ARTICLES

THE REGULATION OF THE PRACTICE OF LAW, PRACTICE AND PROCEDURE, AND COURT ADMINISTRATION IN VERMONT—JUDICIAL OR LEGISLATIVE POWER?

John A. Dooley III*

I. INTRODUCTION

In 1974, Vermont amended the sections of its constitution that describe the Judiciary Department, the first amendments in this area since the adoption of the current constitution in 1793.[1] The legislative history of the amendments suggests that they were intended to modernize the structure and operation of the courts, as well as to serve as the constitutional embodiment of certain policies that had been created by statute over the previous 170 years.[2] The 1793 provisions, which the amendments replaced, were brief and incomplete, the structure of the courts being largely determined by two sentences in one section of the constitution.[3] The judicial selection methods, generally election by the legislature every two years, were archaic.[4]

The 1974 amendments brought about a number of important changes.[5] The courts were unified under the Vermont Supreme Court. The structure of the lower courts was left to the legislature, with a limited definitional role for the supreme court. The selection of most judges was transferred to the Governor, with the advice and consent of the Senate, based on nominees presented to the Governor by a judicial nominating body established by the legislature. At the end of each six-year term, the legislature retained

---

*Member, Vermont Bar Association; Reporter, Vermont Rules; L.L.B., Boston College Law School. The opinions expressed in this article are those of the author. They do not necessarily reflect those of the Vermont Legislature or Judiciary.

1. VT. CONST. ch. II, §§ 4-6 (1793).

2. The relevant legislative history is not collected and published. It is on file and available through the *Vermont Law Review*.

3. VT. CONST. ch. II, § 4 (1793).

4. *Id.* § 5.

5. VT. CONST. ch. II, §§ 28-41 (as amended 1974).

the power to vote not to continue a judge in office. The amendments provided for mandatory retirement of judges at seventy years of age. The amendments also formally recognized the supreme court's rule-making power, subject to revision by the legislature. Finally, they gave the supreme court the power to discipline lawyers and judges.

Some parts of the 1974 amendments are clear and self-executing. Other parts have proven to be less than clear, particularly as they describe the relationships between the judicial and legislative powers. In the last few years, there have been recurring differences between the supreme court and members of the legislature over the powers of the court. Because of these disputes, the legislature created the Legislative Committee on Judicial Rules which was directed to review the actions of the judiciary in areas other than the deciding of cases.[6]

The first annual report of the Legislative Committee on Judicial Rules indicates skepticism about the constitutional authority for some of the actions of the supreme court. In part, the report blames the 1974 constitutional amendments:

> The Committee finds that the provisions under the present constitution, statutes and rules have created a potential for conflict in defining the proper roles of the two branches. As a result there is considerable uncertainty as to the validity of a number of current practices . . . .
>
> [E]ven if legislation is enacted so as to eliminate conflicts between court rules and statutes, and to establish more clearly the interaction between the two branches on matters of mutual concern, the provisions of the Vermont Constitution will continue to leave room for argument over the extent of the Judiciary's power vis-a-vis the powers of the Legislature . . . .
>
> It seems, therefore, that it may be an appropriate time to rectify the omission through amendment of the Constitution. By so doing, the potential for future conflict between the judiciary and the legislative branches should be lessened sub-

6. *See* VT. STAT. ANN. tit. 12, § 3 (Cum. Supp. 1983). Originally, the committee consisted of six persons—three House of Representative members appointed by the Speaker and three Senate members appointed by the Committee on Committees. In 1983, the statute was amended to add the chairmen of the House and Senate Judiciary Committees to bring the membership up to eight persons. 1983 Vt. Acts No. 14.

> stantially. In order to eliminate current uncertainties and to provide a means for public discussion of these issues, the committee is recommending both statutory changes and the consideration of possible amendments to the Constitution.[7]

The committee suggested three alternative amendments to the constitution.[8] One of these was offered in the 1982 legislative session but was not considered.[9]

While the report of the Legislative Committee on Judicial Rules would suggest clear and sharp differences over the meaning and consequences of the current constitutional provisions, neither branch has taken definitive positions on any of the issues brought into focus by the amendments. Indeed, it is not always clear precisely what those issues might be. There is instead a general feeling that each has invaded the other's "turf."[10]

This article will explore three of the areas containing potentially troublesome issues left unresolved by the 1974 constitutional amendments. The areas examined are: practice and procedure, court administration, and the practice of law. These labels are chosen both because they facilitate constitutional analysis and because they represent particularly sensitive areas, ones liable to be the focus of conflict between the legislative and judicial branches.

---

7. Legislative Committee on Judicial Rules, Annual Report 6-7 (January 31, 1983). [hereinafter cited as Report on Judicial Rules, 1983].

8. The report recommended "consideration" of possible amendments as a compromise between committee members who supported specific constitutional changes. Chairman Norris Hoyt, Representative from Norwich, filed a separate statement because he "disagree[d] with the report's emphasis on suggesting consideration of amendment of the Vermont Constitution, at this time" *Id.* at 10. The committee submitted three possible constitutional amendments, labeled Alternative Drafts A, B and C. *Id.* Alternative Draft C would have clearly specified that the legislature could amend judicial rules governing admission to the bar and the regulation of attorneys. The other amendments were more sweeping, going to some or all of the issues raised in the report. Copies of the Alternative Drafts are available at the *Vermont Law Review.*

9. Alternative Draft A was offered by Senators Skinner and Avery as Proposal 8. It was sent to the Judiciary Committee, but not reported in the 1982 session. Senate Chamber Proposed Amendment to the Constitution of the State of Vermont. Proposal 8 (undated). A copy of Proposal 8 is available at the *Vermont Law Review.*

10. That sentiment is particularly apparent in the separate statement of Representative Hoyt, appended to the Report on Judicial Rules, 1983, *supra* note 7. He asserted that the supreme court "has mistakenly interpreted its undoubtedly *separate* powers to mean *autonomous* or *isolated sovereign* powers." *Id.* at 10 (emphasis in original), and he recounted an instance where a Justice of the Vermont Supreme Court refused to appear before the House Judiciary Committee because of separation of power. *Id.* at 11.

II. The Judicial Branch Under The Constitution Of 1793 And The Amendments Of 1974

Historians record that one of the main features of the constitutions of the United States and the individual states is that they provide for the separation of governmental power into three distinct branches of government—the legislative, the executive, and the judicial.[11] Madison states in the Federalist Papers that the accumulation of legislative, executive, and judicial power into one place is "the very definition of tyranny."[12] John Adams wrote that only by balancing the power of one branch against the power of the other two can "the efforts in human nature toward tyranny . . . alone be checked and restrained, and any degree of freedom preserved."[13] The separation of the judicial power from the legislative and executive was particularly important if individual justice were to be available. Alexander Hamilton went as far as to say that there would be " 'no liberty' if the power of judging is not separated from the legislative and executive powers."[14]

Vermont adopted the policy of separation of powers in the constitution of 1793.[15] Section 5 provides that: "The Legislative, Executive and Judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the others."[16] Other sections specify in varying degrees the "powers properly belonging" to each department.[17] The judicial powers, however, are almost entirely unspecified. Similarly, although the 1793 constitution specifies the persons or institutions exercising the legislative[18] and executive powers,[19] it is silent on what person or institution can exercise the judicial power.[20]

---

11. *See, e.g.*, W. Bondy, The Separation of Governmental Powers, 5 Columbia University Faculty of Political Science Studies in History, Economics and Public Law (1896); A. Vanderbilt, The Doctrine of the Separation of Powers and Its Present-Day Significance (1953).

12. The Federalist No. 47 (J. Madison).

13. 4 C. Adams, The Works of John Adams 186 (1851).

14. The Federalist No. 78 (A. Hamilton).

15. Vt. Const. ch. II, § 6 (1793).

16. *Id.*

17. *Id.* ch. II, §§ 2, 9, 12-20 (legislative powers); §§ 3, 10, 11 (executive powers).

18. *Id.* § 9.

19. *Id.* § 10.

20. The equivalent section of the Vermont Constitution, chapter II, § 4, provides only that courts be "maintained in every county." One explanation for the omission is that there was really only one court—the supreme court—at that time. The justices of the supreme court rode circuit as county court judges, coming together for appeals as the supreme court.

From the adoption of the constitution until 1974, there were few reported decisions explaining the judicial power.[21] Overall, the decisions show that the Vermont Supreme Court was unwilling to define judicial power broadly or to assert even a narrowly defined power except in the clearest cases.[22] The court was thus able to avoid confrontations with the other branches.

It is fair to say that by 1974, the nature of judicial power was less certain in Vermont than in any other state in the country. A long history of accommodation by the court and a legislature which routinely controlled judicial branch affairs suggested that Vermont had a very weak judicial department. Yet, judicial accommodation and legislative control could not alone determine what the Vermont Constitution meant. Without a definitive interpretation, the proper power relationships remained uncertain.

It is helpful to the later discussion to see precisely how unusual the Vermont situation was. From the end of the nineteenth century, most commentators were strongly urging that the judicial branch should control areas in addition to the deciding of individual cases.[23] This was particularly true in the areas of civil procedure and court administration[24] but was also true of the admission

---

It was, however, common in the New England states to provide little detail on the courts. *See* Callender, *The Shackled Judiciary*, 181 THE ANNALS 109 (1935).

21. *See infra* text accompanying notes 79-88.

22. One analyst has characterized the attitude of the Vermont Supreme Court as follows: "It has only been in cases where it has been, so to speak, driven to the wall, that the judiciary has undertaken to give effect to the Constitutional aspect of the value system to the detriment of the statutory aspect." H. Thurber, The Vermont Judiciary: A Study in Cultural Adaptation 55 (April, 1955) (unpublished dissertation available at the *Vermont Law Review*).

23. The most effective, persistent and enduring proponent of court rule-making was Roscoe Pound, who became Dean of Harvard Law School. Among his writings are Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388 (1910); Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 ILL. L. REV. 163 (1915); Pound, *The Crisis in American Law*, 10 J. OF AM. JUDICATURE SOC'Y 5 (1926); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. OF AM. JUDICATURE SOC'Y 178 (1936). Dean Pound addressed the Vermont Bar Association in 1943 and stirred up interest in improvements in the administration of justice in Vermont. The result was a special study and a series of recommendations to improve Vermont's system of justice. Vermont Bar Association, Report of the Special Committee to Report on Vermont's Judicial System (October 1944).

24. In addition to the writings of Dean Pound, see Shelton, *Progress of the Proposal to Substitute Rules of Court for Common Law Practice*, 5 VA. L. REV. 111 (1917); Taft, *Success of English Procedure Attributed to Judge-Made Rules*, 9 J. OF AM. JUDICATURE SOC'Y 126 (1925); Sunderland, *Exercise of the Rule-Making Power*, 10 J. OF AM. JUDICATURE SOC'Y 70 (1926).

of attorneys, of defining the unauthorized practice of law, and of the discipline of lawyers and judges.[25]

As cases arose, the highest courts of some states asserted more and more power over these areas—usually relying on a separation of powers clause in the state constitution.[26] The result of this process was that in most states a form of power-sharing developed between the legislature and the judiciary over policy in these areas. In only a few states did the judiciary look at its powers as described in its constitution and decide that it had no power over a particular area.[27]

In looking at the history in other states, it is not always easy to draw a line between law and politics. Although many of the decisions seem to indicate broad areas of judicial power, the courts often controlled less than the decisions suggest.[28] Nor did the compromises between legislative and judicial power—the power-sharing arrangements—always make logical sense. Many of the rela-

---

25. *See, e.g.*, Bruce, *The Judicial Prerogative and Admission to the Bar*, 19 ILL. L. REV. 1 (1924); Comment, *Judicial Reform Has Complete Program*, 12 J. OF AM. JUDICATURE SOC'Y 5 (1928).

26. Connecticut is an example of the evolution in one state. *See, e.g.*, Styles v. Tyler, 64 Conn. 432, 30 A. 165 (1894); Norwalk St. Ry. Co's Appeal, 69 Conn. 576, 37 A. 1080 (1897); Bridgeport Pub. Library v. Burrough's Home, 85 Conn. 309, 82 A. 582 (1912); *In re* Dattilo, 136 Conn. 488, 72 A.2d 50 (1950); State Bar Ass'n v. Conn. Bank and Trust Co., 145 Conn. 222, 140 A.2d 863 (1958); Heiberger v. Clark, 148 Conn. 177, 169 A.2d 652 (1961); Adams v. Rubinow, 157 Conn. 150, 251 A.2d 49 (1968); State *ex rel.* Kelman v. Schaffer, 161 Conn. 522, 290 A.2d 327 (1971); State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1974). As the law evolved through these cases, Connecticut went from a state where most judicial policy was determined by the legislature to a state where the judiciary had nearly exclusive control over practice and procedure and the practice of law. The evolution has been criticized in Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1 (1975), on the grounds that the judiciary grabbed more and more power as time went on with no support in the constitution. That criticism is analogous to the criticisms made of the legislature for taking judicial powers. *See* A. VANDERBILT, *supra* note 11, at 97-117. Placed side by side, the criticisms suggest a pendulum effect, one branch taking power until stopped by the other.

27. The most prominent examples are New York and North Carolina where the legislative branch is held to have exclusive power to control admission to legal practice. *See In re* Cooper, 22 N.Y. 67, 92 (1860); *In re* Applicants for license, 143 N.C. 1, 55 S.E. 635 (1906). The New York holdings are based in part on a specific constitutional prohibition against judges exercising "any power of appointment to public office." Because the court considered attorneys as public officers, it could not appoint them.

28. *See, e.g.*, Peterson, *Rule-Making in Colorado: An Unheralded Crisis in Procedural Reform*, 38 U. COLO. L. REV. 137, 141-49 (1966). Even though the Colorado Supreme Court clearly held in Kolkman v. People, 89 Colo. 8, 300 P. 575 (1931) and its progeny that the judiciary had inherent authority over judicial procedure and that the legislative branch was forbidden from exercising this power, procedure continued to be controlled by the legislature as if nothing had happened.

tionships were unpredictable and unstable, suggesting that more permanent reform was necessary.[29]

One would have to conclude from the precedents in other states with constitutional provisions similar to those in Vermont that the Vermont Constitution gave the judicial branch more power than the decisions of the supreme court suggested. Even if nothing had happened in 1974, some realignment was likely. Only by holding that the cases coming from other states were wrong could the supreme court have validated the degree of legislative domination that was present.[30]

The decisions in other states were leading to more permanent reform through state constitutional amendments. In accordance with the arguments of commentators on the state of the judiciary, the amendments reflected relatively broad judicial power in the conduct of the affairs of the judicial department.[31] Court systems were generally unified under a supreme court. The court was explicitly given primary responsibility for court administration, procedure in all courts, and admission and regulation of lawyers.[32] When the new constitutions were not explicit, the former power-sharing arrangements continued.[33]

---

29. *See* Peterson, *supra* note 28.

30. In fact, the Vermont cases have the opposite tendency. That is, the rhetoric of the cases cited by the court is stronger than the court's actual decision. For example, one of the cases cited with approval in *In re* Monaghan, 126 Vt. 53, 57, 222 A.2d 665, 669 (1966), is the Connecticut decision of *Heiberger v. Clark* which struck down a statute on admission to practice because it was inconsistent with court rule. *Monaghan* does not, however, use much of the language of *Heiberger*. A fair inference is that the court recognized what the precedents said about its power but was unwilling to openly endorse their rationale until a case came along in which the rationale was determinative.

