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THE SOURCE OF AUTHORITY FOR RULES OF COURT AFFECTING PROCEDURE

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This article is divided into sections as here indicated. Section 1: The Scope of This Article. Section 2: What Is Procedure? Section 3: What Are Rules of Court? Section 4: The Different Functions of the Judiciary under a Typical American State Constitution. Section 5: The Doctrine of Inherent Judicial Power over Matters Ancillary to the Administration of Justice, but Concurrent with Non-Frustrating Legislative Power. Section 6: Certain Doctrines at Variance with the Doctrine Presented in Section 5. Section 7: The Doctrine of Legislative Supremacy in the Field of Procedure. Section 8: Constitutional Limitations on the Doctrine of Legislative Supremacy. Section 9: The Doctrine of Inherent and Exclusive Judicial Rule-Making Power in the Field of Procedure. Section 10: The Doctrine of the Constitutionality of Statutes Granting to the Judiciary the Power to Make Rules of Procedure in Contravention of Statutes.

SECTION 1: THE SCOPE OF THIS ARTICLE.

In a recent and illuminating article¹ Commissioner Laurance M. Hyde of the Missouri Supreme Court does four things. In the first place he emphasizes an historical fact sometimes forgotten, namely, that the so-called rules of common-law procedure, as formulated by Blackstone, Tidd and Chitty, which were actually applied by the common-law courts of this country during the formative period of American jurisprudence, never were a set of rules consciously and deliberately promulgated as com-

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1. Hyde, From Common Law Rules to Rules of Court (1937) 22 WASHINGTON U. LAW QUARTERLY 187.

mands by courts in the same way that an ancient rule to show cause was formulated by a court or as a modern rule to regulate the filing of transcripts and briefs on appeal is formulated by a court. Common-law rules in the early nineteenth century were merely concise restatements of pre-existing principles. To quote from Mr. Hyde's article:

"Our practice and procedure, as well as our substantive law, came to us as a part of the common law of England. It seems to be the popular impression that common-law procedure was judge-made procedure. It was, in fact, neither a set of rules made by courts nor a code adopted by a legislative body. Instead, it was a conglomeration of legislative enactments, rules and orders of courts, ancient usages, and judicial decisions; the haphazard growth of six centuries."²

In the second place, Commissioner Hyde reminds us that in this country dissatisfaction with the procedural defects of the trans-atlantic common-law system led, during the middle decades of the nineteenth century, to radical changes in procedure by legislation. Many states adopted elaborate and detailed codes or practice acts fundamentally changing the entire system, and these codes have been recognized as binding upon the courts. According to the prevailing theory in American states, the power to change these formulated rules of procedure has remained in the legislature and has been exercised only spasmodically. To quote again from the article:

"Because the legislatures in this country, which enacted these new codes, retained the exclusive right to make any changes therein, our codes have remained to this time substantially the same as then enacted."³

In the third place, Commissioner Hyde describes in detail and with proper attention to historical developments the modern English function of procedural rule-making through a Rules Committee consisting of judges, barristers and solicitors, created by Act of Parliament, whose rules when promulgated must be laid before Parliament and may by that body be annulled—although apparently this power of annulment has never been exercised by Parliament.

Finally, Commissioner Hyde compares the prevailing Amer-

2. *Op. cit.*, p. 187.

3. *Op. cit.*, p. 187.

ican system of static legislative codes, necessarily difficult of modification, with the dynamic English system of rules promulgated by a perpetual committee functioning as an arm of the judiciary, and charged with the constant duty of seeing to it that the rules of procedure are adjusted to the actual needs of a changing society. This final phase of the article is the most elaborately treated, and the entire article, obviously written from a practical American viewpoint, is clearly intended as a plea for judicial rule-making power with respect to procedure in this country and for an abandonment of the purely legislative treatment of all efforts for direct procedural modification.

In the course of his article Commissioner Hyde touches upon a doctrine frequently advanced in the table talk of lawyers and occasionally advanced in legal periodical literature and judicial opinions.⁴ This is the doctrine that the supreme court of a typical American state, by virtue of the constitutional division of all governmental power into three branches, by virtue of its appellate jurisdiction at common law and in equity, and by virtue of its power of superintending control, has an inherent power to prescribe rules of procedure even in derogation of legislative enactment. Says Commissioner Hyde:

“It is now being urged that our courts may change our procedural codes without legislative authority. Whether this is true or not, consideration of the English governmental system makes it immediately apparent why an act of Parliament was necessary before English courts could have power to change statutory rules of practice and procedure. Under our state and federal Constitutions providing for separation of governmental functions into three coordinate branches, whether the judicial department has this power, without the consent of the legislative department, is at least a different question. Following the precedent of the English Parliament, American legislatures have always exercised authority to make or change procedural rules, and it is not the purpose of this article to discuss its constitutional basis.”⁵

As to the existence or non-existence of such inherent judicial power, to be exercised without any additional express constitu-

4. See references in Section 9 of this article.

5. Hyde, *From Common Law Rules to Rules of Court* (1937) 22 WASHINGTON U. LAW QUARTERLY 187, 188.

tional grant or any legislative delegation, and in contravention of statutory enactments, Commissioner Hyde carefully refrains from expressing his own opinion. His article is intended for another purpose. The purpose of this present article is to consider in the light of actual judicial decisions the possibility of plausibly asserting that the supreme court of a typical American state can in effect repeal the procedural statutes of that state, without a prior grant of power by constitutional provision or legislative enactment.

SECTION 2: WHAT IS PROCEDURE?

The most widely quoted American description of procedure is found in *Kring v. Missouri*.⁶ It is as follows: "The word 'procedure', as a law term, is not well understood, and is not found at all in Bouvier's *Law Dictionary*.⁷ Fortunately a distinguished writer on Criminal Law in America has adopted it as the title to a work of two volumes.⁸ . . . He says: "The term procedure is so broad in its signification that it is seldom employed in our books as a term of art. It includes in its meaning whatever is embraced by the three technical terms, Pleading, Evidence and Practice.' And in defining practice in this sense, he says: "The word means those legal rules which direct the course of proceeding to bring parties into court and the course of the court after they are brought in'; and evidence, he says, as part of procedure, 'signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.'" This is about the same as Jeremy Bentham's concept of adjective or procedural law.⁹ While useful for many purposes, this concept of procedure is not sufficiently exact for present purposes when we are considering the judicial rule-making power. Our modern idea of procedure includes pleading and practice, but does not include evidence which seems to be regarded as a part of substantive law. "Rules of evidence constitute substantive law, and cannot be governed by rules of court" even in a state where procedural rule-making has been conferred on the supreme court by an act

6. 107 U. S. 221, 231, 2 S. Ct. 443, 452, 27 L. ed. 506, 510 (1883).

7. Ed. of 1867; not defined in ed. of 1883; is defined in ed. of 1897 and ed. of 1914.

8. Bishop, *Criminal Procedure*, (1872) sec. 2.

9. 1 Bentham, *Rationale of Judicial Evidence* (1827) 5, note by John S. Mill, Editor.

of legislation.¹⁰ In this article procedure will be regarded as including pleading and practice but not evidence.

The word practice is a vague term. It means that part of procedure which is not pleading. For immediate purposes it may be helpful to point out that at present all principles of practice may be classified in five groups according to the respective sources of authority of the principles. The *first* group includes those principles of practice which are based upon ancient decisions of adjudicated cases, now a part of the common law of procedure and rigid through *stare decisis*.¹¹ (After indictment for a felony, a court can do nothing in the absence of the defendant.) The *second* group includes those principles of practice which are in the nature of constitutional provisions or statutory enactments. (In a majority of states a trial judge cannot comment on the evidence.) The *third* group, existing in England and in a few, but not many, American states, includes those promulgated rules of court, which, by reason of an express constitutional provision or legislative enactment, will supersede earlier statutes and rules of law, if it conflict therewith. (In Colorado: Rule 14b, restoring the English common law right of a trial

10. *State v. Pavelich*, 153 Wash. 379, 382, 279 Pac. 1102, 1103 (1929). Thayer, *Preliminary Treatise on Evidence* (1898), 511, "A court is frequently represented as passing on questions of evidence when in reality it is dealing with some other branch, either of substantive law or procedure." 1 Wigmore, *Evidence* (2d ed. 1923) 16, [In equity] "there were a few variant rules, often spoken of as rules of evidence, but really rules of procedure or of substantive law,—as when in chancery parol evidence was admitted to reform a deed." See also Wickes, *The New Rule-Making Power of the United States Supreme Court* (1934) 13 *Texas L. Rev.* 1. There is a view *contra*. For a description of procedure broad enough to include evidence, see Sunderland, *Character and Extent of Rule-Making Granted United States Supreme Court* (1935) 21 *A. B. A. J.* 404, 407. See also Callahan and Ferguson, *Federal Evidence Rules* (1936) 45 *Yale L. J.* 622, 641-644. The important question (at present academic) is this: Suppose a state legislature should pass a statute delegating to the supreme court the power to make rules of evidence which, when promulgated, would supersede conflicting common law and statutes. Would such a statute be an unconstitutional attempt to delegate substantive law-making power? For suggestive essays on procedure, see Arnold, *Role of Substantive Law and Procedure in the Legal Process* (1932) 45 *Harv. L. Rev.* 618, and Cook, "Substance" and "Procedure" in the *Conflict of Laws* (1933) 42 *Yale L. J.* 333.

11. Professor Sunderland has suggested that *stare decisis* ought never to have "found its way into the procedural field." See one of his valuable contributions to the literature of this subject, *Progress Toward a Better Administration of Justice* (1933) 17 *Jour. Am. Jud. Soc.* 49, 51. In England the old mistake (if it was a mistake) has been corrected by a legislative transfer of superstatutory rule-making power to the courts.

judge to comment on the evidence.)¹² The *fourth* group includes those principles of practice which are in the nature of promulgated rules of court, subordinate to statutes and principles of case law. (In many trial courts: no case shall be set down for trial on the first day of the term.) The *fifth* group includes unrecorded principles based on custom and usage. (At the opening of court attorneys should remain standing until the judge is seated.)

During the century following the American Revolution, both in England and in this country, the importance of the fifth group was greatly diminished. This was probably due to the constant tendency in both England and this country to give up judicial discretion for legal certainty. By the passage of statutes, by judicial decisions in reviewing courts, and in England by the adoption of superstatutory rules of court, the first, second and third groups of principles were, in 1880, larger and more significant than those groups were in 1780. In 1833, an improper ruling by a *nisi prius* judge in England on the right to open and close a jury case was an irregularity of practice, but not ground for a new trial.¹³ Five years later such an improper ruling was ground for a new trial¹⁴ A principle from group five was transferred to group one.

SECTION 3: WHAT ARE RULES OF COURT?*

As already indicated, lawyers use the word *rule* in different senses. A *rule of law* is the restatement of a pre-existing prin-

12. Printed in *Kolkman v. People*, 89 Colo. 8, 20, 300 Pac. 575, 580 (1931).

13. *Burrell v. Nicholson*, 1 M. & Rob. 304, 174 Eng. Rep. 104 (1833).

14. *Huckman v. Fernie*, 3 M. & W. 505, 150 Eng. Rep. 1245 (1838).

* See, for a list of 108 law review articles on rule-making power and similar topics 16 A. B. A. J. 199 (1930). More recent law review articles are here appended, arranged alphabetically according to authors. Atwood, *Missouri Rule as to the Regulation of the Bar* (1936) 1 Mo. L. Rev. 227, reprinted 14 Tenn. L. Rev. 438 (1937); Beardsley, *Law Encroachments* (1930) 14 Jour. Am. Jud. Soc. 130; Beardsley, *Judicial Claim to Inherent Power over the Bar* (1933) 19 A. B. A. J. 509; Beardsley, *Inherent and Impliedly Granted Judicial Power Over the Bar* (1933) 19 A. B. A. J. 728; Beardsley, *A Reply to "The Illinois View of Judicial Power"* [by Miller, *q. v.*] (1934) 20 A. B. A. J. 124; Blackard, *Past and Present Requisites for Admission to the Bar in Tennessee* (1936) 14 Tenn. L. Rev. 135; Chesnut, *Analysis of Proposed New Federal Rules of Civil Procedure* (1936) 22 A. B. A. J. 533; Chused, *Public Comment as Contempt of Court* (1930) 16 St. Louis Law Review 24; Clark (Boyle), *Missouri's Accomplishments and Program for Eliminating the Unlawful Practice of Law* (1936) 22 A. B. A. J. 9, reprinted 14 Tenn. L. Rev. 248 (1936); Clark (Boyle), *The Mis-*

ciple of law. The originating source of the principle is independent of the tribunal or person formulating the rule. The rule in Shelley's case was based on a principle of law recognized and followed long before Shelley's case was decided. Chief Justice Shaw, discussing an important point in criminal procedure, said: "This is the old established rule of the common law, adopted and acted

