Loyola University Chicago Law Journal

Volume 10
Issue 1 *Fall 1978*

Article 7

1978

The Bounds of Power: Judicial Rule-Making in Illinois

Joanna C. New

The Bounds Of Power: Judicial Rule-Making In Illinois

INTRODUCTION

The constitutional doctrine of separation of powers[1] distributes authority among governmental departments, purportedly to prevent excessive accumulation of power in any single branch.[2] In Illinois, the courts have steadily shifted the boundaries between legislative and judicial power.[3] Recently, the Illinois courts have adopted a construction of judicial power that asserts dominance over court rule-making,[4] while abandoning a prior concept of concurrent[5] authority exercised by the judiciary and the legislature. This expansionist concept of judicial authority culminated in *People v. Jackson*,[6] where the Illinois Supreme Court held that one of its rules would supersede any conflicting legislative enactment.[7]

This note examines the evolution of the separation of powers doctrine as applied to court rule-making authority, focusing attention on the court's departure from concurrent rule-making, as explicated

1. "The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." ILL. CONST. art. 2, § 1 (1970).

2. In re Estate of Barker, 63 Ill. 2d 113, 119, 345 N.E.2d 484, 488 (1976).

3. People ex rel. Stamos v. Jones, 40 Ill. 2d 62, 237 N.E.2d 495 (1968); People v. Lobb, 17 Ill. 2d 287, 161 N.E.2d 325 (1959); Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952); People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934); People v. Kelly, 347 Ill. 221, 179 N.E. 898 (1932). These decisions are comparable to those made by the New Jersey Supreme Court in Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406 (1950), and by the Connecticut Supreme Court in State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1975). *Winberry* held that the state's constitutional grant of rule-making authority to the state supreme court "subject to law" meant merely subject to substantive law. The result was an absolute grant of procedural rule-making power to the New Jersey Supreme Court. *Clemente* held that the state legislature lacked any authority to enact rules regarding either practice or administration binding the state supreme court, thus declaring rule-making power to be the exclusive province of the judiciary.

4. People v. Jackson, 69 Ill. 2d 252, 371 N.E.2d 602 (1977); People v. Walker, 58 Ill. App. 3d 323, 374 N.E.2d 490 (1978); People v. Menken, 54 Ill. App. 3d 199, 369 N.E.2d 363 (1977); People v. Thornton, 54 Ill. App. 3d 202, 369 N.E.2d 358 (1977); People v. Brumfield, 51 Ill. App. 3d 637, 366 N.E.2d 1130 (1977).

5. *See* People ex rel. Stamos v. Jones, 40 Ill. 2d 62, 237 N.E.2d 495 (1968); Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952); People v. Brumfield, 51 Ill. App. 3d 637, 366 N.E.2d 1130 (1977). Although the 1970 Constitutional Convention characterized the court rule-making function as "concurrent," 2 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1067 (1969-1970) [hereinafter cited as PROCEEDINGS], it should have been depicted as complementary. Concurrent power implies the joint exercise of authority over a single function. In actuality, control over some matters was delegated to the legislature, reserving the remainder to the judiciary. *Id.*

6. 69 Ill. 2d 252, 371 N.E.2d 602 (1977).

7. *Id.* at 260, 371 N.E.2d at 606.

in *People v. Jackson.* The constitutional implications of *Jackson* are also discussed. Finally, this note addresses the unresolved issues engendered by *Jackson,* particularly those concerning the Illinois Civil Practice Act[8] and the proposed Illinois evidence rules.[9]

THE SCOPE OF THE RULE-MAKING POWER

There are two methods of interpreting the doctrine of separation of powers. One theory delegates all governmental functions of a particular nature to the exclusive control of a single department.[10] The other method allocates authority among the branches, to be exercised concurrently.[11]

Illinois courts have rejected the former approach, refusing to literally construe the separation doctrine.[12] Instead, the courts have created a concept of overlapping, concurrent powers.[13] This posture is attributable to the ambiguous treatment of the separation of powers doctrine in successive Illinois constitutions.[14] While all these constitutions have expressly prohibited a governmental branch from exercising a power "properly belonging" to another department,[15] none has delineated those functions which "properly" belong within each department.[16] In the absence of any definitive boundary between the rule-making authority vested in each branch of government, both the judiciary and the legislature have adopted court rules.[17] Furthermore, the Illinois Constitutional Convention of 1969-1970 espoused the concurrent rule-making approach and delegated to the courts the task of establishing the boundary between the legislature and the judiciary.[18]

---

8. ILL. ANN. STAT. ch. 110, §§ 1-94 (1977).

9. Repeated proposals for codification of Illinois' common law evidence rules have been considered, most recently during the summer of 1978.

10. *See* Field v. People, 3 Ill. 79, 83-84 (1839).