31. Whatever may have been the differences over whether courts had specific rule-making power under individual separation of power clauses, there was nearly unanimous endorsement of constitutional amendments to give courts rule-making power, usually with respect to practice and procedure, the practice of law, and court administration. *See, e.g.*, Cushman, *Our Antiquated Judicial System*, 181 THE ANNALS 90 (1935); Callender, *supra* note 20; AUMANN, THE JUDICIARY ARTICLE IN STATE CONSTITUTIONAL REVISION (1960); INSTITUTE OF JUDICIAL ADMINISTRATION, JUDICIAL ARTICLES: SELECTED RECENT PROPOSALS (1958); NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 12-15, 77-91 (6th ed. 1963) [hereinafter cited as MODEL STATE CONSTITUTION]; American Bar Association, *Model State Judicial Article* 47 J. OF AM. JUDICATURE SOC'Y 1, 8-12 (1963); Council of State Governments, *Judicial Constitutional Article*, 1972 SUGGESTED STATE LEGISLATION 5 (1971). The first constitutional reforms occurred in New Jersey. *See* Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952).

32. *See, e.g.*, FLA. CONST. art. IV, § 15 (1972); KY. CONST. § 116 (1975); N.D. CONST. art. V, § 3 (1976).

33. *See, e.g.*, ALA. CONST. art. VI, § 139 (1956); ALASKA CONST. art. IV, § 6 (1970); HAWAII CONST. art. V, §§ 5, 6 (1978).

To the extent Vermont joined in the reform movement prior to 1974, it was by statute. In 1965, the legislature gave the supreme court "administrative and disciplinary control of all judicial officers of the state, in addition to and not inconsistent with the constitutional powers of the general assembly in those matters."[34] In 1967, the legislature created the position of court administrator, to be appointed by the supreme court.[35] In 1967, the legislature authorized the supreme court to create rules of "pleadings, practice, procedure and forms for all actions and proceedings in all courts of this state."[36] In 1969, the legislature specifically authorized the court to merge law and equity by rule.[37]

In the 1974 amendment to the constitution, Vermont fully joined in the reform movement. As amended, the Vermont Constitution provides that the judicial power is vested in a "unified judicial system" composed of the supreme court, the superior court and other subordinate courts as the legislature creates.[38] Chapter II, section 30 of the constitution provides: "The Supreme Court shall have administrative control of all the courts of the state, and disciplinary authority concerning all judicial officers and attorneys at law in the state." Chapter II, section 37 provides: "The Supreme Court shall make and promulgate rules governing the administration of all courts, and shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. Any rule adopted by the Supreme Court may be revised by the General Assembly." Other provisions deal with the supreme court's power to define jurisdiction or venue by rule and its power to suspend justices or judges for cause.[39]

While the 1974 amendments expanded and solidified the powers of the judicial department, many questions remained. In other states, the legislature and the judiciary had evolved power sharing relationships, but there was little history of power-sharing in Vermont. As the judiciary began to assert powers it found in the new constitution, as well as some that it failed to assert prior to 1974, it ran into a reluctant legislature. Conflict quickly developed in three

---

34. VT. STAT. ANN. tit. 4, § 3 (1972).

35. VT. STAT. ANN. tit. 4, § 21 (1972).

36. VT. STAT. ANN. tit. 12, § 1 (Cum. Supp. 1983). As discussed in the text, the statute has been amended numerous times since adoption.

37. VT. STAT. ANN. tit. 4, § 222 (1972).

38. VT. CONST. ch. II, § 4.

39. *See* VT. CONST. ch. II, §§ 30-31, 36.

major areas.

The first area is control over the practice of law, particularly in the admission of lawyers to the bar. In this area, the constitutional amendment gave the supreme court explicit power only over the discipline of lawyers.[40] However, the court asserted authority over the admission of attorneys in response to a Sunset Review of the Vermont Board of Bar Examiners carried out by the Legislative Council.[41] The court later redesigned the board and admission process in response to perceived inadequacies in the administration of the bar examinations.[42] Members of the legislature have questioned the power of the court to control attorney admission, especially when court rules directly conflict with a statute.[43] A major purpose of the constitutional amendments suggested by the Legislative Committee on Judicial Rules would have been to create or make explicit legislative power over the admission of lawyers.[44]

The second area is control over practice and procedure. In 1977, as a result of legislative dissatisfaction with the rule on prejudgment attachment of real estate, the legislature adopted a statute in conflict with the rule and provided that the rule was "null and void" to the extent of the inconsistency.[45] At the same time, the legislature amended the rules enabling statute that had existed before the 1974 constitutional amendment to delete the authorization that rules could supersede statute and substitute a prohibition on modifying rules that had been repealed, modified, or revised by the legislature.[46] In 1979, the legislature amended statutes on execution and trustee process of wages and added statutes to create a judgment lien.[47] The law provided that any rules of civil procedure in conflict with the law "shall not be effective to the extent of the conflict . . . ."[48] In 1982, the legislature further amended the rules enabling statute to establish a Legislative Committee on Judicial

---

40. *See infra* text accompanying notes 66-75.

41. *See infra* text accompanying notes 76-82.

42. *See* Rules of Admission to the Bar of the Vermont Supreme Court, VT. STAT. ANN. tit. 12, app. I, pt. II (Cum. Supp. 1983).

43. *See generally*, Report on Judicial Rules, 1983, *supra* note 7.

44. *Id.* at 7-8.

45. 1977 Vt. Acts (Adj. Sess.) No. 254, § 3. The section can be found in the Note to VT. STAT. ANN. tit. 12, § 3295 (Cum. Supp. 1983).

46. This amendment added the last sentence to VT. STAT. ANN. tit. 12, § 1 (Cum. Supp. 1983).

47. 1979 Vt. Acts No. 67.

48. *Id.* § 8. This section can be found in the Note to VT. STAT. ANN. tit. 12, § 2681 (Cum. Supp. 1983).

Rules to review judicial rules.[49] Under the amendment, rules must be submitted to the Legislative Committee "at least 30 days prior to the date of promulgation."[50] Although the Legislative Committee on Judicial Rules has only once objected to a procedural rule, and that rule was modified by the court,[51] the committee suggested constitutional amendments including one that specified that rules could not supersede statutes.[52]

The third area is control over court administration. The disputes here have largely been over the mechanics of lawyer licensing and regulation and the assignment of judges. In 1979, the Vermont Supreme Court, without any specific statutory authority, levied an annual licensing fee of $20.00 on lawyers to support the Professional Conduct Board, the lawyer discipline arm of the supreme court.[53] The fee was increased in 1980 to $50.00 and in 1982 to $75.00.[54] The latter increase was to cover some of the costs of an expanded bar examination structure. Members of the legislature questioned the power of the court to levy a licensing fee or to spend the money without an appropriation.[55]

---

49. 1981 Vt. Acts No. 231, § 3 (Adj. Sess.) amending VT. STAT. ANN. tit. 12, § 1 and adding VT. STAT. ANN. tit. 12, §§ 2-4 (Cum. Supp. 1983).

50. VT. STAT. ANN. tit. 12, § 3(e) (Cum. Supp. 1983). This language creates difficulties in interpretation since the supreme court is obligated to submit only "promulgated" rules. In practice, the court has submitted promulgated rules to the committee at least 30 days before the effective date but has been unwilling to submit any proposed rules before they are promulgated. The Legislative Committee proposed an amendment to VT. STAT. ANN. tit. 12, § 3(e) (Cum. Supp. 1983) to validate the court's practice. *See* Report on Judicial Rules, 1983, *supra* note 7, at 5, 15.

51. The Legislative Committee objected to the language of an amendment to VT. R. CRIM. P. 5(h) (1972). The Advisory Committee on the Rules of Criminal Procedure advised the court to adopt the language preferred by the Legislative Committee and the supreme court agreed. The Legislative Committee also sought a later effective date for the Vermont Rules of Evidence although it is unclear whether the committee finally objected to the effective date. In this case, the court did not accede to the committee's wishes, however, and did not change the effective date. The Legislative Committee has also objected to an administrative order issued by the Board of Bar Examiners. The court has changed the order in part.

52. *See* Report on Judicial Rules, 1983, *supra* note 7, at 13 ("Possible Constitutional Amendment-Alternate Draft B"). The other drafts of amendments dealt only with court administration and the practice of law.

53. *See* VT. STAT. ANN. tit. 12, app. I, pt. III (Cum. Supp. 1983). The initial $20.00 fee was incorporated in the original version of the Annual Licensing of Attorneys provision at § 1, adopted by Vermont Supreme Court Order of September 25, 1979.

54. *See* VT. STAT. ANN. tit. 12, app. I, pt. III, § 5 (Cum. Supp. 1983). The court has also set bar admission fees. *See* Rules of Admission to the Bar of the Vermont Supreme Court, VT. STAT. ANN. tit. 12, app. I, pt. II, § 9 (Cum. Supp. 1983).

55. The Legislative Committee on Judicial Rules took the position that court imposed fees violated chapter II, § 27 of the Vermont Constitution which states: "No money shall be

Since 1974, the legislature has regularly enacted or amended statutes dealing with judicial assignment.[56] Some of these were intended to eliminate conflicts between rules and statutes, others to regulate or control judicial conduct. Many have been the source of friction between the legislature and the judiciary. For example, in 1980, the legislature enacted a requirement that the administrative judge for trial courts "specially assign" superior judges to hear and determine contested divorce and custody cases.[57] The statute provided that the administrative judge give consideration to "experience, temperament and expertise in matrimonial matters" in making the assignment.[58] It represented a compromise intended to meet some of the pressure for establishment of a family court in Vermont.[59] The administrative judge implemented the statute by specially assigning all superior judges to contested divorce and custody cases.[60] He took the position that all superior judges had "ex-

---

drawn out of the Treasury, unless first appropriated by act of legislation." *See* Report on Judicial Rules, 1983, *supra* note 7, at 3. To compromise this dispute, the Chief Justice proposed legislation that would turn over the funds supporting admission and discipline to the general fund and require appropriations for these activities. The committee accepted the compromise and proposed the legislation. *Id.* 17-18. It passed the legislature as 1983 Vt. Acts No. 81. However, the committee also proposed constitutional amendments to repeat the command of chapter II, section 27, applied specifically to the judiciary in chapter II, sections 30 or 37. *See id.* at 12-13. Passage of the amendment would only have heightened the conflict since the supreme court had not claimed it was not governed by chapter II, section 27. Instead, it took the position that it had not "drawn out of the treasury." To be consistent, the court would have had to take the position that the new amendment did not affect admission or licensing fees.

56. *See* VT. STAT. ANN. tit. 4, §§ 73 (assignment of superior judges), 111(3) (assignment of assistant judges), 444 (assignment of district judges) (Cum. Supp. 1983). The court has also adopted rules on assignment. *See* VT. STAT. ANN. tit. 12, app. VIII, A.O. 12, 13 (superior and district judges) (Cum. Supp. 1983).

57. Since 1974, there have been various proposals to unify the trial courts to implement ch. II, § 4 of the constitution. *See generally*, NATIONAL CENTER FOR STATE COURTS, A UNIFIED COURT SYSTEM FOR VERMONT (1974). The proposals have generally failed, often because of internal disagreement in the judicial branch. In 1980, however, some implementation steps were approved including the creation of an administrative judge designated by the supreme court from among the superior or district judges. *See* VT. STAT. ANN. tit. 4, § 71(3) (Cum. Supp. 1983), VT. STAT. ANN. tit. 12, app. VIII, A.O. 18 (Cum. Supp. 1983). The statute and rule are consistent. Similarly, the duties of the administrative judge are set forth in both statutes and in the rule.

The statute on assignment of judges to contested divorce and custody cases is VT. STAT. ANN. tit. 4, § 73(b) (Cum. Supp. 1983).

58. VT. STAT. ANN. tit. 4, § 73(b) (Cum. Supp. 1983).

59. Report of Findings and Recommendations of the Committee Appointed by the Senate to Study the Court System of the State of Vermont (January, 1979).

60. The most recent version is Administrative Judge for Trial Courts, Order No. 74-83, re Assignment and Designation (June 7, 1983). The order also provides that "any contested divorce case which has been pending for more than one year shall be advanced for prompt

perience, temperament and expertise" in matrimonial matters or they would not have been appointed to the superior bench. Some members of the legislature found the administrative judge's position to be an evasion of the statute.

Probably the greatest dispute arose over the rotation of superior court judges. Bills were introduced to limit the required amount of travel for these judges in the wake of the resignation of one judge who claimed that he could not have a family life consistent with the travel responsibilities.[61] These bills faced a cool reception from some members of the legislature. Some of the affected judges complained publicly about legislative interference in judicial affairs. The resulting publicity helped move a compromise bill to limit superior judge rotation.[62]

The following is an analysis of the allocation of power between legislature and judiciary in each of these three areas.

III. The Practice Of Law

The constitution of 1793 is silent regarding the regulation of the practice of law. The 1974 Amendment refers to lawyer discipline, but not to bar admission standards or to the regulation of unauthorized practice. There are other parts of the 1974 amendment, however, that may be relevant to these subjects, in particular those parts which deal with court administration.

An analysis of the relative power of the judicial and legislative branches to regulate the practice of law should begin with the constitution of 1793. The questions to ask appear relatively simple: (1) Is the regulation of the practice of law part of the judicial power described in chapter II, section 5 of the Vermont Constitution? (2) If so, what is the extent of this power? If the answer to the first question is no, the regulation of the practice of law clearly lies in the province of the legislature and the inquiry need go no further. The second question is asked because the power to regulate the practice of law may be divided, with part in the judicial branch and part in the legislative branch.

---

hearing upon the request of any party." *Id.*

61. The judge was Superior Judge Edwin Amidon. The cause was quickly picked up by women's groups who argued that the requirement that a judge be away from home most of the time was a major cause of the lack of women applicants for judgeships.

62. See Vt. Stat. Ann. tit. 4, § 73(a) (Cum. Supp. 1983).

A. *The Vermont History*

A reasonable place to start the analysis is with the historical record. Unfortunately, that record is less instructive than one might expect. It is as if both branches have acted to confirm the power of the other.

The earliest recorded regulation of lawyers in Vermont comes from the legislature. A law of 1779 empowered the supreme and county courts to appoint attorneys.[63] A 1787 law, passed shortly after Vermont adopted its second constitution, gave to the supreme court the "exclusive right of appointing and admitting attorneys."[64] These statutes have been replaced and amended over time, but the central point has remained the same—admission to the bar is determined by the supreme court.[65]

As early as 1800, the supreme court issued rules on admission of attorneys. These early rules divided admission to the county courts from admission to the supreme court.[66] The rules of 1817 provided for admission to the supreme court after three years of admission to the county court.[67] When an application was received by the supreme court it appointed "a committee of the members of . . . [the] bar [in the county in which the candidate resided] to examine into the character and qualifications of such candidate."[68] In effect, the rule provided for an ad hoc board of bar examiners to review the qualifications of the applicant.

By 1883, the process had become much more formal. The supreme court determined admission for all courts. Rule IV of the Rules of 1883 required a bar examination "by not less than three members of a committee of the bar to be appointed by such Court for that purpose."[69] The general form of the 1883 rules has continued up until the most recent amendments in the wake of deficien-

---

63. The 1779 law is set out in Legislative Council Staff, Sunset Review of the Board of Bar Examiners to the Vermont General Assembly 12 (1979) [hereinafter cited as Sunset Review] and 62-79 Op. Att'y Gen. 10 (Feb. 1979) [hereinafter cited as Attorney General's Opinion].