souri Plan to Bar Government (1936) 14 Tenn. L. Rev. 348; Clark (Charles), The Proposed Federal Rules of Procedure (1936) 22 A. B. A. J. 447; Rules of Civil Procedure for Federal Courts (1936) 22 A. B. A. J. 787; Dowling, Inherent Power of the Judiciary (1935) 21 A. B. A. J. 635, reprinted 11 Ind. L. J. 116 (1935); Editorial, Who Shall Control Criminal Procedure? (1929) 13 Jour. Am. Jud. Soc. 107; Editorial, Cannon Reinstatement Statute Declared Unconstitutional (1932) 18 A. B. A. J. 143; Editorial, Extraordinary Situation in Wisconsin (1931) 17 A. B. A. J. 561; Editorial, New York Merchants Indorse Judicial Council and Rule-Making Power (1932) 18 A. B. A. J. 76; Editorial, Power of Courts to Promulgate Rules for Inferior Courts (1935) 69 U. S. L. Rev. 1; Editorial, Rule-Making Authority in Missouri (1936) 19 Jour. Am. Jud. Soc. 166; Finch, Judicial in Place of Legislative, Court Procedure (1933) 10 N. Y. U. L. Q. Rev. 360; Finch, Proposed Rules of Civil Procedure for the Federal Courts (1936) 22 A. B. A. J. 809; Gambrell, Lay Encroachments on the Legal Profession (1931) 29 Mich. L. Rev. 989; Gertner, Inherent Power of Courts to Make Rules (1936) 10 U. of Cinn. L. Rev. 32; Hawley, Bar Integration in Idaho (1931) 14 Jour. Am. Jud. Soc. 141; Houck, Judicial Power and the Duty to Eliminate the Unlawful Practice of Law (1935) 21 A. B. A. J. 717; Hugus, An Integrated Bar (1936) 43 W. Va. L. Q. 10; Hyde, From Common Law Rules to Rules of Court (1937) 22 WASHINGTON UNIVERSITY LAW QUARTERLY 187; Kephart, Unauthorized Practice of Law (1936) 40 Dickinson L. Rev. 225; Miller, The Illinois View of Judicial Power—A Reply [to Beardsley, *q. v.*] (1933) 19 A. B. A. J. 616; Miller, The Illinois View of Judicial Power [No. 2] (1934) 20 A. B. A. J. 26; Mitchell, Proposed New Rules of Civil Procedure in Federal Courts (1936) 22 A. B. A. J. 780; Nelles, The Summary Power to Punish for Contempt (1931) 31 Col. L. Rev. 956; Panter, The Inherent Power of Courts to Formulate Rules of Practice (1935) 29 Ill. L. Rev. 911; Parker, Enforcement of Professional Ethics (1935) 21 A. B. A. J. 514; Potts, Inadequacy of Disbarment Machinery (1934) 12 Texas L. Rev. 127; Robinson, Self-Help or Self-Destruction? The Rule-Making Power (1937) 9 Rocky Mountain L. Rev. 122; Shafroth, The Legal Education Wilderness (1934) 9 Ind. L. J. 369; Shanfeld, The Scope of Judicial Independence in Procedure and Control of the Bar (1934) 19 ST. LOUIS LAW REVIEW 163; Sunderland, Progress Toward a Better Administration of Justice (1933) 17 Jour. Am. Jud. Soc. 49; Sunderland, The Function and Organization of a Judicial Council (1934) 9 Ind. L. J. 479; Sunderland, Character and Extent of Rule-Making Power Granted to the United States Supreme Court (1935) 21 A. B. A. J. 404; Tolman, Proposed Rules of Civil Procedure in Federal Courts (1936) 22 A. B. A. J. 783; Turrentine, Bar Discipline (1935) 34 Mich. L. Rev. 200; Tyler, Origin of the Rule-Making Power and Its Exercise by the Legislatures (1936) 22 A. B. A. J. 772; Weihofen, Practice of Law by Motor Clubs (1936) 3 U. of Chi. L. Rev. 296; Wheaton, Procedural Improvements and the Rule-Making Power of Our Courts (1936) 22 A. B. A. J. 642; Wheaton, Courts and the Rule-Making Power (1936) 1 Mo. L. Rev. 261, reprinted 14 Tenn. L. Rev. 448 (1937); Wigmore, Proposed Rules of Civil Practice in Federal Courts (1936) 22 A. B. A. J. 811.

upon in this commonwealth, by which courts of justice are bound to be governed, until altered by the Legislature."¹⁵ Rules of law are based upon statutes or judicial decisions. In the recent and important case of *Funk v. United States*¹⁶ the term "rule" (or "rules") is used thirty-six times and in each instance it indicates a rule of law. A *special rule of court* is an order in the course of a particular law suit directed by the court against one of the litigants or an officer of the court. The term is still a common one in proceedings for extraordinary remedies.¹⁷ A *general rule of court* is an order directed against all persons who come within its scope. Like a statute it acts prospectively and like a statute it must be promulgated or published to be effective.¹⁸ Unlike a rule of law, which is a concise repetition of a principle already valid, a rule of court, whether special or general, derives its authority from the same court that formulates the rule.¹⁹

An interesting and somewhat confusing use of the term in two different technical senses can be found in *Kolkman v. People*²⁰ by examining the so-called "Rule 14b" of the Supreme Court of Colorado, adopted in 1929 after a legislative delegation of power to make rules of procedure had been enacted in 1913. The "Rule 14b" is as follows: "The rules governing comments by district judges on evidence shall be those now in force in the United States district courts." In the title of the rule the word *rule*

15. *Commonwealth v. Carey*, 12 Cush. (66 Mass.) 246, 252 (1853).

16. 290 U. S. 371, 54 S. Ct. 212, 78 L. ed. 369 (1933).

17. "The preliminary rule in prohibition is made absolute." *State ex rel. Madden v. Padberg*, 101 S. W. (2d) 1003, 1008 (Mo. 1937).

18. See Rules of the Supreme Court of Missouri, revised to Nov. 1, 1934, any volume of official reports since 334 Mo., appendix pp. i-xx.

19. The term *rule of judges* was formerly sometimes applied to those mysterious *resolutions* (from which evolved the modern advisory opinions), adopted in conference by the justices and barons of the old common law courts of England. A rather important resolution changing the practice, but not the established common law of procedure, in regard to the right to open and close jury trials in certain tort cases, is described in *Carter v. Jones*, 6 Car. & P. 64, 172 Eng. Rep. 1147 (1833), s. c. 1 Mood & R. 281, 174 Eng. Rep. 96. Apparently this resolution was never reduced to writing officially and was never formally promulgated. Its existence was not even known to counsel for one of the litigants in the case cited. Later it became very important and was referred to as the "rule of the judges." Best, *Right to Begin and Reply* (Crandall's Amer. ed. 1886) 113-126. This so-called rule has attracted some attention in this country. *Judge v. Stone*, 44 N. H. 593, 606 (1863) (not recognized as binding); 1 Monell, *Practice*, N. Y. (2d ed. 1853) 647 (referred to as a "a mere arbitrary regulation").

20. 89 Colo. 8, 20, 300 Pac. 575, 580 (1931). For a judicious note see 27 Ill. L. Rev. 664 (1933).

means a command formulated and made effective by the supreme court of Colorado, because the court itself is undoubtedly clothed with authority to make, repeal and amend rules of procedure. The so-called "rules now in force in the United States district courts" are merely principles of the common law which the United States district judges, by virtue of the doctrine of *stare decisis*, have no power to modify. As will be emphasized in Section 7 of this article, at the time of the American Revolution in England and also in this country, general rules of court were always invalid if in conflict with established rules of the common law of procedure or with statutes.

In the first half of the nineteenth century in England, a procedural rule-making power was conferred upon courts by legislation with the intention of lodging in the courts a power to promulgate rules of higher authority than earlier statutes so that in case of conflict the rules would supersede the statutes. (It should be noted that this kind of rule-making power is conferred by the legislature; the rule-making power described in Section 5 is not conferred but is inherent, that is, implied by the Constitution.) In 1833, the British Parliament passed the epoch-making Civil Procedure Act,²¹ which, in addition to prescribing immediate alterations in the common law of procedure, conferred some rule-making power upon the courts and expressly indicated that in case of conflict between new rules and old statutes and old rules of common law, the new rules would prevail. By authority of this statute the common law courts promulgated the famous Hilary Rules.²² Since 1873 in England, and since 1913 in this country, the procedural rule-making power of courts has been greatly extended by legislation. Every American lawyer is now familiar with the existence in the Anglo-American system of a judicial procedural rule-making power which for practical purposes is a legislative power as well as a judicial power.

In this article, as a matter of convenience, those procedural rules of court which are of higher authority than conflicting statutes will be called superstatutory rules of court. Those procedural rules of court, conforming to the original normal type,

21. 3 and 4 Wm. IV, c. 42.

22. Adequately described for Americans in *McKyring v. Bull*, 16 N. Y. 297, 69 Am. Dec. 696 (1857).

which are effective only when not in conflict with statutes, will be called substatory rules of court.

For constitutional reasons it sometimes happens in this country that a rule of court will be superstatutory even if the legislature has not conferred rule-making power on the court and has deliberately designed to contravene or to prevent a particular rule of court. Examples of this kind of superstatutory rules of court will be given in Section 8 of this article.

England,²³ the United States,²⁴ and ten states²⁵ have provided for the existence of superstatutory rules of procedure.

In the absence of a statutory or direct constitutional grant of authority, has an appellate court power to prescribe substatory rules of practice for the trial courts? On principle the answer would be a negative one, because in this country the typical trial court is a separate constitutional tribunal, subject only to a reviewing jurisdiction and a superintending control.²⁶

In seventeen states the question is superfluous because by either constitutional provision or legislative enactment the highest appellate courts (or a judicial council, or a conference of judges) have been given power to promulgate substatory rules

23. 15 and 16 George V, c. 99.

24. 48 Stat. 926, 28 U. S. C. A. sec. 723-a (1934), applies to criminal procedure. 48 Stat. 1064, 28 U. S. C. A. sec. 723-b (1934), applies to civil procedure at law. 48 Stat. 1064, 28 U. S. C. A. sec. 723-c (1934) makes possible union of law and equity, subject to veto by congress.

25. *Alabama*, Gen. Acts, 1935, 177 (applies to equity cases only); *Colorado*, Code Civ. Proc. Comp. Laws, 1921, sec. 444, p. 184; *Delaware*, Rev. Code, 1935, 108, sec. 6; *Florida*, Comp. Stats., 1936 Supp., sec. 4682 (1); *Maryland*, Const. 1867, Art. 4, sec. 18 (applies only to equity pleading and practice; may be changed by the General Assembly, similar power in common law granted by General Assembly in 1927; Code of 1924, 1935 Supp., Art. 26, sec. 35); *New Jersey*, 2 Cum. Supp. to C. S., sec. 163-308, P. 2820 (power in supreme court to prescribe rules at common law); *Laws of N. J.*, 1915, c. 116, sec. 11, p. 168; *Comp. St. Supp.* 1924, sec. 33-124 (the chancellor makes procedural changes in equity); *New Mexico*, Laws, 1933, c. 84, p. 147; *Washington*, Rem. 1927 Supp., secs. 13-1 and 13-2; *West Virginia*, Acts of W. Va., 1935, c. 37, p. 169 (official notice required, and hearing if requested); *Wisconsin*, Wisc. Stat. 1935, sec. 251, p. 18 (official notice required, and hearing if requested).

26. *Smith v. Valentine*, 19 Minn. 452 (1878); *Trotter v. Heckscher*, 41 N. J. Eq. 478, 4 Atl. 784 (1886). "The right of the circuit court to make its own rules is a right that is inherent"—but the supreme court has the right to review on writ of error. *Risher v. Thomas*, 2 Mo. 98 (1828). *Contra*, *People v. Callopy*, 358 Ill. 11, 192 N. E. 634 (1934). The court also held that the action of the trial court in violation of the Supreme Court's rule was a violation of the common law of Illinois, and this weakens the authority of the case so far as rule-making power is concerned.

of court so as to bring about uniformity in the domain of procedure not controlled by statutes.²⁷

Making certain adjustments,²⁸ it seems that twenty-five state supreme courts (or judicial councils or similar committees) have the power to bring about complete uniformity of practice in the trial courts of their respective states.

In England, before judicial rule-making power was exalted by Parliament into a quasi-legislative function, there was the same important difference between statutes and general rules of court that existed in all American states down to 1913, and still exists in thirty-eight states. In *Bartholomew v. Carter*²⁹ it appears that under an act of Parliament a defendant had a right to rely on a statutory defense after pleading the general issue without any special plea. A subsequent rule of court required in every such case that the defendant should write in the margin of his plea the words "by statute." In the case cited, the defendant insisted that the rule of court was in conflict with the statute, and therefore void. All lawyers in the case, at the bar and on the bench, agreed that if there was a conflict, the rule would fail. The court decided that the rule did not relate to pleading, but was a mere regulation of practice, like designating a certain office in which pleadings should be filed, and therefore the rule was held to be binding because not in conflict with the statute.

27. *Alabama*, Code of 1928, sec. 6663 (rules for all courts not contrary to provisions of Code); General Acts, 1935, 177, (superstatutory rules may be adopted by the Supreme Court for equity cases); *Arizona*, R. C. 1928, sec. 3652; *California*, Const., 1879, Art. VI, sec. 1-a amended in 1926 (power lodged in a judicial council); *Illinois*, Smith-Hurd Ill. Stat. 1935, c. 110, sec. 126; Callaghan's Ill. Stat. Ann. 1933 Supp., c. 110, sec. 130; *Kansas*, R. S. Kan. 1935, sec. 60-3825; *Michigan*, Const. 1908, Art. VII, sec. 5; *Mississippi*, Code 1930, Vol. 1, sec. 3377; *Nebraska*, Const. 1875, Art. 5, sec. 25, amended 1920; *New York*, Cahill's Consol. Laws 1930, c. 31, sec. 82 (majority of App. Div. judges make rules of trial courts); *North Dakota*, 1913-25 Supp. to Comp. Laws, sec. 769a6, p. 326; *Ohio*, Page's Ann. Gen. Code, 1932, secs. 10501-13 (rules for probate court only); *Oklahoma*, 1 Okl. Stat. 1931, c. 1, Art. 1, sec. 23; *Rhode Island*, Gen. Laws 1923, sec. 4651, p. 1365 (rules of the superior court are subject to approval of the supreme court); *South Dakota*, Comp. Laws 1929, Vol. 1, sec. 2504-A; *Tennessee*, Code of 1932, Art. V, sec. 9928, p. 2102 (rules must be promulgated by unanimous vote of supreme judges); *Texas*, Const., 1876, Art. V, sec. 25, amended 1891; *Virginia*, Code, 1930, secs. 5960-5960a.

28. *Alabama*: supra, notes 25 and 27. *Ohio*: rule-making power for Probate Courts only. Supra, note 27.

29. 3 Man. & G. 125, 133 Eng. Rep. 1083 (1841).

SECTION 4: THE DIFFERENT FUNCTIONS OF THE JUDICIARY UNDER A TYPICAL AMERICAN STATE CONSTITUTION.

The man who was most influential in developing American constitutional law was not John Marshall or James Madison, but a Frenchman named Charles-Louis Montesquieu. Nearly 200 years ago Montesquieu, influenced by John Locke, advanced the suggestion that all governmental authority manifests itself in the three domains of legislative, executive and judicial power, which should be kept rigidly separate.³⁰ This doctrine of the separation of powers as advanced by Montesquieu was received in America with almost religious enthusiasm and has now been frozen into our American constitutional law, both federal and state.