11. In re Estate of Barker, 63 Ill. 2d 113, 119, 345 N.E.2d 484, 487-488 (1976); City of Waukegan v. Pollution Control Board, 57 Ill. 2d 170, 173-74, 311 N.E.2d 146, 148 (1974).

12. *See* People v. Kelly, 347 Ill. 221, 233, 179 N.E. 898, 903 (1932); People v. Thornton, 54 Ill. App. 3d 202, 208, 369 N.E.2d 358, 362 (1977) (Green, J., specially concurring.)

13. "All the court decisions of this state recognize that there is an overlap—that there is not a strict division between the three areas of government, but that there is an overlap." 2 PROCEEDINGS 1067 (1969-1970). *See* People v. Lobb, 17 Ill.2d 287, 161 N.E.2d 325 (1959); Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952); People v. Kelly, 347 Ill. 221, 234-35, 179 N.E.2d 898, 903 (1932).

14. *See* ILL. CONST. of 1818, arts. 3, 6; ILL. CONST. of 1870, arts. 2, 6; ILL. CONST. art. 2, § 1 and art. 6 (1970).

15. ILL. CONST. art. 2, § 1 (1970).

16. *Compare* ILL. CONST. art. 4, § 1 *and* art. 6, § 1 with art. 2, § 1.

17. Rules promulgated by the legislature have been codified in the Illinois Civil Practice Act, ILL. ANN. STAT. ch. 110 §§ 1-94 (1977). Rules adopted by the judiciary have been compiled in Illinois Supreme Court Rules, ILL. ANN. STAT. ch. 110A §§ 1-910 (1970).

18. 6 PROCEEDINGS 825 (1969-1970).

Lack of a precise delineation of judicial power enables the Illinois Supreme Court to describe its own authority.[19] In determining the scope of judicial authority the court has used English common law, the Illinois Constitution,[20] the inherent power doctrine, the distinction between substantive and procedural law, and the procedural distinction between practice and administration.

Traditional Judicial Power

Although Illinois courts have relied upon English common law[21] to determine the bounds of judicial power, salient differences between English and Illinois courts[22] make that reliance inappropriate. Early English courts were vested with rule-making authority to regulate both court practice and administration,[23] whereas Illinois courts are limited in their control of trial matters to administrative and supervisory rule-making.[24] The responsibility for granting relief through the issuance of the King's writs[25] enabled the courts to promulgate much substantive law.[26] Illinois courts, however, may only create substantive law by rule of decision.[27]

Early English courts derived the authority to perform these broad judicial functions from the King, who defined the scope of these activities.[28] As arms of the Crown, the courts depended upon the King's strength to enforce their rules and decisions.[29] The constitutional origin of Illinois judicial power is the clearest distinction between the judicial power of the English common law courts and that exercised by contemporary Illinois courts.[30] The judiciary article of

19. The drafters, unable to agree as to the desirable limits of the rulemaking power of the two bodies, deliberately refrained from speaking to that question and left that issue as it existed prior to 1962 with the refinements of the question to be decided on a case by case basis.

People v. Thornton, 54 Ill. App. 3d 202, 207, 369 N.E.2d 358, 362 (1977) (Green, J., specially concurring).

20. ILL. CONST. art 6 (1970).

21. *Compare* Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926) *with* Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois*, 47 NW.U.L.REV. 443 (1952).

22. *See* Comment, *The Inherent Power of Courts to Formulate Rules of Practice*, 29 ILL. L. REV. 911, 914-15 (1935).

23. For a complete review of these developments, *see* People v. Callopy, 358 Ill. 11, 192 N.E. 634 (1934).

24. ILL. CONST. art. 6, § 16 (1970).

25. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 353-424 (5th ed. 1956).

26. "The mere fact that the English Courts did make most of the procedural law proves too much since they made most of the substantive law as well." Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois*, 47 NW.U.L.REV. 443, 445 (1952).

27. *See* note 46 *infra* and accompanying text.

28. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 104 (5th ed. 1956).

29. *Id.*

30. ILL. CONST. art. 6 (1970).

the Illinois constitution creates a discrete, independent governmental entity, fully endowed with its own particular authority.

The judiciary article vests all judicial power in the Supreme, appellate, and circuit courts.[31] The Supreme Court is authorized to promulgate rules governing appeals,[32] and is empowered with "general administrative and supervisory"[33] rule-making authority to expedite judicial processes. The drafters of the 1970 Illinois Constitution sought to retain the concurrent rule-making approach which had been advanced by Illinois courts.[34] The distribution of rule-making power between the judiciary and the legislature was left to the court to determine.[35]

The judiciary article's enumerations are subject to several interpretations. One approach restricts judicial power to those functions specifically described by the article, admitting nothing additional.[36] Conversely, express enumerations have been regarded as designations of exclusivity,[37] forbidding other departments from exercising functions specifically assigned to the judiciary. The commonly-held view is that these enumerations are merely exemplary, and are supplemented by inherent judicial power.[38] Thus, embodied in the constitutional grant of judicial authority is the underlying assumption that the courts possess inherent power.

