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JUDICATURE

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from THE NATIONAL CENTER FOR STATE COURTS

The back-and-forth history of rulemaking authority

THIS NOVEMBER, ARKANSAS VOTERS WILL DECIDE ISSUE 1, a constitutional amendment that would, among other things, allow the state's legislature to create rules of pleading, practice, and procedure for the state's courts and amend, annul, and repeal any rules adopted by the Arkansas Supreme Court.

For many states, including Arkansas, having an explicit provision that places rulemaking authority in the hands of the state's court of last resort is a relatively new phenomenon. Since the early days of our nation, states have experimented with different ways of handling rules of practice and procedure. At first, most states continued the British practice of allowing local courts to operate autonomously. Early efforts to shift rulemaking authority to the state's court of last resort proved challenging and often temporary.

Ohio offers an example of the changing trends over time. In 1803, just after Ohio won statehood, the legislature granted the state's supreme court power to create "general rules of practice for the courts of common pleas." But, likely because lower court judges were concerned about the intrusion on their autonomy, the statute was repealed a year later. In 1810, the legislature specified by law that the supreme court could create a suggested set of rules for the Courts of Common Pleas. By 1845, the legislature had granted the supreme court power over lower "state" courts and made those rules "binding and obligatory." But eight years later, the legislature created its own Code of Civil Procedure, and by 1885 the supreme court was again stripped of its rulemaking power over lower courts.

For the next 50 years, rulemaking authority lay with Ohio's legislature. Then, a 1935 statute gave the supreme court the right to approve or amend "state" court rules of practice and procedure. Finally, the 1968 Modern Courts Amendment created the three-step process used today: the Ohio Supreme Court prescribes rules governing practice and procedure in all courts, but the proposed rules are to be laid before the legislature, which has the power to amend them. Once the rules go into effect, all laws in conflict with rules are of no force or effect. Lower courts retain the right to create their own rules as long as they are "not inconsistent" with the Supreme Court's rules.

The Ohio example of on-again-off-again rulemaking authority occurred at the same

time state legislatures sought to simplify practice and procedure themselves. For example, the Field Code, the 1848 New York Code of Civil Procedure named for its lead author and proponent David Dudley Field, reformed and codified the common law practices of New York courts (many of which were retained from the time of the Revolution) and merged law and equity. But the reform turned sour as the legislature became arguably too involved. The Field Code adopted in 1848 consisted of approximately 390 sections; by 1909, it had 3,000-plus sections and was decried as an example of legislative revision "gone mad."

In the 1900s, groups such as the American Bar Association and the American Judicature Society began to believe that the authority to create rules of practice and procedure should rest within the judiciary itself, but they were divided on how the power should be administered. A 1909 ABA committee suggested the courts of last resort should "so far as possible" have the power, but only as that was consistent with home rule and local independence. Some critics argued that handing the power to the court of last resort would stymie reform because justices of the high court, who tended to be older, had "reached an age in life when all change seems abhorrent."

The American Judicature Society was largely responsible for the solution proposed in Bulletin VII-A (1917), which outlined a system of constitutional language for a "unified" court system. It used much of the language of Great Britain's Judicature Acts of 1873 and 1875, written in constitutional provisions that could avoid the tug of war states faced with legislatures. Rather than give the power to the court of last resort, however, AJS proposed giving rulemaking authority to a Judicial Council chaired by the chief justice of the state and made up of the top judges in the state, similar to a proposal of the 1873 Judicature Act but granting a Judicial Conference (made up of all judges in the state) the power to change Judicial Council rules by majority vote (copying the 1875 Judicature Act language). The legislature could adopt a "short practice act," but when a statute and court rule conflicted, the rule would trump the law.

THE AMERICAN JUDICATURE SOCIETY PROPOSED GIVING RULEMAKING AUTHORITY TO A JUDICIAL COUNCIL CHAIRED BY THE CHIEF JUSTICE OF THE STATE AND MADE UP OF THE TOP JUDGES IN THE STATE.

Since then, three broad trends have emerged. First, the federal Rules Enabling Act was enacted in 1934, granting the federal Judicial Conference power to create Rules of Civil Procedure (and, later, rules for criminal procedure, etc.). This did not completely resolve tension between the branches, however: Congress refused to allow the Federal Rules of Evidence to go into effect in the 1970s, instead enacting their own version. States looked to the language of the Enabling Act for adopting their constitutional provisions, while state high courts looked at adopting, either partially or wholesale, the federally developed civil procedure and similar rules.

Second, debate continued over whether a judicial council or the court of last resort would have power to promulgate rules. For example, Georgia's 1986 constitution provides its supreme court with the power to adopt uniform court rules. However, each "class" of court has a separate Judicial Council made up of the judges from that court, such as the Council of Superior Court Judges. The state's supreme court may only adopt a rule "with the advice and consent of the council of the affected class or classes of trial courts."

