislature has veto power over promulgated rules which it may exercise at any time. *See id.* at § 22.004(b). Dean Newton supports the view that the phrase "laws of the state" should not be read to mean legislative enactments but compliance with the Rule-Making Act. *See* Newton & Wicker, *Personal Jurisdiction and the Appearance to Challenge Jurisdiction in Texas*, 38 BAYLOR L. REV. 491, 557-58 (1986)(changes focus from conflict between rule and existing statute to compliance with section 22.004 of Government Code). Texas Supreme Court decisions that hold a statute has priority when in conflict with a rule, reflect a broader reading of the phrase "not inconsistent with the laws of the state" embracing *any* legislative enactment. *See, e.g.*, Kirkpatrick v. Hurst, 484 S.W.2d 587, 589 (Tex. 1972)(civil rule 4 enlarging substantive rights of plaintiff to extend statute of limitations inconsistent with article 5526 and must fall); Few v. Charter Oak Fire Ins. Co., 463 S.W.2d 424, 427 (Tex. 1971)(mandatory joinder provision of civil rule 39 inconsistent with article 4621 and 4626 allowing permissive joinder of husband and must yield to statute); Missouri, K. & T. Ry. v. Beasley, 106 Tex. 160, 177, 155 S.W. 183, 187 (1913)(supreme court cannot set aside statute by court rule). While the supreme court has narrowed its holding in the conflict situation to "conflicts between civil rules and 'substantive law'," subsequent courts of appeal have recited the broad language of *Few* without consideration whether the statute before the court was "substantive." Newton & Wicker, *Personal Jurisdiction and the Appearance to Challenge Jurisdiction in Texas*, 38 BAYLOR L. REV. 491, 558-59 (1986). *Compare Kirkpatrick* 484 S.W.2d at 589 (rule 4 cannot be read to enlarge time period of plaintiff to file suit) *with Few*, 463 S.W.2d at 425 (rule 39 passed pursuant to supreme court's rule-making power limited by constitution so that when court rules conflict with statutes rules must yield). *See also* C.E. Dukes Wrecker Serv., Inc. v. Oakley, 526 S.W.2d 228, 232 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.)(reciting broad language of *Few* without examining if statute substantive); Crickmer v. King, 507 S.W.2d 314, 317 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.)(permissive joinder statute conflicted with mandatory language of rule 39 causing rule to fall under language of *Few* without examination if statute was substantive). The *Few* decision itself may be criticized on two other grounds. *See Few*, 463 S.W.2d at 425 (court rule yields to legislative statute when two conflict). First, though the statute in question was passed subsequent to the promulgation of rule 39 (mandatory joinder of parties), the statute made no mention of repealing or disapproving rule 39 as required by the Rule Making Act. *See* TEX. GOV'T CODE ANN. § 22.004(b) (Vernon 1988)(recodification of civil statute 1731(a)(2) stating that court rules and amendments remain in effect until legislature disapproves them). Second, the legislature had expressly withdrawn from the procedural rule-making field 33 years before this decision rendering the act's procedural significance a nullity. *See* Bar Ass'n of Dallas v. Hexter Title & Abstract Co., 175 S.W.2d 108, 113 (Tex. Civ. App.—Fort Worth, 1943)(passage of rule-making act evidences legislature's will to relinquish rule-making power to supreme court), *aff'd*, 142 Tex. 506, 179

ture and judiciary, if no legislative action is taken after the court issues its repealing order, the court rule prevails.[202] In this scenario, no conflict between the two branches exists because it may be implied that the legislature approves of the court action.[203] Should the legislature act subsequent to a repealing order of the supreme court, however, the statute disapproving the court rule would control.[204]

On close examination, the apparent conflict currently existing between rule 13 of the Texas Rules of Civil Procedure[205] and chapter 9 of the Civil Practice and Remedies Code[206] reveals no conflict at all. First, the legislature has not acted subsequent to the promulgation of rule 13 and the repealing order to disapprove the court's action.[207] Second, the legislature's enactment of chapter 9 of the Civil Practice and Remedies Code is a nullity because the legislature has vested the supreme court with the full rule-making power of the state.[208] The legislature's role is not to draft rules of proce-

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S.W.2d 946 (1944); TEX. GOV'T CODE ANN. § 22.004(a) (Vernon 1988)(supreme court has full rule-making power in civil procedure and practice).