We Americans all agree that in the main the results have been desirable, and we all agree that the doctrine has caused some confusion and vexatious litigation. Much of this confusion has to do with questionable exercises of alleged legislative power or judicial power.³¹

The undoubted field of legislative power has to do with modifying substantive law. The undoubted field of judicial power has to do with deciding law-suits by applying substantive law. Between these two fields of undoubted constitutional power there is a border-land, like a wilderness, through which the theoretical boundary line runs without being definitely marked. "There are certain powers inherent in the judicial office. How far the legislative department of the government can impair them, or dictate the manner of their exercise, are interesting questions; but it is unnecessary in this case to consider them."³² These words were used by the Supreme Court of the United States when deciding that the so-called Conformity Act of June 1, 1872,³³ does not re-

30. For modern criticisms, see Frankfurter and Landis, *Power of Congress to Regulate Contempts—A Study in Separation of Powers* (1924) 37 *Harv. L. Rev.* 1010; MacCorkle, *The Separation of Powers* (1937) 14 *Tenn. L. Rev.* 390.

31. In Oklahoma, during the present decade, confusion existed in the borderland between the executive and the judiciary, resulting in drastic action by the judiciary. See 13 *Jour. Am. Jud. Soc.*, 8-15, 119-123 (1934). And of course in the new-deal litigation the confusion was between the legislative and executive branches.

32. *Nudd v. Burrows*, 21 U. S. 426, 441, 23 L. ed. 286, 290 (1875).

33. 17 Stat. 196, 28 U. S. C. A. sec. 724 (1872). The point decided had to do with statutory construction, not legislative power. The case is direct authority for the assertion that the "personal conduct and administration

quire federal judges to abandon the common law as to giving instructions to the jury even if a local state statute has modified the common law so far as the state courts are concerned.

The first function of the legislative department of a typical state government is to change, when needed, substantive laws affecting public and private rights, including laws to provide revenue and for the orderly conduct of governmental business. The *first* and chief function of the judicial department of government is to administer justice, that is, to determine and prevent controversies by applying substantive law through court proceedings. For the fair, orderly, and convenient administration of justice, it is necessary to have certain rules regulating pleading and practice (process, preliminaries other than pleading, trial, judgment, execution) in the courts of justice. The *second* function of the judicial department is to administer fairly and intelligently these rules of procedure because substantive rights depend upon such administration of procedural rules. On theoretical grounds it can be insisted that the creation, modification and repeal of such rules of procedure is inherently a judicial function, and then the duty of prescribing rules of procedure would be a part of the second function of the judicial department of government. On theoretical grounds it can be urged that, since these

of the judge in discharge of his separate functions is . . . neither practice, pleading, nor a form or mode of proceeding within the meaning of those terms as found in" the Conformity Act. 21 U. S. 426, 441, 23 L. ed. 286, 290 (1875). The case, in common with many state court decisions, is highly persuasive authority for the assertion that in a typical American state the legislature by statute can abolish the common law privilege of the trial judge to comment orally upon the evidence in a law-suit where a jury is trying the facts. The constitutionality of such statutes has been questioned. Scott, Trial by Jury and the Reform of Civil Procedure (1918) 31 Harv. L. Rev. 669, 680-681. It should be remembered that the principle of no-comment in some states has been established not by statute or constitutional provision, but by judicial decisions modifying the old common law as unfit for the local environment. *Whitelaw's Exec. v. Whitelaw*, 83 Va. 40, 1 S. E. 407 (1887); *State v. Thompson*, 21 W. Va. 741, 756 (1882). Very likely in many states the no-comment statutes, when adopted, were merely codifications of the local common law. This must be true of Illinois. The no-comment statute was not adopted until 1845, and yet the Virginia type of common law prevailed from the beginning. *People v. Callopy*, 358 Ill. 11, 192 N. E. 634 (1934). There is a problem of history here not yet sufficiently studied, namely, the influence of American trial judges and American legal advisers in modifying the English common law in this country. Allied to it is another problem of history, namely, the extent to which American statutes in derogation of English common law are in reality codifications of local state common law. For examples in Pennsylvania, see Wharton, *Commentaries on Law* (1884) sec. 23.

rules of court procedure have to do with the orderly conduct of the state government, the duty of providing such rules is primarily a legislative function. For the present this conflict between two theories of governmental power in creating new rules of procedure will be put to one side.³⁴

Attention is now directed to a *third* judicial function which has to do with certain matters ancillary to the administration of justice, intimately connected with, but not directly a part of, the administration of justice by courts. One of these ancillary matters has to do with the admission of qualified persons to the privileges and responsibilities of the public profession of the law.³⁵ Another ancillary matter has to do with preventing unqualified or unauthorized persons from practicing law. Another has to do with punishing contempts of court affecting the administration of justice, whether committed by lawyers or laymen. And there are other matters ancillary to the administration of justice but not directly a part of it, such as permitting the use of photographic cameras or radio-broadcasting sets in the court room.

Probably in every civilized society, certainly in the United States, the actual business of conducting law-suits according to established legal principles of right and wrong is intended, not only to settle existing disputes, but also to be a guide for human conduct so that thereafter many controversies can be avoided or determined without litigation. Probably in every civilized country, certainly in the United States, this delegated and vicarious duty of administering justice according to the conventional principles of right and wrong laid down in the courts is carried on by men and women of specialized training, who are known as lawyers. In the United States these lawyers are regarded as officers of the court, and, in addition to being qualified to conduct litigation in court, they are also qualified and authorized to give advice to their clients outside of court and sometimes in association with lawyers retained by adversaries of their own clients, to make proper adjustments, compromises and settlements in civil matters, and thus perform one of the first duties

34. To be noticed again in Section 9.

35. "The public profession of the law"—that pregnant phrase was introduced into American jurisprudence by Alfred Z. Reed, since 1913 adviser on legal education to the Carnegie Foundation for the Advancement of Teaching. See Reed, Training for the Public Profession of the Law (1921) Carnegie Foundation for the Advancement of Teaching, Bull. No. 15.

of a lawyer, namely, to serve as a peace-maker for society. Outside the court house a lawyer is often socially useful in settling disputes in the capacity of arbitrator or umpire for business men, or members of one family, with conflicting interests, who may or may not be represented before him by adversary attorneys.³⁶ If a lawyer, after being licensed to practice law, so conducts himself as to thwart the administration of justice, either by misconduct in the court or by misconduct outside of court, he should be subject to discipline. If a person who is not a lawyer undertakes to act as a lawyer and enjoy the privileges of practicing law, he has offended against the administration of justice.

Is the duty of protecting society from evils following the illegal practice of law, or the practice of law by unqualified persons, a judicial duty or a legislative duty, or a duty shared concurrently by both the judiciary and the legislature? Different answers have been offered to this question. In the next section an effort will be made to present the answer which is the most reasonable and best supported by authority.³⁷

SECTION 5: THE DOCTRINE OF INHERENT JUDICIAL POWER OVER MATTERS ANCILLARY TO THE ADMINISTRATION OF JUSTICE, BUT CONCURRENT WITH NON-FRUSTRATING LEGISLATIVE POWER.

In connection with the regulatory power of courts the word *inherent* is used by lawyers in three senses. In the first sense, the only sense in which the word is ever used by English lawyers, *inherent* means implied and completely effective, unless and until a statute supervenes and destroys the implied power. Quite fre-

36. An amusing and instructive illustration of this particular function of an English barrister is given in G. Bernard Shaw's play, *You Never Can Tell* (1898).

37. The difference between the three kinds, or three manifestations, of judicial power, are recognized by Ellison, C. J., in his masterly opinion for the majority in *Clark v. Austin*, 101 S. W. (2d) 977, 988-9 (Mo. 1937). In this Section 4 of the present article, the effort has been merely to repeat and expound what was judicially announced in the case last mentioned. Many questions remain unsettled. In the *Austin* case the offending laymen violated a statute prohibiting them as laymen from practicing law in any tribunal, statutory as well as constitutional. Suppose the statute should be amended so as to permit certified accountants to practice law in all tribunals. What would the Supreme Court do with the statute? There are passages in the majority opinion in the *Austin* case suggesting that the new legislation might be valid as to statutory tribunals, such as the Public Service Commission, essentially non-judicial, and invalid as to constitutional courts possessing regular common-law-and-equity jurisdiction.

quently (and very properly) the word is used in this way by American lawyers.³⁸ In the second sense, *inherent*, as applied to a regulatory power of constitutional courts, indicates a power implied by the constitution in such an undoubted and essential fashion that even the legislature cannot by express enactment take the power away from the courts. The power is immune from destruction or frustration by the legislature.³⁹ In the third sense the word *inherent* means something sinister and indicates superconstitutional power belonging to courts because they are courts, and not because they are American constitutional courts.⁴⁰

In this article the word *inherent* is used, except in quotations, only in the second sense. An inherent judicial power is a power granted impliedly by the people through the constitution and therefore not to be taken away, crippled or frustrated by the legislature.

There is an inherent judicial power to regulate non-procedural matters ancillary to the administration of justice, which power is concurrent with legislative power so long as the legislative power is not exercised to frustrate the administration of justice. If the legislative power is exercised so as to destroy, cripple or frustrate the administration of justice, then the judicial power becomes exclusive and the frustrating legislation is unconstitutional.

The doctrine presented in this section is a synthesis and blending of four principles of American constitutional law. These four principles will now be indicated and then each one will be mentioned again with reference to authorities. The four principles are these: (1) The constitutional requirement of a three-fold division of government should be liberally and not strictly construed. (2) Apart from deciding law-suits and apart from all

38. So used as applying to statutory, not constitutional, courts in *Nudd v. Burrows*, 21 U. S. 426, 441, 23 L. ed. 286, 290 (1875).

39. "In the courts erected by the Constitution there is an inherent power of self-defense and self-preservation." *Carter v. Commonwealth*, 96 Va. 791, 816, 32 S. E. 780, 785, 45 L. R. A. 310, 315 (1899).

40. For an example of this use of the word, see majority opinion in *State v. Cannon*, 196 Wis. 534, 539, 221 N. W. 603, 604 (1928). And for a protest against any judicial power being superior to constitutions, see dissenting opinion in the same case, l. c. 541 and 605. See also *Nelles and King, Contempt by Publication* (1928) 28 Col. L. Rev. 401, 425—a mine of information on constitutional provisions, statutes and cases relating to contempt of court.

responsibility for procedure, the judiciary has inherent power over matters affecting the administration of justice. (3) The matters just referred to may be helpfully regulated through statutory enactments. (4) If such statutory enactments frustrate the administration of justice, they will be declared unconstitutional by the courts.

The constitutional requirement of a three-fold division of government should be liberally and not strictly construed. The drafters of the New Hampshire Constitution of 1792, aware of danger in logic when divorced from experience, restated Montesquieu's dogma as follows: "In the government of this State, the three essential powers thereof, to-wit, the legislative, executive and judicial, ought to be kept as separate from, and independent of, each other as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the Constitution in one indissoluble bond of union and amity."⁴¹

Practically the same result has been reached in the other states and in the federal government through judicial exposition. Judge James B. Gantt in *Rhodes v. Bell*⁴² expressed the prevailing American view when he said that although it was "the purpose of the people in the framing and adoption of our constitutional provision to keep the several departments of our state government separate and independent in the spheres allotted to each, a careful study of the whole constitution will, we think, demonstrate that it was not the purpose to make a total separation of these three powers."⁴³

Apart from deciding law-suits and apart from all responsibility for procedure, the judiciary has inherent power over matters affecting the administration of justice. Admission to the bar of a particular state so as to enable the lawyer thus admitted to practice law, as attorney or as counsellor, is a matter which is

41. Part I, Art. 37; same in Const. of 1902.

42. 230 Mo. 138, 150, 130 S. W. 465, 468 (1910).

43. To the same effect: *People ex rel. Rusch v. White*, 334 Ill. 465, 479, 166 N. E. 100, 105, 64 A. L. R. 1006, 1014 (1929); *State ex rel. Patterson v. Bates*, 96 Minn. 110, 115, 104 N. W. 709, 711, 113 Am. St. Rep. 612, 617 (1905); *Clark v. Austin*, 101 S. W. (2d) 977, 987 (Mo. 1937); *Saratoga Springs v. Saratoga Gas, E. L. & P. Co.*, 191 N. Y. 123, 132, 83 N. E. 693, 695, 18 L. R. A. (N. S.) 713, 718, 14 Ann. Cas. 606, 607 (1908); 1 Story, *Constitution* (5th ed., 1891) sec. 525; 3 Willoughby, *Constitutional Law* (2d ed., 1929) secs. 1062-1066.

non-procedural and ancillary to administering justice, and is subject to control by the judiciary through the exercise of inherent judicial power. *Byrdonjack v. State Bar*⁴⁴ and *In re Day*⁴⁵ are two important cases which support the statement just made. Other cases are cited in the footnote below.⁴⁶ The United States Supreme Court at its beginning refused to admit attorneys to practice at its bar merely because they were members of their local state bars, and this caused some resentment, but was acquiesced in.⁴⁷

The disbarment of attorneys and the determination of grounds for disbarment are likewise matters over which the judiciary has inherent power. In the illuminating case of *In Re Richards*,⁴⁸ the court said: "It is not always easy to determine what objects are naturally within the range or orbit of a particular department of government, but it will scarcely be denied that a primary object essentially within the orbit of the judicial department is that courts function in the administration of justice, for which purpose they were created, and in the light of judicial history they cannot long continue to do this without power to admit and disbar attorneys who from time immemorial have in a peculiar sense been their officers."⁴⁹

The prevention and discouragement of practicing law by persons and corporations unauthorized to do so constitute another matter ancillary to administering justice.⁵⁰ The same is true of contempt of court directly affecting the orderly administration of justice, whether on the part of lawyers or laymen.⁵¹

44. 208 Cal. 439, 281 Pac. 1018, 66 A. L. R. 1507 (1929).

45. 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519 (1899).

46. Opinions of the Justices, 279 Mass. 607, 180 N. E. 725, 81 A. L. R. 1059 (1932); *In re Cannon*, 206 Wis. 374, 240 N. W. 441 (1932); *Ex parte Steckler*, 179 La. 410, 154 So. 41 (1934).

47. Rule II, adopted Feb. 5, 1790, 1 Cranch xvii, 2 L. ed. 13. See 1 Warren, *Supreme Court in U. S. History* (1922) 54.

48. 333 Mo. 907, 915, 63 S. W. (2d) 672, 675 (1933).

49. See also *In re Myrland*, 45 Ariz. 484, 45 P. (2d) 953 (1935); *Gould v. State*, 99 Fla. 622, 127 So. 309, 69 A. L. R. 699 (1930); *People ex rel. Karlin v. Culkin*, 248 N. Y. 465, 162 N. E. 487 (1928); *Danforth v. Egan*, 23 S. D. 43, 119 N. W. 1021, 20 Ann. Cas. 418, 139 Am. St. Rep. 1030 (1909).

