Increased and Accessible Illinois Judicial Rulemaking

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INTRODUCTION

Much of the responsibility in Illinois for establishing procedural law guiding the operation of courts and the practice of law is now shared by the General Assembly and the Illinois Supreme Court. While pockets of guidelines are, and should be, within the judiciary’s absolute control and thus immunized from any legislative interference, less than absolute judicial authority over the bulk of procedural law is preferred by most commentators and by most American states. In settings where such responsibility is shared, typically there is a primary lawmaker, who initiates most procedural law changes, and a secondary lawmaker, who possesses far less initial responsibility but who usually maintains some final power of review. Where procedural lawmaking responsibility is shared, there are varying means by which the primary and secondary authority may be distributed and exercised.

Unfortunately, the present distribution of responsibility for Illinois procedural law is troublesome. The division of primary authority between the legislature and the judiciary is unclear, resulting in instances of conflicting statutes and rules. Where primary authority has been assumed by the legislature, the choice of primary lawmaker is wrong. As well, the attributes of secondary authority over procedural law are uncertain, as evidenced by cases involving exclusive judicial rulemaking.

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Besides distributional problems, the exercise of procedural law-making power often is troublesome because of the decision-making processes utilized. In particular, in promulgating rules, the Illinois Supreme Court usually employs too secretive and closed a process. This process typically involves advisory committees whose members, duties and ongoing work are relatively unknown.² And, in enacting procedural statutes, the General Assembly also often employs an inadequate deliberative process, in that it fails to hear fully from the legal profession. Exemplary is its recent consideration of standards on the certification of claims by attorneys.³

This Article suggests that all primary authority over procedural law should now be vested in the Illinois judiciary, with the General Assembly possessing only secondary authority. Part I explains that increased judicial responsibility is supported by the Illinois Constitution, particularly when read in light of its history, and by rationales founded on expertise, efficiency and separation of powers. Greater judicial control over procedure should not be fully assumed by the supreme court; rather, bodies consisting of judges from varying courts, as well as lawyers, legislators and others, should exercise significant rulemaking duties. Finally, all judicial rulemaking processes must be open and accessible.

Constitutional amendment is the best, and perhaps the only, way to remedy existing problems in the distribution and exercise of procedural lawmaking responsibility. The current hodgepodge of constitutional provisions should be replaced by a small set of directives which clearly define primary and secondary authority. The recognition of primary judicial authority should be accompanied by assurances that judicial rulemakers employ open and accessible decision-making processes. While Illinois judges are quite accustomed to law-making during adjudication, they are less experienced in lawmaking during rule promulgation. Experience indicates that Illinois judicial rulemaking now occurs on occasion without significant opportunity for public input. Promulgation of rules in closed and secretive meetings should hereinafter be expressly discouraged in order to assure greater adherence to democratic principles and better rules.

I. INCREASED JUDICIAL AUTHORITY FOR PROCEDURAL LAW

Current Illinois constitutional law recognizes a shared responsibility for most procedural law. Beyond the general provisions dealing

². See infra note 108 and accompanying text.
³. See infra notes 52-62 and accompanying text.
with separation of powers and the vesting of legislative and judicial powers, the constitution contains several provisions expressly recognizing both legislative and judicial responsibility for laws guiding the courts and the legal profession. Legislative responsibility is recognized in constitutional declarations that the "Appellate Court shall have such powers of direct review of administrative action as provided by law" and that "Circuit Courts shall have such power to review administrative action as provided by law." Judicial responsibility is recognized in statements that the supreme court "shall" provide by rule for certain matters relating to appeals; "may" provide by rule for other appellate matters; "shall adopt rules of conduct for Judges and Associate Judges;" and "shall provide by rule for matters to be assigned to Associate Judges." Further, the constitution provides that the general administrative and supervisory authority over all courts is vested in the Illinois Supreme Court, to be exercised by its Chief Justice in accordance with its rules.

Notwithstanding such declarations, much of the responsibility for Illinois procedural law remains unaddressed constitutionally. There are no express provisions on practice and procedure laws, on evidentiary principles, or on regulations governing the practice of law. However, there have been attempts at change. In 1922, for example, there was a proposal to add to the Illinois Constitution the following:

The Supreme Court shall have exclusive power to prescribe rules of pleading, practice and procedure in all courts; but rules not inconsistent therewith may be prescribed respectively by other courts of record. Any rule of pleading, practice or procedure may be set aside by the General Assembly by a special law limited to that purpose.

4. ILL. CONST. art. II, § 1.
5. ILL. CONST. art. VI, § 1.
6. ILL. CONST. art. VI, § 1.
7. ILL. CONST. art. VI, § 6 (emphasis added).
8. ILL. CONST. art. VI, § 9 (emphasis added).
9. ILL. CONST. art. VI, §§ 4(b), 5, and 6.
10. ILL. CONST. art. VI, § 6.
11. ILL. CONST. art. VI, § 13(a).
12. ILL. CONST. art. VI, § 8.
13. ILL. CONST. art. VI, § 16. Of course, an express recognition of judicial rulemaking power may be superfluous should such a power exist in the absence of any constitutional delegation. See, e.g., Thomas v. Arn, 474 U.S. 140, 146-47 (1985) (appellate courts have "supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation", though there is no mention of a provision expressly delegating such authority).
And in 1952, the following constitutional amendment was urged:

The Supreme Court shall make rules governing practice and procedure in all courts. Subject to its rules, the judges of each district of the appellate court and the circuit judges of each circuit court may make rules governing practice and procedure in their courts.\textsuperscript{15}

Though efforts to add such new provisions have been unsuccessful to date, other Illinois constitutional history suggests that much primary authority for procedural law shifted to the judiciary. Public policy rationales as well as constitutional history support the desirability of increased judicial rulemaking and several Illinois Supreme Court decisions have recognized the shift toward greater judicial accountability.\textsuperscript{16} Yet, to date, the high court has failed to exercise this new authority in a significant manner. Further, the legislature has given few signals of its willingness, or wish, to reduce its role in procedural law-making. Constitutional amendments seem necessary so that the boundaries between legislative and judicial responsibility for procedural law are clearer and so that increased judicial rulemaking will be assured.

A. CONSTITUTIONAL HISTORY

Over the years, the General Assembly has been delegated less and less control over court structure and jurisdiction and thus over judicial power. Increasingly, the parameters of the judicial power are being defined constitutionally, with the result that the General Assembly's authority regarding court procedure is more frequently founded on the general grant of legislative power and less frequently on specific delegations of authority over courts.

\textsuperscript{15} Proposed amendment to the Judicial Article of the ILL. CONST. of 1870, art. VI, § 3 (1952). The high court power was seen as not disturbing "the historic power of the legislature to act where the court has not acted." MEMBERS OF THE JOINT COMMITTEE ON THE JUDICIAL ARTICLE, EXPLANATORY STATEMENT ON THE PROPOSED JUDICIAL ARTICLE FOR THE CONSTITUTION OF THE STATE OF ILLINOIS 41 (W. Cedarquist ed. 1953). See also Trumbl, Judicial Responsibility for Regulating Practice and Procedure in Illinois, 47 NW. U.L. REV. 443, 455 (1952).