202. *See* TEX. GOV'T CODE ANN. § 22.004(b) (Vernon 1988)(supreme court rules and amendments effective until legislature disapproves them); H. WENDORF & D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL xxi (2d ed. 1988)(judicial rule prevails when legislature fails to act following supreme court's repealer accompanying promulgated rule).

203. *See Few*, 463 S.W.2d at 425-26 (statute enacted after effective date of court rule places rule in conflict with statute and rule must yield); *Bar Ass'n of Dallas*, 175 S.W.2d at 113 (as check on court's rule-making power legislature reserved right to disapprove proposed court rule); H. WENDORF & D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL xxi (legislative inaction subsequent to court promulgated rule with repealer allows rule to prevail).

204. *See Few*, 463 S.W.2d at 425-26 (subsequently enacted legislative statute supercedes promulgated court rule); TEX. GOV'T CODE ANN. § 22.004(b) (Vernon 1988)(court rules remain effective *until* disapproved by legislature); H. WENDORF & D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL xxi-xxii (2d ed. 1988)(legislative action *after* court rule has priority over rule in conflict scenario).

205. *See* TEX. R. CIV. P. 13 (effect of signing pleadings, motions and other papers; sanctions).

206. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001 - .014 (Vernon 1988)(sanctions for frivolous pleadings and claims).

207. *See* TEX. GOV'T CODE ANN. § 22.004(b) (Vernon 1988)(court rule and amendments remain effective until disapproved by legislature); *see also* H. WENDORF & D. SCHLUETER, TEXAS RULES OF EVIDENCE MANUAL xxi (2d ed. 1988)(inaction by legislative after court passes rule and repealer allows rule not statute to prevail).

208. *See* Garrett v. Mercantile Nat'l Bank at Dallas, 140 Tex. 394, 397-98, 168 S.W.2d 636, 638 (1943)(Rule Making Act confers upon supreme court all power over civil procedure, relinquishing legislature's role in area); Bar Ass'n of Dallas v. Hexter Title & Abstract Co., 175 S.W.2d 108, 113 (Tex. Civ. App.—Fort Worth 1943)(legislature relinquished all power to supreme court over procedural rule-making), *aff'd*, 142 Tex. 506, 179 S.W.2d 946 (1944); TEX. GOV'T CODE ANN. § 22.004(a),(c) (Vernon 1988)(full rule-making power rests in supreme court over practice and procedure in civil actions). This scenario properly places responsibility for rule-making power in the judiciary so that the court may maintain its integrity as a co-equal governmental branch. *See* Browde & Occhialino, *Separation of Powers and*

dure for the courts.[209] Rather, the legislature's only role is to disapprove court rules enacted pursuant to the Rule Making Act.[210] While the legislature presently has the final word in Texas as to the viability of a procedural rule promulgated by the supreme court, the legislature has never utilized its power to disapprove a statute.[211]

Should the legislature at some future date repeal the Rule Making Act, only then would it become viable for the supreme court to consider proclaiming its procedural independence.[212] The most acceptable theory for the Texas Supreme Court to follow would be one based on inherent power.[213] It

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the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints, 15 N.M.L. REV. 407, 463 (1985)(judiciary must have ultimate responsibility for rule-making to function as co-equal branch of government). *But see* AMERICAN BAR ASSOCIATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 73 (5th ed. 1971)(courts do not have full rule-making power if legislature can disapprove court rules).