64. 14 Williams, Laws of Vermont 217 (1966): "An Act for the Appointment and Regulating of Attornies and Proceedings at the Bar," (March 8, 1787).

65. The various laws are set out in the history to Vt. Stat. Ann. tit. 4, § 901 (1972).

66. *See* Sunset Review, *supra* note 63, at 19-20.

67. Rules of the Supreme Court and Court of Chancery, 11 (1817).

68. *Id.*

69. Rules Regulating the Admission of Attorneys to the Courts of Vermont, Rule IV at 6 (1883).

cies in the bar examination. In 1898, the legislature passed a statute establishing a board of bar examiners of six persons.[70]

There is little early case law on the admission or regulation of attorneys. In 1841, the supreme court decided it could not directly admit a lawyer to practice in the court of chancery. Admission would have to be done by the courts of chancery "in accordance with the general rules on that subject, established by the Court, many years since."[71]

In 1895, the court held that it had the power to disbar a lawyer for violating the oath of admission and for corrupt and fraudulent acts.[72] The court noted that by admitting the lawyer, the court held him out to be worthy of confidence because "the statute and rules formulated by its authority" for admission require the court to find that the applicant has a good moral character.[73] In a later decision on a petition for reinstatement of the same lawyer, the court noted that it "is empowered, by rules, to make provisions for admission to the bar . . ."[74]

Two years later, the court, in another disbarment case, noted that the procedure for such cases was established by rule and went on to discuss why those particular procedures were adopted.[75] The court reasoned that the power to disbar flowed from the power to admit lawyers. When a lawyer is found to be unworthy, "it is the duty of the Court, empowered to admit, to withdraw the rights and privileges conferred by the admission."[76]

In 1919, the legislature enacted some procedural statutes on disbarment, apparently to enable the supreme court to process disbarment complaints when it was out of session.[77] The statutes on lawyer discipline were repealed in 1978.[78]

There is little of interest in the cases until 1924. In that year, the supreme court decided *In re Morse*,[79] the first in a line of cases concerning the unauthorized practice of law. In deciding that the

70. *See* VT. STAT. ANN. tit. 4, § 902 (1972).
71. *See In re* Application to Admit Solicitors in Chancery, 13 Vt. 158 (1841).
72. *In re* Enright, 67 Vt. 351, 355, 31 A. 786, 787 (1895).
73. *Id.* at 354, 31 A. at 787 (1895).
74. *In re* Enright, 29 Vt. 317, 319, 37 A. 1046, 1047 (1897).
75. *In re* Jones, 70 Vt. 71, 39 A. 1087 (1897).
76. *Id.* at 87, 39 A. at 1091.
77. 1919 Vt. Acts No. 63, § 1.
78. 1977 Vt. Acts (Adj. Sess.) No. 235, § 10.
79. *In re* Morse, 98 Vt. 85, 126 A. 550 (1924).

unauthorized practice of law was a contempt of the supreme court, the court discussed the power to admit and regulate lawyers:

> [The right to act as an attorney] cannot be lawfully exercised except by those who have complied with all statutory requirements, and the rules of court, relating thereto. Authority to confer or withhold this privilege is usually confided to the courts. . . . The power and authority to license attorneys has always rested with the courts, in this State, though at first, not exclusively with this Court. Early, the county courts had authority to admit attorneys to those courts, and the Legislature prescribed the requirements for admission; but attorneys of the county courts could not, as such, practice in the Supreme Court, and the latter Court, apparently, had unrestricted authority to fix requirements for admission thereto. . . . Later, the Legislature abolished the requirements previously prescribed by it, and gave the Judges of the Supreme Court full and absolute authority to make rules regulating the admission of attorneys to that Court, and to the several courts. . . . Other changes followed, from time to time, extending the authority of the Judges of the Supreme Court, down to 1906. . . . We need not pause to consider whether prior to this enactment this Court had authority to deal with persons pretending to practice law as attorneys before the justice courts, for certain it is, it now has [that] . . . authority. . . .[80]

This discussion is instructive on a number of points. The court related its power to sanction the unauthorized practice of law to its power to admit. It continued to describe its power to admit as one given by statute, but it left open the question whether it could punish individuals for the unauthorized practice before a court when it did not have the clear statutory authority to admit to that court.

From *In re Morse*, the analysis applied by the court changed. In the 1934 case of *In re Haddad*,[81] the court noted that admission is regulated by rules made under statutory authority. The court went on, however, to hold that the power to disbar is a summary one inherent in the courts and judicial in character.[82] It found that its "inherent power of discipline is not derived from the Constitu-

80. *Id.* at 93, 126 A. at 552.
81. *In re* Haddad, 106 Vt. 322, 324, 173 A. 103, 104 (1934).
82. *Id.* at 325-26, 173 A. at 105.

tion or, necessarily, from the statutes of the State."[83] Later discipline cases emphasize that lawyers are officers of the court.[84]

This ambivalence affects both the admission and the unauthorized practice cases. In the series of decisions under the title *In re Monaghan*,[85] the court discussed its power of admission as given by statute and "[t]he law-making power of this state."[86] The court discussed its power to refuse to admit unfit persons as part of the "preservation of judicial dignity and integrity," citing cases from other states that hold that admission of attorneys is controlled by the judicial branch.[87] In the unauthorized practice decision of *In re Pilini*, the court described the legislature's power as follows: "Statutes may aid by providing machinery and criminal penalties governing certain business activities, but may not extend the privilege of practicing law to persons not admitted to practice by this Court."[88] Thus, the legislature may not set standards that will result in the admission of persons whom the supreme court rejects.

B. *Regulation of the Practice of Law in Other States*

In almost every state other than Vermont, there are precedents describing the relative power of the legislature and the judiciary over the practice of law. In all but two states, the holdings are that the ultimate power to regulate the practice of law—including admission of lawyers, discipline of lawyers, and punishment of the unauthorized practice of law—lies in the judicial branch of government under the state constitution.[89] In a few

---

83. *Id.* at 325, 173 A. at 105.

84. *See In re* Paddock, 114 Vt. 207, 42 A.2d 342 (1945) (in disciplinary proceeding, a court can do "whatever behooves it in the exercise of its jurisdiction over attorneys as officers of the court." *Id.* at 210, 42 A.2d at 343-44).

85. *In re* Monaghan, 122 Vt. 199, 167 A.2d 81 (1961); 126 Vt. 53, 222 A.2d 665 (1966); 126 Vt. 193, 225 A.2d 387 (1967).

86. 122 Vt. at 205, 167 A.2d at 85.

87. 126 Vt. at 58-59, 222 A.2d at 670.

88. *In re* Pilini, 122 Vt. 385, 390, 173 A.2d 828, 830 (1961).

89. For a state by state list, see Board of Comm'rs v. State *ex rel.* Baxley, 295 Ala. 100, ———, 324 So. 2d 256, 261-62 n.2 (1975). The leading case is *In re* Day, 181 Ill. 73, ———, 54 N.E., 646, 648-51 (1899) in which the Illinois Supreme Court analyzed the relevant English and American history. *See also* Comment, *Separation of Powers: Who Should Control the Bar?*, 47 J. URB. L. 715 (1969) (reviews many of the cases); Robertson & Buehler, *The Separation of Powers and the Regulation of the Practice of Law in Oregon*, 13 WILLAMETTE L.J. 273, 286 n.67 (1977) (lists many of the cases concerning bar admission with the comment, "[t]he rule followed in an overwhelming majority of jurisdictions is that admitting persons to the practice of law is a judicial act clearly within the inherent power of the judiciary").

states, the constitution explicitly gives the judiciary the power over the practice of law.[90] In most states, however, the regulation of the practice of law is seen as part of the inherent power of the judicial branch, protected from legislative infringement by the separation of powers clause of the state constitution.[91] None of the decisions relying on inherent power suggest that it extends to only part of the control of the practice of law, to the control of attorney discipline, for example, but not to admission.[92]

The Vermont experience, whereby the legislature regulates the practice of law by statute, exists in almost every state.[93] Many decisions discount the validity of this history of legislative regulation either because it cannot alone determine the proper meaning of the constitution or because it is found to be a legislative recognition of judicial power.[94] While these analyses explain why the judicial branch controls the practice of law, they do not clearly dictate what effect should be given to regulation by the legislature. On this there seem to be four theories.

The first theory is that all such regulation of the practice of law is invalid as constituting an exercise of judicial power.[95] While this theory might appear to be the most consistent with a finding of inherent judicial power over the practice of law, few states have adopted it.[96]

The second theory is that the legislature can regulate pursuant to its police power to set minimum standards as long as the judiciary is free to impose more rigorous standards above the minimum. Under this theory, only the judiciary can determine who will be allowed to practice law, to be an "officer of the court," but the legislature can set standards to exclude persons.[97]

---

90. *See, e.g.*, S.D. CONST. art. V, § 12.

91. *See, e.g.*, Heiberger v. Clark, 148 Conn. 177, 188-90, 169 A.2d 652, 658 (1961); Board of Overseers of the Bar v. Lee, 422 A.2d 998, 1002 (Me. 1980).

92. *See, e.g., In re* Keenan, 310 Mass. 166, ___, 37 N.E.2d 516, 520 (1941).

93. In many states, legislative regulation has been far more intrusive than in Vermont. *See, e.g.*, Board of Comm'rs v. State *ex rel.* Baxley, 295 Ala. 100, 324 So. 2d 256 (1975); State *ex rel.* Ralston v. Turner, 141 Neb. 556, 4 N.W.2d 302 (1942).

94. *See, e.g.*, Ratterman v. Stapleton, 371 S.W.2d 939, 941 (Ky. 1963); State v. Moritz, 244 Ind. 156, ___, 191 N.E.2d 21, 23 (1963); Rhode Island Bar Ass'n v. Automobile Serv. Ass'n, 55 R.I. 122, 129-30, 179 A. 139, 142 (1935).

95. *See, e.g.*, Sharood v. Hatfield, 296 Minn. 416, 424, 210 N.W.2d 275, 280 (1973).

96. *See, e.g.*, State Bar Ass'n of Conn. v. Conn. Bank & Trust Co., 145 Conn. 233, 140 A.2d 863 (1958).

97. *See, e.g., In re* Bailey, 30 Ariz. 407, ___, 248 P. 29, 30 (1926). This case has the most complete explanation of the theory. The theory has been used less in recent cases, probably

The third theory is that legislative regulation in aid of the courts will be allowed as long as it does not interfere with the ultimate power of the court to determine who can be admitted, who can remain admitted, and to define the practice of law.[98] This theory reflects an assumption that there are certain things which the legislature can do better than the judiciary to help enforce judicial branch policy.

The fourth theory recognizes that the legislature can engage in reasonable regulation so long as it does not interfere directly with the proper exercise of judicial power.[99] Although this theory is similar to the third theory, it differs in that it can result in the validation of legislative regulation that directly conflicts with judicial policy so long as the legislative regulation is reasonable and does not interfere with the core of judicial power.

All of these theories assume some sort of power-sharing which reflects the different interests of the respective branches. The judiciary wants to ensure that those who practice in front of it are competent and to facilitate the administration of justice. The legislature wants to ensure that the public, including those who want to practice law, are adequately protected and fairly treated by the government. Accommodations reflecting both interests are sought. Because they are intended to create accommodations, the theories and rules are vague and difficult to apply. They do not always make logical sense.

There is another factor, less often discussed in the cases but nonetheless important; that is, the context in which the issue arises. In most of the cases, the issue is the validity of legislative action in an area where the courts have been silent or court action where the legislature has been silent. In these contexts the action of one branch is almost always held valid when opposed by silence from the other.[100]

---

because of a recognition that exclusion of competent applicants is as serious a problem for the judiciary as acceptance of incompetent applicants. One test of this theory was provided by the cases which reviewed the validity of the once common statutes barring women from practicing law. Some courts refused to accept the statute. *See In re* Thomas, 16 Colo. 441, 27 P. 707 (1891).

98. *See, e.g.*, Creditors' Serv. Corp. v. Cummings, 57 R.I. 291, 300, 190 A. 2, 8 (1937).

99. *See, e.g.*, Sadler v. Oregon State Bar, 275 Ore. 279, ___, 550 P.2d 1218, 1222 (1976); State Bd. of Law Examiners v. Phelan, 43 Wyo. 481, ___, 5 P.2d 263, 265 (1931).

100. *See, e.g., In re* Admission, 61 Neb. 58, 84 N.W. 611 (1900) (statute); *In re* Keenan, 310 Mass. 166, 37 N.E.2d 516 (1941) (statute); *In re* Member of Bar, 257 A.2d 382 (Del. 1969) (rule); R.J. Edwards, Inc. v. Hert, 504 P.2d 407 (Okla. 1972) (rule).

The difficult cases arise when one branch takes an action in direct contravention of the actions of the other. If the judicial branch promulgates a regulation inconsistent with a statute, the courts are likely to uphold this regulation as the last expression of policy on the issue.[101] If the legislature enacts a statute which is inconsistent with a judicial rule, the result is more difficult to predict, although more likely than not the last action, the statute, controls.[102] The courts will not give effect to a statute which they see as an attempt to overrule the court on a central policy issue.[103]

C. *Control Over the Practice of Law Under the 1793 Vermont Constitution*

There have been two analyses of the above history and the law in other states. Each analysis has reached a different conclusion.

The first analysis is set forth as part of an Opinion of the Attorney General in response to an inquiry from the Legislative Council about the ability of the legislature to investigate court records on the admission and disciplining of attorneys. The inquiry was part of a Sunset Review of the Board of Bar Examiners.[104] After reviewing the Vermont history, the opinion concluded that the judicial branch has the inherent power to regulate the practice of law. It analyzed the various accommodations between legislative and judicial branch regulation which have been reached in other states and concluded that the legislative role is generally limited to setting minimum standards for admission.[105] Thus, it found that the Board of Bar Examiners cannot be removed from "judicial hands."[106]

The opinion went on to say that the legislature has the power to investigate the Board of Bar Examiners, even though the board is part of the judicial branch, as long as the investigation does not

---

101. *Compare In re* Berkwitzk, 323 Mass. 41, 80 N.E.2d 45 (1948) *with In re* Keenan, 310 Mass. 166, 37 N.E.2d 516 (1941).

102. *See* Sadler v. Oregon State Bar, 275 Ore. 279, 550 P.2d 1218 (1976) (statute controls); *but see* Application of Feingold, 296 A.2d 492 (Me. 1972) (rule controls).

103. *See generally* Shapiro, *Judicial Control over the Bar Versus Legislative Regulation of Governmental Ethics: The Pennsylvania Approach and a Proposed Alternative*, 30 Duq. L. Rev. 13 (1981).

104. Attorney General's Opinion, *supra* note 63.

105. *Id.* at 15. The opinion concluded that this rule "is administerable and comes the closest to accommodating the genuine needs of each branch." *Id.*

106. *Id.* at 16.

impair "the effective functioning" of the board.[107] Thus, the opinion found that the legislature can have access to board records unless the information is confidential and disclosure would undermine the effective functioning of the board.[108] The opinion also drew some conclusions about the meaning of the 1974 constitutional amendments.