\textsuperscript{16} See, e.g., People v. Goodman, 366 Ill. 346, 8 N.E.2d 941 (1937) (see infra notes 43-51 and accompanying text); People ex rel. Brazen v. Finley, 119 Ill. 2d 485, 519 N.E.2d 898 (1988) (see infra notes 52-62 and accompanying text); People v. Taylor, 50 Ill. 2d 136, 277 N.E.2d 878 (1971) (see infra notes 63-71 and accompanying text); People v. Jackson, 69 Ill. 2d 252, 371 N.E.2d 602 (1977) (see infra notes 72-81 and accompanying text).
As well, the inherent (that is, the unarticulated, or implicit) judicial authority over procedural law can now more frequently be grounded on constitutional principles. Thus, statutory bases for judicial rulemaking are becoming less relevant (or irrelevant). When judicial authority over procedural law inheres in the constitution, because the judiciary must possess the tools to accomplish its constitutionally-assigned tasks, resulting rules are more likely immunized from legislative change. This is especially true when the judicial authority inheres in a constitutional provision expressly recognizing judicial rulemaking power and failing to indicate any role for the legislature.

A brief review of Illinois constitutional history demonstrates increasing judicial, and diminishing General Assembly, responsibility for courts, for their procedure, and for the legal profession.

Under the 1818 Constitution, the powers of government were divided between the legislative, executive and judicial departments;17 no department could exercise any powers of another unless "expressly directed or permitted."18 The legislative department was, however, granted significant duties regarding the judicial department. For example, one provision said: "The judicial power of this state shall be vested in one supreme court, and such inferior courts as the general assembly shall . . . ordain and establish."19 Other provisions authorized the legislature to require high court justices to "hold circuit courts,"20 and mandated it to provide for the appointment and duties of justices of the peace.21

Under the 1848 Constitution, legislative duties regarding Illinois courts and their procedures were continued, but reduced. The General Assembly could authorize "courts of justice" to grant divorces22 and could direct "in what manner suits may be brought against the state."23 It could no longer require high court-justices to "hold circuit courts." Most importantly, the Assembly's total control over lower courts was eliminated. The new constitution declared:

The judicial power of this state shall be and is hereby vested in one supreme court, in circuit courts, in county courts, and

17. ILL. CONST. of 1818, art. I, § 1.
19. ILL. CONST. of 1818, art. IV, § 1.
20. ILL. CONST. of 1818, art. IV, § 4.
21. ILL. CONST. of 1818, art. IV, § 8.
22. ILL. CONST. of 1848, art. III, § 32.
23. ILL. CONST. of 1848, art. III, § 34.
in justices of the peace; *Provided*, that inferior local courts
... may be established by the general assembly in the cities
... but such courts shall have a uniform organization and
jurisdiction ... .

No longer were all lower courts ordained and established by the
legislature. Further, the jurisdiction of the circuit courts was defined
constitutionally. Yet, the duties of such lower court officials as
county judges and justices of the peace continued to be prescribed
chiefly by the legislature.

Under the 1870 Constitution, there was a further erosion of
legislative authority over procedural law. The General Assembly could
not pass local or special laws for regulating the practice in courts of
justice; for regulating the jurisdiction and duties of justices of the
peace, police magistrates and constables; for changes of venue; for
summoning and impaneling juries; or for any other area where a
general law could be made applicable. Furthermore, legislative con-
trol over the judicial power in the lower courts was diminished, as
exemplified by new provisions prescribing much of the jurisdictional
authority of county courts and probate courts. Nevertheless, the

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25. *Ill. Const.* of 1848, art. V, § 8:
There shall be two or more terms of the circuit court held annually in each
county of this state, at such times as shall be provided by law; and said
courts shall have jurisdiction in all cases at law and equity, and in all cases
of appeals from all inferior courts.
26. *Ill. Const.* of 1848, art. V, §§ 18, 19:
§ 18. The jurisdiction of said court shall extend to all probate and such
other jurisdiction as the general assembly may confer in civil cases, and
such criminal cases as may be prescribed by law, where the punishment is
by fine only, not exceeding $100.
§ 19. The county judge, with such justices of the peace in each county as
may be designated by law, shall hold terms for the transaction of county
business, and shall perform such other duties as the general assembly shall
prescribe: *Provided*, the general assembly may require that two justices, to
be chosen by the qualified electors of each county, shall sit with the county
judge in all cases; and there shall be elected, quadrennially, in each county,
a clerk of the county court, who shall be *ex officio* recorder, whose
compensation shall be fees: *Provided*, the general assembly may, by law,
make the clerk of the circuit court *ex officio* recorder, in lieu of the county
clerk.
27. *Ill. Const.* of 1870, art. IV, § 22.
All judges and state's attorneys shall be commissioned by the governor.
VI, § 23 (continuation of superior court of Chicago) and *Ill. Const.* of 1870, art.
VI, § 26 (criminal court of Cook county).
1870 Constitution continued to permit significant legislative control over judicial power. It expressly recognized legislative authority to create "inferior appellate courts" and to establish a "probate court in each county having a population over 50,000." General Assembly responsibility for court structure, and thus for procedural law, was dramatically reduced with the constitutional amendments of 1962. One amendment was worded as follows: "The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts." No longer were lower courts to be ordained and established legislatively. Other amendments wholly or substantially eliminated legislative authority over the jurisdiction of the lower courts. In addition, an amendment declared that the Supreme Court was vested with "general administrative authority over all courts," with no express recognition of the opportunity for legislative review.

The movement toward increased judicial rulemaking authority continued under the 1970 Constitution. Thus, while a 1962 amendment granted the Supreme Court the authority to provide by rule for direct appeal in certain cases from the circuit courts to the high court "subject to law hereafter enacted," the new constitution stated that the supreme court shall provide by rule for direct appeal in such cases, without mentioning the impact of any legislative enactments. Similarly, a 1962 amendment provided that circuit judges shall appoint magistrates to serve at their pleasure "subject to law," while the new 1970 Constitution provided that circuit courts "shall have such number of Associate Judges as provided by law," with the matters assigned to associate judges guided by Illinois Supreme Court rule. In addition, the 1970 Constitution declared that the "Supreme Court

29. ILL. CONST. of 1870, art. VI, § 11.
30. ILL. CONST. of 1870, art. VI, § 20. See also ILL. CONST. of 1870, art. VI, § 12 (legislature dictates appellate jurisdiction of circuit courts).
31. ILL. CONST. of 1870, art. VI, § 1 (1962).
33. ILL. CONST. of 1870, art. VI, § 2.
34. ILL. CONST. of 1870, art. VI, § 5 (1962).
35. ILL. CONST. art. VI, § 4(b).
36. ILL. CONST. of 1870, art. VI, § 12 (1962).
37. ILL. CONST. art. VI, § 8.
38. ILL. CONST. art. VI, § 8.
shall adopt rules of conduct for Judges and Associate Judges," making no mention of legislative review.

The trend is clear. Illinois constitutional history from 1818 to 1970 reflects diminishing legislative influence on the Illinois court system. Over the years, the General Assembly's power to create courts and procedural law for the legal profession has diminished. This history also reflects increasing constitutional mandates regarding the structure of state courts and their powers. Such mandates, where ambiguous, are ultimately clarified by judges. Thus, judges are increasingly compelled to define the contours of their constitutional duties and the necessary means by which such duties must be undertaken. In this setting there is more frequently recognized an increased judicial responsibility for procedural law.