Inherent Judicial Power

Illinois courts have long recognized the existence of inherent judicial power[39] arising independently of any constitutional grant. In-

---

31. ILL. CONST. art. 6, § 1 (1970).

32. *Id.* §§ 4(b)-(c), 6.

33. *Id.* § 16.

34. "The Committee did not intend to effect a change in the common law which has developed from the [language of the present judiciary article]." 6 PROCEEDINGS 566 (1969-1970).

35. *Id.* at 825.

36. *See* 6 PROCEEDINGS 1326 (1969-1970) where the same analysis was applied to the legislative enumerations. *See also* THE FEDERALIST No. 47 (J. Madison).

37. Note, *People ex rel. Stamos v. Jones: A Restraint on Legislative Revision of the Illinois Supreme Court Rules*, 6 J.MAR.J.PRAC. & PROC. 382, 392 (1973); 6 PROCEEDINGS 812-27 (1969-1970).

38. *See* Johnson v. State Electoral Board, 53 Ill. 2d 256, 290 N.E.2d 886 (1972).

39. Inherent power has been described as "universally recognized," People v. Lobb, 17 Ill. 2d 287, 299, 161 N.E.2d 325, 332, (1959); "irrefutable," Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rulemaking*, 55 MICH. L. REV. 623, 626 (1957); and "settled," Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois*, 47 NW.U.L.REV. 443, 448 (1952). Despite these generous suppositions, the definition of inherent power has remained nebulous.

> Section I of article VI of the constitution vests the judicial power in the courts provided in or permitted to be created by the constitution. While the constitution

herent judicial power has been justified by the traditional role of courts as rulemakers[40] and adjudicators.[41] For example, since the resolution of legal disputes requires interpretation of the common law and of statutory provisions, this function has been deemed exclusively and inherently judicial.[42]

Two corollaries emerge from the concept of inherent judicial power. First, power which is inherently judicial cannot be diminished or negated by legislative enactment.[43] The legislature lacks authority to subordinate judicial power, since it exists independently of legislative delegation.[44] Similarly, inherent power cannot be abolished by a constitutional amendment because it is not dependent upon constitutional mandate for its existence.[45] Secondly, the courts possess control over court rules to facilitate the rendering of judgments pursuant to their inherent power.[46]

Circumscription of the courts' inherent power lies exclusively within the discretion of the judiciary.[47] Using its inherent power, the court has asserted its authority to delimit judicial rule-making. The scope of the Supreme Court's rule-making function is governed by doctrinal distinctions between substantive and procedural law, as well as distinctions between court practice and administration. This

---

does not define what constitutes judicial power, it is an exclusive and exhaustive grant vesting all such power in the courts.

Agran v. Checker Taxi Co., 412 Ill. 145, 148-49, 105 N.E.2d 713, 725-726 (1952).

40. People v. Lobb, 17 Ill. 2d 287, 299, 161 N.E.2d 325, 327 (1959). However, the proposition that a function is necessarily inherent merely because it is traditional lacks support. *See* Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois,* 47 Nw.U.L.Rev. 443 (1952).

41. "It is evident that the rendition of judgments by the courts is one of the most important inherent judicial powers of the courts. . . ." Agran v. Checker Taxi Co., 412 Ill. 145, 150, 105 N.E.2d 713, 715 (1952).

42. Wright v. Central Du Page Hospital Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); People v. Bruner, 343 Ill. 146, 158, 175 N.E. 400, 405 (1931).

43. The General Assembly has power to enact laws governing judicial practice only where they do not unduly infringe upon the inherent powers of the judiciary. . . . It is the undisputed duty of the court to protect its judicial powers from encroachment by legislative enactments, and thus preserve an independent judicial department.

Agran v. Checker Taxi Co., 412 Ill. 145, 149, 105 N.E.2d 713, 715 (1952).

44. In contrast, federal courts are dependent for their authority upon congressional grants. U.S. Const., art. 3. Congress is empowered to amend and repeal the federal rules governing procedure. *See also* Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois,* 47 Nw.U.L.Rev. 443, 446 (1952).

45. *See* Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952). The court noted that prior to the ratification of the United States Constitution, courts promulgated rules "as an attribute of their judicial powers." *Id.* at 149, 105 N.E.2d at 715.

46. *Id.* at 150, 105 N.E.2d at 715.

47. People ex rel. Stamos v. Jones, 40 Ill. 2d 62, 66, 237 N.E.2d 495, 498 (1968); People v. Bruner, 343 Ill. 146, 157, 175 N.E. 400, 404 (1931).

examination begins by dividing laws generally between those related to substance and those concerned with procedure. When that division has been established, a scrutiny of the procedural components, practice and administration will follow.