50. *Berk v. State ex rel. Thompson*, 225 Ala. 424, 142 So. 832, 84 A. L. R. 740 (1932); *State ex rel. Miller v. St. Louis Trust Co.*, 335 Mo. 845, 74 S. W. (2d) 343 (1934); *State ex rel. McKittrick v. C. S. Dudley and Co., Inc.*, 102 S. W. (2d) 895 (Mo. 1937).

51. *Bradley v. State*, 111 Ga. 168, 36 S. E. 630, 50 L. R. A. 691 (1900); *Clark v. Austin*, 101 S. W. (2d) 977 (Mo. 1937); *Rhode Island Bar Ass'n v. Auto Service Ass'n*, 55 R. I. 122, 179 Atl. 139, 100 A. L. R. 226 (1935).

The matters just referred to may be helpfully regulated through statutory enactments. Most of the cases cited in the paragraphs immediately preceding as authorities for an inherent judicial power to regulate certain matters ancillary to the administration of justice were cases in which the legislative power was also exercised without any question being raised by the courts (if we disregard a few dissenting opinions) as to the validity of such exercise of legislative power. In each of these cases it was found or assumed that the legislative enactments were in the interest of the state itself and not harmful to the administration of justice. Other examples of legislation helpful to the judiciary in a field where the judiciary claims inherent power are cited in the footnote below.⁵²

If such statutory enactments frustrate the administration of justice, they will be declared unconstitutional by the courts. The acceptance of the doctrine restated in this section does not weaken the judiciary. The doctrine of judicial review is part and parcel of American law. The courts are created to protect all constitutional rights, including their own rights. If a particular statute or part of a statute is found to frustrate the administration of justice, it will be ignored as an unconstitutional intrusion upon the judicial domain. The limits of the legislative power are clearly set forth by Chief Justice Ellison in *Clark v. Austin*.⁵³ Speaking for the majority of the court, he says:

“The ultimate objective of both departments may be the same—the good of the people in the administration of justice; but the powers are fundamentally different. The courts’ power essentially is protective and self-serving; the legislative power is to advance the public welfare. And it will not do to say the Legislature can attain this end merely by passing punitive statutes. If it has the power to prescribe punishments for acts committed in the practice of law, it also has the power to define the acts for which those punishments are to be assessed, and to prohibit such acts without assessing any punishment, leaving it to the courts to dis-

52. In re Shattuck, 208 Cal. 6, 279 Pac. 998 (1929) (state bar act valid); In re Edwards, 45 Idaho 676, 266 Pac. 665 (1928) (state bar act valid in part and invalid in part); In re Scott, 53 Nev. 24, 292 Pac. 291 (1930) (state bar act valid); In re Morse, 98 Vt. 85, 126 Atl. 550, 36 A. L. R. 527 (1924) (illegal practice of law act applied to layman).

53. 101 S. W. (2d) 977, 997 (Mo. 1937).

cipline the offenders as their officers. On the other hand, the Legislature could, by passing a punitive statute affecting the practice of law, hamper and frustrate the courts; as if the General Assembly in this state should make it a punishable offense for a lawyer appointed by us to serve on a bar committee established by our Rule 36."⁵⁴

Many cases cited above illustrate the existence of this judicial power in the absence of any manifestation of legislative power in the same field. In other cases there was a manifestation of legislative power. But in no case is it admitted, according to the doctrine here set forth, that the power is delegated to the court by the legislature, when the court is created by the constitution itself. The power is inherent, implied, essential, protective, because of the exalted trust placed by the people themselves in the courts through their constitutional creation.

If the courts have an inherent power to regulate non-procedural matters ancillary to administering justice, then the courts have a power to promulgate rules which would be superstatutory in case of a conflict with legislative enactments. Such rules in the matter of admission to the bar have become quite common during the past decade. Canons of ethics have also been prescribed as rules of court.

A comparison of an unrepealed statute of Missouri⁵⁵ setting forth rather low minimum educational requirements for applicants for admission to the bar with a certain rule of the Supreme Court,⁵⁶ effective since November 1, 1934, will indicate that in Missouri the inherent power of the judiciary to admit attorneys and to control their educational preparation is an accepted fact. A futuristic rule of court was promulgated. It has been enforced. It is more drastic than the earlier statute. Insofar as there is a conflict, the rule is superstatutory.⁵⁷

Among the rules promulgated by the Missouri Supreme Court in 1934 was Rule 35⁵⁸ which set forth, as binding on all attor-

54. See Appendix to any volume of official reports since 334 Mo., page xvii.

55. R. S. Mo. 1929, sec. 11696.

56. Rule 38, printed in each volume of official Missouri Reports since 334 Mo., appendix, page xviii.

57. See also in re Day, 181 Ill. 73, 54 N. E. 646, 50 L. R. A. 519 (1899) (rules prevail over statute); Ex parte Steckler, 179 La. 410, 154 So. 41 (1934) (rule followed although more drastic than statute); In re Cannon, 206 Wis. 374, 240 N. W. 441 (1932) (statute ignored).

58. See any volume of official Missouri Reports since 334 Mo., appendix, pp. vii-xv.

neys, the Code of Ethics of the American Bar Association, each canon being numbered as a separate section of the rule. Canon 34 of the Code, original section 34 of Missouri Rule 35,⁵⁹ seems to permit a splitting of collection fees with a layman "where it is not prohibited by statute." Such practice is clearly prohibited and made criminal by a Missouri statute.⁶⁰ In a recent case, *State ex rel. McKittrick v. Dudley & Co., Inc.*,⁶¹ the facts showed an habitual practice of splitting fees by lawyers with a layman. The respondent contended that this rule of court,⁶² insofar as it adopted the language of the Code of Ethics, impliedly permitted the splitting of fees because the rule had modified the earlier statute. The court en banc, speaking through Judge Tipton, properly held that the rule by any reasonable construction was not in conflict with the statute, but to avoid confusion in the future the court on March 26, 1937, amended the rule by a formal order so that now the Missouri rule is more drastic than canon 34 of the Code of Ethics.⁶³

The assumption of rule-making power in 1934 by the Missouri Supreme Court in the matter of legal education, bar-admission, bar-discipline and bar-protection, very naturally has attracted attention. Helpful expositions of the new situation have been published by Judge Atwood⁶⁴ and by General Chairman Clark.⁶⁵

In Section 7 of this article an effort is made to show that in the field of procedure, insofar as procedure concerns controversies at common law (both civil and criminal) and in equity, and also under statutes creating new rights, the legislature is supreme and procedural statutes are binding on the courts, subject to ordinary constitutional limitations. How about remedial

59. *Ibid.*

60. R. S. Mo. 1929, sec. 11694.

61. 102 S. W. (2d) 895 (Mo. 1937) (original *quo warranto* in Supreme Court).

62. Rule 35, sec. 34, *supra*, note 58.

63. 9 Mo. Bar J. 56 (1937).

64. Former judge of the Missouri Supreme Court, writer of the court's opinion in the land-mark case of *In re Richards*, 333 Mo. 907, 63 S. W. (2d) 672 (1933). See his essay, *The Missouri Rule as to Regulation of the Bar* (1936) 1 Mo. L. Rev. 237, reprinted 14 Tenn. L. Rev. 438 (1937).

65. Member of the Supreme Court's Bar Committees, whose ability and persistence are largely responsible for the improved professional standing of the Missouri Bar. See his addresses, *Missouri's Accomplishments and Program for Eliminating the Unlawful Practice of Law* (1936) 22 A. B. A. J. 9, and *The Missouri Plan of Bar Government* (1936) 14 Tenn. L. Rev. 348.

matters in connection with the judicial investigation of alleged offences against the administration of justice, over which constitutional courts have an inherent power of control, and particularly violations of general rules of court designed to protect the administration of justice? Some cases assume or assert that the legislature is supreme in this field.⁶⁵ There is another view and on principle a sounder view. If what may be called the substantive law of bar-admission and bar-exclusion and contempt of court in the nature of contempt against the administration of justice, is a matter over which the judicial department has an inherent power of control (even if there is a concurrent power in the legislative department) it would seem to follow that the remedial details of conducting the occasional investigations necessary to apply and vindicate the substantive law of such matters would also be within the judicial department inherently, derived from the constitution directly, and not by way of grant from the legislative department. This is the view advanced by the Supreme Court of Virginia in the important case of *Carter v. Commonwealth*,⁶⁶ wherein it was decided that a statute requiring a jury trial in a contempt case directly affecting the administration of justice was unconstitutional. The court said:

“That in the courts created by the Constitution there is an inherent power of self-defense and self-preservation; that this power may be regulated, but cannot be destroyed, or so far diminished as to be rendered ineffectual, by legislative enactment; that it is a power necessarily resident in, and to be exercised by the court itself, and that the vice of an act which seeks to deprive the court of this inherent power is not cured by providing for its exercise by a jury; that while the legislature has the power to regulate the jurisdiction of circuit, county, and corporation courts, it cannot destroy, while it may confine within reasonable bounds, the authority necessary to the exercise of the jurisdiction conferred.”⁶⁷

65a. *Cole v. Egan*, 52 Conn. 219 (1884); *Ex parte Edwards*, 11 Fla. 174 (1867); *In re Darrow*, 175 Ind. 44, 92 N. E. 369 (1910); *Foster v. Commonwealth*, 8 Watts & Serg. 77 (Pa. 1844); *In re Waugh*, 32 Wash. 50, 72 Pac. 710 (1903).

66. 96 Va. 791, 32 S. E. 780, 45 L. R. A. 310 (1899). See *Potts, Inadequacy of Disbarment Machinery* (1934) 12 Texas L. Rev. 127.

67. 96 Va. 791, 816, 32 S. E. 780, 785, 45 L. R. A. 310, 315 (1899). To the same effect: *Hale v. State*, 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 254, 60 Am. St. Rep. 691 (1896); *Lenihan v. Commonwealth*, 165 Ky. 93,

Some light may be thrown on this particular problem by considering an accepted principle of American constitutional law. If a state constitution contains a self-executing provision in the nature of a grant of a new right, which did not exist at common law or in equity, then the legislature cannot impair that constitutional right by limiting unreasonably the remedial methods for vindicating the constitutional right. In a Missouri case⁶⁸ it appeared that a new constitution had created a new property right in connection with condemnation suits. The legislature, by a highly restrictive procedural statute, frustrated the intention manifested in the constitution. The Supreme Court held the statute invalid and approved the ruling of the lower court that a remedy could be used different from the prescribed, restrictive and allegedly exclusive remedy of the statute. And so if it is true that bar-admission, bar-exclusion and bar-protection are matters inherently within the control of the judiciary, and if it is true that the legislature has passed frustrating statutes in the guise of exclusive procedural remedies, it would follow that the procedural statutes should be disregarded. On the other hand, if the legislature has prescribed appropriate statutory remedies to aid the judiciary in exercising its inherent power and duty to protect the administration of justice, then the statutes would be regarded as non-frustrating, and appropriately would be followed. If there is no statute, common-law precedents could be followed. If there are frustrating statutes, they would be ignored as unconstitutional. (It is to be noted that procedure in Sections 7, 8 and 9 of this article relates to ordinary law-suits, civil and criminal. Here in Section 5, procedural remedies referred to relate only to judicial efforts to correct alleged interferences with the administration of justice as protected by the judiciary.)

What has just been said seems to be illustrated by the official attitude of the Supreme Court of Missouri during recent years. In combating the illegal or reprehensible practice of law, that court has exercised original jurisdiction against corporations by using the adequate statutory remedy of *quo warranto*,⁶⁹ against

176 S. W. 948, L. R. A. 1917B, 1132 (1915); *Ex parte Cashin*, 128 Miss. 224, 90 So. 850 (1922); *State Law Examiners v. Phelan*, 43 Wyo. 481, 5 P. (2d) 263, 78 A. L. R. 1317 (1931).

68. *Hickman v. City of Kansas*, 120 Mo. 110, 25 S. W. 225, 23 L. R. A. 658, 41 Am. St. Rep. 684 (1894).

69. *State ex rel. Miller v. St. Louis Union Trust Co.*, 335 Mo. 845, 74 S. W. (2d) 348 (1934).

members of the Bar, by using the excellent statutory special proceeding, which now expressly names the Supreme Court as having original jurisdiction, supplemented by a more comprehensive rule of the Supreme Court;⁷⁰ against unlicensed laymen by using the common-law order to show cause on information as in a contempt proceeding.⁷¹ There is nothing in the Constitution expressly authorizing original contempt proceedings in the Supreme Court. The subject may be regarded as covered by the short statutory provision for notice⁷² or by Supreme Court Rule 36,⁷³ effective since November 1, 1934, which expressly authorizes certain official representatives of the Bar to prosecute "such actions as may be appropriate to suppress such unlawful practices." The court, anticipating a highly improbable situation, in the *Austin* case⁷⁴ indicated that it would disregard a statute, if one should be passed, making it a crime for a lawyer "to serve on a bar committee established by our Rule 36."

SECTION 6: CERTAIN DOCTRINES AT VARIANCE WITH THE
DOCTRINE PRESENTED IN SECTION 5.

In view of the possibilities of serious conflict between the judicial and legislative branches of American state governments, it is quite remarkable, and creditable to the common-sense of legislators and judges, that there have been comparatively few cases in court which present any clash between judicial power and legislative power in dramatic or sensational form. It is believed that the doctrine restated in Section 5 gives the correct solution of a constitutional problem. However, other solutions have been advanced or assumed in the course of litigation. These other solutions will now be indicated briefly.

The doctrine of inherent and exclusive judicial power. A doctrine has been advanced in this country that in matters ancillary to the administration of justice and not connected with ordinary questions of procedure, the courts have an inherent and exclusive power of control, derived directly from the constitution in the same way that the inherent and exclusive power to decide a law-

70. R. S. Mo. 1929, secs. 11708-11715; Rule 36 of the Supreme Court, 337 Mo. appendix xv.

71. *Clark v. Austin*, 101 S. W. (2d) 977 (Mo. 1937).

72. R. S. Mo. 1929, sec. 1866.

73. 337 Mo. appendix xv.

74. 101 S. W. (2d) 977, 994 (Mo. 1937).

suit is derived directly from the constitution. As a result of this doctrine it would follow that any attempt by the legislature to pass statutes relating to these matters would be unconstitutional as a trespass upon the judicial field.