B. RATIONALES SUPPORTING INCREASED JUDICIAL AUTHORITY

Beyond this constitutional history, increased judicial authority over procedural law can be founded on compelling public policy grounds. In their seminal work on constitutional allocations of procedural lawmaking powers between the legislature and the judiciary, Professors Levin and Amsterdam summarized the arguments supporting primary judicial authority as follows:

[L]egislatures have neither the immediate familiarity with the day-by-day practice of the courts which would allow them to isolate the pressing problems of procedural revision nor the experience and expertness necessary to the solution of these problems; legislatures are intolerably slow to act and cause even the slightest and most obviously necessary matter of procedural change to be long delayed; legislatures are subject to the influence of other pressures than those which seek the efficient administration of justice and may often push through some particular and ill-advised pet project of an influential legislator while the comprehensive, long-studied proposal of a

39. ILL. CONST. art. VI, § 13(a).

40. Bonaguro, The Supreme Court's Exclusive Rulemaking Authority, 67 ILL. B.J. 408 (1979). This is not to suggest that where a legislature has absolute control over a court's business, even to the point of being able to abolish the court, there is also absolute legislative control over the ways in which such business is conducted. See U.S. v. Howard, 440 F. Supp. 1106, 1110 (D. Md. 1977), aff'd, 590 F.2d 564 (4th Cir. 1979) ("the fact that Congress can create the lower federal courts does not alter the conclusion that it cannot validly establish a timetable for judicial action"). Inherent in legislative establishment of a court may be a delega­tion of certain judicial powers immunized from legislative review absent disestablishment.
bar association molders in committee; and legislatures are not held responsible in the public eye for the efficient administration of the courts and hence do not feel pressed to constant reexamination of procedural methods.

Moreover, it must be remembered that a very large part of maintaining maximum effectiveness in the courts does not lie in drastic wholesale procedural reform, but in the necessary minor alterations of single rules from time to time as experience dictates, and such small matters as these inevitably fare badly when they must compete for legislative attention. . . . Codes tend to foster litigation of procedural issues, since the legislature cannot clarify by simple pronouncement whatever ambiguity may inhere in its codes and the courts themselves can provide clarification only in the process of adjudication. Court rules, on the other hand, are flexible in application, easy of clarification, and rapid of amendment should amendment be required. They are the work of an agency whose whole business is court business and for whom court efficiency can become a major interest, an agency keenly aware of the latest problems and fully capable of bringing to bear in their early solution a long and solid experience.41

In Illinois, these bases supporting primary judicial authority are joined with rationales related to the troubles caused by existing divisions of procedural lawmaking responsibility. The constitution now indicates that much of the responsibility for procedure is shared by the General Assembly and the supreme court. Some uncertainty among lawmakers about accountability is inevitable in such a system. As well, some difficulty in harmonizing statutes and rules covering a single topic is normal. Yet, confusion is heightened in Illinois, since different bodies are designated as the primary lawmaker, with the differences based on the nature of the procedural guidelines. Legal

41. Levin & Amsterdam, Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision, 107 U. PA. L. REV. 1, 10-11 (1958) (citations omitted). And consider the following: "[T]he legislature, informed . . . of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend." Cardozo, A Ministry of Justice, 35 HARV. L. REV. 113, 113-14 (1921). This public policy perspective is not new to Illinois. See Trumbull, supra note 15, at 452 ("The arguments for primary or exclusive judicial responsibility for the regulation of practice and procedure in the courts are in the aggregate more impressive and more persuasive than those for paramount legislative responsibility").
reformers consequently often run between the legislature and the judiciary, in doubt as to who possesses primary authority over an issue or who has the initial power to act. In Illinois today, the supreme court possesses primary authority over administrative, supervisory, professional conduct, and most appellate practice rules, while the General Assembly exercises (though it may not rightfully possess) primary authority over most other practice and procedure areas.

Beyond the foregoing reasons, primary judicial authority over all procedural law would help lessen the growing problems caused by differences between absolute and less than absolute rulemaking power. In Illinois, there are increasing pockets of procedural law deemed within the high court's absolute control. Such areas seemingly include at least the regulation of those admitted to legal practice and the rules of appellate procedure. They may also include all guidelines "necessary to the full performance of the judicial function." The case law recognizing such absolute high court authority is, of course, tied to the noted constitutional developments. Unfortunately, absolute power is often confused with the concept of exclusive power. A brief review of selected Illinois cases will demonstrate a failure to differentiate the areas subject to absolute power or to define the varying forms of exclusive power. Assertions of absolutism and exclusivity in rulemaking then compound the difficulties already inherent in the Illinois system of shared powers where the primary authority over procedural law is divided between the legislature and the judiciary.

In the area of admission to legal practice, the Illinois Supreme Court has long held that the power to regulate and define the practice of law is a prerogative of the judiciary as an incident to the separation of powers. This separation creates within the judicial branch the inherent authority to regulate the study of law and the admission to the bar. As a result, the judiciary possesses the final authority to define the nature of legal practice by laypersons as well as by lawyers.

*People v. Goodman,* for example, involved legislation granting the Illinois Industrial Commission the power to make rules dictating procedure before it. Pursuant to this grant of authority, the Commis-

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44. *Id.* at 349-50, 8 N.E.2d at 944.

45. 366 Ill. 346, 8 N.E.2d 941 (1937).
sion had promulgated a rule allowing a claimant to be represented by his attorney or "agent." Under this rule, a non-lawyer had built a lucrative practice of handling compensation claims.

In finding that the non-lawyer had engaged in the unauthorized practice of law and therefore should be fined, the Illinois Supreme Court held that the unlicensed practice of law, whether in or out of court, is a contempt in that it usurps the privilege of an attorney to practice law. The court noted that although the General Assembly may pass laws forbidding certain legal practice, such laws can only augment, but cannot "supersede or detract from, the power of the judicial department to control the practice of law."

Thus, the Goodman court concluded that the legislature could not view the practice of law as being confined to courtroom activity, and that the assembly could not bestow upon an administrative body the authority to confer upon a layperson the right to practice law. Rather, the court said the definition of legal practice and the establishment of standards lie within the "inherent" realm of the judiciary.

In Goodman, the Illinois Supreme Court claimed an exclusive authority to regulate admission to the bar. In that context, the power was superior but not absolute, because judicial authority was subject to supplementation and augmentation by statutes which added to, but did not contradict, existing judicial rules. Like the regulation of

46. Id. at 352, 8 N.E.2d at 945.
47. Id. at 348-49, 8 N.E.2d at 943.
48. Id. at 350, 8 N.E.2d at 944.
49. Id. at 349, 8 N.E.2d at 944.
50. Id. at 349-50, 8 N.E.2d at 944.
51. Language in In re Anastaplo, 3 Ill. 2d 471, 121 N.E.2d 826 (1954), further demonstrates the high court's acknowledgement that its standards of admission to the bar permit supplementation by statute. There, the petitioner had successfully passed the Illinois Bar Examination, but the Committee on Character and Fitness determined that he did not possess the general fitness necessary for admission. This determination was based upon petitioner's refusal to discuss his possible membership in the Communist Party. The Committee's opinion was premised on the notion that a member of the Communist Party "might not be able in good faith to take the oath of office. . . ." Id. at 474, 121 N.E.2d at 828. Holding that the Committee had properly inquired into petitioner's ability to take the oath in good conscience, the court stated:

In the exercise of its judicial power over the bar, and in discharge of its responsibility for the choice of personnel who will compose that bar, this court has adopted Rule 58 which governs admissions and provides . . . that applicants shall be admitted to the practice of law by this court after satisfactory examination by the Board of Examiners and certification of
admission to legal practice, the supreme court has also declared its exclusive domain over the governance of those admitted to the bar. But in this latter context, the term may mean an absolute or sole authority to govern attorneys which does not admit supplementation or augmentation by any other lawmaker. Thus, in *People ex rel. Brazen v. Finley*, the Illinois Supreme Court invalidated a circuit court rule requiring an affidavit of compliance with various ethical rules adopted by the circuit court. The local rule mandated that an affidavit accompany initial pleadings in specific types of cases, including personal injury and domestic relations actions. The local approval by a Committee on Character and Fitness. . . . Still another condition precedent to admission to practice law in this State, imposed by the legislature, is the taking of an oath . . . . Such an oath requires loyalty to our government . . . . thus inquiry aimed at determining the loyalty of an applicant, must be deemed to be relevant to a determination of the conditions for admittance fixed both by the statute and by the rule of this court.