Distinguishing Substance and Procedure

Illinois courts are forbidden to promulgate substantive law, since that is the exclusive province of the legislature.[48] The courts are restricted to the formulation of procedural rules.[49] The distinction between substance and procedure is readily defineable; procedural[50] laws govern court activity, while substantive laws establish rights, set duties, and grant relief.[51] However, this distinction is extremely difficult to apply, as substantive rights are often inextricably interwoven with procedural regulations.[52] In the absence of constitutional guidance, the distinction between substance and procedure falls to judicial decision.[53]

The courts have generally deferred to the legislature by awarding a substantive label to laws falling within the gray area between substance and procedure.[54] Procedural rule-making has been perceived as a function performed concurrently[55] by the legislature and the judiciary. Rules assigned to the procedural domain are further

48. *See* People v. Lobb, 17 Ill. 2d 287, 161 N.E.2d 325 (1959). It has been commented that, "[w]hile the courts necessarily make new substantive law through the decision of specific cases coming before them, they are not to make substantive law wholesale through the exercise of the rule-making power." Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 HARV. L. REV. 234, 239 (1951).

> Courts are precluded from promulgating substantive rules so that legally enforceable rules of conduct . . . are considered, debated, and approved by chosen representatives of the people when those rules touch more than the mere workings of the court machinery or the orderly dispatch of judicial business.

Note, *The Rulemaking Powers of the Illinois Supreme Court*, 1965 U.ILL.L.F. 903, 904.

49. Note, *People ex rel. Stamos v. Jones: A Restraint on Legislative Revision of the Illinois Supreme Court Rules*, 6 J.MAR.J.PRAC. & PROC. 382 (1973).

50. Procedure has been defined as "[t]he mode and order of . . . obtaining compensation for an injury by an action or suit in the . . . courts, from the inception of such suit until it ends in the final determination of the court of last resort. . . ." Fleischman v. Walker, 91 Ill. 318, 320 (1878).

51. As a general rule laws which fix duties, establish rights and responsibilities among and for persons, . . . are substantive in character[,] while those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in court are procedural. . . .

Note, *The Rulemaking Powers of the Illinois Supreme Court*, 1965 U.ILL.L.F. 903, 904.

52. *See, e.g.*, Dead Man Act, ILL. ANN. STAT. ch. 51, § 2 (1977).

53. *See* Note, *The Rulemaking Powers of the Illinois Supreme Court*, 1965 U.ILL.L.F. 903, 914.

54. Agran v. Checker Taxi Co., 412 Ill. 145, 149, 105 N.E.2d 713, 715 (1952); *See also* H. FINS, ILLINOIS COURT PRACTICE UNDER THE NEW JUDICIAL ARTICLE (United States Law Printing 1964).

55. *See* note 5 *supra* and accompanying text.

categorized, delegating matters of practice to the legislature while reserving administrative concerns to the judiciary.

Distinguishing Administration and Practice

Function provides the distinction between court practice and court administration. Practice rules prescribe the manner in which litigants seek resolution of legal controversies.[56] Administrative rules dictate routines to promote court efficiency.[57] Through a constitutional grant of "general administrative and supervisory authority"[58] the judicial branch has express control over court administration: docketing, timing rules, assignment of judges, and pre-trial activities.[59] That authority, specifically carved away from the sovereign powers of the legislature, has become exclusive to the judiciary.[60] Regulation of court practice rules, the second component of procedural law, remains with the legislature, both because it has not been particularly granted to another governmental branch,[61] and because practice rules may affect substantive rights.[62] Courts practice rules regulate such matters as where a controversy may be heard, what parties may be joined, whether parties are at issue, and when a verdict may be rendered.[63]

The power to determine whether a rule governs administration or practice lies within the interpretive capacity of the court.[64] That power derives from the court's role as the final interpreter of the constitution.[65] That interpretive power is aptly applied to the characterization of law as a matter of practice or of administration. The

56. *See* People v. Raymond, 186 Ill. 407, 414-415, 57 N.E. 1066, 1069 (1900). *See also* Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rulemaking*, 55 MICH. L. REV. 623, 635 (1957).

57. The purpose of delegating administrative authority to the courts was to "strengthen the concept of an effective centralized administration of the judicial system." 6 PROCEEDINGS 813-814 (1969-1970).

58. ILL. CONST. art. 6, § 16 (1970).

59. 4 PROCEEDINGS 688, 690 (1969-1970).

60. *See* People v. Brumfield, 51 Ill. App. 3d 637, 644, 366 N.E.2d 1130, 1136 (1977).

61. All legislative power is vested in the General Assembly, subject to the restrictions contained in the constitution. Every subject within the scope of civil government which is not withdrawn from the authority of the legislature may be acted upon by it.