The second analysis is found in the Sunset Review of the Board of Bar Examiners as prepared by the Legislative Council staff.[109] It concluded that "both the legislative and judicial branches can lay legitimate claim to different aspects of jurisdiction over legal practice."[110] The conclusion was based primarily on an historical analysis, on a finding that the legislature has consistently regulated the admission of attorneys, and that the supreme court has acknowledged that its power comes from the statute.[111]

The Legislative Council staff seems to have opted for an accommodation of competing powers based on the interests of the two branches. It found that the judiciary has a legitimate interest in assuring a competent bar for court appearances.[112] The legislature's concern, on the other hand, is the public interest generally. Thus, it concluded that a legislative requirement that a particular person may appear in a judicial proceeding would "arguably violate the separation of powers prescribed under the Vermont Constitution."[113] On the other hand, the staff found "less intrusive regulation concerning admission"[114] to be within the legislative prerogative; it found it difficult to imagine, for example, how a statute establishing the size of the Board of Bar Examiners had anything to do with the court's legitimate interests.[115]

While the standard the Legislative Council used is not explicitly spelled out, there is a discussion of why the legislature has a legitimate oversight function over the Board of Bar Examiners. The report found that oversight "should only become impermissible when it unduly burdens or interferes with the judicial depart-

---

107. *Id.* at 22.
108. *Id.* at 25.
109. Sunset Review, *supra* note 63.
110. *Id.* at 11.
111. *Id.* at 14.
112. *Id.* at 16.
113. *Id.* at 16.
114. *Id.*
115. *Id.*

ment in the exercise of its judicial functions."[116] Presumably, that is the standard under which all legislative branch regulation of the practice of law would be judged. For example, the report noted that the supreme court rule, as it then existed, created a board of seven bar examiners in the face of the statute requiring six examiners. The Legislative Council staff argued that the statute controlled unless the six member board were an "undue burden on the judiciary" and found no basis for concluding an undue burden existed.[117]

Neither of the above analyses is entirely convincing. The Attorney General's Opinion adopts the least workable of the possible accommodations between legislative and judicial power. By allowing the legislature to set any minimum admission standard and the judiciary any maximum standard, overly restrictive admission standards are likely to result.[118] The judicial interest would not be satisfied if the legislature were to adopt such high minimum standards that qualified persons could not practice law. Nor would the legislative interest be served if the court were to set high admission standards as an anticompetitive device.

On the other hand, the analysis of the Legislative Council staff weighs the role of the judicial branch too lightly. If the admission of attorneys is wholly or partly the exercise of judicial power, then the means used to determine who will be admitted are essential parts of that power. It does not make sense to say that the legislature and the judiciary share power and responsibility for determining who can practice law and then to say that the means of determining admission is entirely within the control of the legislature. The Vermont experience shows otherwise. The extreme pressure on the bar admission process and the opportunity for error make it critical that the Board of Bar Examiners function effectively and accurately.

A better formulation of judicial and legislative branch powers

---

116. *Id.* at 17.

117. *Id.* at 21.

118. Standards of admission to the Vermont Bar have been a particularly sensitive matter recently. The discovery that the Board of Bar Examiners had made significant grading errors on the July 1981 bar examination led the supreme court to appoint a special investigatory committee. The committee was charged, *inter alia*, to "review for fairness and efficacy the procedures presently in use by the Board of Bar Examiners." The committee, chaired by former Vermont Governor Philip Hoff, issued its report on April 1, 1982. Report of the Special Study Committee on Bar Admissions and Continuing Legal Education (1982). Despite the Hoff Committee report, controversy surrounding admissions has continued.

under the 1793 constitution would have three elements. First, control over the practice of law, including admission to the bar, attorney discipline, and the control of unauthorized practice, is primarily vested in the judicial branch under the separation of powers clause. This conclusion is based less on the ambiguous Vermont history than on precedents from other states. To conclude otherwise would put Vermont out of step with the law of every state with constitutional provisions even remotely like those in the Vermont Constitution. Where asserted, the power of the judiciary to control the practice of law should override legislative regulation of the professions generally or even the specific regulation of the practice of law. Where the judiciary does not assert its power, legislative regulation should control.

Second, there must be outer limits to the judicial power to control the practice of law especially because the judiciary grants a monopoly to lawyers which extends to activities only remotely connected with deciding cases and controversies. The claim for the unique treatment of attorneys, exempting them from legislative control, is weak in the face of general legislative regulation applicable to those in similarly monopolistic professional situations.[119] The line here is ill defined but a workable distinction can be discerned if one gives a high presumption to the validity of the actions of either branch.

Third, the means adopted to regulate lawyers, including the regulation of such areas as procedures, structures, and financing, should be seen as concurrently controlled by the legislative and judicial branches. In part, this conclusion flows from the interests as discussed above. In part, it also flows from the long history in Vermont of legislative control over practice and procedure and over some aspects of court administration.[120] Normally, this means that the last statute or rule on a subject would control.[121] The possibil-

---

119. It is impossible to know what monopoly the law gives to lawyers. There is no statute on unauthorized practice. The legislature has demonstrated no interest in this area. The last court decision is over 20 years old and the Vermont Bar Association has disbanded its enforcement arm for fear of antitrust litigation. While the language of some of the early cases is broad, it is fair to say, as the Sunset Review concludes, that the actual boundaries of legal practice are much narrower. *See* Sunset Review, *supra* note 63, at 3. Thus, there is *de facto* no prohibition against unauthorized practice at this time.

120. See *infra* text accompanying notes 56-62.

121. This "ping-pong" effect is discussed below. The major impediment to acceptance of this policy is that each branch seems to see a later action by the other branch as a denial of its own power rather than the assertion of power by the other branch. Thus, the act of

ity of each branch continuously overruling the other would ideally produce compromise.

D. *Control Over the Practice of Law Under the 1974 Constitutional Amendments*

Difficulties in interpreting the Vermont Constitution in this area were not eliminated by the passage of the 1974 constitutional amendments. The constitution now provides that the supreme court shall have "disciplinary authority concerning all . . . attorneys at law in the State."[122] It has no parallel provision for other aspects of control of the practice of law. However, the same section gives the supreme court "administrative control of all the courts of the state"[123] and section 37 requires the court to "make and promulgate rules governing the administration of all courts."[124] Rules adopted under section 37 may be revised by the legislature.[125]

The first question raised by the constitutional amendments is what they did to the pre-existing power relationships with respect to the practice of law. There are a number of possible answers. The Attorney General's Opinion analyzes the interrelationship of sections 30 and 37 and concludes:

> 1) The supreme court's power over the disciplining of lawyers is absolute and the legislature has no power in the area;
> 2) Rules on bar admission are rules on "administration" of courts under Section 37 and are therefore subject to revision by the legislature;
> 3) Under Section 30, the supreme court has administrative control over all courts. This is an absolute power in which the legislature may not interfere; and
> 4) Sections 30 and 37 can be reconciled only by limiting the legislature's power to revise court administration rules under Section 37 to instances where the revision does "not interfere with fundamental court policy" and does not "materially interfere with the performance of the court's duty of

---

the court in superseding the statute providing for six bar examiners was seen by the legislature as a usurpation of its power rather than an exercise of judicial power. Indeed, the statute was nearly 100 years old, and everyone seemed to agree that the structure established in the rule was better. Despite that view of the merits, the spectre of rules superseding statutes raised legislative ire.

122. VT. CONST. ch. II, § 30.

123. *Id.*

124. VT. CONST. ch. II, § 37.

125. *Id.*

administration."[126]

The staff of the Legislative Council appeared to accept the view that control over bar admission was part of court administration but were unwilling to accept the balance struck between the sections in the Attorney General's Opinion. In their view, section 37 allowed the legislature to revise any rule of court administration or any rule on any subject.[127]

The first Report of the Legislative Committee on Judicial Rules also looked at sections 30 and 37. While the report is couched in tentative language, its initial conclusion seems to be that the absence of specific constitutional reference to judicial branch control over attorney admission, coupled with the specific reference to discipline, indicates that there is no exclusive judicial power over bar admission under the constitution.[128] It also adopted the view that any rule of the court, including any rule dealing with bar admission, can be revised by the legislature under section 37.[129]

Much of the confusion over the effect of the 1974 amendments on regulation of attorneys resulted from the drafting model chosen. Most of the amendments to the judicial article come from the Model State Constitution, drafted by the National Municipal League.[130] That model is silent on regulation of the practice of law and there is no indication that the silence is intended to change the status quo.

There is nothing in the history of the constitutional amendment that shows the intended effect on the practice of law. The 1965 report of the Judicial Branch Study Committee authorized by the Legislative Council did not discuss the area.[131] The language on control over lawyer discipline was added by the Constitutional

---

126. ATTORNEY GENERAL'S OPINION, *supra* note 63, at 13-28.

127. Sunset Review, *supra* note 63, at 15.

128. Report on Judicial Rules, 1983, *supra* note 7, at 2-3.

129. *Id.* at 6.

130. MODEL STATE CONSTITUTION, *supra* note 31.

131. There are actually two reports, one dated December 29, 1966, Vermont Legislative Council, Study of the Judicial Branch—Report on Proposal No. 5 (1966) [hereinafter cited as 1966 Judicial Study Report] and a supplementary report dated 1967, entitled Vermont Legislative Council, Report to the Legislative Council on Proposal No. 5 (1967) [hereinafter cited as 1967 Judicial Study Report]. Both reports were accepted by the Legislative Council and transmitted to the legislature. While the first report does not mention the practice of law, it finds in the constitution the "inherent right [of the judicial branch] to prescribe the rules and regulations under which it shall operate." 1966 Judicial Study Report at 9.

Commission, but is not discussed.[132] Nor was it discussed in the available legislative transcripts on the constitutional amendment. One can only speculate that the language on attorney discipline was added as an afterthought to the provision on judicial officer discipline, an area where a real need for specificity was perceived.[133]

For two major reasons, the conclusion of the Legislative Committee that the 1974 amendment negates any judicial power on bar admission, is incorrect. First, the overall policy behind the amendment was to add to or to conserve judicial power. In light of this policy, repeal by implication from an utterly silent record is an unlikely, even contradictory, result. The only precedent, from another state, holds that a specific constitutional provision covering lawyer discipline does not negate the existence of judicial power over bar admission.[134]

The second reason is that it would make no policy sense to separate attorney discipline from attorney admission or other aspects of regulation of attorneys. This separation does not exist in other states.[135] Moreover, the Vermont Supreme Court had held that the power over lawyer discipline is derived from the power over admission.[136] It would be incongruous to take away the power over admission and leave the disciplinary power.

Although the 1974 amendment apparently did not eliminate judicial power over the practice of law, that power is affected by the new constitutional references to court administration and rulemaking. It is unlikely that all judicial power over the practice of law can be subsumed under the term "court administration." While there is some overlap, the concepts have different origins and histories. Indeed, application of the term "court administra-

---

132. See Constitutional Commission, Report to the General Assembly of the Constitutional Commission 31 (1971). The report simply repeats the words of what became section 30 without further explanation.

133. The need was created because judges are not selected by the supreme court and thus one could not infer that the supreme court could discipline judges.

134. *See* Singer v. Louisiana State Bar Ass'n, 378 So. 2d 423, 426 (La. 1979). The Louisiana Constitution gives the Supreme Court of Louisiana original jurisdiction over disciplinary proceedings against a member of the bar. LA. CONST., art. 5, § 5(b). It is the only reference to lawyers in the Louisiana Constitution. In *Singer*, the court reasoned that its inherent power over the practice of law should not be eliminated by implication from a specific reference to lawyer discipline. *Singer*, 378 So. 2d at 425-26.

135. *See, e.g., In re* Keenan, 310 Mass. 166, 171, 37 N.E.2d 516, 520 (1941).

136. *See supra* note 57.

tion" to the standards of admission, the ethics of the legal profession, or the definition of unauthorized practice would have placed these areas squarely under the control of the legislature. That the legislature did not control most of these areas is an indication that they were not considered part of court administration.

It is an unlikely interpretation that the "any rules" language of section 37 really means any rules adopted by the court, whether or not pursuant to section 37. This interpretation would virtually eliminate the separation of powers clause. There was no intent to do that in 1974. A more likely interpretation is that the legislature's power to revise rules is limited to rules described in section 37.

A fair interpretation is that the court's inherent power to set admission standards, standards of lawyer conduct, and the definition of the practice of law are like the power to decide cases—essential judicial functions that cannot be exercised by the legislature under the separation of powers clause. However, the means that are used to determine whether applicants for admission to the bar meet the appropriate standards, to determine whether lawyers comply with the proper ethical rules, or to determine whether particular conduct is the unauthorized practice of law, are all part of court administration. Rules and actions which establish these standards are subject to sections 30 and 37 of chapter II of the Vermont Constitution.

The effect of this categorization is developed in Part V of this article. In short, the effect is as follows:

> 1) The supreme court has the duty and power to create general policies on court administration and issue them as rules; 2) The rules of court administration have the force of law—that is, they supersede all prior inconsistent rules or statutes—and may in turn be revised by the legislature; and 3) When the supreme court acts pursuant to the general policy—by ruling that the conduct of a particular lawyer was unethical—this specific ruling cannot be revised by the legislature.[137]

Probably the strongest argument for this interpretation is that it clarifies and defines the pre-existing law without changing it to any great degree. The results reached above are roughly the same

137. *See infra* text accompanying notes 206-58.

as courts in other states have reached under separation of powers provisions.

One weakness of this construction is that it makes the reference to lawyer discipline in section 30 superfluous. It is tempting, because of this effect, to find, as the Attorney General's Opinion suggests, that every aspect of lawyer discipline is within the exclusive control of the judiciary. But there is no logical reason why the overall scheme of the judicial article mandates this interpretation.[138] The absence of any drafting history on the point suggests no change was intended.

The presence of section 37 does answer the power questions underlying the friction between the legislature and the supreme court in this area. The size and make-up of the Board of Bar Examiners should be taken as a matter of court administration. Thus, the supreme court has the power to change that size by rule, even in the face of an inconsistent statute, subject to the legislature's power to revise the rule. Similarly, section 37 should be seen as the source of the court's power to levy fees to support lawyer admission and discipline actions, again subject to the legislature's right to revise those fees.[139]

IV. Practice And Procedure

A. *History of Practice and Procedure Regulation*

At common law, the procedure that courts used to decide cases was largely determined by case law. Inevitably, that meant that the highest court of a jurisdiction established that procedure because its decisions controlled and generally were published. While individual courts controlled their own judicial procedure, there were no rules.

In this and every other state, the legislature began to take over judicial procedure by passing statutes. In the early years, statutory

---

138. The argument would be that the specific reference in section 30 makes the control over this area absolute. *See* Attorney General's Opinion, *supra* note 63, at 27; *In re* Supreme Court License Fees, 251 Ark. 800, ___, 483 S.W.2d 174, 175 (1972); State v. Bartholomew County Court, 383 N.E.2d 290, 292 (Ind. 1978); Louisiana State Bar Ass'n v. Edwins, 329 So. 2d 437, 440-41 (La. 1976). In effect, this would mean that the court has total control over the Professional Conduct Board and Judicial Conduct Board, but shares control over every other administrative aspect of the judicial system with the legislature. No policy reasons support this differential treatment.

139. For cases supporting this proposition, see *infra* note 198.

law controlled only a small part of judicial procedure.[140] By the mid-nineteenth century, however, a reform movement had developed with the goal of replacing common law procedures with statutory codes.[141] The Field Code was adopted in New York, and thereafter, in most states.[142]

Regulating procedure by statutory codes proved to be a bad policy in many states. The codes were rigid and difficult to amend. As they grew more complex, the codes spawned constant appeals on procedural points. The codes rarely had the flexibility to adapt to the many situations that arose in the courts. Procedural statutes often reflected the special interests of the narrow segment of the bar that were in the legislature.[143]

---

140. Legislative intervention was necessary in the early years to establish procedure:

> Court procedure in this country came to be the product of the legislature because of the establishment of a judicial system in virgin territory. There were no traditions similar to those existing in England and since courts were needed immediately and some regulations had to be prescribed for their immediate use, it was found easier to pass a statute than to await the development of procedure by court decision and tradition.