*Id.* at 475-76, 121 N.E.2d at 829. See also *Lozoff v. Shore Heights, Ltd.*, 66 Ill. 2d 398, 362 N.E.2d 1047 (1977), where a Wisconsin attorney sought recovery of legal fees for services he had rendered in Illinois. There the court cited, with approval, *ILL. REV. STAT.* ch. 13, para. 1 (1969), which prohibited the allowance of attorneys fees for persons other than attorneys licensed in Illinois. Reciting language from *Goodman*, the court held: "Such statutes are merely in aid of, and do not supersede or detract from, the power of the judicial department to control the practice of law."

*Id.* at 402, 362 N.E.2d at 1048-49.

The legislature's secondary authority over admission to the bar, however, is limited. Legislation must be both general and reasonable. These requirements were expressed in *In re Day*, 181 Ill. 73, 54 N.E. 646 (1899). There, the General Assembly had passed legislation that whenever the Illinois Supreme Court changed its rules of admission to the bar, such new rules could only have prospective force. Thus, anyone who had begun studying law before the change could obtain a license by complying with the old rules of admission. As a result of this legislation, it happened that persons who commenced their study before November 4, 1897 could obtain a license by completing only two years of study, but those who began study on or after that date would be required to complete three years of study. The court found the enactment to be "special legislation" and remarked that if the legislature had any authority over admission to the practice of law, such authority could only be exercised through a general law. *Id.* at 80, 54 N.E. at 647. The court further stated that legislation regarding admission to the bar must be reasonable. The court said:

The legislature may enact police legislation for the protection of the public against things hurtful or threatening to their safety and welfare. So long as they do not infringe upon the powers properly belonging to the courts they may prescribe reasonable conditions which will exclude from the practice those persons through whom injurious consequences are likely to result to the inhabitants of the State . . . .

*Id.* at 95, 54 N.E. at 652 (emphasis added).

52. 119 Ill. 2d 485, 519 N.E.2d 898 (1988).

53. *COOK COUNTY CIR. C.R.* 0.7, quoted in *Finley*, 119 Ill. 2d at 488-89, 519 N.E.2d at 899-900.
rules of ethics to be enforced through the affidavit requirement were, in substance, covered by two Supreme Court Rules found in the Code of Professional Responsibility.\textsuperscript{54}

In \textit{Brazen}, a licensed attorney challenged the authority of the circuit court to promulgate this affidavit requirement. Proponents of the local rule contended that Supreme Court Rule 21(a) granted to the circuit court the rulemaking authority to impose the affidavit requirement.\textsuperscript{55} Rule 21(a) provides that

> a majority of the circuit court judges in each circuit may adopt rules governing civil and criminal cases which are consistent with these rules and the statutes of the State, and which, so far as practicable, shall be uniform throughout the State.\textsuperscript{56}

Proponents urged that the affidavit requirement was consistent with Supreme Court Rules because it sought, in effect, to assure compliance with certain provisions of the Code of Professional Responsibility. Thus, they argued, the affidavit requirement aided, but did not supplant, the statewide rules.\textsuperscript{57}

The supreme court rejected the position that circuit courts share the power to regulate and discipline attorney conduct.\textsuperscript{58} Citing earlier cases recognizing that certain high court power is exclusive,\textsuperscript{59} the court stated: “This court’s sole authority to regulate and discipline attorney conduct arises from our inherent power to govern admission to the

\footnotesize{\textsuperscript{54} Rules 2-103 and 5-103 of the \textit{ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY}, discussed in \textit{Brazen}, 119 Ill. 2d at 490, 519 N.E.2d at 900. \textsuperscript{55} \textit{Brazen}, 119 Ill. 2d at 490-91, 519 N.E.2d at 900-01. \textsuperscript{56} ILL. REV. STAT. ch. 110A, para. 21(a) (1985), quoted in part in \textit{Brazen}, 119 Ill. 2d at 490, 519 N.E.2d at 900. \textsuperscript{57} \textit{Brazen}, 119 Ill. 2d at 490-91, 519 N.E.2d at 900-01. \textsuperscript{58} Id. at 492, 519 N.E.2d at 901. Proponents of the Cook County rule asserted that the Supreme Court had recognized concurrent authority by the high court and the circuit courts to govern attorney conduct in \textit{Arnold v. Northern Trust Co.}, 116 Ill. 2d 157, 506 N.E.2d 1279 (1987). There, attorneys challenged a circuit court rule requiring attorneys for minors and incompetents in personal injury actions to submit sworn petitions supporting contingent fee requests in excess of 25% of the settlement. The validity of this local rule was upheld. The court in \textit{Brazen} distinguished \textit{Arnold}, stating that it was based upon the circuit court’s duty to protect the interests of minors and not upon a finding of concurrent power to regulate attorney behavior. \textit{Brazen}, 119 Ill. 2d at 492, 519 N.E.2d at 901 citing \textit{Arnold}, 116 Ill. 2d at 169, 506 N.E.2d at 1279. \textsuperscript{59} \textit{In re Harris}, 93 Ill. 2d 285, 443 N.E.2d 557 (1982); \textit{In re Mitan}, 75 Ill. 2d 118, 387 N.E.2d 278 (1979); \textit{In re Teitelbaum}, 13 Ill. 2d 586, 150 N.E.2d 873 (1958); People ex rel. Ill. State Bar Ass’n v. People’s Stock Yards State Bank, 344 Ill. 462, 176 N.E. 901 (1931); \textit{In re Day}, 181 Ill. 73, 54 N.E. 646 (1899).}
practice of law in Illinois." Pursuant to this exclusive authority, the Illinois Supreme Court said that it had established a comprehensive scheme for regulating and punishing attorney misconduct. The court concluded that the local rule was an improper transgression upon "the exclusive rulemaking and disciplinary authority invested in the Supreme Court," in that it "impose[d] a greater burden on attorneys than this court now required," since the Supreme Court Rules require no affidavit of compliance.

_Brazen_ involved a local court rule rather than a statute. The court's rationale, however, clearly suggests that the source of the offending law was irrelevant to the decision. Rather, where the supreme court enjoys absolute or sole rulemaking authority, there is no room for other laws, regardless of their nature or source.

A third area in which the judiciary has claimed exclusive rulemaking responsibilities involves appellate procedure. As noted earlier, the constitution confers upon the Illinois Supreme Court the power to provide by rule for appeals in certain cases from the circuit courts directly to the supreme court and for appeals to the appellate court from other than final judgments of the circuit court.