209. *See* TEX. GOV'T CODE ANN. § 22.004(b) (Vernon 1988)(legislature's role to disapprove or veto rules considered unwarranted or inconsistent). *But see* Meshell v. State, 739 S.W.2d 246, 278-79 (Tex. Crim. App. 1987)(Miller, J., dissenting)(legislature empowered by constitution to make procedural laws used in Texas courts); TEX. CONST. art. V, § 31(c) (legislature may delegate to supreme court power to promulgate other rules raising inference that legislature has constitutional power to promulgate rules). The latter interpretation, if effective, would make the power of the judicial branch subject to the whim of the legislature. *See Meshell,* 739 S.W.2d at 255 (permitting legislature to provide procedural rules without existence of underlying "right" gives unlimited power to legislature to infringe on judiciary's substantive power); Williams v. State, 707 S.W.2d 40, 47 (Tex. Crim. App. 1986)(per curiam)(legislature's ability to alter final judgments of court under facade of procedural enactment subjects judiciary to whim of legislature).

210. *See* TEX. GOV'T CODE ANN. § 22.004(b) (Vernon 1988)(legislature may only disapprove procedural rules).

211. *See id.* (former article 1731(a) shows no instance of legislative disapproval of promulgated rules since inception of Rule Making Act).

212. *See* TEX. CONST. art. V, § 31(a)(b) (supreme court alone responsible for judicial administration and promulgation of rules of civil procedure and practice). Until the legislature does repeal the Rule Making Act, the court has no need to declare its procedural independence from any branch of government. *See id.* This follows from the fact that the court currently has the duty to initiate and supervise the rule-making process, subject only to legislative veto, which has yet to occur. *See id.*; *see also* TEX. GOV'T CODE ANN. § 22.004(a),(c) (Vernon 1988)(to ensure full rule-making power of supreme court may repeal inconsistent statutes or rules conflicting with enactments).

213. *See* Mays v. Fifth Court of Appeals, 31 Tex. Sup. Ct. J. 533, 534 (June 22, 1988)(Spears, J., concurring)(Texas courts have inherent power to preserve efficient functioning of judicial branch as separate branch of government); Eichelburger v. Eichelburger, 582 S.W.2d 395, 397-400 (Tex. 1979)(inherent power of court derived not from legislative grant or constitutional provision but from fact court constitutionally created and charged to perform specific responsibilities and duties). Although the supreme court has utilized its inherent power for various purposes, promulgation of its inherent power over rule-making would seem to conflict with article V, section 31(c) of the Texas Constitution which could be construed to allow the legislature a constitutional grant of authority to promulgate rules. *See* TEX. CONST. art. V, § 31(c) (legislature may delegate to supreme court power to promulgate other rules

is within this scenario that the independent nature of the Texas judiciary,[214] accountable elected judges,[215] and a strong tradition of separation of powers[216] would support the judiciary's action so it may administer justice and preserve its independence and integrity[217] as the Texas Constitution

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proscribed by law or constitution subject to limitations prescribed by law); Calvert, *Jurisdiction of the Texas Supreme Court in Divorce Cases*, 33 BAYLOR L. REV. 51, 53-54 (1981)(criticizing supreme court's use of inherent/implied power to find jurisdiction in divorce cases). On closer analysis, however, article V, section 31(c) restricts the use of whatever implied or residual rule-making power the legislature would have. *See* TEX. CONST. art. V, § 31(c) (legislature may delegate to supreme court further power to promulgate rules legislature may create). Instead of finding an implied or direct constitutional grant of power in the legislature to create or promulgate rules in section 31(c), the plain language shows the legislature can only delegate to the supreme court the authority to create rules. Without the aid of the Rule-Making Act, article V, section 31 is open to three possible constructions when its language is examined. First, one could find that the legislature now has power to create rules from section 31(c) and pass a limitation and/or procedure granting unto itself the power to promulgate those rules. *See id.* (legislative act creating power in itself to promulgate rules of court would be "law of the state" which supreme court could not override). Second, the legislature could pass a procedure or limitation that it may solely or jointly promulgate rules of procedure based on section 31(c) thus limiting the courts power over rule-making since the legislative act would be a "law of the state" the court is subject to in its promulgation of rules. *See id.* § 31(a),(b),(c) (supreme court shall promulgate procedural and administrative rules not inconsistent with the laws of this state). Third, in conjunction with the mandatory provisions of section 31(a) and (b) which place an affirmative duty on the supreme court to control and promulgate rules, the legislature may request the supreme court to pass specific rules under the court's rule-making power. *See id.* at § 31(c) (legislature may *delegate* to supreme court power to promulgate other rules proposed or recommended by law). The third interpretation is more reasonable when section 31 is read as a whole and harmonizes without conflict a seemingly contradictory provision. *Id.*

214. *See Ex Parte* Towles, 48 Tex. 413, 439 (1877)(framers intended to create complete judicial system not subject to legislative change); TEX. CONST. art. V, § 1, interp. commentary (Vernon 1955)(judicial power vested in constitutional courts which legislature may not destroy or restrict).