Vermont Bar Association, Report of the Special Committee to Report on Vermont's Judicial System, *supra* note 23, at 16.

141. The legislative reform movement was in response to the complexity of common law procedure. Edson Sunderland, an early and strong advocate for judicial rule-making power, described the situation as follows:

> Early procedure at common law and in chancery was developed by the courts themselves as a by-product of litigation. It grew out of the experience of the bench and bar, and showed the skillful work of well trained specialists.
>
> This method of development would have had unlimited capacity for keeping the procedural machinery adjusted to changing needs, had it not been for the fatal influence of the rule of stare decisis.
>
> The rule should never have found its way into the procedural field. Its proper function is to stabilize the rules . . . . But procedure requires no such stability . . . . [F]lexibility in procedure is its most essential quality.
>
> The common law and chancery judges, however, failed to distinguish between rules of law and the mechanics of procedure . . . . The result was the utter stagnation of procedure. Rules became perpetually binding because they had once been announced, and the elasticity disappeared from the machinery of justice.

Sunderland, *Progress Toward a Better Administration of Justice*, 17 J. OF AM. JUDICATURE SOC'Y 49, 51 (1935).

142. The Field Code and the results of its adoption are discussed in Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388 (1910) and Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 ILL. L. REV. 163 (1915). While the Field Code is generally seen as a disaster in New York, there is no indication in the various reports over the years that legislative procedure was totally inappropriate in Vermont. *See* 1966 Judicial Branch Study, *supra* note 131, at 1 (Vermont's cautious approach to judicial reform has enabled it to "avoid the elaborate code procedures which have overburdened the courts and legal practioners [sic] in many other states").

143. For an itemization of the problems with codes, see Comment, *Procedural Reform*

A new reform movement grew up to replace the last one. The aim of this movement was to replace statutory procedure with court rules. Some noted legal scholars argued that courts had the inherent constitutional authority to control their own procedure.[144] These arguments led a number of state courts to assert the right to control practice and procedure as an inherent judicial power.[145] More often, the reform was implemented by a statutory delegation of rule-making power to the courts.[146] In recent years, many states have amended their constitutions to give the judiciary the sole or concurrent power over court procedure.[147]

The power to establish judicial practice and procedure has resided in the legislature in Vermont. Only in a few extreme instances where legislative regulation interfered with the courts' responsibility to try cases has the supreme court found an interference with judicial powers. In *Kimball v. Barber*,[148] the supreme court held that the legislature could not pass a law extending the appeal period for an individual litigant. The court found that the statute had the effect of undoing the trial court judgment, an act that could be taken only by the courts under the Vermont Constitution. In *Granai v. Witters*,[149] the court struck down a statute that gave an automatic continuance to a lawyer who was also a legislator, while the legislature was in session. The court found that granting a continuance is a discretionary judicial power, part of the "internal administration reserved unto the judiciary."[150]

Until recently, the Vermont Legislature had delegated little of its power in this area to the courts. Essentially, the courts were

---

Calls for Exercise of Rule-making Power, 9 J. OF AM. JUDICATURE SOC'Y 122 (1925).

144. *See, e.g.*, Wigmore, *Legislature Has No Power in Procedural Field*, 20 J. OF AM. JUDICATURE SOC'Y 159 (1936); Pound, *Regulation of Judicial Procedure by Rules of Court*, 10 ILL. L. REV. 163 (1915).

145. *See, e.g.*, Kolkman v. People, 89 Colo. 8, 300 P. 575 (1931); State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1974).

146. Some state-by-state breakdowns are contained in *Judicial Rule-Making Power Gains Ground*, 27 J. OF AM. JUDICATURE SOC'Y 59 (1943) (lists statutes in 21 states); Harris, *The Extent and Use of Rule-Making Authority*, 22 J. OF AM. JUDICATURE SOC'Y 27 (1938).

147. *See, e.g.*, ALASKA CONST. art. IV, § 15; HAWAII CONST. art. VI, § 7. These constitutions have served as models since the states were admitted and drafted their constitutions with the benefit of the historical experiences in other states.

148. 2 D. Chip 77 (1824). *See also* Hill v. Town of Sunderland, 3 Vt. 507 (1831); Staniford v. Barry, 1 Aik. 314 (1825).

149. 123 Vt. 468, 194 A.2d 391 (1963).

150. *Id.* at 471, 194 A.2d at 393.

able to establish procedural rules only where the rules were not inconsistent with statute.[151] Since statutes governed almost all areas of judicial procedure, there was little room for court rules. Studies of Vermont's courts over the years generally urged that the courts be given rule-making power over procedure. This was the conclusion of the Special Vermont Bar Association Committee (1944)[152] and the Judicial Branch Study Committee of the Legislative Council (1966).[153]

In 1967, the legislature passed a statute authorizing general court rules with "respect to pleadings, practice, procedure and forms for all actions and proceedings in all courts of this state."[154] However, the rules or amendments thereto had to be reported to the legislature and could not be effective for forty-five legislative days. The statute specifically stated that rules would supersede all laws in conflict therewith.

Four years later, the Constitutional Revision Commission reported what, with minor modification, became chapter II, section 37 of the Vermont Constitution.[155] The intent of the commission in proposing the amendment, and the legislature in adopting it, was apparently to place the relationship created by the rule-making statute in the constitution.[156] However, the commission adopted the wording of the National Municipal League's Model State Con-

---

151. *See* Davis v. Dunn, 90 Vt. 253, 98 A. 81 (1916).

152. Report of the Special Committee to Report on Vermont's Judicial System, *supra* note 23, at 16-18.

153. 1966 Judicial Branch Study, *supra* note 131, at 9. The recommendation also came from the Vermont Judicial Council. *See Fourth Biennial Report* 9-10 (1953); *Fifth Biennial Report* 4-5 (1955); *Sixth Biennial Report* 4-5 (1957).

154. *See* 1967 Vt. Acts No. 311, § 1 (Adj. Sess.). The original version provided that the rules "shall be consistent with the acts of the general assembly." *Id.* Since this limitation meant no advancement over the prior law, the statute was amended the next year to remove this limitation and allow the rules to supersede procedural statutes. *See* 1969 Vt. Acts No. 119, § 1. VT. STAT. ANN. tit. 12, § 1 (1973) presents the statute after the first amendment.

155. *See* Report to the General Assembly, *supra* note 132, at 36.

156. This was the recommendation of the Legislative Council's Committee. *See* 1966 Judicial Study Report, *supra* note 131, at 9. The commission report never mentioned the rule-making section. It did contain this general comment: "However, many important reforms with widespread support have not been adopted, especially where constitutional problems are posed; and unresolved constitutional issues remain in connection with certain of the measures that have been adopted." Report to the General Assembly, *supra* note 132, at 30. In view of the assertion of the Legislative Council's Committee that the judiciary already had rule-making power, and the absence of any action under this power, the commission may have seen the supreme court's rule-making power as one of the "unresolved constitutional issues."

stitution (6th ed.).[157]

Despite the passage of the constitutional amendment in 1974, the legislature has continued to amend the rule-making statute. A 1978 amendment eliminated the power of rules to supersede statutes, substituting a provision that the legislature may "repeal, revise or modify any rule or amendment" and the court cannot affect that action by subsequent rule making.[158] A 1981 amendment created a committee to review judicial rules and provided that new judicial rules do not go into effect for forty-five legislative days if the Legislative Committee on Judicial Rules objects.[159]

The legislature has never directly amended a court rule, but has continued to enact statutes on court procedure at times contrary to existing rules. For some, but not all, of these amendments, the statute provided that inconsistent court rules were superseded.[160]

B. *Practice and Procedure Regulation—The Issues*

The 1974 amendment did not bring certainty to the relationship between the branches on procedural regulation. The legislature has continued to modify the pre-existing rule-making statute, generally tending to narrow judicial power or to expand legislative oversight. It has continued to adopt judicial procedure, often without an awareness of the existing rules. Meanwhile, the judicial branch has increasingly insisted that its powers are governed by Chapter II, Section 37 of the constitution and not by the statute.

Three major issues seem to dominate legislative/judicial

---

157. MODEL STATE CONSTITUTION, *supra* note 31, art. VI. Chapter II, section 37 of the Vermont Constitution is taken from section 6.07 of that constitution. Most of the other sections of the 1974 amendment are taken from article VI of the Model State Constitution which is almost identical to article IV, § 15 of the Alaska Constitution. *See* Stewart, *A Model Judiciary for the 49th State*, 42 JUDICATURE 52 (1958). There are two main differences between the Vermont version and the Model State Constitution section. First, the Model State Constitution allows legislative amendment of judicial rules only "by a two-thirds vote of all the members." The Vermont Constitution allows legislative revision of rules without specifying how. *See supra* note 142. Second, the Model State Constitution separates the rule-making powers into two sentences, the first dealing with court administration, and the second dealing with practice and procedure. The Vermont version combined the sentences into one. This latter change seems to be one of style only.

158. The sentence added was the current last sentence of VT. STAT. ANN. tit. 12, § 1 (Cum. Supp. 1983).

159. VT. STAT. ANN. tit. 12, §§ 1-4 (Cum. Supp. 1983).

160. *See supra* notes 31 and 33.

branch relations in this area:

> 1) Whether the supreme court can adopt procedural rules that supersede existing statutes;
> 2) Whether the legislature has any role in judicial procedure other than to revise court rules; and
> 3) Whether the legislature can regulate court rule-making procedure including the effective date of rules.

These issues are considered in the next section.

C. *Effect of Rules on Statutes*

The most obvious omission in chapter II, section 37 is that it failed to deal with the effect of rules of practice and procedure on pre-existing statutes on the same subject. From 1969 to 1978, the omission was of little practical significance because the legislature recognized the power of the supreme court rules to supersede inconsistent statutes and the court relied upon the statutory authorization. In 1978, however, the statute was amended to remove any authorization for rules to supersede statutes and in some instances to deny that power.[161] Of course, the statute could not eliminate the judicial power created by the constitution.

That section 37 includes the power of rules to supersede pre-existing procedural statutes is clear for four reasons. The first is that the power was contained in the rules enabling statute when chapter II, section 37 was adopted by the legislature and by the citizens of Vermont. The intent of the drafters of the constitutional provision was to embody those rule-making powers which were in the statute.[162] That intent would also cover the power of the supreme court to promulgate statutes by judicial rules. While there may be some inconsistency between the court's power to su-

---

161. There seem to be two intents that produce the same result. The Constitutional Commission generally endorsed the 1966 Judicial Branch Study, *supra* note 131. *See* Report to the General Assembly, *supra* note 132, at 28-29. The Legislative Council sought a constitutional amendment on court rule-making to clarify a power it thought the judiciary already had. *See* 1966 Judicial Branch Study, *supra* note 131, at 9. The commission report also sought amendments to ensure that the constitution covered the various judicial reform proposals which had been adopted or proposed. *See supra* note 124.

162. Throughout the drafting process in the Senate, the special counsel to the committee tried to make the constitutional provision and the statute "congruent." *See* Senate Judiciary Committee Hearings 32 (Feb. 14, 1971). Subsequently, the counsel suggested a drafting change in the constitutional provision so statute and provision would be consistent. *See* Senate Judiciary Committee Hearings (March 4, 1971).

persede statutes and the legislature's power to revise rules, as discussed below, that inconsistency is not sufficient to undermine the intent to embody the policy of the statute.[163]

Second, the model from which the Vermont provision was taken was intended to confer to judicial rules the power to supersede statutes. Section 37 is virtually identical to Section 6.07 of the Model State Constitution, as drafted by the National Municipal League.[164] The commentary to the Model State Constitution states that "[t]hese rules are to have the force of law . . . ."[165] These words are normally used to describe those rules which have the effect of statutes and thus supersede pre-existing statutes.[166] Furthermore, the Model State Constitution section was itself taken verbatim from the words of Article IV, Section 15 of the Alaska Constitution.[167] That section has been interpreted as giving the Alaska Supreme Court the power to issue rules of practice and procedure which supersede conflicting statutes.[168] This interpretation preceded the drafting of the Vermont amendments by eleven years.

The third reason is related to the second. Eight states—Alabama, Alaska, Florida, Maryland, Missouri, Montana, Ohio, and South Dakota—have constitutional provisions on practice and procedure similar to Vermont's.[169] In the Ohio Constitution the power of judicial rules to supersede statutes is specifically itemized.[170] In the remaining seven states the relevant constitutional provisions are silent on whether the power to supersede statutes exists. In five of those states, the highest courts have found that rules supersede statutes.[171] There have been no rulings in

---

163. *See infra* text accompanying notes 176-83.

164. MODEL STATE CONSTITUTION, *supra* note 31, § 6.07 at 90-91.

165. *Id.* at 79.

166. *Compare* HAWAII CONST. art. V, § 6; Omnibus Judicial Act, Title V, § 1 in Council of State Governments, SUGGESTED STATE LEGISLATION—1972 8, 16 (1971).

167. ALASKA CONST. art. IV, § 15.

168. *See* Leege v. Martin, 379 P.2d 447, 451 n.13 (Alaska 1963). As *Leege* points out, the Alaska Supreme Court has specifically provided for the superseding effects in its rules of civil and criminal procedure. *See also* Nolan v. Sea Airmotive, Inc., 627 P.2d 1035, 1040 (Alaska 1981); Silverton v. Marler, 389 P.2d 3, 5-6 (Alaska 1964).

169. *See* ALA. CONST. art. VI, § 6.11; ALASKA CONST. art. IV, § 15; FLA. CONST. art. V, § 2(a); MD. CONST. art. IV, § 18(a); MO. CONST. art. V, § 5; MONT. CONST. art. IV, § 2(3); OHIO CONST. art. IV, § 5(B); S.D. CONST. art. V, § 12.

170. OHIO CONST. art. IV, § 5(B).

171. *See* Opinion of the Justices, No. 229, 342 So. 2d 361, 362 (Ala. 1977); Winegardner v. Greater Anchorage Area Borough, 534 P.2d 541, 545 (Alaska 1975); Bernhardt v. State, 288 So. 2d 490, 496 (Fla. 1974); County Fed. Sav. & Loan Ass'n v. Equitable Sav. & Loan

Montana and South Dakota. These interpretations are consistent with rulings in other states where the constitution is not specific on this point.[172] Only when the state constitution explicitly states that the rules must be consistent with existing statutes have the decisions denied the power of rules to supersede statutes.[173]

The final reason is the most important. The Vermont Supreme Court's power and duty to regulate practice and procedure in all state courts arose after the legislature had adopted statutes covering virtually every aspect of practice and procedure. If the rules must be consistent with statutes, there is virtually no room left for rules. Even after the Vermont Supreme Court has adopted comprehensive rules governing civil procedure, criminal procedure, appellate procedure and evidence, there are still a significant number of areas governed exclusively by statute. For example, there are no rules for the probate courts—even the most minute detail of probate procedure is regulated by statutes.[174] There are no rules for particular types of actions—e.g., habeas corpus—and only limited rules for other procedures—e.g., attachment.[175] The constitutional mandate to make and promulgate rules governing civil and criminal procedure in all courts simply could not be implemented if rules could not supersede existing statutes. Vermont's experience

---

Ass'n, 261 Md. 246, ___, 274 A.2d 363 (1971); State *ex rel.* Peabody Coal Co. v. Powell, 574 S.W.2d 423, 426 (Mo. 1978).