Pursuant to this latter power, the court promulgated a rule which allowed appeals by the state of certain orders in criminal cases, including orders suppressing evidence. The General Assembly later enacted contradictory legislation by amending the Code of Criminal Procedure to provide that orders suppressing evidence in a preliminary hearing are non-final and unappealable by the state, thus having no effect in subsequent proceedings. The validity of the legislation was challenged in _People v. Taylor._

In _Taylor_, the defendant was charged with unlawful possession of narcotics. At the preliminary hearing the judge granted the defendant's motion to suppress evidence obtained during a search of his residence. Later, a grand jury indicted the defendant for the same offense. At trial the defendant again moved to suppress the evidence,
arguing that because the state had failed to appeal the previous suppression order, that order was binding. The trial court agreed, but was reversed. The Illinois Supreme Court granted leave to appeal. The state contended on appeal that as a result of the statute, the order entered in the preliminary hearing was not appealable and was therefore not binding at the subsequent trial. The defendant argued that the section violated the constitutional provision which vests rule-making authority in the Illinois Supreme Court and which provides for no General Assembly participation. Because the court had provided by rule for appeals from orders suppressing evidence, the defendant argued the General Assembly lacked authority to declare such orders non-appealable. In holding the section of the Code void, the court held that the constitution vested "sole authority" in the supreme court to promulgate rules regarding appeals to the appellate court from non-final judgments. Because the order suppressing evidence entered in the preliminary hearing was an appealable order pursuant to the rule and the state did not appeal, the order was found binding on the trial court. The decision leaves little doubt that the court will jealously guard its rulemaking powers respecting certain appeals, and will strike down legislation contradicting its rules. The validity of a statute which purports to regulate such appeals in areas not covered by Supreme Court rules is unclear, although language in Taylor suggests even such legislation would be void.

One of the most dramatic acknowledgments of exclusive judicial rulemaking authority occurred in the 1977 Illinois Supreme Court

67. Taylor, 50 Ill. 2d at 137, 277 N.E.2d at 879.
68. Id. at 139, 277 N.E.2d at 880.
69. Id. at 140, 277 N.E.2d at 881. The court noted the constitutional rule-making authority relevant to the appellate rule at issue contained no reference to General Assembly participation, though other court rules on appeal could only be promulgated constitutionally if they were subject to law. Id. at 139-40, 277 N.E.2d at 880-81. See supra notes 34 & 35 and accompanying text discussing Ill. Const. of 1870, art. VI, § 5 and its subsequent "repeal" in the 1970 Constitution. On this latter point, consider the current constitutional provision on rules involving direct appellate review of administrative agency decisions. See supra note 7 and accompanying text; Benton Police Dept. v. Human Rights Comm'n, 147 Ill. App. 3d 7, 497 N.E.2d 876 (5th Dist. 1986).
70. Taylor, 50 Ill. 2d at 140, 277 N.E.2d at 880.
71. Id. The Court in Taylor declared that because the constitutional delegation of rulemaking authority employed by the court makes no reference to General Assembly participation, the court was vested with "sole authority." Id. at 139-40, 277 N.E.2d at 880-81.
decision of *People v. Jackson*. The case involved the high court's "general administrative and supervisory authority." Under this authority, the Illinois Supreme Court had promulgated a rule which directed trial courts to examine prospective jurors, but which authorized them to allow the parties to question potential jurors directly. This rule conflicted with an amendment to the Code of Criminal Procedure which granted attorneys the right to examine jurors personally. In *Jackson*, the circuit court held this amendment unconstitutional, and apparently refused to allow the defendant's attorney the opportunity to conduct *voir dire* examination.

On appeal, the supreme court framed the issue as "whether control of *voir dire* examination is a judicial or legislative function." The court began its analysis by reciting the constitutional provision on separation of powers, wherein one branch is forbidden from exercising powers properly belonging to another. The court also noted the provision on the "judicial power", finding it to be an "exclusive grant" of power, as well as the provision on "general administrative and supervisory authority." Finally, the court turned to the constitution's provision regarding an annual judicial conference, at which proposals to improve the administration of justice would be developed. Since the foundation for the rule governing *voir dire* was laid by the judicial conference, the court reasoned that it must be "a product of this court's supervisory and administrative responsibility." Hence, the General Assembly lacked authority to regulate *voir dire* examinations, and the statutory amendment constituted an infringement by the legislature upon the judicial branch.

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72. 69 Ill. 2d 252, 371 N.E.2d 602 (1977).
73. *Id.* at 259, 371 N.E.2d at 605.
74. *Id.* at 255, 371 N.E.2d at 603.
75. *Id.* But see Whitlock v. Salmon, 56 U.S.L.W. 2575 (Mar. 30, 1988) (No. 18043) (finding a similar statute to be "an acceptable solidification" of a comparable rule).
76. *Jackson*, 69 Ill. 2d at 255, 371 N.E.2d at 603.
77. *Id.* at 255-56, 371 N.E.2d at 604 citing ILL. CONST. art. II, § 1.
78. *Id.* at 256-57, 371 N.E.2d at 604-05 citing ILL. CONST. art. VI, §§ 1, 16.
79. *Id.* at 259, 371 N.E.2d at 605 citing ILL. CONST. art. VI, § 17.
80. *Id.*
81. *Id.* at 260, 371 N.E.2d at 605-06. *Jackson* may soon be expanded to invalidate statutes interfering with the exercise of judicial power even where there is no judicial rule directly in conflict. See, e.g., David Ware v. Central DuPage Hosp., No. 66197 (appeal filed) (1988) (involving statutory right of voluntary dismissal). But see Kahle v. John Deere Co., 104 Ill. 2d 302, 308, 472 N.E.2d 787, 789-90 (1984) (difficulties with statutory right of dismissal should be addressed by legislature).
As the foregoing cases demonstrate, exclusive judicial authority means that court rules will override conflicting statutes. Occasionally, it also means that statutes are forbidden entirely in areas governed by rules, even if the statutes would not conflict with any existing rules. However, by shifting the primary authority over all procedural law completely to the judiciary, concerns about differences between areas of exclusive and non-exclusive power, as well as between areas of primary judicial and legislative authority, will be reduced, if not eliminated. Thus, unfortunate clashes over legislative intrusions into areas of exclusive judicial prerogative will disappear and the efficiency and expertise noted by Levin and Amsterdam will be promoted. In all matters of procedure, the judiciary will assume the bulk of responsibility.

C. OPEN AND ACCESSIBLE DEBATE

In promulgating a comprehensive set of rules, the judiciary must abide by democratic principles mandating that majority sentiment usually prevail and that such sentiment be determined after an open debate accessible to all who wish to participate. In so doing, the judiciary can accommodate the legislature’s concerns about particular rules—whether or not in the area of absolute judicial power—by implementing a deliberative process which necessitates input from General Assembly members. Disputes over the boundaries of legislative and judicial power will inevitably continue to arise; yet, with open and accessible judicial rulemaking for all areas of procedural law, conflicts should become less frequent.