For the most part the doctrine is based upon dissenting opinions and overruled cases. To a slight extent it is supported by judicial decisions and un-overruled opinions. In *State ex rel. Wright v. Barlow*,⁷⁵ the court said: "We have reached the definite conclusion that this court is vested with the exclusive power to determine the qualifications of persons who may be permitted to practice law in this state and possesses the exclusive power to disbar licensed attorneys who have been unfaithful to the trust which the court has reposed in them." This was an original action to adjudge the defendant, a county judge but not a licensed attorney, in contempt of court for practicing law by giving legal advice outside of court. One of the defenses was the existence of a statute regulating the practice of law and prescribing only one sanction, namely, punishment as for a crime, and therefore the Legislature had "excluded" the court from the field. The court ruled against this defense, using the language quoted above. There was no direct ruling that the criminal statute was unconstitutional. If there should be a prosecution under the criminal statute, the issue would be clearly raised.

*State ex inf. v. Shepherd*⁷⁶ was a case involving alleged contempt of the Supreme Court of Missouri by a newspaper editor. The Supreme Court en banc unanimously decided that determining what are contempts against the administration of justice, and punishing such contempts, were matters exclusively within the limits of judicial power. The respondent relied upon a legislative act which seemed to curtail the judicial power. The court expressly held "that the legislature exceeded its powers when it enacted section 1616, Revised Statutes 1899, and that this court has an inherent and constitutional right to punish contempt summarily, which cannot be taken away, abridged, limited or regulated by the legislature."⁷⁷

75. 131 Neb. 294, 301, 268 N. W. 95, 98 (1936).

76. 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624 (1903).

77. 177 Mo. 205, 238, 76 S. W. 79, 89, 99 Am. St. Rep. 624, 648 (1903). The condemned statutory section, amended materially, is now R. S. Mo. 1929, sec. 1864.

The holding and the reasoning of the case last cited were followed six years later by the same court en banc when *Chicago B. & Q. Ry. Co. v. Gildersleeve*⁷⁸ was decided, although three of the seven judges dissented. The majority opinion stated in effect that the constitutional courts of Missouri have unlimited power to punish for contempt and that the legislature cannot pass laws on that subject because, if it could, it might enact unreasonable laws destroying that power. The doctrine of inherent and exclusive power in matters of contempt was afterwards abandoned by the Supreme Court of Missouri in the case of *Ex parte Creasy*,⁷⁹ decided by the court en banc without any dissent.

In territorial days Oklahoma was committed to the unlimited, inherent theory of judicial control over contempts,⁸⁰ and apparently this is still the law in Oklahoma, except insofar as the constitution has placed some express limitations on the judicial power over contempts.⁸¹

In re Removal of Janitor of the Supreme Court^{81a} had to do with the effort of a statutory official, purporting to act under a statute, to remove from office an appointee of the supreme court. The supreme court denied the power in the statutory official to make the removal. The decision was based in part upon a favored construction of an ambiguous statute, and in part upon the asserted "power inherent in every court of record, and especially a court of last resort, to appoint such assistants."⁸²

The above cited case of *Clark v. Austin*⁸³ was unanimous in result but not in reasoning. The able but rather mechanistic dissenting opinion by Judge Frank is based upon the strict theory of a rigid separation of governmental powers with an excessive-

78. 219 Mo. 170, 118 S. W. 86, 16 Ann. Cas. 749 (1909); cited with apparent approval in note 34 Harv. L. Rev. 424 (1921).

79. 243 Mo. 679, 148 S. W. 914, 41 L. R. A. (N. S.) 478 (1912). The opinion in the Shepherd case, 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624 (1903), has been much criticized. Three observations may be made: (1) The contempt was outrageous. (2) The statute held unconstitutional was in the nature of a frustrating statute. (3) The court could have reached the same result without claiming an inherent and exclusive control over contempts.

80. *Smith v. Speed*, 11 Okl. 95, 66 Pac. 511, 55 L. R. A. 402 (1901).

81. *State ex rel. Short v. Owens*, 125 Okl. 66, 256 Pac. 704 (1927); *Ex parte Owens*, 37 Okl. Crim. Rep. 118, 258 Pac. 758 (1927). To the same effect: *State v. Morrill*, 16 Ark. 384 (1855) (a contempt case).

81a. 35 Wis. 410 (1874).

82. *Supra*, note 81a, l. c. 419.

83. 101 S. W. (2d) 977 (Mo. 1937).

ly logical exclusion of all legislative power from the judicial domain. He deems it proper to hold unconstitutional even penal statutes defining the practice of law and prescribing a punishment for the illegal practice of law. Judge Frank says:

"We agree with the holding that the power to define and regulate the practice of law is, in its exercise, judicial and not legislative, but we do not agree with the further holding that the exercise of such power may be regulated by statute. If it be correct to hold that such power is judicial, then it is not correct to hold that the exercise of such power may be reasonably regulated by the Legislature, in face of the constitutional injunction that the legislative department of government shall not encroach upon the powers and functions properly belonging to the judicial department."⁸⁴

The doctrine of legislative supremacy. Some courts have decided cases involving conflict between judicial power and legislative power in the non-procedural border-land by asserting or assuming that the legislature is clothed with law-making power over all subjects except insofar as the power is expressly curtailed by the state and federal constitutions. *In re Waugh*⁸⁵ was an original disbarment proceeding in the Supreme Court of Washington. The allegations clearly indicated that the respondent was never qualified to be an attorney, but had obtained admission by fraud on a trial court. Since the constitution did not expressly confer original jurisdiction on the Supreme Court in disbarment cases and since a statute conferred such jurisdiction on the trial courts, a demurrer to the petition was sustained. The court said: "The inherent power of a court is an undefined quantity and an undefinable term, and courts have indulged in more or less loose expressions concerning it. It must necessarily be that the court has inherent power to preserve its existence and to fully protect itself in the orderly administration of its business. Its inherent power will not carry it beyond this."⁸⁶ Two of five judges dissented. As applied to contempts, the leading case supporting the doctrine of legislative supremacy is *Ex parte Hickey*.⁸⁷

84. *Supra*, note 83, l. c. 980.

85. 32 Wash. 50, 72 Pac. 710 (1903).

86. *In re Waugh*, 32 Wash. 50, 51, 72 Pac. 710 (1903). To the same effect: *State v. Foreman*, 3 Mo. 602 (1834).

87. 4 Smed. & Mar. (12 Miss.) 751 (1845).

The doctrine of comity. Many judicial opinions have avoided serious examination of this constitutional problem by using the concept of comity borrowed from private international law. "In the matter of contempt we have never gone further than to rule that as a matter of comity between the separate departments of the state government, we would recognize such reasonable restrictions imposed by the legislature."⁸⁸ This doctrine admits too much. The foreign statute in private international law is recognized as valid in the first instance. The local forum then decides as a matter of local policy whether the valid foreign law is to be locally adopted and applied. A frustrating statute tending to cripple or destroy the administration of justice is never valid but *ultra vires* the legislature and hence is unconstitutional.

SECTION 7: THE DOCTRINE OF LEGISLATIVE SUPREMACY
IN THE FIELD OF PROCEDURE.

As above indicated, procedure in this article means pleading and practice. In this domain of procedure, what is the degree of authority possessed by statutes when compared with common law, and what is the degree of authority possessed by statutes when compared with general rules of court? All American lawyers will give the same answer: Unless a statute is unconstitutional, it will prevail over a conflicting principle of the common law or a rule of court.

The small group of American lawyers who now assert that courts have an inherent power to prescribe rules of procedure in contravention of statutes are forced to admit as intelligent lawyers that all statutes regulating procedure are and always have been unconstitutional.⁸⁹

Do judges in the judicial department of a typical American state have the power to prescribe, outside the course of litigation, new rules of court which will regulate procedure, it being understood that the judges have not received a specific grant of rule-making power by constitutional provision or legislative enactment? In every decade between 1790 and 1920 the answer to that question was a unanimous *no*. Since 1920 there have been some suggestions made in respectable quarters that our profes-

88. In re Hagen, 295 Mo. 435, 442, 245 S. W. 336, 337 (1922). To the same effect: In re Greathouse, 189 Minn. 51, 60, 248 N. W. 735, 739 (1933); State v. Cannon, 196 Wis. 534, 538, 221 N. W. 603, 604 (1928).

89. See Section 9 of this article.

sional ancestors, at the bar and on the bench, were wrong; that the legislature at Jefferson City in 1849 and many other legislatures in the nineteenth century usurped unconstitutional power when they adopted David Dudley Field's Code of Civil Procedure; that our Missouri Code of Criminal Procedure is also unconstitutional; that the old system was bad but it was made by judges and therefore should be revised by judges; that there was no legal justification for what the young legislators did, although perhaps there was a moral justification in the ignorance, timidity and laziness of the old judges; that the judges of each state had the power, by reason of the fact that they administered common law and equity in courts established by a constitution, to get together and prescribe new rules of court to operate prospectively, which could have combined law and equity, could have extended the possibilities of joinder of parties litigant and of causes of action, could have changed the effect of writs of summons, could have regulated the lien-producing effect of a judgment and could have modified any of the thousand and one details of procedure, that is, pleading and practice, which latter term includes process, writs, judgments, and executions.

Many excellent arguments can be made, and have been made, for a lodgment in the courts of a new rule-making power which would grant to them the function of creating permanent directions for pleading and practice, to be binding even if in contravention of statutes. England, the United States, and ten of our states have, by constitutional provision or legislative enactment, conferred this power upon the courts.⁹⁰ The wisdom of this lodgment of power in the courts is outside the scope of this article.

The scope of this article includes a brief consideration of this question: Do our American state courts, without a constitutional or legislative grant of power to regulate procedure, possess the inherent, implied, constitutional power to prescribe rules of procedure in contravention of statutes? Of course, this is a question of American constitutional law. It is quite true that the typical American state constitution has an article which in express terms creates a judicial department as a separate branch of sovereignty, independent of the legislature. That means it is independent when acting judicially within its orbit as outlined

90. See Section 3 of this article.

expressly or impliedly by the constitution. The typical state constitution expressly creates certain courts and expressly confers upon those courts jurisdiction at *law* and in *equity*. The constitution makes certain express delegations of original and appellate jurisdiction. The typical constitution also grants to the appellate courts a superintending control over the lower courts and tribunals (such as was possessed by the King's Bench over the inferior common-law courts and statutory tribunals).

This paraphrase of a typical state constitutional provision would be meaningless without a reasonably clear notion of the technical terms *law* and *equity*. These terms do not mean the same thing in Paris or Buenos Aires that they mean on the banks of the Thames or the levees of the Mississippi.⁹¹ As these terms are used in our American state constitutions (and also in our federal constitution) they mean the common law and equity of England at the time of the American Revolution as received in each state and modified by local custom.

*Ross v. Rittenhouse*⁹² involved a question of procedure, and in deciding it Chief Justice McKean invoked "the genius and spirit of the common law of England which is the law of Pennsylvania." In *United States v. Wonson*,⁹³ Judge Story examined English cases to distinguish a writ of error from a statutory appeal and referred to "the common law of England, the grand reservoir of all our jurisprudence." For the collection of debts due the federal government from a fiscal officer, a summary process authorized by Congress and sanctioned by long usage in England before the American Revolution was held valid as not violating the due-process clause in *Murray v. Hoboken Land Co.*⁹⁴ The court said:

"We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their

91. The late Augustine Birrell used to say that he never knew anybody outside the legal profession who understood the meaning of law and equity as those terms are used in English jurisprudence.

92. 1 Yeates 443, 457 (Pa. 1792) 2 Dall. 160, 163, 1 L. ed. 331, 332.

93. 1 Gall. 5 (C. C. D. Mass.) 28 Fed. Cas. (No. 16750) 745, 750 (1812).

94. 18 How. (59 U. S.) 272, 15 L. ed. 372 (1856).

civil and political condition by having been acted on by them after the settlement of this country.”⁹⁵

*Clark v. Allaman*⁹⁶ was decided in territory originally French, afterwards Spanish, and now American, but never English. The court said: “Among the most elementary of our legal concepts is that of the adoption of the English common law as the basis of American jurisprudence.” In *Aetna Accident and Liability Company v. Miller, Receiver*,⁹⁷ a receivership case, the assignee of the state’s claim against an insolvent bank was held to be a preferred claim, in the absence of any controlling statute, for the following reason: “At the time the territory of Montana was organized and first formally adopted the common law as our rule of decision in the absence of statutes, there existed a vast number of decided cases from almost all of the states holding that divers and sundry prerogatives ascribed to the King at common law had passed to the states.”

The first generation of American lawyers after the Revolution certainly would never have claimed for American courts any power in procedural matters adverse to legislative power manifested through statutes in the same field, unless such power was within the common-law and equity powers of the English courts. At the time of the American Revolution, did the justices and barons of the English common-law courts, and the Lord Chancellor, possess the power to promulgate general rules of court in contravention of acts of Parliament? If the answer is *yes*, then there is a plausible argument that our constitutional courts have inherent power to make rules of procedure in contravention of statutes. If the answer is *no*, then certain zealous lawyers who (with the best of motives) are yearning for a particular reform should stop talking about “inherent power to ignore the legislature” and should stop repeating that “the constitution means what the judges say it means.” The judges have taken an oath of office. What these zealous lawyers should do is to work for a transfer, by constitutional amendment or legislative act, of procedural rule-making power to the judiciary.

95. 18 How. (59 U. S.) 272, 277, 15 L. ed. 372, 374 (1856).

96. 71 Kan. 206, 215, 80 Pac. 571, 574, 70 L. R. A. 971 (1905). This case gives an historical outline of the reception of the common law in Missouri as well as in Kansas.

97. 54 Mont. 377, 382, 170 Pac. 760, 761, L. R. A. 1918C 954 (1918).

No American judge will ever assert that he has greater power than the English judges and chancellors of the eighteenth century, except insofar as our constitutions and statutes have expressly or impliedly enlarged his powers.

Those terms *law* and *equity* which appear in our state and federal constitutions are links in a chain binding our American courts to the institutions of Blackstone, Mansfield, Hale, Roll, Eilsmere, Coke, Bracton, Glanvil, and the barons at Runnymede.

It is not to be expected that our American courts will be nonchalant and superficial if called upon to determine whether there is a power to nullify statutes implied in the terms *law* and *equity*, which must be interpreted as English technical terms of the eighteenth century except insofar as modified by colonial customs, and constitutional law, on this side of the Atlantic.