172. *See, e.g., In re* Maricopa County Juvenile Action, 126 Ariz. 546, ___, 617 P.2d 54, 56 (1979); State *ex rel.* Kelman v. Schaffer, 161 Conn. 577, ___, 290 A.2d 327, 331 (1971); People v. Cox, 82 Ill. 2d 268, ___, 412 N.E.2d 541, 545 (1980); *In re* Little Walnut Creek Conservancy Dist., 419 N.E.2d 170, 171 (Ind. App. 1981); Smith v. Martinez, 96 N.M. 440, ___, 631 P.2d 1308, 1309 (1981); Production Credit Ass'n of Madison v. Olson, 280 N.W.2d 920, 927 (N.D. 1979); Laudenberger v. Port Auth. of Allegheny County, 496 Pa. 52, 436 A.2d 147 (1981); Sherwin v. Arveson, 96 Wash. 2d 77, 633 P.2d 1335 (1981); Hinkle v. Black, 262 S.E.2d 744, 750 (W. Va. 1979); Petersen v. State, 594 P.2d 978, 982 (Wyo. 1979).

173. *See, e.g.*, Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980) decided under article VI, section 5 of the Virginia Constitution which provides that rules of practice and procedure "shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly." Few v. Charter Oak Fire Ins. Co., 463 S.W.2d 424 (Tex. 1971) decided under article V, section 25 of the Texas Constitution which provides that rules of procedure shall not be "inconsistent with the laws of the State." The Vermont Constitution uses similar language in chapter II, sections 30 and 31. Each section allows judicial rule-making on jurisdiction or venue but the rules must be "not inconsistent with law." This language was taken from the Model State Constitution.

174. *See* VT. STAT. ANN. tit. 14 (1973).

175. Most of the statutes on attachment, levy of execution and trustee process were left untouched when the Vermont Rules of Civil Procedure were adopted. *See* VT. STAT. ANN. tit. 12, §§ 2681-3693 (Cum. Supp. 1983). Few of these statutes have been repealed or amended since. The statutes are generally archaic and difficult to use. Some sort of modernization is needed.

demonstrates the ineffectiveness of a limited rule-making power. Throughout much of this century, the Vermont courts have had the power to enact rules only so long as they were consistent with law. Only very limited sets of rules were developed and these had little impact on judicial procedure.

There is one situation where allowing rules to supersede statutes is debatable. That is where the statute was enacted to amend a pre-existing rule. In 1978, the Vermont Legislature amended the rules enabling statutes to deny this power, at least where the legislature amends a rule directly (as opposed to enacting a statute inconsistent with the rule).[176] The Legislative Committee on Judicial Rules called a situation where the legislature amends a rule and the court reenacts the original version a "ping-pong." It argued that if a "ping-pong" were to occur, the legislature would be greatly disadvantaged because it meets only part time.[177] Although it called the "ping-pong" conflict "improbable," it suggested a constitutional amendment that would deny *all rules* the power to supersede statutes.[178]

The court's ability to supersede statutes does to some extent undermine the legislature's power to revise rules adopted by the supreme court. If the court can undo the revision merely by readopting the original rule, the legislature's power to revise is illusory. The real effect of this situation could well be an endless battle in which the last branch to act controls. Put another way, the power over rules would be shared—neither branch could act unilaterally without risking effective intervention by the other

---

176. While the legislature amended VT. STAT. ANN. tit. 12, § 1 (1973) to deal with the supremacy of legislative rule revisions, 1981 Vt. Acts No. 118, § 2, they implemented their desires by passing a statute inconsistent with the rule rather than amending the rule. Some members of the judiciary committees apparently believed that the supreme court could not supersede a statute enacted to replace a rule, but could reamend a rule after it was revised by the legislature. The constitution says nothing about the method the legislature uses to change a rule saying that rules can be "revised" by the legislature. It is difficult to see how the method the legislature uses to revise a rule makes any difference.

177. *See* Report on Judicial Rules, 1983, *supra* note 7, at 6.

178. *See id.* at 13 (Possible Constitutional Amendment—Draft B). The amendment draft suggests that the Committee sees the diminution of its powers by any rule that supersedes a statute even if, for example, the statute had been enacted long before there were even rules to revise. Apparently, the committee did not realize that many statutes have been superseded by the Vermont Rules of Civil Procedure, the Vermont Rules of Criminal Procedure, the Vermont Rules of Appellate Procedure and the Vermont Rules of Evidence. The rules superseded the statute because of the effect of VT. CONST. ch. II, § 37 and VT. STAT. ANN. tit. 12, § 1 (1973) before its amendment.

branch.[179]

Even though the "ping-pong" situation limits the legislature's revision power, it is probably possible under chapter II, section 37 of the Vermont Constitution. This result has been identified in the leading New Jersey case of *Winberry v. Salisbury*.[180] The court in *Winberry* found the result unacceptable and argued for total control of rule-making by the court. At least one commentary on *Winberry* has accepted the court's analysis and suggested as an alternative a sunset provision on the legislative revision.[181] In states with constitutional provisions similar to Vermont's, no court decisions have suggested that the power to supersede statutes is limited. There is one reported decision in which the "ping-pong" effect was upheld.[182]

It is important to recognize that because of competing policies, the "ping-pong" effect may actually be desirable. An all out power battle is highly unlikely—it has never happened in Vermont—and a very important consideration is that flexibility remain for progressive reform. Flexibility is most likely if neither the legislature nor the court has the final say to the exclusion of the other.[183] Sharing power should lead to the type of cooperation which produces the best procedure.

Another relevant consideration is that the legislature has never amended a court rule directly. It has, however, enacted conflicting statutes apparently on a theory that the court cannot supersede a statute, but could reverse any amendment to a judicial rule. As the next section argues, there are constitutional questions raised by this method of changing court policy.[184] There is also a very serious practical problem. The result is two provisions, each

---

179. Despite the argument of the Legislative Committee on Judicial Rules, it is the supreme court that is at a disadvantage if the branches cannot reach a compromise. The legislature's control over appropriations would leave the court unwilling to fight.

180. 5 N.J. 240, 244, 74 A.2d 406, 408 (1950).

181. *See* Levin & Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 37-42 (1958).

182. Hensley v. Bethesda Sheet Metal Co., 320 Md. 556, 188 A.2d 290 (1963). The case has no analysis of the problem.

183. If the "ping-pong" effect were prohibited, any rule revisions made by the legislature would be removed from the court's rule-making powers forever. Over time, the legislature would take control over more and more procedural matters and put them beyond the power of the court. The system would again become rigid, resisting reforms that have nothing to do with the differences between the legislature and the court that led to the rule revision in the first place.

184. *See infra* text accompanying notes 186-90.

covering the same subject, and often difficult to integrate with each other. The existence of two different provisions on a single subject is a magnet for litigation and appeal. Ideally, either a statute or rule should be enacted to reconcile the conflicting provisions. The court is in the best position to attempt this reconciliation, but only if its new version will control. If the court is powerless to create one final version superseding both the rule and the statute, it must leave the undesirable situation alone.[185]

D. *The Effect of Post 1974 Procedural Statutes*

Another omission from the amended constitutional provision is a specification of the effect of legislative statutes on judicial procedure enacted after the constitutional amendment. In view of the mandatory language of section 37, there is an initial question of whether the legislature retains any power to initiate judicial procedure. Taken literally, the constitutional provision appears to direct that judicial practice and procedure be created only by supreme court rule, with the legislative power being limited to revising judicial rules.[186] This literal interpretation has not been followed by the legislature since the constitutional provision was added. The legislature has continued to enact procedural statutes and the court has found those statutes to be effective.

There are actually three alternative interpretations of section 37: (a) that the legislature's power over judicial procedure is limited to revising court rules; (b) that legislative acts creating judicial procedure are effective only if accepted by the court; (c) that the legislature has the power to initiate judicial procedure. Both of the first two interpretations have been adopted in some states.[187]

---

185. An example of the problem occurred when the legislature amended VT. STAT. ANN. tit. 13, § 6565 (Cum. Supp. 1983) to limit binding plea agreements in criminal cases. The Advisory Committee on the Rules of Criminal Procedure found the statutory change to be ambiguous. They recommended, and the court adopted, a relatively minor amendment to VT. R. CRIM. P. 11(e). *See* Reporter's Notes—1983 Amendment to Rule 11. The rule amendment clarified what was an ambiguous situation and prevented a lengthy period of uncertainty until the supreme court could rule on the meaning of the statute. It is doubtful, however, that the court would have amended the rule if its amendment did not control. To do so would have been to give an advisory opinion on the meaning of the ambiguous statute without briefs or argument.

186. VT. CONST. ch II, § 37.

187. *See* Markert v. Johnston, 367 So. 2d 1003 (Fla. 1978) (only the court can create procedural rules); State v. Leonardis, 73 N.J. 360, 375 A.2d 607 (1977) (legislature can revise court-created judicial procedure); State v. Superior Court, 107 Ariz. 224, 485 P.2d 549 (1971) (procedural statutes deemed to be rules of court until modified or suspended by the court);

These interpretations appear to impose too strict limits on legislative power. Nothing in the history of the constitutional amendments suggests there was an intent to eliminate the power of the legislature to enact procedural statutes.

At a minimum, the language in section 37 is a clear direction to the supreme court to "govern" practice and procedure by rules "in all courts."[188] The clear intent is that all practice and procedure would eventually be governed by court rules and not by statutes.[189] When this end is reached, there will be no reason for legislative intervention except pursuant to the legislature's power to revise court rules.

The constitutional provision may, however, impose limits on the form of legislative action. The constitutional specification is that if the legislature wants to change judicial procedure, it can "revise" the rule that establishes that procedure. There are important reasons to insist on this method of change. The enactment of a statute in the same area as an existing rule creates uncertainty. The Alaska Supreme Court, interpreting a nearly identical constitutional provision, has created a rule which is intended to encourage conformity to the constitutional process. The decisions hold that legislative changes in procedure are viewed as unintentional unless related directly to the relevant court rules.[190] In effect, the court uses a strong presumption against finding that a statute was intended to change a pre-existing rule, rebuttable by a statement from the legislature that such a change was perceived and expected.

The Alaska policy maintains a role for the legislature in initiating judicial procedure while requiring some compliance with the seemingly exclusive constitutional mandate. The legislature may enact procedural statutes, but there will be a strong presumption

---

State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1974) (procedural statutes may be accepted or rejected by the court).

188. *See* Peterson, *Rule-Making in Colorado: An Unheralded Crisis in Procedural Reform*, 38 U. Colo. L. Rev. 137, 159 (1966). Colorado adopted the language of the Model State Constitution on rule-making but omitted the legislature's power to revise rules. The author concludes that the constitutional provisions eliminated all legislative power over judicial procedure.

189. *But cf.* Model State Constitution provision requiring two-thirds vote of entire legislature. Model State Constitution, *supra* note 31, § 6.07 at 90.

190. *See, e.g.*, Nolan v. Sea Airmotive, Inc., 627 P.2d 1035 (Alaska 1981); Leege v. Martin, 379 P.2d 447 (Alaska 1963). The latter case was cited in the Reporter's Notes to the 1983 Amendment to V. R. Crim. P. 11. *See supra* note 149.

that the statute does not change any rules. In this way the legislature is encouraged to use the constitutional method of change to "revise" the rules directly.

E. *Rule-Making Procedure*

There are two aspects to an analysis of rule-making procedure: (1) whether rule-making procedures imposed by the legislature are valid; and (2) whether the current rule-making procedures are appropriate. The first aspect is raised by the relatively complicated review process created by the Legislative Committee on Judicial Rules. Under the statutes,[191] an objection by the committee to "initially prescribed" rules means that the rules cannot go into effect for forty-five legislative days, allowing the legislature adequate time to revise or repeal the rules.[192] Except in emergencies, rules have to be submitted to the committee at least thirty days before their effective date.[193] The committee takes the position that any objection by the committee further suspends the effective date while the objection is being considered and for another thirty days if the court changes the rule in response to the objection.[194]

The statutory power to suspend the effective date of a rule creates severe problems with the timing of new rules. The delay period—forty-five legislative days—is most of a legislative session and the legislature meets only in the first four months of the year. Thus, any new rule promulgated in the summer or fall could be effectively delayed for six months to a year. Even worse, any rule promulgated during the last half of the legislative session could be held up for over a year because of the inability to consume the forty-five legislative day review period in one session.

A plain reading of the words of the constitution leads to the interpretation that the court fully controls the rule-making process up until the rules are promulgated. Thereafter, the legislature's power to revise or repeal them comes into effect. Under this interpretation, it is up to the court to establish the effective date of the rules.

Any alternative interpretation would essentially change the

---

191. VT. STAT. ANN. tit. 12, § 1 (Cum. Supp. 1983).
192. *Id.*
193. *Id.* § 3(e).
194. *Id.* § 4(a).

words of the constitution. Under the statutes,[195] assuming that the Legislative Committee on Judicial Rules objects to a new rule, the court actually proposes a rule (not promulgates) and the legislature prevents it from going into effect (not revises). Moreover, the statute draws a distinction between new rules and rule amendments not in the constitution.[196] In other states, suspension and review processes have been authorized in their constitutions. Thus, Montana and Ohio both have review processes in their constitutional provisions authorizing judicial rule-making.[197]

There are few reported decisions on the legislative regulation of the process of court rule-making. In three states, Pennsylvania, Michigan, and Nevada, the legislature applied open meeting laws to rule-making and the supreme court struck down the statute or interpreted it not to apply to the judicial branch.[198] The courts found that applying the statutes to the judicial branch was an intrusion into judicial powers and a violation of the principle of separation of powers.[199] The theory of these cases would appear to govern rule-making procedures under the Vermont Constitution.

Conflicts over the validity of rule-making procedures established by statute have been more theoretical than real. The Vermont Supreme Court has delayed the effective date of its rules for a sufficient amount of time to allow legislative review. The likelihood that the court controls all parts of rule-making process carries with it the responsibility of ensuring that the process is fair and open. This is the second aspect of the rule-making procedure issue.

As judicial rule-making has come of age, there has been increasing interest in the process by which those rules are made. Generally, analysts have found rule-making to be too much of a closed process, involving only a few lawyers and judges with little explanation of why actions are, or are not, taken.[200] It is beyond

---

195. *Id.* § 3(e).

196. *Id.*

197. *See* MONT. CONST. art. VII, § 2(3); OHIO CONST. art. IV, § 5(B).

198. *See In re* 42 Pa. C.S. § 1703, 482 Pa. 522, 394 A.2d 444, 446-47 (1978); *In re* "Sunshine Law," 1976 PA 267, 400 Mich. 660, 255 N.W.2d 635 (1977); Goldberg v. Eighth Judicial Dist. Court, 93 Nev. 614, 572 P.2d 521 (1977).

199. *In re* 42 Pa. C.S. § 1703, 400 Mich. 660, ___, 255 N.W.2d at 636, *In re* "Sunshine Law," 482 Pa. 522, ___, 394 A.2d at 450; *Goldberg*, 93 Nev. 614, ___, 572 P.2d at 522.