With primary, if not absolute, judicial authority over all procedural law, disputes about the boundaries of governmental power will most likely arise when the legislature passes a law significantly affecting procedure but designed to foster a substantive law policy. One such law in Illinois deals with the certification of claims by attorneys in medical malpractice actions.12

82. ILL. REV. STAT. ch. 110, para. 2-622 (1985). But see Parness, Frivolous Pleadings in Illinois: Observations on the 1985 Medical Malpractice Reforms, 74 ILL. B.J. 238 (1986) (suggesting the Illinois Supreme Court was “better suited” to alter medical malpractice pleading law); Montford & Barber, 1987 Texas Tort Reform: The Quest for a Fairer and More Predictable Texas Civil Justice System, 25 HOODS. L. REV. 245, 354-55 (1988) (noting Texas Supreme Court’s repeal of a comparable Texas statute on actions in tort). See also Struckoff v. Struckoff, 76 Ill. 2d 53, 389 N.E.2d 1170 (1979) (statute requiring bifurcated trial in marriage dissolution action is not unconstitutional as a legislative encroachment upon judicial rulemaking, at least where there exists no conflicting rule, since legislature controls conditions of dissolution and since it is reasonable to protect all whose lives are impacted by an end to a marriage).
of legislative power because of its goal to reduce the litigation burdens of the medical profession and its insurers, in enacting this law the General Assembly failed to engage in an adequate deliberative process. The procedural dimensions of the law went largely unconsidered by legislators chiefly responsible for court and legal profession guidelines, as well as by Illinois judges and lawyers.\textsuperscript{83} Perhaps the inattention to procedural law policy occurred because the law was subsumed in a package of proposals largely focused on substantive tort reform. More alarming still is a second recent statute dealing generally with claim certification by attorneys, thus covering claims and defenses in all civil actions regardless of their nature.\textsuperscript{84} That act seemingly intrudes upon an area within, at least, primary judicial authority as it involves attorney conduct. The act's relationship to any particular substantive law policy remains unclear.\textsuperscript{85} Again, adequate deliberations on procedural law concerns seemed absent in the legislature.\textsuperscript{86} This is particularly troubling as the certification law is quite controversial, having been rejected by some jurisdictions and undergoing reconsideration in others where it has already been adopted.

Increased judicial rulemaking, undertaken in an open and accessible way, would help diminish disputes over proposed substantive law statutes having significant procedural law implications. Mechanisms to assure dialogue on such statutory proposals between legislators and judicial rulemakers would exist in an open and accessible judicial rulemaking mechanism. With advance warning, constitutional questions regarding separation of powers could even be avoided if the rulemakers adopted the procedural law components of any such statute as part of a new rule.\textsuperscript{87}

\textsuperscript{83} See letter from Senator Roger Keats to Jeffrey A. Parness (Sept. 4, 1985) (copy permanently on file with the N. ILL. U.L. Rev.).

\textsuperscript{84} ILL. REV. STAT. ch. 110, § 2-611 (Supp. 1986).

\textsuperscript{85} See Parness, supra note 82, at 240 ("It may well be that the Illinois General Assembly has some authority to attempt to alter attorney conduct. Nevertheless, the Illinois Supreme Court is usually better suited to such a task, particularly when the conduct has no substantive law implications."). But see, e.g., Patterson v. Northern Trust Co., 286 Ill. 564, 122 N.E. 55 (1919) (checking "pestiferous litigants" is the responsibility of the General Assembly).

\textsuperscript{86} Solovy, Wedoff & Bart-Howe, Attorney Sanctions Under Section 2-611 of Code, 133 Chi. Daily L. Bull., Jan. 13, 1987, at 2, col. 1 ("Due to the speed with which the law was enacted, there is a dearth of legislative history . . . .").

\textsuperscript{87} See, e.g., In re Florida Evidence Code, 372 So. 2d 1369 (Fla. 1979), modified on other grounds, 404 So. 2d 443 (1981) ("To avoid multiple appeals and confusion . . . caused by assertions that portions of the evidence code are procedural and, therefore, unconstitutional . . . the Court . . . adopts . . . the provisions of the evidence code . . . to the extent that they are procedural . . . .") Id.
Boundary disputes between the legislature and judiciary are also likely to arise when the judiciary, as primary lawmaker, promulgates a rule having a significant impact on the enforcement of a substantive right within the legislature's domain or on a right guaranteed constitutionally. Consider judicially-promulgated rules on derivative or class actions, as well as rules governing the conduct of a jury trial. Again, open and accessible judicial rulemaking will satisfy democratic principles, and will assure the dialogue between legislators and judicial rulemakers which is necessary to minimize infringements of substantive rights by procedural rules.

Beyond reducing problems caused by differences between areas of absolute and shared responsibilities, and between procedural guidelines subject to one primary lawmaker or another, increased judicial rulemaking, undertaken in conformity with democratic principles, will result in almost all procedural law reforms being initiated by the judiciary. Thus, most procedural law should be found in judicial rules, and the difficulties created by the need to integrate procedural law statutes and rules would be substantially eliminated. Accountability for procedural law reform would also be clearly placed. The prospect of procedural law reformers running back and forth between the legislature and the courts would be significantly reduced.

II. REMEDIAL CONSTITUTIONAL AMENDMENTS

Primary judicial authority for all procedural law is supported by both constitutional history and strong public policy rationales. Such authority can be exercised without forsaking cherished democratic principles. Yet, without express constitutional mandate, such authority seemingly will not be exercised. While the legislature long ago expressly delegated procedural law-making powers to the judiciary at a time when Illinois constitutional law on judicial power recognized

89. See, e.g., Colgrove v. Battin, 413 U.S. 149, 159-60 (1973) (local rule providing for six person juries does not violate seventh amendment jury trial right, with no view expressed "as to whether any number less than six would suffice").
90. Consider recent efforts at altering the law regarding grand jury power to subpoena attorneys; a petition for a rule change was filed with the Illinois Supreme Court only after a bill (requiring that subpoenas receive prior judicial approval) was passed by the General Assembly but vetoed by the Governor. Golden, ISBA Gets Support From ABA on Attorney Subpoena Issue, 134 CHI. DAILY L. BULL., Mar. 8, 1988, at 1, col. 2; Schweit, Daley Opposes ISBA Plan to Limit Lawyer Subpoenas, 134 CHI. DAILY L. BULL., Mar. 24, 1988, at 1, col. 2.
very significant General Assembly duties regarding court structure, it has not stopped exercising those powers itself in significant ways. As well, while the 1977 Illinois Supreme Court decision in People v. Jackson may have signaled "a new era of Illinois Supreme Court involvement in the process of developing rules of procedure and [for] the conduct of trials," the court has yet to move in fact toward establishing "a comprehensive and unified system of regulation of procedure and the trial of cases in Illinois." Illinois is thus left with "an unnecessarily complex, disorganized, and frequently unclear, if not inconsistent, morass of statutes, rules and judicial decisions" on procedural law. The General Assembly's recent passage of a general statute on attorney certification of claims and defenses, modeled on Federal Rule of Civil Procedure 11, illustrates well the legislature's unfortunate continuing involvement in procedural law, as well as the continuing inertia of the high court.

Constitutional change is the best way, and perhaps the only way, to remedy existing problems in the distribution and exercise of pro-

91. A part of the Code of Civil Procedure states:
(a) The Supreme Court of this State has power to make rules of pleading, practice and procedure for the circuit, Appellate and Supreme Courts supplementary to, but not inconsistent with the provisions of this Act, and to amend the same, for the purpose of making this Act effective for the convenient administration of justice, and otherwise simplifying judicial procedure, and power to make rules governing pleading, practice and procedure in small claims actions, including service of process in connection therewith. . . .
(b) Subject to the rules of the Supreme Court, the circuit and Appellate Courts may make rules regulating their dockets, calendars, and business.
ILL. REV. STAT. ch. 110, para. 1-104 (1985). This delegation was added to the Civil Practice Act of 1933, a time when the General Assembly had greater constitutionally-defined responsibilities for organizing the Illinois judicial system. See supra text accompanying notes 29-30.
93. Id. at 109. In the absence of constitutional amendments expressly recognizing primary judicial authority over all procedural law, this lack of movement may be wise—though such a movement may be supported by case law and by statute. See supra note 91. See also, e.g., Comment, The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change, 75 CALIF. L. REV. 1473, 1475 (1987) (urging that in the area of individual rights, the procedurally arduous means of constitutional change rather than extratextual procedures (case development) are preferable because they represent an accepted norm, foster societal consensus on basic values, promote constitutional stability and limit majoritarianism).
94. Graham, supra note 42, at 108.
95. See supra note 84 and accompanying text.
96. See supra note 85 and accompanying text.
cational law-making powers. Needed are constitutional amendments which more clearly define the primary and secondary authority over Illinois procedural law and which delegate all primary authority to the judiciary. As well, amendments are needed which better assure open and accessible judicial rulemaking.