Professor Holdsworth says that even Coke, although uttering some bold dicta as to the fundamental nature of the common law, frankly admitted the ultimate supremacy of Parliament, and from Coke's death down to the present time there has been no question as to the inability of any British tribunal or official to ignore or modify an act of Parliament.⁹⁸

At the end of an elaborate description of redress by suit in court, Blackstone said:

"But this intricacy of our legal process will be found, when attentively considered, to be one of those troublesome, but not dangerous, evils, which have their root in the frame of our constitution, and which therefore can never be cured without hazarding everything that is dear to us. In absolute governments, when new arrangements of property and a gradual change of manners have destroyed the original ideas on which the laws were devised and established, the prince by his edict may promulgate a new code, more suited to the present emergencies. But when laws are to be framed by popular assemblies, even of the representative kind, it is too herculean a task to begin the work of legislation afresh, and extract a new system from the discordant opinions of more than five hundred counsellors."⁹⁹

We may not admit the wisdom of Blackstone's fear of legislation. But there can be no dissent from the correctness of his conclusion about the sole power of Parliament consciously to

98. 4 Holdsworth, *History of English Law* (1924) 186-187.

99. 3 Bl. Com. (1765) *267.

create remedial alterations in the common law of procedure, either directly or by a delegation of power. (Of course, the power of the courts judicially to change the common law by decisions in the course of litigation is quite different from the power to make changes for the future by promulgating new rules of court.) In another place, Blackstone is even more emphatic. After describing the parliamentary routine of passing a bill and obtaining the royal assent thereto, Blackstone said:

“An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the king himself, if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms, and by the same authority of parliament: for it is a maxim in law, that it requires the same strength to dissolve, as to create, an obligation.”¹⁰⁰

If it can be shown that the common law of England, when transplanted to this country, was modified through public opinion, registered in official action, so as to authorize colonial courts to promulgate prospective rules in contravention of statutes and the common law of procedure, then it would be quite proper to assert that a modern state constitution, by conferring jurisdiction at law and in equity upon the constitutional courts, had impliedly authorized those courts to promulgate superstatutory rules. It is true that the colonial and early republican courts showed much independence in modifying common law and equity through their judicial decisions in the course of litigation, and thus they built up some new and distinctive American rules of law. Francis Wharton has pointed out the importance of this process in the legal history of Pennsylvania.¹⁰¹ But there is an

100. 1 Bl. Com. (1765) *185.

101. Wharton, *Commentaries on Law* (1884) sec. 2. In thinking about the formative period of American jurisprudence, perhaps we pay too much attention to the appellate judges and not enough to the trial judges. Those trial judges must have had a lot of common-sense and independence. In Pennsylvania and Massachusetts there never were any separate courts of chancery, and until well along in the nineteenth century there was no general adoption of equity by the constitution or statutes. And yet by a remarkable series of interlocutory decisions and final judgments the trial judges expanded the common-law actions so as to apply much of the substantive part of equity for the benefit of both plaintiffs and defendants. This was sometimes justified on the theory that the Court of Exchequer had

entire dearth of legal or historical authority for asserting that the colonial courts assumed any conscious power to formulate prospective rules in contravention of statutes regulating procedure. The earliest American descriptions of rules of court all assume that they are and must remain subordinate to legislation unless a superseding quality is conferred upon them by legislative or constitutional grant.

In *Barry v. Randolph*¹⁰² a rule relating to appeals to the court of common pleas from a lower statutory court was challenged as in conflict with a statute, but sustained because of no conflict. Judge Jasper Yeates said: "A rule of the same kind precisely subsisted before the American Revolution. It is true that no rule can be made which would divest a citizen of any legal right." Other early American cases recognizing the legislative supremacy in the field of procedural law are cited in the footnote.¹⁰³

It should be remembered that the American Revolution was not a fight against the common law of England. It was a fight to get the common law of England established in America. It was a rebellion against the official English doctrine that English governmental rights in the plantations of America were acquired, not through colonization, but through conquest. "And, therefore," as Blackstone said, "the common law of England, as such, has no allowance or authority there; they being no part of the mother country, but distinct, though dependent dominions."¹⁰⁴ As a reply to this doctrine the Continental Congress in its Declaration of Rights,¹⁰⁵ stated: "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."

The attitude of the late colonial and early republican judges

equity jurisdiction. But issues of fact were always tried by a jury. Story, *Equity* (12th ed. 1877) sec. 57; Wharton, *Commentaries on Law* (1884) sec. 113; 7 Dane, *Abridgment of American Law* (1924) 516-639.

102. 3 Binn. 277, 279 (Pa. 1810).

103. *Dubosq v. Guardians of the Poor*, 1 Binn. 415 (Pa. 1808); *Vanatta v. Anderson*, 3 Binn. 417 (Pa. 1811); *Snyder v. Bauchman*, 8 Serg. & R. 336 (Pa. 1822); *Thompson v. Hatch*, 3 Pick. (20 Mass.) 512 (1826); *Risher v. Thomas*, 2 Mo. 98 (1828).

104. 1 Bl. Com. (1765) *108; quoted and criticized by Story, *Commentaries on the Constitution* (5th ed. 1891) secs. 151 and 152.

105. Sec. 5 (1774); quoted by Pound and Plucknett, *Readings on the Common Law* (1927) 309. The book contains additional data on the American reception of the English common law.

was one of extreme loyalty, not to say servility, toward the English judicial system as it existed for the benefit of Englishmen in England. On August 8, 1791, the United States Supreme Court adopted its original Rule VII¹⁰⁶ in these words:

“The chief justice, in answer to the motion of the attorney-general, made yesterday, informs him and the bar, that this court considers the practice of the courts of King’s Bench, and of Chancery, in England, as affording outlines for the practice of this court; and they will from time to time, make such alterations therein as circumstances may render necessary.”¹⁰⁷

(Of course, *practice* here means customs and court rules not in conflict with rules of law or statutes.) Certainly the lawyers who practiced in the federal supreme court were not induced by this language to reject the fundamental English doctrine of procedure that, when the legislature passes a statute, the statute is supreme.

In the nineteenth century there was very little text-book treatment of the rule-making power in this country. Perhaps the best was by Joel P. Bishop.¹⁰⁸ He said: “A rule is invalid when contravening a statute or any doctrine of established law.”¹⁰⁹ In the twentieth century a widely used encyclopedia stated the generally accepted principle in these words: [The rule-making power is] “not absolute but subject to limitations based on reasonableness and conformity to constitutional and statutory provisions.” In support of the principle, ninety-nine cases from forty-five appellate courts are cited.¹¹⁰

106. 1 Cranch xvii, 2 L. ed. 13 (1791). John Jay was Chief Justice, and Edmond Randolph was attorney-general. For the attorney-general’s motion see 2 Dall. 411, 1 L. ed. 437 (1792).

107. Criticized as too “difficult for an American lawyer to correctly understand,” 6 Dane *Abridgment of American Law* (1823) 550.

108. Bishop, *Marriage and Divorce* (6th ed. 1881) secs. 80-86.

109. *Supra*, note 108, sec. 84.

110. 15 C. J., *Courts* (1918) 901-902, sec. 276. Some more recent cases are: *McMann v. Hamilton*, 202 Cal. 319, 260 Pac. 793 (1927) (rule tested by statute and held valid); *State ex rel. Brockman Manufacturing Co. v. Miller*, 241 S. W. 920 (Mo. 1922) (rule tested by statute and held valid); *State ex rel. Paramount Progressive Order of Moose v. Miller*, 216 Mo. App. 692, 273 S. W. 122 (1925) (rule tested by statute and held valid); *Bank of Beaverton v. Goodwin*, 124 Ore. 166, 264 Pac. 356 (1928) (rule limiting discretion of judges in extending time for filing a pleading, held invalid because of conflict with statute); *Carroll v. Quaker City Cab. Co.*, 308 Pa. 345, 162 Atl. 258 (1934) (rule limiting time for issuing writ held invalid because of conflict with statute).

Of the twentieth-century-fourth-decade cases perhaps the best considered is from Arizona.¹¹¹ The legislature in 1901 granted to the Supreme Court power to make "rules of practice" for the trial courts without any specific utterance that the rules would or would not be subordinate to statutes.¹¹² In 1932, the Supreme Court promulgated a rather lengthy and involved rule applying to "any demurrer, motion or similar pleading."¹¹³ When, in 1935, a trial court's attention was called to a conflict between this rule and a statute relating to motions for a new trial, the court made a decision in accord with the statute and not in accord with the rule. The Supreme Court sustained this decision, saying: "In so far as there is a constitutional statute in regard to practice which provides for a certain method of procedure, that statute prevails over a rule made by the court which is in conflict therewith."¹¹⁴

SECTION 8: CONSTITUTIONAL LIMITATIONS ON THE DOCTRINE OF LEGISLATIVE SUPREMACY.

Some impatient lawyers, eager to establish the doctrine that a state supreme court, without any express constitutional or legislative grant of power, can promulgate general rules of procedure in contravention of statutes, have diligently searched through recent digests and reports and have reprinted in red ink, as it were, all cases in which a state supreme court has declared unconstitutional any particular statute in any way touching on procedure. Many particular statutes in the field of contracts have been declared unconstitutional. It does not follow that the supreme court of a state can promulgate a new code of contract law and abrogate pre-existing statutes. It is quite true, as will be indicated in Section 10, that promulgating new rules of procedure is a judicial function in the sense that a grant of power by the legislature expressly authorizing the judicial department to promulgate superstatutory rules of procedure is not an unconstitutional delegation of legislative power, and will not wreck the Sacred Temple of the Three Powers. Until lawyers, in a state like Missouri, have enough influence with the legislature, or the voters (who possess the initiative and referendum franchise),

111. *De Camp v. Central Arizona L. & P. Co.*, 57 P. (2d) 311 (Ariz. 1936).

112. *Supra*, note 111, l. c. 313.

113. *Supra*, note 111, l. c. 312.

114. *Supra*, note 111, l. c. 313.

to obtain a grant of superstatutory rule-making power for the judicial department, it would be well for lawyers to remember that *stare decisis* is still operative in the courts, and that the tribunalistic history of English law in the eighteenth century and of American law in the nineteenth century will be studied by judges in the future, when deciding novel issues, as in the past.

The Magna Carta of the modern advocates of judicial omnipotence is Judge Stephen Field's opinion in the case of *Houston v. Williams*.¹¹⁵ In 1854, California adopted a statute which in terms provided "that all opinions given upon an appeal in any Appellate Court of this State, shall be in writing, with the reason therefor, and filed with the Clerk of the Court."¹¹⁶ Five years later the Supreme Court on appeal reversed a certain judgment. No written opinion was filed. A party litigant petitioned the court to file a written opinion. The petition was denied. The court said:

"The provision of the statute had not been overlooked when the decision was rendered. It is but one of many provisions embodied in different statutes by which control over the Judiciary Department of the government has been attempted by legislation. To accede to it any obligatory force would be to sanction a most palpable encroachment upon the independence of this department. If the power of the Legislature to prescribe the mode and manner in which the Judiciary shall discharge their official duties be once recognized, there will be no limit to the dependence of the latter. If the Legislature can require the reasons of our decisions to be stated in writing, it can forbid their statement in writing, and enforce their oral announcement, or prescribe the paper upon which they shall be written, and the ink which shall be used. And yet no sane man will justify any such absurd pretension, but where is the limit to this power if its exercise in any particular be admitted?

"The truth is, no such power can exist in the Legislative Department, or be sanctioned by any Court which has the least respect for its own dignity and independence. In its own sphere of duties, this Court cannot be trammelled by any legislative restrictions. Its constitutional duty is discharged by the rendition of decisions. The Legislature can no more require this Court to state the reasons of its decisions, than this Court can require, for the validity of the statutes, that

115. 13 Cal. 24, 73 Am. Dec. 565 (1859).

116. 13 Cal. 24, 25.

the Legislature shall accompany them with the reasons for their enactment. The principles of law settled are to be extracted from the records of the cases in which the decisions are rendered. The reports are full of adjudged cases, in which opinions were never delivered. The facts are stated by the Reporter, with the points arising thereon, and are followed by the judgments rendered, and yet no one ever doubted that the Courts, in the instances mentioned, were discharging their entire constitutional obligations."¹¹⁷

An historian¹¹⁸ has told us that this emphatic declaration of independence from the quill pen of a great but very human judge was an episode in a petty but protracted quarrel between the judges of the court and certain newspapers of Sacramento, in which the legislators and the governor took sides with the newspapers.¹¹⁹ The actual decision in *Houston v. Williams*¹²⁰ was sound. In the absence of any mandate in the constitution, the writing of opinions by an appellate judge is obviously a matter of inherent judicial discretion, and a statute attempting to impose such a duty on the judiciary would be an unconstitutional trespass on the judicial department as established by organic law. The case of *Horner v. Amick*¹²¹ goes even further and holds that a constitutional provision, rhetorically a command to write opinions, is directory only.

In *Thoe, Adm., v. Chicago M. and St. P. R. Co.*,¹²² a statute had the effect of taking away from the trial court the right to direct

117. 13 Cal. 24, 25 and 26. The last sentence in the passage quoted in the text naturally raises a question. Suppose all American appellate judges would stop writing opinions and would merely decide cases. Would those judges be "discharging their entire constitutional obligations"—even in states where the constitutions are silent about opinions? Of course we have too many judicial opinions. But could we, and the next generation of Americans, get along without any opinions at all? Perhaps the ideal system is that prevailing in the New York Court of Appeals. The judges write opinions only in cases involving novel points of law. In each of the other cases the decision alone is printed, with a brief indication of the procedural history of the case, prepared by the Reporter.

118. Swisher, *Stephen J. Field, Craftsman of the Law* (1930) 105-109.

119. Later on there was a knifing and talk about a duel and charges of cowardice against Field from which he suffered bitterly and which perhaps had some causal relation to the case of *In re Neagle*, 135 U. S. 1, 10 S. Ct. 658, 34 L. ed. 55 (1889). *Supra*, note 118.

120. 13 Cal. 24, 73 Am. Dec. 565 (1859). To same effect: *Ex parte Griffiths*, 118 Ind. 83, 20 N. E. 513 (1888); *Vaughan v. Harp*, 49 Ark. 16, 4 S. W. 751 (1887).

121. 64 W. Va. 172, 61 S. E. 40 (1908).

122. 181 Wis. 456, 195 N. W. 407, 29 A. L. R. 1280 (1923).

a verdict in any jury case. Reluctantly and with more courtesy than was shown in California, the Wisconsin court upheld the action of the trial judge in disregarding the statute as an assault upon the constitutional functions of the judiciary.