200. *See, e.g.*, J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977); Hazard, Book Review, 87 YALE L.J. 1284 (1978); Oakes, Book Review, 78 COLUM. L. REV. 205, 209 (1978); Parness & Manthey, *Public Process and Ohio Supreme Court Rule-Making*, 28

the scope of this article to explore all the criticism of the rule-making process in relation to the Vermont situation. Two points are, however, important to an overall understanding of the rule-making power.

First, placing both rule-making and adjudicatory responsibilities in the same institution—here the supreme court—creates unique pressures. Often the court is required to "legislate" in an area where it will certainly have to adjudicate, raising the possibility of a conflict of roles. The Sunset Review of the Board of Bar Examiners, prepared by the staff of the Legislative Council, suggested that each member of the court will be "in the position of potentially having to disqualify himself from deciding matters arising under the rules."[201]

The disqualification suggestion is an extreme that has not been adopted to date.[202] That the power to "legislate" and the power to "adjudicate" are separate in the constitution suggests that they must find a way to coexist without consuming one another. In broad terms, there seem to be two alternatives. The first is for the court to spend so much time and care with rule-making, allowing for as much participation as possible, that rule-making becomes a functional substitute for adjudication. The second is for the court to put little of "itself" into rule-making, remaining independent by adopting proposals of its advisory committees without change, thus leaving itself free to adjudicate with an open mind.

So far, the court has adopted some aspects of both approaches. The court has recently strengthened the rule-making process[203] and has, in some instances, amended the proposals that come from its advisory committees. On the other hand, the court has generally adopted, or rejected, the proposals as it has received them.

The second point, that the process should be fair and open, arises simply because a process in the judicial branch is inevitably more accessible for some than a process in the legislature, but far

---

CLEV. ST. L. REV. 249 (1979).

201. *See* Sunset Review, *supra* note 63, at 17.

202. *See, e.g.*, Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444 (1946) (Court held that the fact it promulgated rules does not "foreclose consideration of their validity, meaning or consistency").

203. *See* Administrative Order No. 11, as amended effective June 1, 1982; VT. STAT. ANN. tit. 12, app. VIII, A.O. 11 (Cum Supp. 1983).

less accessible for others. Proposed rules and rules changes are sent to all licensed lawyers in the state.[204] The advisory committees which generate the proposals are made up of lawyers and judges, accessible to their peers and those who work in the judicial branch. Except when a specific rule has been generated by a special interest group, however, there is little meaningful public input in rule-making even though notices of proposed rule-making have been placed in newspapers and public hearings have been held.[205] Some lawyers serving as legislators have been reluctant to participate in the rule-making process because of their ultimate responsibility to "revise" if necessary. Unfortunately, this position means that lawyers, who are often the most knowledgeable and concerned about the administration of justice, do not participate in the process of judicial rule-making.

V. Court Administration

A. *Court Administration in Vermont*

Concern about court administration is a relatively recent phenomenon. Until this century the court system has not even been administered as one institution. Each county court was controlled by the county assistant judges. The probate courts were also local, controlled by the elected judge and register, with certain controls by the county. The Vermont Supreme Court was only an appellate court with little direct power over the functioning of the lower courts.

The rules of court administration have historically been set by the legislature.[206] Each of the separate court systems acted as the legislature directed. The only constitutional limits on legislative power were those derived from the separation of powers clause. These limits were largely unexplored except in the *Granai v. Witters* case discussed earlier.[207] There, the supreme court said that matters of internal administration were reserved to the judiciary,

---

204. *See id.* § 4(b).

205. *See id.* §§ 5, 6. Since the 1982 amendment to the Administrative Order the Court Administrator has routinely published a notice of rule-making to encourage public comment under section 5. The Advisory Committee on the Rules of Civil Procedure held a public hearing on the Vermont Rules of Civil Procedure in 1982 and on interest on lawyer trust accounts in 1983. On request, it held a hearing on amendments to civil rules dealing with abuse prevention actions.

206. *See e.g.*, Vt. Stat. Ann. tit. 4, ch. 3 (1972).

207. Granai v. Witters, 123 Vt. 468, 194 A.2d 391 (1963).

holding specifically that the decision of whether to grant a continuance is a matter of internal administration.[208]

The path to a unified judicial system began with the establishment of the district court and court administrator in 1967.[209] The district court was set up as one state-wide court under the administrative control of the court administrator who in turn appointed the local clerk and court reporter.[210] The court administrator was established as an employee of the supreme court, with duties assigned by the court.[211] In addition to discharging duties in district court administration, the court administrator chose probate registers, had some power over judge assignment, and served as clerk of the supreme court.[212]

The 1974 amendments to the constitution unified all of the courts under the supreme court. In addition to the unification section, there were two additions in court administration. Chapter II, section 30 gave the supreme court "administrative control of all the courts of the state." Section 37 directed the court to create rules "governing the administration of all courts," subject to the right of the legislature to revise court rules. Before looking at the 1974 amendment, it is helpful to look at the scope of inherent power of the supreme court over court administration. While the content of inherent power was largely unexplored in Vermont, it had been defined in decisions in states with similar constitutional provisions. One can only assume that these precedents would have applied in Vermont had the issues arisen, especially in view of the specific holding in the *Granai* case. These decisions serve as the backdrop against which the 1974 amendment was adopted.

B. *Inherent Power Over Court Administration*

Courts have asserted inherent power over court administration in four basic areas: (1) obtaining adequate resources; (2) choosing and regulating personnel; (3) determining cases; and (4) other (a catchall of dissimilar applications). The first area has been the most visible and often the most controversial.

---

208. *Id.* at 471, 194 A.2d at 393 (1963).

209. 1967 Vt. Acts No. 194, § 1 (District Court); 1967 Vt. Acts No. 174, § 2 (Court Administrator).

210. *See* VT. STAT. ANN. tit. 4, § 436 (1973); § 691 (Cum. Supp. 1983).

211. *See* VT. STAT. ANN. tit. 4, § 21 (1972).

212. *See* VT. STAT. ANN. tit. 4, §§ 8, 651 (1972); §§ 358, 357(a) (Cum. Supp. 1983).

(1) *Resources.* As a general rule, the judiciary has the inherent power to determine and compel payment of the money reasonable and necessary to carry out its mandated responsibilities and its power and duty to administer justice.[213] The case decisions show variations in the extent and applicability of power. In Colorado, for example, the supreme court has asserted the power in courts "to incur necessary and reasonable expenses in the performance of their judicial duties," thus casting upon the legislature or executive the burden of proving that an expenditure is unreasonable in order to defeat it.[214] Other states have more narrowly delimited court power, requiring both that an expenditure be necessary and clear proof of that necessity.[215] Most decisions lie somewhere in between.[216]

Even under the most liberal test, the inherent power of the judiciary to obtain resources is very limited, being used only for clear needs.[217] Many of the decisions, for example, find and discuss the necessary power over resources, but the courts refuse to exercise that power either because the need is not adequately shown or because of comity.[218]

---

213. *See generally,* Comment, *Judicial Financial Autonomy and Inherent Power,* 57 CORNELL L. REV. 975 (1972); Comment, *State Court Assertion of Power to Determine and Demand its Own Budget,* 120 U. PA. L. REV. 1187 (1972).

214. *See* Smith v. Miller, 153 Colo. 35, 384 P.2d 738 (1963). *See also In re* Court Reorganization Plan, 161 N.J. Super. 483, 381 A.2d 1255 (1978), *aff'd,* 78 N.J. 498, 396 A.2d 1144 (1979).

215. *See, e.g.,* Anderson County Quarterly Court v. Judges, 579 S.W.2d 875 (Tenn. App. 1978).

216. *See, e.g.,* Millholen v. Riley, 211 Cal. 29, ___, 293 P. 69, 71 (1930) (court can remove "obstructions to successful and convenient operation"); Chief Judge v. Board of County Comm'rs 401 So. 2d 1330 (Fla. 1981) (court must first cooperate and must hold hearing before issuing any order); Webster County Bd. of Supervisors v. Flattery, 268 N.W.2d 869, 873 (Iowa 1978) (court can remove impediments to the "immediate, necessary, efficient and basic functioning of the courts"); O'Coins, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, ___, 287 N.E.2d 608, 612 (1972) (court can protect "from impairment resulting from inadequate facilities or lack of supplies or supporting personnel" but must use power sparingly, in emergencies where other methods fail); Judges for Third Judicial Circuit v. County of Wayne, 383 Mich. 10, 172 N.W.2d 436 (1969), *after remand,* 386 Mich. 1, 190 N.W.2d 228 (1971); Clerk of Court's Compensation for Lyon County v. Lyon County Comm'rs 308 Minn. 172, 241 N.W.2d 781 (1976) (court can stop "unreasonable and intrusive" power grabs by the legislative branch in order to enforce needs, but not wants); State *ex rel.* Johnston v. Taulbee, 66 Ohio St. 2d 417, ___, 423 N.E.2d 80, 83 (1981) (court can "secure and safeguard the free and untrammeled exercise of judicial functions"); Commonwealth *ex rel.* Carroll v. Tate, 442 Pa. 45, 274 A.2d 193 (1971).

217. *See* Hazard, McNamara & Sentilles, *Court Finance and Unitary Budgeting,* 81 YALE L.J. 1286 (1972).

218. *See, e.g.,* State *ex rel.* Moran v. Department of Admin., 103 Wis. 2d 311, 307 N.W.2d 658 (1981).

The Vermont Supreme Court has not asserted this power to obtain appropriations from the legislature. It has, however, asserted it against the executive branch to obtain budgetary autonomy from the Governor. As discussed below, it has used an aspect of this power to impose fees on lawyers and bar applicants, in order to support the administration of the bar examination, and to support lawyer disciplinary processes.[219]

(2) *Personnel.* The inherent power of the judiciary extends to those things "reasonably necessary for administration of justice."[220] The decisions have uniformly held that this definition includes the power to appoint employees of the judicial branch and regulate the terms of employment, at least within some limits.[221] There are, however, some differences in dealing with legislative assertions of the right to regulate court personnel. Some courts have held that the legislature has a right to regulate the qualifications, rights, and conditions of employment of court personnel.[222] Others accept virtually no regulation by the legislature.[223]

In some respects, the decisions in this area are similar to those which concern the practice of law. General legislative regulation of subjects like mandatory retirement, labor/management relations, merit systems, pension rights, and the like are held valid in the absence of a specific judicial rule to the contrary.[224] Where created, however, a specific judicial rule may control. In Vermont, the judicial branch has accepted general regulation without question while the legislature has not directly interfered in the ability of the judicial branch to select its own employees.

---

219. *See infra* text accompanying notes 257-58.

220. *See* State *ex rel.* Weinstein v. Saint Louis County, 451 S.W.2d 99, 102 (Mo. 1970).

221. *See* Roylston v. Pima County, 106 Ariz. 249, 475 P.2d 233 (1970); Millholen v. Riley, 211 Cal. 29, 293 P. 69 (1930); Witter v. Cook County Comm'rs 256 Ill. 616, 100 N.E. 148 (1912); Tucker v. State, 218 Ind. 614, 35 N.E.2d 270 (1941); Burnside v. Bristol County Bd. of Retirement, 352 Mass. 481, 226 N.E.2d 234 (1967); State *ex rel.* Saint Louis County v. Edwards, 589 S.W.2d 283 (Mo. 1979); Mowrer v. Rustk, 95 N.M. 48, 618 P.2d 886 (1980); Beckert v. American Fed'n of State, County & Mun. Employees, 425 A.2d 859 (Pa. Commw. 1981); Massie v. Brown, 9 Wash. App. 601, 513 P.2d 1039 (1973).

222. *See, e.g.*, Burnside v. Bristol County Bd. of Retirement, 352 Mass. 481, 226 N.E.2d 234 (1967).

223. *See, e.g.*, Mowrer v. Rusk, 95 N.M. 48, 618 P.2d 886 (1980).

224. *See* Simmons v. State, 36 So. 2d 207 (Fla. 1948); State v. Johnson, 224 Ind. 540, 69 N.E.2d 592 (1946); Matthews v. State, 288 So. 2d 714 (Miss. 1974); State v. Merialdo, 70 Nev. 322, 268 P.2d 922 (1954); Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969); Schario v. State, 105 Ohio St. 535, 138 N.E. 63 (1922); Atchison, T. & S.F. Ry. Co. v. Long, 122 Okla. 86, 251 P. 486 (1926).

(3) *Determining cases.* The inherent power of the judiciary extends to the control of its docket, the order of its business, and the determination of how and why cases will be expedited.[225] Most of the reported decisions in this area involve attempts by legislatures to demand by statute that hearings or decisions be held or made within certain time limits or attempts at requiring docket preference for certain cases. Others, like *Granai v. Witters*, involve special continuances for parties represented by legislators.[226] With few exceptions, the courts have held such statutes to be an attempt by the legislature to exercise inherent judicial powers and thus to be invalid under the separation of powers provision of the state constitution.[227]

These cases are not necessarily the outer limit of the principle. As indicated earlier, many courts have found the inherent power of the judiciary to include the right to regulate the practice of law.[228] The holdings generally recognize, however, that the legislature can regulate in the area absent inconsistent judicial regulation.[229] If the court is to strike down a procedural statute, it must find that the procedural issue is so central to the court's responsibilities that the court cannot fulfill the responsibilities if it follows the statute.[230] For example, courts have struck down a statute that requires the judge to tell the jury the possible penalty for a crime;[231] a statute requiring additional notice to a party before a case can be dismissed for non-prosecution;[232] and a statute that gives the parties a peremptory challenge to the judge.[233] These cases, and others like them, should be taken as instances where the court believes it is absolutely blocked from administering justice in an impartial and efficient manner.[234]

---

225. *See* McConnell v. State, 302 S.W.2d 805 (Ark. 1957); Lemoine v. Martineau, 115 R.I. 233, 342 A.2d 616 (1975); Williams v. Bordon's, Inc., 274 S.C. 275, 262 S.E.2d 881 (1980). *But see* Government Serv. Ins. Underwriters v. Jones, 368 S.W.2d 560 (Tex. 1963).

226. Granai v. Witters, 123 Vt. 468, 194 A.2d 391 (1963).

227. *See supra* note 225.

228. *See supra* text accompanying notes 89-103.

229. *Id.*

230. *See, e.g.*, Commonwealth v. Sutley, 474 Pa. 256, 378 A.2d 780 (Pa. 1977); Knight v. City of Margate, 86 N.J. 374, 431 A.2d 833, 842 (1981); *In re* Pa. C.S. § 1703, 482 Pa. 522, 394 A.2d 444 (1978); Agran v. Checker Taxi Co., 412 Ill. 145, 105 N.E.2d 713 (1952).

231. Simmons v. State, 36 So. 2d 207 (Fla. 1948).

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

233. Johnson v. Goldman, 94 Nev. 6, 575 P.2d 929 (1978).

234. *See also* Commonwealth v. Furste, 288 Ky. 631, 157 S.W.2d 59 (1941); People v. Brumfield, 51 Ill. App. 3d 637, 366 N.E.2d 1130 (1977); Puckett v. Cook, 568 P.2d 721 (Okla. 1978).

The Vermont Supreme Court's decision in *Granai v. Witters* suggests that the court's inherent power gives it the ultimate responsibility over docketing, scheduling, and related areas.[235] Development in this area may logically have led to the assertion of broader judicial power over practice and procedure, shared with the legislature. This development has not occurred and is unlikely in view of the specific powers in the 1974 constitutional amendments.