A. ABSOLUTE, PRIMARY AND SECONDARY AUTHORITY OVER PROCEDURAL LAW

In addressing the problems in the distribution of authority over procedural law, constitutional drafters should maintain, where feasible, well-developed and well-understood precedents. A continuing ability of the courts to recognize pockets of absolute judicial authority seems warranted; thus, certain areas of procedural law should be free of any legislative oversight. Yet, such areas should be small. Some absolute authority seems necessary for certain "general administrative and supervisory" guidelines, as well as for certain guidelines covering the regulation of the legal profession (including rules for attorney admission and discipline). Generally, pockets of absolute judicial authority should include matters "so fundamental and so necessary to a court" that their absence would render the phrase "judicial power" meaningless. 97

Most procedural law guidelines would be subject only to a primary, non-absolute judicial authority. The exercise of such authority should vary, however, depending upon the guidelines under consideration. Judicial rules concerning the establishment of administrative, supervisory or professional conduct guidelines should always prevail over inconsistent statutes and should not otherwise be subject to override by the legislature. All statutes establishing administrative, supervisory or professional conduct guidelines need not be precluded. Rather, judicial rulemakers should defer to the General Assembly in these areas when judicial rules are lacking but are needed, or when augmentation of existing judicial rules seems necessary. This legislative power to fill gaps and to augment should be rarely exercised, and it

97. Levin & Amsterdam, supra note 41, at 30. See also U.S. v. Brainer, 691 F.2d 691, 697 (4th Cir. 1982); In re Grady, 118 Wis. 2d 762, 348 N.W.2d 559 (1984); In re Hearing on Immunity for Ethics Complaints, 96 N.J. 669, 477 A.2d 339 (1984); Eash v. Riggins Trucking Co., 757 F.2d 557, 562 n.7 (3d Cir. 1985). Distinctions involving the pockets of absolute judicial authority seemingly necessitate "nice distinctions that may be troublesome," but which are "nonetheless necessary." Daniels v. Williams, 474 U.S. 327, 334 (1986).
should require a supermajority vote in each house. Such a legislative power should usually only be employed when the General Assembly pursues a substantive law goal in ways which significantly touch upon the implementation of judicial rules. The aforementioned statute on the certification of medical malpractice claims may exemplify such legislative power, as the legislature sought to reduce the numbers of certain substantive law claims and yet acted in an area, the regulation of attorney conduct during litigation, which the judiciary has placed within its exclusive domain. As will soon be demonstrated, the creation of open and accessible judicial rulemaking mechanisms should provide General Assembly members with ample opportunity for input during most judicial deliberations on administrative, supervisory, or professional conduct rules. It also should provide judicial rulemakers with a channel by which to communicate with the legislature about pending bills having procedural law ramifications.

Judicial authority over other areas of procedure (including matters often characterized as rules of practice and procedure) should be subject to a differing form of primary judicial authority. In these areas, the judiciary would initiate discussion of, and promulgate, almost all procedural law guidelines. However, this authority would be subject to greater legislative review. The judiciary would not possess the "final say." Rather, prior to their effectiveness, judicial rules in these areas would have to be submitted to the General Assembly, which could block implementation by a supermajority vote in each house. Subsequent to implementation, the General Assembly could repeal, supplement or augment such judicial rules by a similar vote.

Of course, such secondary authority over procedural law is in addition to the participatory rights afforded legislators during open judicial rulemaking deliberations.

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99. The requirement of presentment to the governor seemingly holds even where the legislature is only blocking implementation of a judicial rule. INS v. Chadha, 462 U.S. 919 (1983) (unconstitutionality of a one-house legislative veto); see also General Assembly of New Jersey v. Byrne, 90 N.J. 376, 448 A.2d 438 (1982). Though a two-thirds or three-fifths vote by each house is sufficient to overcome gubernatorial veto, Ill. Const. art. IV, § 9, arguably presentment of such a supermajority vote to the governor would still be necessary in order to assure executive branch participation in lawmaking.

100. See Levin & Amsterdam, supra note 41, at 40 n.185.
The legislature's authority over procedural law guidelines under such a scheme would thus always be secondary. Such secondary authority would be somewhat stronger in the areas outside of administration, supervision and professional conduct regulation. Yet, in all settings, most procedural law guidelines would not require affirmative General Assembly action.

Prior to any consideration of how such primary judicial authority ought to be exercised, and thus of the merits of public process judicial rulemaking, a final question lingers: should the judiciary's primary authority over procedural law always be assumed by courts? While formal judicial rulemaking by groups of judges who do not form a single court has been relatively unknown in Illinois, there are precedents elsewhere. In California, for example, a council of judges (who serve on a variety of appellate and trial courts) is constitutionally responsible for adopting "rules for court administration, practice and procedure, not inconsistent with statute." Comparably, some are now urging that the rulemaking powers of the United States Supreme Court be transferred to the Judicial Conference of the United States (where many feel they already lie de facto). Such non-court judicial rulemaking has much to commend it. For example, groups of judges from various courts will likely reflect diverse backgrounds and significant expertise in all levels of procedural law. As well, unlike the United States Supreme Court as rulemaker, a non-court judicial rulemaker would never later sit in a case challenging one of its own rules. This is not to suggest that the absence of the high court as

101. Secondary authority is justifiable as procedural laws both "may have radical impact on the community" and possess "the potential of frustrating substantive policies." Levin & Amsterdam, supra note 41, at 18. See also Kaplan & Greene, The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury, 65 HARV. L. REV. 235, 254 (1951) ("it seems doubtful wisdom for a court to place itself beyond legislative control when it pronounces general rules"). But see Pound, Procedure Under Rules of Court in New Jersey, 66 HARV. L. REV. 28, 43-46 (1952) (urging there be no legislative authority).


104. 28 U.S.C. § 331 (1987) (currently, the Judicial Conference recommends to the U.S. Supreme Court changes to Supreme Court Rules governing lower federal courts).

105. Weinstein, Reform of Federal Court Rulemaking Procedures, 76 COLUM.
final rulemaker is without cost. For example, its absence might undermine the efforts at achieving a unified court system—a goal of Illinois constitutional reforms in the past decades.\textsuperscript{106} Perhaps, while not acting as final rulemaker, the supreme court might maintain a power to review and reject judicially-promulgated rules of others before they take effect.\textsuperscript{107} While further investigation and debate seems warranted, delegation of primary authority to non-court judicial rulemakers may be preferable.