Taylorville Sanitary District v. Winslow, 317 Ill. 25, 27, 147 N.E. 401, 402 (1925).

62. *See* note 52 *supra* and accompanying text.

63. ILL. ANN. STAT. ch. 110, §§ 1-94 (1977).

64. *See* People v. Thornton, 54 Ill. App. 3d 202, 369 N.E.2d 358 (1977) (Green, J., specially concurring), for a recent example of the exercise of this authority.

65. "[T]he power of the court to make rules governing . . . procedure is one which is inherent in the court. . . ." People v. Brumfield, 51 Ill. App. 3d 637, 643, 366 N.E.2d 1130, 1135 (1977).

discretion to categorize and define rule-making functions has resulted in a steady expansion of judicial authority.

JUDICIAL EXPANSIONISM: PEOPLE V. JACKSON

The Evolution of Court Rule-Making Prior to Jackson

When first confronted with a conflict between a statute and a supreme court rule, Illinois courts deferred to the legislature. In *Angel v. Plume & Atwood Mfg. Co.*,[66] the Illinois Supreme Court held that a statute governing the docketing of cases prevailed over a contrary supreme court rule. Despite the essentially administrative nature of the docketing rule, the court deferred to the legislative enactment. Legislative deference was reiterated in *Rozier v. Williams*,[67] where the court allowed a statute requiring purchase of an appeal bond to preclude a court rule abrogating the prerequisite.[68] Thus, in this deferential period, the court relinquished control of an appellate process, traditionally judicial,[69] and conferred it upon the legislature.

As the judiciary attained greater legitimacy,[70] the courts assumed a complementary stance, acquiring wider latitude in judicial rule-making, and explicitly prohibiting the legislature from transgressing upon inherently judicial powers.[71] *People v. Callopy*[72] exhibited slight broadening of judicial authority through the court's resolution of a challenge to a rule requiring written jury instructions in criminal cases. The court declared that the judiciary was authorized to promulgate rules for court procedure, absent a legislative enactment.[73]

Agran v. Checker Taxi Co.[74] achieved considerable judicial expansion. The Illinois Supreme Court asserted control over the mechanism for dismissal of cases for want of prosecution, reasoning that

66. 73 Ill. 412 (1874).

67. 92 Ill. 187 (1879).

68. While circuit courts, and other courts of record, have undoubted power to make all reasonable rules for the transaction of the business of the courts, yet their rules must be in furtherance of law, and not in contravention of it. All rules of court must be subordinate to the general laws of the State, and such as are not are [sic] binding on no one.

Id. at 190.

69. *See* note 75 *infra* and accompanying text.

70. Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois*, 47 Nw.U.L.Rev. 443, 448 (1952).

71. People v. Kelly, 347 Ill. 221, 235, 179 N.E. 898, 903 (1932).

72. 358 Ill. 11, 192 N.E. 634 (1934).

73. Consistent with its previous deferential approach, the court added the caveat that should the legislature later act in this area, the court would be required to conform its rule to the statutory scheme. *Id.* at 13, 192 N.E. at 635.

74. 412 Ill. 145, 105 N.E.2d 713 (1952).

a statute governing this matter impermisssibly infringed upon the court's inherent power to render judgments.[75] *Agran* was noteworthy both for its reliance upon an enhanced view of inherent power, and for its decisive interjection of judicial authority into the realm of trial procedure. The *Agran* approach was re-emphasized in *People v. Lobb*[76] when the court based its authority to create a *voir dire* rule which was "consistent with constitutional safeguards"[77] upon inherent judicial power. Each of these interpretations successively advanced the bounds of judicial rule-making power.

This incremental trend was dramatically accelerated by the court's exposition in *People ex rel. Stamos v. Jones,*[78] which first articulated judicial dominance over rule-making authority through invalidation of a statute governing admission to bail that conflicted with a supreme court rule.[79] The court espoused the view that the power to promulgate rules for the appellate process was constitutionally entrusted solely to the courts; therefore, the legislative enactment was an impermissible intrusion upon an exclusively judicial domain.[80] Although the conflicting provisions were procedural in nature, both affected the substantive right of admission to bail.[81] Justification for the *Jones* court's assertion of judicial dominance may be found in the constitutional provision which confers the authority to regulate appeals upon the court.[82] Yet, in effect, the judiciary exerted control over a largely substantive issue under the guise of regulating appellate procedure.

The Illinois courts exhibited further departure from previous judicial restraint in decisions subsequent to *Jones.* Conflicting statutes were invalidated even where they regulated matters over which the judiciary had not been expressly granted exclusive authority.[83] The Illinois appellate courts defined the permissible scope of judicial

75. *Id.* at 150, 105 N.E.2d at 715.

76. 17 Ill. 2d 287, 161 N.E.2d 325 (1959).

77. *Id.* at 299, 161 N.E.2d at 332.