Third, legislatures have made change challenging. Most constitutional amendments to deprive the legislature of power over rules of practice or procedure had to come from the legislature itself, through constitutional conventions or by initiative in states where such efforts are permitted. For this reason, states that have achieved some level of explicit constitutional rulemaking authority in their state constitution have done so either through a constitutional convention or, if through the legislature, via an omnibus rewrite of their judiciary article. Examples of the latter include Alabama (Amendment 328, adopted by voters in 1973) and more recently Arkansas (Amendment 80, adopted by voters in 2000).

Today, the states can be divided into three broad types with respect to the explicit, exclusive placement of constitutional rulemaking authority within the judiciary (and more specifically the court of last resort).

Type I states, of which there are 13, have explicit and exclusive constitutional language granting the judiciary, a judicial council, or the supreme court rulemaking power. Michigan is an example here; its constitution provides: "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."

Type II states have explicit language in their constitution granting rulemaking authority to the courts but allowing the legislature to intervene. These 22 states generally fall into two subtypes:

JUDICIAL HONORS

J.H. CORPENING II, the chief district court judge for the 5th Judicial District of North Carolina, received the David W. Soukup Judge of the Year Award at the National Court Appointed Special Advocates Conference in March. The award honored Corpening's efforts to establish an innovative program that assists drug-addicted mothers with recovery and helps them keep and care for their babies during recovery.

The city of Ocala, Florida, renamed a portion of one of its streets to honor retired Judge **SANDRA E. CHAMP**, recognizing her trailblazing role as both the first elected female judge and the first African American judge in the Fifth Judicial Circuit of Florida. Champ served from 2000 until she retired in 2003.

JAMES B. PASLAY, the longest-serving magistrate judge of Spartanburg County, South Carolina, received the state's highest honor, the Order of the Palmetto, in May. He was appointed a judge of the civil and criminal court of Spartanburg in 1973. The court became the City of Spartanburg Magistrate Court in 1979, and Paslay has served there ever since. "I'd do this another 45 years if I could," he said.

PETER T. FAY received the 2018 American Inns of Court Professionalism Award for the United States Court of Appeals for the Eleventh Circuit. A senior judge on the circuit since 1994, Fay was recognized as a "legal legend" by the Eleventh Judicial Circuit Historical Society in 2008.

Judge **JENNIFER WALKER ELROD** of the U.S. Court of Appeals for the Fifth Circuit was named Appellate Judge of the Year by the Texas Association of Civil Trial and Appellate Specialists.

Type II-a gives the legislature the power to alter, add, or veto any rules. The Ohio Modern Courts Amendment discussed above is an example of this. Similarly, California's constitution provides that state's Judicial Council the authority to adopt rules for court administration, practice, and procedure, but requires that any such rule shall not be inconsistent with statute. The legislature's ability to alter rules may require a simple majority or supermajority to act.

Type II-b grants the judiciary explicit and exclusive authority for rulemaking but leaves certain areas or rules open to legislative activity. Colorado, for example, grants the supreme court broad powers but reserves for the legislature the power to adopt simplified procedures in county courts for misdemeanor trials. North Carolina's constitution divides the judiciary itself, giving explicit and exclusive authority for the appellate division (supreme court and court of appeals) to the supreme court. In 1967, the North Carolina General Assembly delegated supplemental rulemaking authority for the lower courts to the supreme court but retained the ability to alter, amend, or repeal rules — a power it has exercised several times since.

TYPE I STATES	TYPE II STATES	TYPE III STATES
Arizona	Alabama	Connecticut
Arkansas	Alaska	Idaho
Delaware	California	Indiana
Hawaii	Colorado	Iowa
Illinois	Florida	Kansas
Kentucky	Georgia	Maine
Michigan	Louisiana	Massachusetts
New Hampshire	Maryland	Minnesota
North Dakota	Missouri	Mississippi
Oklahoma	Montana	Nevada
Pennsylvania	Nebraska	New Mexico
West Virginia	New Jersey	Oregon
Wisconsin	New York	Rhode Island
	North Carolina	Tennessee
	Ohio	Washington
	South Carolina	
	South Dakota	
	Texas	
	Utah	
	Vermont	
	Virginia	
	Wyoming	

Type III states have no explicit language in their constitutions that mention practice or procedure. Many of these 15 states, however, do have language in their constitutions granting their supreme court "administrative authority" or stating that the courts are under the supervision or supervisory control of the supreme court.

How does this play out in Arkansas? Prior to Amendment 80, Arkansas was a Type III state, with no explicit constitutional language for rulemaking by the supreme court. After Amendment 80, the state became Type I: The state's supreme court "shall prescribe the rules of pleading, practice and procedure for all courts . . . ." If Issue 1 is adopted, Arkansas will become a Type II, with the legislature able to create rules or amend or repeal any existing rule adopted by the supreme court with a three-fifths' vote.

– **WILLIAM RAFTERY** blogs about state legislation affecting the courts at **gaveltogavel.us**.