215. *See* TEX. CONST. art. V, § 2 (election of judges provides another check in separation of powers by guaranteeing executive branch cannot overly influence judiciary).

216. *See* Houston Tap Ry. Co. v. Randolph, 24 Tex. 317, 335-36 (1859)(article II, section 1 intends each branch of government to be competent to execute constitutional duties without interference or aid from employees of another branch); Lytle v. Halff, 75 Tex. 128, 131-32, 12 S.W. 610, 611 (1889)(three departments of government shall co-exist without restricting or encroaching on each other). *But see* Pope & McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 9 (1978)(separation of powers doctrine requires each branch to work together in promulgating rules since each branch cannot hermetically be sealed from the other).

217. *See* State v. Clemente, 353 A.2d 723, 731 (Conn. 1974)(invasion of judiciary's power forces court to find statute unconstitutional because acquiescence to gradual invasion of judicial power by legislature renders judiciary no more than judicial staff of legislature); Meshell v. State, 739 S.W.2d 246, 255 (Tex. Crim. App. 1987)(en banc)(allowing legislature to infringe on judicial power under guise of procedural rules renders separation of powers meaningless); Eichelburger v. Eichelburger, 582 S.W.2d 395, 398-99 (Tex. 1979)(inherent judicial powers are

demands.

B. *Shared Responsibility*

The Texas system of shared responsibility in procedural rule-making maximizes the talents of both the legislature and judiciary.[218] The judiciary, as the initiator in the rule-making process, can utilize its experience and ability to quickly adapt to the changing needs of the courts and bar.[219] The legislature retains its role as supervisor of the rule-making process and can effectuate policy decisions by its power to disapprove rules that encroach on the legislative function[220] thus avoiding problems encountered in other states.[221] Realizing the procedural and substantive entanglement rule-making can entail, there exists in the Texas system a practical compromise between the court and legislature, allowing both to work together in resolving difficulties instead of forcing a constitutional confrontation.[222] In the past, for example,

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those which are called upon to preserve judiciary's independence and integrity); Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints,* 15 N.M.L. REV. 407, 463 (1985)(final responsibility over rule-making must rest with judiciary if judiciary to function as co-equal governmental branch).

218. *See* Winberry v. Salisbury, 74 A.2d 406, 413 (N.J.)(advantages of judicial rule-making include formation by experts, interpretation by sympathetic judges and rapid response when change is needed), *cert. denied,* 340 U.S. 877 (1950); Levin & Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision,* 107 U. PA. L. REV. 1, 38 (1958)(virtue of court rule-making is flexibility and immediate responsiveness to existing problems); Pope & McConnico, *Texas Civil Procedure Rule Making,* 30 BAYLOR L. REV. 5, 7-8 (1978)(advantages of judicial and legislative rule-making). Judge Pope considers the judiciary's rule-making talents to include efficiency in changing and correcting rules, immunity from political pressures, judicial expertise as opposed to educating legislators on the rule-making process, prompt attention to procedural change as opposed to busy and infrequent legislative sessions, and the ease of amending existing rules. *Id.* The best talents of the legislature in the rule-making process include closer scrutiny of rules and legislative review so as not to impinge on substantive rights of litigants. *Id.*

219. *See* Pound, *The Rule-making Power of the Courts,* 12 A.B.A. J. 599, 602 (1926)(judicial regulation over rules ensures simple effective procedure shaped by expertise).