*Riglander v. Star Co.*¹²³ involved a statute which apparently controlled absolutely the order in which certain cases should be tried. It was held that the act was invalid because it deprived "the courts of the right to exercise that judicial discretion which has always been their prerogative."¹²⁴ Partly on the authority of the *Riglander* case, the Supreme Court of Oklahoma held unconstitutional a statute in the nature of a command that in a certain class of cases the trial court should always try each case within ten days after defendant's answer was filed.¹²⁵

In all the cases above cited in this section, the conflict was between a mandatory statute relating to procedure on the one hand, and on the other hand, an unformulated principle of judicial discretion so essential to the free exercise of the judicial function as to justify the courts in holding that there was an inherent duty to protect the judicial function derived directly from the constitution. If the courts first prescribe a general rule of procedure, clearly relating to an inherent judicial function, and then the legislature enacts a conflicting statute, it is the duty of the court, after careful reconsideration of the matter, to hold the statute unconstitutional. For a court not to do so would be to surrender a chief characteristic of American jurisprudence, the function of judicially reviewing any legislation when challenged on constitutional grounds.

Several Indiana cases decided during the past two decades involved a conflict between rules of the Supreme Court, obviously designed to encourage the fair, prompt and convenient dispatch of appellate business, and statutes authorizing loose and sloppy professional work by attorneys for litigants in the Supreme Court.

In *Epstein v. State*¹²⁶ the appellant admitted that he failed to

123. 98 App. Div. 101, 90 N. Y. Supp. 772 (1904), aff'd 181 N. Y. 531, 73 N. E. 1131 (1905).

124. 90 N. Y. Supp. 775 (1904).

125. *Atchison, Topeka & Santa Fe Ry. Co. v. Long*, 122 Okl. 86, 251 Pac. 486 (1926).

126. 190 Ind. 693, 128 N. E. 353 (1920). See note, 34 Harv. L. Rev. 424 (1921).

comply with a certain rule of the court, which required that "the briefs shall set out a concise statement of so much of the record as presents every error and exception relied on."¹²⁷ He contended that a statute passed after the rule was promulgated had the effect of abolishing the rule. The holding was in favor of the rule. The court said: "This court is a constitutional court, and as such receives its essential and inherent powers, rights and jurisdiction from the Constitution, and not from the legislature, and it has power to prescribe rules for its own direct government independent of legislative enactment."¹²⁸ This language is broader than is necessary. But the holding is quite sound and by no means unprecedented. Other Indian cases are cited in the footnote.¹²⁹

That the Supreme Court of Indiana in the cases just referred to in the text and footnote did not intend to recognize any unusual judicial power to make superstatutory rules of practice in the trial courts is evident from a still more recent case, *Barber v. State*.¹³⁰ In this latter case the issue was between the right of a litigant (not the convenience of an attorney) as protected by the statute, and a rule of the trial court in conflict with the statute. The Supreme Court of Indiana did not hesitate to call the rule invalid. This was a murder case in which the right of a defendant to a change of judge secured to him by the statute was erroneously denied by the trial court in reliance on a conflicting general rule of court.

*Turner v. Anderson*¹³¹ in effect held invalid a statutory provision requiring detailed contents of opinions filed in the appellate courts. The case last cited in the text is also interesting because of another point discussed but not before the court as an issue. The Constitution of Missouri makes it mandatory for divisional opinions of the Supreme Court to be written and filed. The Constitution also makes it mandatory for opinions in the courts of appeals to be written and filed. There is no provision

127. 190 Ind. 693, 695, 128 N. E. 353 (1920).

128. 190 Ind. 693, 696, 128 N. E. 353 (1920).

129. *Roberts v. Donahoe*, 191 Ind. 98, 131 N. E. 33 (1921) (time of objecting to transcript on appeal); *Davis v. Indiana*, 189 Ind. 464, 128 N. E. 354 (1920) (contents of transcripts on appeals); *Solimeto v. State*, 188 Ind. 170, 122 N. E. 578 (1919) (contents of brief on appeal).

130. 197 Ind. 88, 149 N. E. 896 (1925).

131. 236 Mo. 523, 139 S. W. 180 (1911). To the same effect: *Smarr v. Smarr*, 319 Mo. 1153, 6 S. W. (2d) 860 (1928).

in the Constitution for opinions of the Supreme Court en banc to be written and filed. A statute clearly commands that in each case determined by the Supreme Court "the opinion of the court shall be reduced to writing and filed."¹³² The divisional opinion (of Judge Lamm) in the instant case included an elaborate *dictum* patently intimating that the statute is unconstitutional insofar as it applies to the court en banc.¹³³ As a matter of fact, this statute is not always followed by the Missouri Supreme Court en banc, when exercising its original jurisdiction.

North Carolina's constitution gives to the General Assembly express authority to make rules of procedure for all courts "below" the Supreme Court.¹³⁴ By construction of the constitution the Supreme Court has developed a doctrine of procedural independence with rule-making power for conducting business in its own tribunal—which, however, does not seem to be unique in practical effect.¹³⁵

The cases cited in this Section 8 show that American state courts are aware of their constitutional duty to protect the judicial function from frustrating legislation. They do not show that ordinary and reasonable practice acts relating to the fundamentals of trial procedure are outside the constitutional orbit of legislative activity. And it would be a mistake to suppose that there is anything novel about the doctrine of this Section 8, or that it started with the petulance of Judge Field in California. In early manhood Chief Justice Gibson was opposed to the doctrine of judicial review. But when he was older he accepted it and applied it. In 1847, the Pennsylvania legislature passed an act in terms granting a new trial to a defeated litigant. (There was no constitutional inhibition against special laws.) The trial court refused to proceed under the statute. A writ of error was sued out as of course. In vigorous language the Supreme Court, speak-

132. R. S. Mo. 1929, sec. 1067.

133. *Turner v. Anderson*, 236 Mo. 523, 139 S. W. 180 (1911). The decision in *Houston v. Williams*, 39 Cal. 24, 73 Am. Dec. 565 (1859), was cited with approval.

134. Art. 4, sec. 2; see also Art. 1, sec. 8.

135. *Lacy v. State*, 195 N. C. 284, 141 S. E. 886 (1928); *State v. Ward*, 184 N. C. 618, 113 S. E. 775 (1922); *Cooper v. Board of Commissioners*, 184 N. C. 615, 113 S. E. 569 (1922); *Herndon v. Imperial Fire Ins. Co.*, 111 N. C. 384, 16 S. E. 465 (1892).

ing through Chief Justice Gibson, upheld the trial court, saying: "The act before us is null."¹³⁶

SECTION 9: THE DOCTRINE OF INHERENT AND EXCLUSIVE JUDICIAL RULE-MAKING POWER IN THE FIELD OF PROCEDURE.

*Hanna v. Mitchell*¹³⁷ was a very important case which involved the validity of the general rule of court applying to all trial courts of the state and authorizing summary judgment in certain cases where verified allegations on one side were not combated by counter-affidavits on the other side. Three justiciable issues were raised and decided. (1) The rule was promulgated by a convention of judges duly authorized by the legislature to act. (2) The rule did not violate the constitutional right of trial by jury. (3) The rule was not inconsistent with the Civil Practice Act passed by the legislature.

The opinion of Judge Page¹³⁸ is quite sound on the issues involved and contains a scholarly and useful but far from comprehensive treatment of the history of judicial power in New York from the seventeenth century to the time of the decision. The opinion contains this misleading *dictum*: "The power to make rules governing the practice and procedure in the courts is a judicial, and not a legislative, power. This was clearly recognized when the Code of Civil Procedure [of 1848] was authorized to be adopted by the legislature. A change in the Constitution was found necessary to confer the power upon the legislature."¹³⁹

This utterance has nothing whatever to do with the issues of the case as set forth in the memorandum opinion of affirmance in the Court of Appeals.¹⁴⁰ It is true that the New York Constitution of 1846 contained a mandate to the legislature for the appointment of three commissioners to draft a new set of rules

136. *De Chastellux v. Fairchild*, 15 Pa. St. 18, 21 (1850). To the same effect: *Dorsey v. Dorsey*, 37 Md. 64 (1872).

137. 196 N. Y. Supp. 43 (1922), *aff'd* 235 N. Y. 534, 139 N. E. 724 (1923).

138. Chairman of the Biennial Convention of Judges (1921) which adopted this particular rule authorizing summary judgment. The Conventions formerly met under authority of Consol. Laws 1909, c. 35, p. 1898. The old law apparently has been modified and judges of the Appellate Division now take action by referendum vote. New York, Cahill's Consol. Laws 1930, c. 31, sec. 82.

139. *Hanna v. Mitchell*, 196 N. Y. Supp. 43, 51 (1922).

140. *Hanna v. Mitchell*, 235 N. Y. 534, 139 N. E. 724 (1923).

of procedure and "to report thereon to the legislature, subject to their adoption and modification from time to time."¹⁴¹ To assert in the twentieth century that the original Field Code in New York would have been unconstitutional if it had not been for this express provision of the New York Constitution of 1846 is startling in the extreme. For historical reasons the doctrine may not lead to any confusion in New York. But if this *dictum* should be accepted as accurate, an enormous amount of confusion would result in Missouri and more than a score of other states whose legislatures adopted the Field Code without any specific constitutional authorization. The Illinois Practice Act of 1933¹⁴² would also be unconstitutional because it was enacted by the legislature without any express constitutional authorization.

The natural meaning of the New York constitutional provision is this: The legislature was ordered by the people forthwith to appoint three commissioners who were ordered in advance by the people to do a particular job, but the people did not grant to the commissioners any final legislative power. The commissioners' report was to be what the French call a *projet de loi*. It was not to be infused with validity unless and until the legislature acted favorably. But there is nothing in the Constitution of 1846 to justify the inference that without specific constitutional authorization the legislature was impotent to change the common law of procedure, or to amend and abrogate any general rules of court that may have been promulgated.

If the only thing in New York that saves the constitutionality of the Field Code of 1848 is the special provision in the Constitution of 1846, then it necessarily follows that much of the very important legislation enacted at Albany on December 10, 1828, which went into effect January 1, 1830, was unconstitutional. Part of this legislation related to civil procedure and part of it related to criminal procedure. Some of it was declaratory of the common law of procedure, but a great deal was in derogation of the common law. The common law and equity reports of the New York Supreme Court of Judicature and the Chancery Court, following 1930, contain many references to this legislation of 1828. In every instance the court enforced the new statutes when in

141. Art. VI, sec. 24.

142. Smith-Hurd Rev. Stat. of 1935, c. 110, secs. 125-263.

conflict with the common law or the traditional equity practice. In an early case^{142a} the court said: "This is the common law rule and under it an action of trover would not lie against the executor for property converted by the testator. But by our statute, 1 R. L. 311, 12, the action of trespass is given by and against executors and administrators for property taken and converted by the testator or intestate in his lifetime." Other pertinent cases are cited in the footnote.¹⁴³ A cursory survey of the legislation of December 10, 1828, will reveal many changes in the common law of civil procedure. The action of replevin was extended and detinue was abolished. The writ of error was made available for chancery cases. Equitable relief was allowed a plaintiff in ejectment when the defendant was committing waste.

Radical changes were made in the common law of criminal procedure. The writ of error was made a writ of right in many cases where it had been discretionary under the common law of New York. The common law of venue was modified, probably in view of extensive navigation on the Hudson River, bounded on each side by relatively small counties. Certiorari was extended to review proceedings when the attorney-general alleged errors of laws on the record proper. The judges of the New York courts at that time gave no indication that they possessed any power to make these changes by rule of court or that they regarded the legislators at Albany as usurpers. No law book printed in New York State has been found in which there is any hint of unconstitutionality in connection with legislation governing the fundamentals of procedure until the case of *Hanna v. Mitchell*¹⁴⁴ was decided and the remarkable *dictum* was uttered

142a. *People v. Gibbs*, 9 Wend. (24 N. Y. C. L.) 29, 33 (1832).

143. *People v. Van Eps*, 4 Wend. (21 N. Y. C. L.) 387 (1830); *People v. Phelps*, 5 Wend. (22 N. Y. C. L.) 1 (1830); *People ex rel. Bailey v. Hoffman*, 7 Wend. (23 N. Y. C. L.) 489 (1832); *People ex rel. Pratt v. Alberty*, 11 Wend. (25 N. Y. C. L.) 160 (1834); *Wilder v. Ember*, 12 Wend. (25 N. Y. C. L.) 191 (1834). The case of *In re Frits*, 2 Paige (N. Y. Ch.) 374 (1831), involved careful construction of a procedural statute and Chancellor Walworth concluded there was no change from the earlier practice, but raised no question as to power of the legislature to make a change in equity practice.

144. 196 N. Y. Supp. 43, 51 (1922). Judge Selden of the New York Court of Appeals, eighty years ago was unsympathetic toward the Field Code. Two of his opinions have been cited (in an excellent article, Paul, *The Rule-Making Power of the Courts* (1926) 1 Wash. L. Rev. 163) as rendering "*dicta* to the effect that the legislature had no power to touch the rules of court," (op. cit., p. 223). These cases are *Rubens v. Joel*, 13

that the Code of 1848 would have been unconstitutional if it had not been for section 24 of Article VI of the Constitution of 1846.

The various opinions in *Kolkman v. People*¹⁴⁵ contain, as Dean Wigmore has said, "a mine of information."¹⁴⁶ The issue as to rule-making power was simple. In 1913, the legislature passed a statute as follows: "The Supreme Court shall prescribe rules of practice and procedure in all courts of record and may change or rescind the same. Such rules shall supersede any statute in conflict therewith."¹⁴⁷ In 1929, before the trial of Kolkman, the Supreme Court adopted its Rule 14b, which in effect re-established the common-law right of every trial judge to comment on the evidence. Of course the rule was valid. But the majority in the *Kolkman* case gave its support to this *dictum*: "Aside from any common law right or statutory grant, the power to make rules of procedure is our constitutional right."¹⁴⁸ In an earlier case¹⁴⁹ the same court, speaking through the same judge, said: "We seriously question the power of the legislature to make any rules or to enact any law with reference to procedure in courts of record unless that power had been expressly or tacitly surrendered to it by the judiciary." This view of a Colorado judge, expressed sixteen years after full superstatutory rule-making power had been conferred upon his court, is interesting but not particularly impressive in the absence of any state or federal decision in support of the Colorado view of an academic question.