78. 40 Ill. 2d 62, 237 N.E.2d 495 (1968).

79. *Id.* at 66, 237 N.E.2d at 498.

80. *Id.*

81. The right of admission to bail is substantive in the sense that it is integrally related to the constitutional right to liberty of the person. Admission to bail is governed generally by statute. *See* ILL. ANN. STAT. ch. 38, § 110 (1977).

82. ILL. CONST. art. 6, §§ 4(b)-(c), 6.

83. *See* People v. Walker, 58 Ill. App. 3d 323, 374 N.E.2d 490 (1978); People v. Menken, 54 Ill. App. 3d 199, 369 N.E.2d 363 (1977); People v. Thornton, 54 Ill. App. 3d 202, 369 N.E.2d 358 (1977); People v. Brumfield, 51 Ill. App. 3d 637, 366 N.E.2d 1130 (1977). *See also* Fins, *Impropriety of Illinois Legislature's Infringement Upon the Constitutional Rule-Making Authority of the Supreme Court,* 66 ILL. B. J. 384 (1978).

authority by resolving the conflict between a statute,[84] and a rule[85] regulating the conduct of *voir dire* examinations.[86] The courts regarded the control of *voir dire* examination as falling within the domain of inherent judicial authority and court administration.[87] The extension of judicial rule-making authority from the appellate to the trial process culminated in *People v. Jackson.*[88]

People v. Jackson

In *People v. Jackson* the Illinois Supreme Court asserted judicial dominance over the regulation of *voir dire* proceedings.[89] Jackson's counsel had been denied the right to examine the jurors although attorney-conducted *voir dire* was explicitly authorized by statute.[90] Instead, the jury had been selected pursuant to a court-conducted *voir dire* examination, as prescribed by Illinois supreme court rule.[91] The trial court had refused to follow the statute, regarding it as an unconstitutional encroachment upon the judicial domain. The appeal to the Illinois Supreme Court advanced the statute's constitutionality and challenged the supremacy accorded to the supreme court rule.

In delivering its opinion, the Illinois Supreme Court employed an oblique, conclusory style that left little space for inquiry into the underlying reasons for its decision. The *voir dire* statute was voided because it conflicted with a supreme court rule.[92] The *Jackson* decision is clear in its stance that any statute addressing matters within judicial control is voidable for its infringement into the judicial domain. The court's reasoning appears to have followed an analysis commencing with a definition of "judicial power."

Judicial power, as granted by the Illinois constitution, encompassed "everything necessary for the full performance of judicial functions."[93] The judiciary's "general administrative and supervi-

84. ILL. ANN. STAT. ch. 38, § 115-4(f) (1977) provides for counsel to examine prospective jurors.

85. ILL. ANN. STAT. ch. 110A, § 234 (1977) restricts examination of prospective jurors to questions from the bench.

86. *Voir dire* examination is the questioning of prospective jurors prior to their empanelment.

87. *See* People v. Walker, 58 Ill. App. 3d 323, 372 N.E.2d 490 (1978); People v. Menken, 54 Ill. App. 3d 199, 369 N.E.2d 363 (1977); People v. Thornton, 54 Ill. App. 3d 202, 369 N.E.2d 358 (1977); People v. Brumfield, 51 Ill. App. 3d 637, 366 N.E.2d 1130 (1977).

88. 69 Ill. 2d 252, 371 N.E.2d 602 (1977).

89. *Id.* at 260, 371 N.E.2d at 606.

90. ILL. ANN. STAT. ch. 110A, § 115-4(f) (1977).

91. ILL. ANN. STAT. ch. 110A, § 234 (1977).

92. 69 Ill. 2d 252, 260, 371 N.E.2d 602, 606 (1977).

93. *Id.* at 257, 371 N.E.2d at 604.

sory authority"[94] gave the Illinois Supreme Court supremacy over all "properly judicial"[95] activities, including *voir dire* examinations. Thus, the enactment regulating *voir dire* constituted an unconstitutional infringement upon the judicial rule-making function.

In essence, the *Jackson* decision exemplifies the state supreme court's assertion of supremacy in the realm of rule-making. *Voir dire,* a matter of trial practice formerly characterized as a legislative responsibility,[96] was subsumed under judicial authority by means of an expansive interpretation of "procedure" and "administration." Moreover, *Jackson* departed from the commonly-held interpretation of the judiciary article's enumerations;[97] control of *voir dire* was not traditionally an inherent power, nor was it expressly conferred upon the judiciary.

The significance of *Jackson* is twofold. The court's posture crystalizes a trend which rejects deference to the legislature and broadens judicial control over court procedure. Of equal import is the concomitant shift in the relationship between the legislature and the judiciary, signalling an alteration in the allocation of power. Through the affirmation of judicial dominance, *Jackson* abandoned concurrent rule-making, thus contravening the intentions of the drafters of the Illinois Constitution.[98] As a result of this departure, the legislature's role in the rule-making process has been greatly subordinated. This judicial policy has far-reaching implications.