220. *See* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers,* 38 OKLA. L. REV. 447, 476 (1985)(review of court rules ensures rules will not diminish or compromise substantive rights); Pope & McConnico, *Texas Civil Procedure Rule Making,* 30 BAYLOR L. REV. 5, 8 (1978)(entanglement of substance and procedure inextricably intertwined in procedural rules demands legislature and court to reach accommodation in procedural rule-making); Spitzer, *Court Rule-Making in Washington State,* 6 U. PUGET SOUND L. REV. 31, 66 (1982)(legislative review checks court power in rule-making).

221. *See, e.g.*, Arneson v. Olsen, 270 N.W.2d 125, 132 (N.D. 1978)(statute changing substantive rights of litigants in use of *res ipsa loquitur* in medical malpractice disputes interpreted as violating court rule-making power); State v. Leonardis, 375 A.2d 607, 614 (N.J. 1977)(pretrial intervention program created by court to allow defendants to avoid trial by successful probation period upheld as constitutional use of court rule-making power despite abridging state's substantive right to prosecute).

222. *See* Pope & McConnico, *Texas Civil Procedure Rule Making,* 30 BAYLOR L. REV. 5,

both branches have worked to simplify the system of special charges.[223] While the court planned to streamline submission of issues, the legislature simultaneously considered enacting a comparative negligence system.[224] The proposed Senate Bill contained numerous statutory requirements for special issues which the court sought to avoid in its simplification process.[225] Instead of confrontation, the senate sponsors were successful in conferring with the supreme court to amend rule 277 to simplify the charge on a comparative negligence issue, accomplishing the objectives of both branches.[226] The system works well, and it would only cause heightened tensions between the legislature and judiciary to change it.

VI. CONCLUSION

The current need for examining the court's role in Texas rule-making results from a conflicting court rule and statute on frivolous pleadings. In Texas, two viable alternatives are available concerning the rule-making process. The first holds that when a statute and court rule conflict, the statute controls. The second view changes the focus of the inquiry from confrontation to compliance with the Rule Making Act. According to the second view, when the procedural requirements are met legislative review is superfluous. Should the issue be pushed to a constitutional confrontation, the supreme court would likely resolve the issue in its own favor rendering to itself exclusive non-reviewable rule-making power. The unique elements of an independent judiciary, elected judges and a strong separation of powers has shaped, the history of Texas rule-making and would support the

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13-14 (1978)(complexity and intertwining of substance and procedure demands courts and legislature to accommodate individual interests to create rules of procedure). Until 1978, Judge Pope characterized Texas rule-making as exemplifying a "middle ground" not subject to judicial or legislative dominance. *Id.* at 9.

223. *See id.* at 14 (court desired to simplify practice that compelled submitting issues separately and distinctly while legislature's creation of comparative negligence statute required submission of special issues comparing all parties negligence in suit).

224. *Id.*

225. *Id.*

226. *Id. But see* Meyers, *The Door is Open — Revised Rule 277*, 8 TRIAL LAW. F. 3, 4 (July-Sept. 1973)(Senate pressured supreme court to promulgate rules of procedure regarding special issues on comparative negligence). Judge Meyers notes the senate did adopt that portion of House Bill 88 making Texas a comparative negligence state but did not adopt that part of HB 88 that involved special issue submission. *Id.* Instead, the Senate passed resolution 49 that respectfully called upon the Supreme Court "to promulgate rules governing the manner of submission of special issues relating to comparative negligence and the other related matters contained in House Bill 88 . . ." *Id.* Judge Meyers concludes that the court's change of Rule 277 should be seen in light of this coercive background. *Id.*; *see also* O'Quinn, *More on Rule 277*, 8 TRIAL LAW F. 3, 3 (Oct.-Dec. 1973)(legislature adopted comparative negligence and would have erased special issue system by legislation but for Supreme Court's promise to change rules avoiding legislative infringement on rule-making authority).

supreme court in the constitutional confrontation scenario. While there are positive and negative elements to both judicial and legislative promulgation of rules, the model of shared responsibility which is currently viable in Texas is preferred. The shared responsibility model encompasses the best elements of both views and protects judicial and legislative interests. So long as the legislature and judiciary are open to communication, the results stemming from rule-making in Texas should continue to benefit the public by procedures designed to swiftly and fairly allow the substantive rights of litigants to be heard.