*State ex rel. Foster-Wyman Co. v. Superior Court*¹⁵⁰ is sometimes cited as in support of the doctrine of inherent and exclusive judicial rule-making power in procedural matters. A reading of the case will show that the court did nothing more than politely recognize "the argument" and forthwith refuse "to further delve

N. Y. 488 (1856) and *Voorhis v. Childs' Ex.*, 17 N. Y. 354 (1858). It is submitted in the first place that Judge Selden was thinking not about *rules of court*, but about *rules of law*. In the second place, it is submitted that he was concerned only with the constitutionality of a union of law and equity. Judge Selden did not deny the power of the legislature to enact statutes of procedure in common law actions and statutes of procedure for equitable suits.

145. 89 Colo. 8, 300 Pac. 575 (1931). For a judicious comment see 27 Ill. L. Rev. 664 (1933).

146. Wigmore, *Evidence* (2d ed. 1934 Supp.) sec. 2551a.

147. Quoted in *Walton v. Walton*, 86 Colo. 1, 21, 278 Pac. 780, 787 (1929).

148. 89 Colo. 8, 32, 300 Pac. 575, 584 (1931).

149. *Walton v. Walton*, 86 Colo. 1, 21, 278 Pac. 780, 787 (1929).

150. 148 Wash. 1, 267 Pac. 770 (1928).

into" it, because "the point here in controversy can be decided upon a far more stable foundation."¹⁵¹ The point was as to the validity of a court-made rule of practice adopted in 1927 after a legislative delegation in 1925 of power to promulgate rules of court to the end that "all laws in conflict therewith shall be and become of no further force or effect."¹⁵²

*State v. Roy*¹⁵³ definitely held that a statute of 1933, delegating to the Supreme Court of New Mexico superstatutory rule-making power was constitutional. The zealous attorney-general, cautiously fearful of some technical infirmity in the statute, had raised the point that the Supreme Court had inherent power to do what had been done, independently of the statute. The court said: "Whether the legislative branch of government was ever rightfully in the rule-making field, or was a mere trespasser or usurper, need not now be determined."¹⁵⁴

An effective essay by Dean Pound has been put forward as support for the doctrine of inherent and exclusive judicial rule-making power in American state supreme courts.¹⁵⁵ There is not a sentence in the essay to justify such an inference. The essay is, first, an argument in favor of the wisdom of placing the power in the judiciary, and, second, an argument for the constitutionality of a statute in Ohio (or any other state) transferring the power to the judiciary.

Nine years ago Dean Wigmore published an impish editorial in a law review announcing in Caliph-of-Bagdad style that all American procedural statutes and codes are, and always have been, unconstitutional and void.¹⁵⁶ No judicial authority was cited. The argument was based on "logic" and "policy". Of course this essay was not intended to be taken as a serious legal

151. 148 Wash. 1, 5, 267 Pac. 770, 771 (1928).

152. Quoted in 148 Wash. 1, 4, 267 Pac. 770, 771 (1928).

153. 40 N. Mex. 397, 60 P. (2d) 646 (1936).

154. 40 N. Mex. 397, 419, 60 P. (2d) 646, 661 (1936). The court based its holding partly upon "inherent power" but expressly refrained from asserting that it has inherent power, without an enabling act, to enforce rules of court in conflict with statutes. Such a question was said to be "academic" in New Mexico, and "should not be determined in advance of necessity," l. c. 420.

155. Pound, Regulation of Judicial Procedure by Rules of Court (1915) 10 Ill. L. Rev. 163.

156. Note, 23 Ill. L. Rev. 276 (1928).

argument.¹⁵⁷ The essay has done good by stimulating historical research and, more important, by converting many lawyers to the wisdom and constitutionality of the plan for a legislative transfer of procedural rule-making power to the judiciary.

No one in the country is more familiar with procedural defects and procedural reforms than Professor Sunderland. In a judicious public address delivered by him four years ago, not a word was uttered suggesting that the courts have inherent power to amend and repeal legislative codes and practice acts.¹⁵⁸

In the past eight years other law review articles have appeared which were intended to be serious legal arguments in favor of the novel notion that American courts, without any grant of power by constitutional provision or statutory enactment, can constitutionally formulate, promulgate and enforce rules of procedure in contravention of statutes.¹⁵⁹ The authors of these articles manifest several characteristics in common. (1) They show a laudable desire to bring about a much-needed reform in American jurisprudence. (2) They fail to realize that strong desire influences the emotions, and emotions sometimes have an adverse effect upon reasoning power. (3) They confuse rules of court with rules of law. (4) They confuse substatutory rules with superstatutory rules. (5) They fail to appreciate the difference between the duty of the judiciary to protect its judicial power and the duty of the court to decide law-suits. (6) They fail to realize that an argument for the constitutionality of a statute granting superstatutory rule-making power to the courts is very different from an argument that no statute is needed to

157. Tyler, *Origin of Rule-Making Power* (1936) 22 A. B. A. J. 772, 773, f. n. 5. This splendid article is by a lawyer who knows his history as well as his cases.

158. Sunderland, *Progress Toward a Better Administration of Justice* (1933) 17 Jour. Am. Jud. Soc. 49.

159. Editorial, *Who Shall Control Criminal Procedure?* (1929) 13 Jour. Am. Jud. Soc. 107; note, 8 Ore. L. Rev. 184 (1929); Panter, *The Inherent Power of Courts to Formulate Rules of Practice* (1935) 29 Ill. L. Rev. 911; Editorial, *Power of Courts to Promulgate Rules for Inferior Courts* (1935) 69 U. S. L. Rev. 1, reprinted 6 Mo. Bar J. 37 (1935); Editorial, *Rule-Making Authority in Missouri* (1936) 19 Jour. Am. Jud. Soc. 166; Gertner, *Inherent Power of Courts to Make Rules* (1936) 10 U. of Cin. L. Rev. 32; Wheaton, *Courts and the Rule-Making Powers* (1936) 1 Mo. L. Rev. 261, reprinted 14 Tenn. L. Rev. 448 (1937); Wheaton, *Procedural Improvements and the Rule-Making Power of our Courts* (1936) 22 A. B. A. J. 642; Robinson, *Self-Help or Self-Destruction? The Rule-Making Power* (1937) 9 Rocky Mountain L. Rev. 122.

enable courts to promulgate superstatutory rules of procedure.

Aaron Burr used to say that law is anything boldly asserted and plausibly maintained. Only in Aaron Burr's sense can the doctrine of this section be regarded as law.

SECTION 10: THE DOCTRINE OF THE CONSTITUTIONALITY OF STATUTES GRANTING TO THE JUDICIARY THE POWER TO MAKE RULES OF PROCEDURE IN CONTRAVENTION OF STATUTES.

When the movement for establishing superstatutory rule-making power in the judiciary started in this country about thirty years ago, the chief objection was based upon the alleged unconstitutionality of the proposal. It was believed by many able lawyers that since procedural regulation in the Anglo-American system had been the subject of legislation for centuries, therefore the function of creating the more important rules for the conduct of litigation was essentially and exclusively a legislative function. It was believed and asserted by many able lawyers that just as the legislature could not delegate to the courts the duty of making substantive law in the fields of contracts, torts and crimes, so the legislature could not delegate to the courts the duty of making new laws relating to grounds for a demurrer, or the joinder of parties plaintiff in a tort action, or simplifying the allegations in an indictment.

The leaders in advocating a superstatutory rule-making power in the courts combated this particular argument by showing that a great deal of rule-making power had always been in the courts; that the scope of judicial rule-making power in the seventeenth and eighteenth centuries was much greater than in the nineteenth century; that the scope of rule-making power was much greater in the first third of the nineteenth century than in the latter third; that the legislative experiments had not been completely successful from a practical viewpoint. Their chief and constant argument was that a delegation to the courts of the power of making superstatutory rules of procedure would not be an unconstitutional proceeding on the part of the legislature, because on analytical grounds and to a lesser extent on historical grounds the devising of such rules is judicial, or at least quasi-judicial, in nature. They invoked the liberal and co-ordinating theory of interpreting the constitutional dogma of the three powers.

It is unnecessary at this time to go into the details of the protracted controversy over the question of whether the legislature can delegate superstatutory rule-making power to the courts.¹⁶⁰ The death of an able, sincere, beloved but somewhat obstinate member of the United States Senate was a factor in the final triumph so far as Congress was concerned. The matter may now be regarded as settled in American jurisprudence. Congress has actually delegated superstatutory rule-making power to the Supreme Court of the United States and the Supreme Court is now acting on the theory that the delegation is constitutional.

The legislatures of ten states have passed statutes in the nature of grants of power authorizing the courts to make superstatutory rules of procedure. The constitutionality of some of these statutes has been very carefully considered. Thorough and illuminating opinions have been written upholding the constitutionality of this twentieth-century legislation.

The Colorado Act of 1913, granting to the Supreme Court the power to make "rules of practice and procedure in all courts of record" expressly stated that "such rules shall supersede any statute in conflict therewith."¹⁶¹ At the time the act was passed, the statutory period for issuing a writ of error was three years. In 1917, the Supreme Court by a rule reduced the period to two years. It was over this new rule that the first contest as to the validity of the enabling act was presented to the Supreme Court in the case of *Ernst v. Lamb*.¹⁶² The plaintiff in error, barred by the rule but not by the statute, contended that the act of 1913 was unconstitutional as an effort to delegate legislative power, and that the rule was void because it attempted to change a statute of limitation as if it were a matter of procedure. Both points were ruled against the plaintiff in error.¹⁶³

*State ex rel. Foster-Wyman Lumber Co. v. Superior Court*¹⁶⁴ was the test case for the enabling act in the State of Washington. The chief ground of attack was the asserted inability of a legis-

160. For historical surveys see Tolman, Address (1936) 22 A. B. A. J. 783, and Wigmore, Address (1936) 22 A. B. A. J. 811.

161. Quoted in *Walton v. Walton*, 86 Colo. 1, 21, 278 Pac. 780, 787 (1929).

162. 73 Colo. 132, 213 Pac. 994 (1923).

163. To the same effect: *Walton v. Walton*, 86 Colo. 1, 278 Pac. 780 (1929); *Kolkman v. People*, 89 Colo. 8, 300 Pac. 575 (1931).

164. 148 Wash. 1, 267 Pac. 770 (1928).

lature constitutionally to delegate its legislative power to the judiciary. In a well-considered opinion upholding a new rule in contravention of an earlier statute, the Supreme Court said: "The legislature, although formerly functioning in this state as the source of rules of practice and procedure in the courts, did not, is so doing, perform an act exclusively legislative, and may, if it so desires, transfer that power to the courts without such an act being a delegation of legislative power."¹⁶⁵ The most significant language of the enabling act was the following sentence: "When and as the rules of court herein authorized shall be promulgated, all laws in conflict therewith shall be and become of no further force or effect."¹⁶⁶

The Wisconsin enabling act was paraphrased in the case of *In re Constitutionality of Statute*.¹⁶⁷ The chief objection was the classic one based upon the constitutional division of powers and the inability of one of the three departments to delegate its power to another one of the three. The court adopted the prevailing American view of a liberal construction of the ancient formula, and then held that the "power to regulate procedure, at the time of the adoption of the [Wisconsin] constitution, was considered to be essentially a judicial power, or at least not strictly a legislative power, and that there is no constitutional objection to the delegation of it to the courts by the legislature."¹⁶⁸ The most significant part of the Wisconsin act was the following language: "All statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto."¹⁶⁹

New Mexico's test case was *State v. Roy*.¹⁷⁰ The gist of the court's opinion was succinctly stated as follows: "It is sufficient here to hold that when the Legislature enacted chapter 84, [of the enabling act of 1933] it did not delegate to this court a function exclusively legislative contrary to section 1, art. 3, of our Constitution," which provides for the orthodox three-fold sepa-

165. 148 Wash. 1, 9, 267 Pac. 770, 773 (1928).

166. 148 Wash. 1, 4, 267 Pac. 770, 771 (1928).

167. 204 Wis. 501, 236 N. W. 717 (1931).

168. 204 Wis. 501, 510, 236 N. W. 717, 720-721 (1931).

169. 204 Wis. 501, 502, 236 N. W. 717, 718 (1931).

170. 40 N. Mex. 397, 60 P. (2d) 646 (1936).

ration of governmental powers.¹⁷¹ Apparently no serious question as to any unconstitutional delegation of legislative power has arisen in Alabama, Delaware, Florida, Maryland, New Jersey or West Virginia, where statutes authorize superstatutory rules of court. The important Wisconsin case¹⁷² already mentioned was decided by a unanimous court and the opinion was written by Judge Wickhem. He gives the following exposition of the purpose of the legislature and what should be the attitude of the courts:

“The law is intended to free the courts from the obligation to follow precedent, which is assumed to have been a major factor in prior failures of courts successfully to regulate procedure, and, on the other hand, to relieve against the inflexibility and difficulty of repeal or modification, which has constituted the principal objection to regulation by legislative code. * * * In the field dealt with by this section there has been a demand for reform—a demand far too insistent to indicate anything less than a corresponding need. The duty of governmental bodies to respond to such demands is self-evident. It is also self-evident that such response as is made must be in accordance with orderly processes and must be in conformance to constitutional limitations. The co-ordinate branches of the government, even in the face of such demands, should not abdicate or permit others to infringe upon such powers as are exclusively committed to them by the constitution. As to the exercise of those powers, however, which are not exclusively committed to them, there should be such generous co-operation as will tend to keep the law responsive to the needs of society. This co-operation is peculiarly necessary today because the complexities of modern life and its problems make it increasingly difficult accurately to predict the value and effect of particular procedures, and increasingly necessary to move by a method of trial and error.”¹⁷³

171. 40 N. Mex. 397, 420, 60 P. (2d) 646, 660. The court relied on the following cases: *In re Constitutionality of Statute*, 204 Wis. 501, 236 N. W. 717 (1931); *State ex rel. Inspection Bureau v. Whitman*, 196 Wis. 472, 220 N. W. 929 (1928); *Hampton v. U. S.*, 276 U. S. 394, 48 S. Ct. 348, 72 L. ed. 624 (1928); *Wayman v. Southard*, 10 Wheat. 1, 6 L. ed. 253 (1825); *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1, 267 Pac. 770 (1928).

172. *In re Constitutionality of Statute*, 204 Wis. 501, 236 N. W. 717 (1931).

173. 204 Wis. 501, 513-514, 236 N. W. 717, 722 (1931).