Regardless of which judicial rulemaker must give the final stamp of approval, groups of judges from different Illinois courts should be chiefly responsible for drafting, debating, and proposing most judicial rules. In this state and elsewhere, a high court with final rulemaking authority inevitably delegates most of its power to advisory committees consisting of lower court judges (as well as lawyers and others). Though such delegation is common, the processes utilized by these judicial rulemakers are subject to much variation. The history in Illinois reveals processes which are too often closed and secretive.\textsuperscript{108} Constitutional amendments regarding primary judicial authority for procedural law must be accompanied by amendments more descriptive of the judicial rulemaking processes so that open and accessible judicial rulemaking is better assured.

B. PUBLIC PROCESS JUDICIAL RULEMAKING

Because the processes for judicial rulemaking in Illinois are frequently closed and secretive, often little is known of the participants

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\textsuperscript{106} See, e.g., \textit{People v. Jackson}, 69 Ill. 2d 252, 256, 371 N.E.2d 602, 604 (1977) (constitutional recognition of the supreme court's supervisory authority over all courts "was employed to fortify the concept of a centrally supervised court system").

\textsuperscript{107} See, e.g., \textit{Colo. Rev. Stat. § 7, Rule 121(a) (1987)} (local court rules submitted to Supreme Court take effect 45 days later unless rejected in writing). This rule has recently been changed. See 16 Colo. Law. 2209-10 (1987) (amendment to Rule 121(a) requiring written approval by high court of any new local rule). See also \textit{Frazier v. Heebe}, 107 S. Ct. 2607, 2612 n.7 (1987) (supervisory power of high court to intervene and void local court rules) and \textit{Fed. R. Civ. P. 83} (circuit judicial council may abrogate local rule).

\textsuperscript{108} See Burleigh, \textit{Court Rules Made to be Amended, Deleted}, Chi. Daily L. Bull., Jan. 9, 1985, at 2, col. 2, where it is said: "Supreme Court rules govern everything . . . Yet the method by which these rules are amended, added to or deleted does not satisfy many attorneys, who say they are often surprised by rule changes made without their input, through channels unknown."
(especially those who advise the final judicial rulemaker, as well as those who advise those advisors). Little is also usually known of judicial rulemaking deliberations. This is particularly troublesome when judicial rules affect sensitive issues of social policy rather than addressing merely technical issues. A more open and accessible system may even be mandated under the emerging first amendment right of access. It surely is compelled by democratic principles; such principles require that widespread and informed debate usually precede legislative or quasi-legislative action. As well, an open system serves such pragmatic goals as enhancing the quality of the final product and promoting the acceptance of rules by those subject to their dictates.

Several general characteristics of open and accessible, and thus public process, judicial rulemaking can be identified. They include a relatively permanent and known rulemaking process: the assurance of adequate notice and opportunity to be heard prior to rule promulgation; a requirement that a reasoned basis for decision accompany new rules; and the opportunity for public initiative. These attributes will vary somewhat in implementation, depending upon such factors as the judicial rulemaker (a court, or a group of judges, lawyers and others); the judicial rule under consideration (a narrow, technical rule, or a rule affecting sensitive policy issues); and the degree of autonomy possessed by the judicial rulemaker (absolute authority or one of two forms of primary authority).

It seems unnecessary, and unwise, for the judicial rulemaking processes to be described in great detail within the constitution. Clear constitutional recognition of primary judicial authority over all procedural rules should prompt judicial rulemakers to adopt public process attributes, because the legislative character of their work and the later minimal involvement of the General Assembly would be

112. Id. at 132-44 (reviewing in detail techniques for implementing these characteristics into judicial rulemaking mechanisms).
clear. Implementation of public process judicial rulemaking in Illinois will be facilitated by the recent reforms in other states. One practice which must soon be terminated involves the use of ad hoc committees to advise judicial rulemakers. The structure and duties of these advisory bodies is unclear. Preferable are permanent advisory bodies, whose roles are defined within court rule or elsewhere and whose membership assures expertise, as well as representation of diverse elements within and outside the legal profession.

Whether judicial rulemaking is undertaken by a court or others, and whether absolute or non-absolute primary authority is involved, public process judicial rulemaking should provide significant opportunity for dialogue between judges and legislators prior to any rule promulgation. Judicial rules inevitably have some impact on the laws within the legislature's domain. Thus, where relevant, the substance/procedure dichotomy, as well as the division between absolute and non-absolute judicial authority, could be discussed before clashes develop. Such dialogue should not conflict with principles of separation of powers. Input by legislators during the consideration of judicially-promulgated rules, in fact, promotes democratic values; it is easily distinguished from instances of interference by legislators with judicial consideration of cases, or of interference by judges with legislative consideration of a bill.

Finally, whether the Illinois Judicial Conference or (preferably) a smaller and more representative body continues to serve as advisor to the high court as rulemaker or is itself delegated some final rulemaking authority, the structure and functions of major judicial rulemaking bodies should be addressed constitutionally. One important function involves insuring the necessary dialogue between the legisla-


115. Unlike the Federal Judicial Conference which has established, pursuant to 28 U.S.C. § 331 (1987), several permanent and widely-known standing committees to advise it on rule changes (where those committees, in fact, undertake most of the rule-making initiative, Weinstein, supra note 99, at 908-09), the Illinois Judicial Conference apparently has no comparable committees, though its Executive Committee at least has the power to recommend their appointment. ILL. REV. STAT. ch. 110A, § 41(c)(4) (1985).

116. As contrasted with the Federal Judicial Conference or state judicial conferences or councils having rulemaking responsibilities (if only advisory), see supra notes 102 & 104 and accompanying text, the Illinois Judicial Conference is quite large. ILL. REV. STAT. ch. 110A, para. 41 (1985). In addition, the Illinois Judicial Conference is composed only of judges. Id.
ture and any judicial rulemaker.\textsuperscript{117} Another is the undertaking of research (typically through a contractor) on the Illinois judicial system where such research is outside the province (though with the aid) of the Administrative Office of the Illinois courts. Federal Judicial Center\textsuperscript{118} activities provide a useful model, as does the work of the Administrative Conference of the United States.\textsuperscript{119}

III. Conclusion

The present distribution and exercise of responsibility for Illinois procedural law governing courts and the legal profession are troublesome. The division of responsibility between the legislature and the judiciary too often is unclear and overly deferential to the legislature. Because primary authority for procedural law is shared by the legislature and the judiciary, unfortunate clashes often develop between statutes and rules. As well, when debating and establishing procedural law, the General Assembly often fails to include judges and lawyers in the dialogue in any significant way.

Primary judicial authority over all procedural law must now be recognized. Such recognition is supported by both constitutional history and strong public policy rationales. In exercising responsibility for procedural law, however, the judiciary must not employ a closed and secretive process. Public process judicial rulemaking should be required.

Remedies should come via constitutional amendment. The current hodgepodge of constitutional provisions on procedural lawmaking should be replaced by a small set of directives which more clearly delegate and define primary and secondary authority. These directives should permit (though not address) some absolute judicial authority, and should expressly delegate all primary authority to the judiciary. Only secondary authority should be vested in the legislature. Differences in the forms of primary and secondary authority should be made clear. Non-court judicial rulemakers should be expressly rec-


\textsuperscript{118} 28 U.S.C. § 620(b)(1) (1985) (the Center is responsible for conducting research as well as for stimulating and coordinating the research of others).

\textsuperscript{119} 5 U.S.C. §§ 571, 574 (1985) (the Conference, assisted by outside experts, is responsible for research and proposals regarding federal administrative agency reform).
ognized, even if their role is only advisory. Finally, constitutional provisions should promote the use of open and accessible decision-making processes during judicial rulemaking.