Implications of Expanded Judicial Power

Expanded judicial rule-making authority, as exemplified by *Jackson,* poses two constitutional dilemmas: paralysis of the legislature's rule-making function, and judicial usurpation of the legislative function. Specifically, the altered concept of judicial power and the concomitant judicial law-making role may have an adverse effect upon the Illinois Civil Practice Act and the proposed adoption

94. Ill. Const. art. 6, § 16 (1970).

95. 69 Ill. 2d 252, 256, 371 N.E.2d 602, 604 (1977).

96. The courts formerly deferred to the legislature in matters which did not fall clearly within the category of procedure. *See* note 52 *supra. Voir dire* examination is an example of an activity falling within the substance-procedure continuum, because of its genesis in the constitutional right to trial by a jury of unprejudiced peers. *See* People v. Jackson, 69 Ill. 2d 252, 260, 371 N.E.2d 602, 606 (1977), in which the court reasoned that "if there were a constitutional right for the parties, through their counsel, to interrogate prospective jurors on their *voir dire* examination, then Supreme Court Rule 234 would be unconstitutional." However, the court concluded that "the basic constitutional right is trial by an impartial jury. That is all to which any litigant is entitled." *Id.*

97. *See* notes 35 through 37 *supra* and accompanying text.

98. People v. Thornton, 54 Ill. App. 3d 202, 207, 369 N.E.2d 358, 362 (1977) (Green, J., specially concurring).

of uniform Illinois evidence rules.[99]

Broadened judicial power threatens to prevent the legislature from fully exercising its concurrent rule-making responsibilities.[100] The legislature has long pursued an aggressive course in rule-making,[101] prodding the court to take similar action. Pursuant to current decisions, legislative encroachment upon the judicial function would render an enactment void even if promulgated to remedy judicial inaction. The legislature may hesitate to fill a procedural void or revise an antiquated rule, fearing that the endeavor would be invalidated. This reluctance would be exascerbated by the absence of any guidance as to what constitutes impermissible infringement upon the judiciary. Lack of direction is attributable to the Illinois Supreme Court's extension of judicial powers well beyond those explicitly enumerated in the judiciary article.[101]

Further issues raised by *Jackson* are the policy ramifications of augmented judicial rule-making power. Recent decisions reflect the court's apparent resolution to place the judiciary beyond legislative check.[103] This result would undermine the public image of the judiciary, as the court would derive its authority from the exercise of sheer constitutional force rather than through its express constitutional grant.[104] Judicial encroachment upon the legislative domain carries grave constitutional implications, both for the separation of powers doctrine and the concept of legislative sovereignty. The legislative power vested in the General Assembly encompasses "the basic 'sovereign' power of the state."[105] Subsequent grants of power to other departments are merely carved away from that possessed by the legislature. Thus, the legislative power is limited in scope only by that authority which has been allocated to other branches.[106] Yet, under the facade of performing its expanded procedural and admin-

99. For an outline of the historical background of the Illinois Civil Practice Act, and a brief discussion of the current progress of codified evidence rules for Illinois, *see*, Graham, *Introduction: The Illinois Supreme Court at the Threshold*, 1978 U.Ill.L.F. 104, 107-10.

100. Note, *People ex rel. Stamos v. Jones: A Restraint on Legislative Revision of the Illinois Supreme Court Rules*, 6 J.Mar.J.Prac. & Proc. 382, 392 (1973).

101. *See* Trumbull, *Judicial Responsibility for Regulating Practice and Procedure in Illinois*, 47 Nw.U.L.Rev. 443 (1952); *contra* Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 Ill. L. Rev. 276 (1928).

102. Note, *The Rulemaking Powers of the Illinois Supreme Court*, 1965 U.Ill.L.F. 903, 912.

103. *See* Fins, *Impropriety of Illinois Legislature's Infringement Upon the Constitutional Rule-Making Authority of the Supreme Court*, 66 Ill. B.J. 384 (1978); *see also* Bonaguro, *The Supreme Court's Exclusive Rulemaking Authority*, 67 Ill. B.J. ___ (1979).

104. *See* Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury*, 65 Harv. L. Rev. 234, 250-51, 254 (1951).

105. 6 Proceedings 1364 (1969-1970).

106. *Id.* at 1364-65.

istrative rule-making function, the court may alter substantive rights with impunity.