(4) *Other.* The term "court administration" is imprecise and elastic: Many miscellaneous issues and cases can be fit within the term. For example, courts have found inherent judicial power over court records, resisting legislative attempts to expunge, change, or seal records.[236] The courts have asserted their inherent power to resist attempts at administrative control, supervision, or investigation by executive branch officials.[237] Other cases have dealt with diverse subjects where some policy is found to be essential to impartial justice. To cite just some examples, the courts have found judicial power to create an *in forma pauperis* authorization,[238] to adopt a Code of Judicial Ethics,[239] to tax jury costs against parties who settle on the eve of trial,[240] and to control the selection of replacement judges.[241]

C. *The 1974 Amendments*

There are two constitutional provisions on court administration. Chapter II, section 37, provides for rules and chapter II, section 30 gives the supreme court administrative control over all courts. For purposes of analysis, it is helpful to start with the former section.

Section 37 has been analyzed in detail earlier under practice and procedure. There is one other part of the legislative history, however, that is relevant to understanding its application to court administration. As the section was reported to the Constitutional

---

235. Granai v. Witters, 123 Vt. 468, 194 A.2d 391 (1963).

236. *See* Johnson v. Gehbauer, 159 Ind. 271, 64 N.E. 855 (1902); Johnson v. State, 336 So. 2d 93 (Fla. 1976).

237. *See Ex parte* Auditor of Pub. Accounts, 609 S.W.2d 682 (Ky. 1980) (audit); Opinion of the Justices, 365 Mass. 639, 309 N.E.2d 476 (1974) (centralized data processing).

238. *See, e.g.*, Iverson v. Marine Bancorporation, 83 Wash. 2d 163, 517 P.2d 197 (1973).

239. *See In re* Kading, 70 Wis. 2d 508, 235 N.W.2d 409 (1976).

240. *See* Jacobson v. Avestruz, 81 Wis. 2d 240, 260 N.W.2d 267 (1977).

241. *See* State v. Day, 200 Minn. 77, 273 N.W. 684 (1937).

Commission, the last sentence read: "Any rule of procedure adopted by the Supreme Court may be revised by vote of the General Assembly."[242] During the deliberation on the section, the counsel to the Senate Judiciary Committee reported that the Chief Justice wanted the section broadened to give the legislature "full authority over all rules."[243] Accordingly, the sentence was changed to say: "Any rule adopted by the Supreme Court may be revised by the General Assembly as provided by law." Subsequently, the last four words of the sentence were dropped.

The effect of the final language of section 37 is to put rules of court administration and rules of practice and procedure on the same footing. The comment to the Model State Constitution defines the intent of this section as: "to place the responsibility for judicial administration where it properly belongs."[244]

Since administrative and procedural rule-making powers are treated the same way by section 37, the conclusions reached earlier about the procedural rule-making power apply equally to the court's administrative rule-making power. This means:

> 1. The supreme court has a duty as well as the authority to promulgate rules of court administration.
> 2. The rules of court administration supersede any pre-existing statutes to the extent of the conflict. The rules may be revised by the legislature.
> 3. The legislature continues to have the power to enact statutes on court administration. However, court administration statutes that are inconsistent with existing rules should be valid only if they show an understanding of the existence of the rule and an intent to supersede it.
> 4. The procedures used by the supreme court in adopting court administration rules, and the effective date of such rules, are determined by the court.

There remains to consider only what the constitution means by "court administration." No definition of "court administration" appears in either the constitution or the Vermont experience. Probably the best source of a definition is the Model State Constitution which Vermont adopted in part.[245] The comment to section

---

242. Report to the General Assembly, *supra* note 137, at 36.
243. *See* Transcript, Senate Judiciary Committee—Feb. 14, 1971, at 32.
244. *See* MODEL STATE CONSTITUTION, *supra* note 31, at 91 (comment to § 6.07).
245. *Id.*

6.05 of that constitution indicates that the following activities are included within the term "court administration":

1. Personnel employment and management;
2. Maintenance of buildings and libraries;
3. Retention of files;
4. Use of systems of accounts for fines and fees;
5. Machinery to keep paper work "flowing in the proper channels;"
6. Planning;
7. Assignment of judges;
8. Supervision of staff;
9. Budgeting.[246]

These are component parts of court administration, but the list is not exclusive. Background papers that accompanied the Model State Constitution stated: "Judicial administration refers to the operation of the machinery of the courts and is primarily concerned with questions of organizational and administrative efficiency and effectiveness."[247] While these definitions are very broad, the overall context of the constitution suggests some exclusions. The first exclusion is for practice and procedure, which is dealt with separately. The second is the regulation of the practice of law as discussed earlier. The third exclusion is for certain basic, inherent judicial powers that should be reserved to the judiciary alone and are thus not subject to legislative review.

The third exclusion is necessary to provide a proper understanding of the last sentence of section 37. It provides that "any rule" may be revised by the legislature.[248] If the words are taken literally, they would mean that every written policy of the judicial branch, wherever the power to create that policy comes from, can be revised by the legislative branch. This literal interpretation would emasculate the separation of powers clause, since the legislature could review virtually any exercise of judicial power.[249]

---

246. *See id.* at 89-90. Vermont did not adopt this section but it should be taken as the source of a definition for section 6.07 which Vermont did adopt. The last power, budgeting, is actually in section 6.06.

247. Romani, The Courts in *Salient Issue of Constitutional Revision* 115, 116 (Nat'l Mun. League 1961).

248. VT. CONST. ch. II, § 37.

249. The effect is that the legislature can review any exercise of judicial power that is implemented by rule—that is, by written policy. In theory, this leaves the court free to operate case by case, without a written policy. In practice, there is little room for the exercise of such power. For example, in the *Granai* decision, the court struck down a legislative continuance statute. If section 37 applied to "any rule," the legislature could revise court

There is no indication in the history of the 1974 amendments that this substantial realignment of power between the legislative and judicial branches was either understood or intended. This is especially true since the "any rule" language was added on the request of the Chief Justice who was unlikely to want to undermine the separation of powers clause.[250] Thus, a better interpretation is that "any rule" means any rule promulgated under section 37—that is, any rule of court administration or of practice and procedure as those terms are used in section 37.[251]

If the above construction is correct, there must be an exclusion from "court administration" for the exercise of essential inherent power. This exclusion would have to be relatively narrow, covering only those instances where the principle of separation of powers is directly threatened by legislative action. The presumption should be that policies within "court administration" can be revised by the legislature even if they are central to judicial branch operations.

The effect of section 30 remains to be considered. While this section mentions administrative control, it provides no legislative review power. The Attorney General's Opinion relied on this section to protect inherent judicial power and the separation of powers from legislative control.[252] Thus, the opinion concluded that the effect of section 30 is that the legislature may use its power under section 37 to revise a court rule "only where such revision does not interfere with fundamental court policy or where such revision does not materially interfere with the performance of the Court's duty of administration."[253]

This construction of section 30 appears to be overbroad in the

---

rules on continuances to add the substance of the statute struck down in *Granai*. In this way, the substance would be made immune from separation of power objections.

The point is that in a bureaucratized judicial system, all direction must find its way into written policies that govern similar cases. Ad hoc decision-making is neither desirable nor feasible. Thus, all judicial power is in issue.

250. Senate Judiciary Committee, Minutes 32 (Feb. 11, 1971).

251. While other states have not faced the issue directly, this seems to be the import of the decisions. Both Alabama and Alaska have adopted the court administration language of section 37. In both states, the courts have used inherent power to make certain judicial action beyond the power of the legislature. *See* Board of Comm'rs v. State *ex rel.* Baxley, 324 So. 2d 256 (Ala. 1975) (practice of law); *In re* Stephenson, 511 P.2d 136 (Alaska 1973) (practice of law).

252. ATTORNEY GENERAL'S OPINION, *supra* note 63, at 27-30.

253. *Id.* at 28.

context of the overall amendment. The major impact of the constitutional amendment was to unify the courts under the Vermont Supreme Court.[254] Thus, the constitutional amendments had to say somewhere that the highest court, the "boss," is the Vermont Supreme Court. The Model State Constitution accomplished this by calling the supreme court "the highest court" and making the chief judge of that court "the administrative head of the unified judicial system."[255] The Vermont Constitutional Commission was unwilling to give this power to the Chief Justice alone so it needed alternative language. The language of section 30 fulfills that function.[256]

It is natural that the provision designating the administrative head does not discuss legislative power because it relates to actions taken pursuant to policy. While the legislature has a legitimate claim to participation in policy-making, it has no claim to participation in implementation decisions. For example, the legislature might legitimately desire to participate in policies and guidelines that describe the qualifications that court clerks must have. But it would have no legitimate claim for participation in the decision of whom to hire as court clerk.

This narrower interpretation of section 30 has the added advantage of being consistent with section 37. Therefore, the construction of section 30 adopted here does not affect the conclusions about the section 37 power adopted earlier.

---

254. *See* Constitutional Commission, Report to the General Assembly, *supra* note 132, at 28-30.

255. MODEL STATE CONSTITUTION, *supra* note 31, at §§ 6.02, 6.05.

256. There are parallels in other states. The constitutions commonly have a rule-making provision and something similar to the administrative control provision. For example, in South Dakota, a rule-making provision similar to that in Vermont coexists with a grant of "general superintending powers over all courts" with no limits. *See* S.D. CONST. art. V, § 12.

A state with a similar provision is New York where the constitution provides: "The authority and responsibility for the administrative supervision of the unified court system for the state shall be vested in the administrative board of the judicial conference." N.Y. CONST. art. 6, § 28. New York does not have a provision giving the courts rule-making power. Therefore, the courts have held that section 28 gives implementation power to the administrative conference while allowing the legislature to continue to control policy unless the legislative regulation "would so deeply cut at the basic fiber of administrative power" as to eliminate it. *Id. See* Corkum v. Bartlett, 46 N.Y.2d 424, 386 N.E.2d 1066 (1979); McCoy v. Public Employment Relations Bd. 28 N.Y.2d 790, 270 N.E.2d 722 (1971); Kleinman v. McCoy, 19 N.Y.2d 292, 226 N.E.2d 174 (1967); Blyn v. Bartlett, 39 N.Y.2d 349, 348 N.E.2d 555 (1976).

D. *Court Administration—Some Examples*

Given the complicated interrelationship of the sections that describe the court administration power, it may be helpful to examine briefly some of the issues that have arisen.

The legislature has questioned the power of the supreme court to restructure the Board of Bar Examiners and to impose a license fee by rule. Under the interpretations of sections 30 and 37 advanced above, both rules should be seen as an exercise of the court's power over court administration. Thus, both rules are valid even where a conflicting statute exists. Further, the legislature has the power to modify either rule under section 37.

The licensing fee rules are more complicated because the court, in effect, raised money and spent it without a specific appropriation. The supreme court took the position that this action did not run afoul of the constitutional requirement that money "drawn out of the Treasury" must first be appropriated because the funds were put in separate funds and not in the treasury.[257] This is a common exercise of judicial power, upheld whenever it has been contested.[258] There is no reason to suggest that imposing fees and

---

257. *See* VT. CONST. ch. II, § 27. In fact, VT. STAT. ANN. tit. 32, § 462 (1972) exempts money held in such trust funds from the appropriation requirement. Thus, the Sunset Review report took the position that the court's disciplinary funds were not inconsistent with the constitution directly but were inconsistent indirectly because the appropriations act made its provisions exclusive "*notwithstanding any other acts or laws.*" Sunset Review, *supra* note 63, at 22-23, quoting 1979 Vt. Acts No. 74, § 1. (emphasis added in Sunset Review). This reading of the constitution seems to be too literal under Button v. Anderson, 112 Vt. 531, 541-43, 28 A.2d 404, 409-10 (1942), and an inadequate reconciliation of VT. STAT. ANN. tit. 32, § 462 (1972) with the appropriations act. The money from the licensing fees either are not in the treasury or they are in the treasury but with an unavoidable duty upon the state to use them to regulate the practice of law. This duty probably makes them exempt from section 27 under *Button*.

Ironically, this issue had been present for many years prior to its having been raised in the Sunset Review. In 1927, the supreme court added to the admission rules a provision for an admissions fee. The 1927 rule provided: "[t]he petition shall also be accompanied by a fee of ten dollars for the use and benefit of the state, which the clerk shall pay over to the state treasurer." Rules of the Supreme Court, County Court and Court of Chancery, Admission of Attorneys, Rule 24(1) at 24 (1927). There is no indication that the proceeds of this fee were ever appropriated. The 1927 Appropriations Act shows no appropriations to the Board of Bar Examiners either in the administration of justice section or in the board section. *See* 1927 Vt. Acts 25, §§ 5, 10.

258. *See In re* Supreme Court License Fees, 483 S.W.2d 174 (Ark. 1972); *In re* Member of Bar, 257 A.2d 382 (Del. 1969); Petition of Florida State Bar Ass'n, 40 So. 2d 902 (Fla. 1949); Rowen v. LeMars Mutual Ins. Co., 230 N.W.2d 905 (Iowa 1975); *In re* Mundy, 202 La. 41, 11 So. 2d 398 (1942); Board of Overseers of the Bar v. Lee, 422 A.2d 998 (Me. 1980); *In re* Gibson, 35 N.M. 550, 4 P.2d 643 (1931); Calhoun v. Supreme Court of Ohio, 61 Ohio

spending the money from these funds is outside the court administration power.

Questions have also arisen about the court's power over judicial assignment. This is an essential part of court administration—probably the power most responsible for judicial reform. Thus, judicial assignment policies are controlled by section 37, and assignment itself is a part of administrative control under section 30. There is currently power-sharing in this area and there is apparently no conflict between rule and statute. However, the court is free to adopt rules inconsistent with the current statutes and the legislature is free to revise the rules.

VI. Conclusions

Vermont has the shortest and oldest constitution in the country. It has even been called "taciturn" to emphasize its consistency with the character of Vermont's citizens. It is not surprising, therefore, that the constitution does not specifically address many questions about the relationship of judicial and legislative branch power. While the omissions lead to some friction and uncertainty, they also create flexibility and encourage a common sense approach to cooperative solutions. On balance, the omissions are healthy.

Since the turn of the century a judicial reform movement has been growing. It has emphasized court unification and a greater role for the judiciary in policy-making about the affairs of the judicial branch. Vermont joined this reform movement late and without extensive experience in working out power distribution questions on which reform hinges. As a result, the constitutional reform that was adopted has not been fully understood or implemented.

The questions that have arisen can be answered in reasonable ways consistent with the progressive intent behind the constitutional amendments. Those answers put Vermont in the mainstream of American states in how judicial branch policy is developed and controlled. Those answers seem to work if the legislative and judicial branches cooperate and reach agreement on policy questions. The constitutional design breaks down, however, if ei-

---

App. 2d 1, 399 N.E.2d 559 (1978). Although some of these cases arise as a challenge to a supreme court rule, most arise as a request by an integrated bar association or a challenge to the rule of a bar association where the court has taken no position prior to the decision.

ther branch is more concerned about asserting its ultimate authority over an issue rather than about how to share power constructively. The constitution was not written to detail the results of turf battles. It would be inconsistent with Vermont's heritage to attempt to supply the details of power-sharing among branches in the constitution. It would produce unpredictable results, reduce flexibility, and lead to a further accretion of detail, immutably changing the face of the constitution.

This article has attempted to derive the most reasonable interpretation of the Vermont constitutional provisions based upon the language of the constitution and the experience in Vermont and other states. Many of its conclusions are tentative, reached with an understanding that a constitution is an organic document, one which must respond to changes in the needs of Vermont's institutions.