The Illinois Civil Practice Act

Expanded judicial rule-making could affect the viability of the Illinois Civil Practice Act.[107] Despite its acknowledgment of the Illinois Supreme Court's inherent rule-making powers,[108] the Civil Practice Act requires court rules to be consistent with statutory provisions.[109] Underlying the Act is the supposition that where a statute and a supreme court rule are in conflict, the legislation supercedes the judicial rule.[110] However, this premise was clearly rejected by the *Jackson* court. Pursuant to *Jackson,* the legislature may enact rules of court procedure, provided they are consistent with those promulgated by the judiciary. The Supreme Court has assumed the authority to formulate conflicting court rules that would prevail over pre-existing statutes.

Although the Civil Practice Act is confined to court procedural details, its provisions are intertwined with substantive rights.[111] The extension of judicial control over matters covered by the Civil Practice Act would constitute an unwarranted intrusion into a heretofore legislative realm.[112]

The Evidence Rules

The ambiguity of the substance-procedure division underlies the problem of determining which rule-making unit is authorized to adopt evidence rules. Evidence has been considered the province of

107. "[I]n Illinois the law of procedure lies in the twilight zone of the legislative and judicial departments. It is governed by both, but is not within the exclusive domain of either." H. FINS, ILLINOIS COURT PRACTICE UNDER THE NEW JUDICIARY ARTICLE 36 (United States Law Printing 1964). Under current interpretations, the statute could be construed as an unwarranted intrusion upon the inherently judicial rule-making power, or it could be nullified by the Illinois Supreme Court's adoption of a conflicting court rule.

108. ILL. ANN. STAT. ch. 110, § 2 (1977).

109. If the legislative intent is to be given effect, rules promulgated by the Supreme Court under the authority expressly conferred by the Civil Practice Act, and in implementation thereof, must be considered and construed as an integral part of the Civil Practice Act.

Robbins v. Campbell, 65 Ill. App. 2d 478, 485, 213 N.E.2d 641, 645 (1965).

110. Supreme Court Rules are to be "supplementary to but not inconsistent with the provisions of this Act. . . ." ILL. ANN. STAT. ch. 110, § 2 (1) (1977). *See* Robbins v. Campbell, 65 Ill. App. 2d 478, 485, 213 N.E.2d 641, 645 (1965); Montz v. Lester, 32 Ill. App. 2d 265, 177 N.E.2d 419 (1961).

111. Note, *The Rulemaking Powers of the Illinois Supreme Court,* 1965 U.ILL.L.F. 903, 913.

112. *Id.* at 914. *See also* Sunderland, *Observations on the Illinois Civil Practice Act,* 28 Ill. L. Rev. 861 (1934).

the legislature because it is not an exclusively procedural area.[113] Yet the state supreme court could assert control over evidence rules by characterizing them as administrative matters.[114] As in the case of *voir dire,* the court could decide that evidence is within the purview of court administrative concerns, and that its own rules violate no constitutional rights. The *Jackson* decision suggests that the substantive rights attendant upon evidence rules will not prevent the court from declaring conflicting legislation void.[115] The current Illinois approach to separation of powers would enable the court to override any proposed evidence statutes, even those receiving legislative approval.[116] Moreover, in the absence of a legislative enactment, the court could adopt its own evidence rules.[117] This policy would have the singular effect of allowing the court to legislate through the exercise of its rule-making authority.[118]

CONCLUSION

As a result of the expansionist trend culminating in *Jackson,* legislative rule-making authority has been usurped to augment judicial power. This judicial extension demonstrates an utter disregard for the traditional separation of powers doctrine, and contravenes the intent of the constitutional drafters.

The altered relationship between the legislature and the judiciary raises difficult constitutional issues. A continuation of the policy of judicial dominance over court rules would seriously endanger the legitimacy of the judiciary as well as the sovereignty of the legislature. It is therefore incumbent upon the Illinois courts to retreat from the concept of enlarged judicial authority set forth in *Jackson.* The judiciary must exercise its exclusive power to restrict incursion

113. For an example of an evidence rule affecting substantive rights, *see* Dead Man Act, ILL. ANN. STAT. ch. 51, § 2 (1977).

114. Presumably the court could acquire such control by formulating rules on its own initiative, or by invalidating inconsistent statutory provisions.

115. *See* Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rulemaking* 55 MICH. L. REV. 623, 641 (1957); Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury* 65 HARV. L. REV. 234 (1951).

116. The Illinois Supreme Court's Committee on Rules of Evidence proposed the adoption of a modified version of the Federal Rules of Evidence on July 18, 1977. The Administrative Office of the Illinois Courts solicited comments from February, 1978, through September, 1978. The Illinois State Bar Association has rejected the proposal as circulated. *See* Graham, *Introduction: The Illinois Supreme Court at the Threshold,* 1978 U.ILL.L.F. 104, 110.

117. By common law decision, the Illinois Supreme Court is currently engaged in an evolutionary creation of Illinois evidence rules.

118. Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury* 65 HAR. L. REV. 234 (1951).

into the legislative domain, and restore to Illinois court rule-making the separation of powers envisioned by the constitutional drafters.

JOANNA C. NEW