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FOUR FACES OF STATE CONSTITUTIONAL SEPARATION OF POWERS: CHALLENGES TO SPEEDY TRIAL AND SPEEDY DISPOSITION PROVISIONS

*Neil C. McCabe**

INTRODUCTION

In recent years, separation of powers has become a major theoretical battleground embroiling the three branches of the federal government. The federal courts have decided questions about the constitutionality of such provisions as the Federal Speedy Trial Act ("FSTA"),[1] the federal sentencing guidelines,[2] the one-house congressional override of administrative agency action[3] (otherwise known as the legislative veto[4]), the Balanced Budget Act,[5] and the independent counsel (special prosecutor) provision.[6]

Less noticed has been a similar struggle at the state level, which predated the burst of activity in the federal courts. For example, before the United States Supreme Court considered the congressional veto, state courts[7] and state attorneys general[8] had addressed the question of the constitutionality of the state

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* Associate Professor, South Texas College of Law. B.A. University of Texas at Austin, 1972; J.D. South Texas College of Law, 1982.

1. *See* United States v. Brainer, 691 F.2d 691, 695 (4th Cir. 1982) (Speedy Trial Act constitutional); 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986).

2. *See* Mistretta v. United States, 57 U.S.L.W. 4102, 4107-16 (U.S. Jan. 18, 1989) (federal sentencing guidelines constitutional); UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL (June 15, 1988).

3. *See* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) (one-house Congressional override contained within Immigration and Nationality Act held unconstitutional). *But see* Leiserson, *Separation of Powers: A New Approach*, 22 GONZ. L. REV. 423, 477 (1987-88) *Chadha* "says that separation of powers has been violated but makes the decision turn on the constitutional procedures for valid legislative action by Congress, which is not a separation of powers issue at all."

4. Schwartz, *The Legislative Veto and the Constitution—A Reexamination*, 46 GEO. WASH. L. REV. 351, 351 n.3 (1978) (identifying first use of term).

5. *See* Bowsher v. Synar, 478 U.S. 714, 736 (1988) (Court held powers vested in Comptroller General under Balanced Budget Act violated command of Constitution). *See also* 2 U.S.C. §§ 901-907, 921-922 (Supp. IV 1986) (Balanced Budget Act).

6. *See* Morrison v. Olson, 108 S. Ct. 2597, 2622 (1988) (authority of independent counsel held constitutional). *See also* 28 U.S.C. §§ 591-598 (1982 and Supp. IV 1986) (independent counsel provision).

7. *See* State v. A.L.I.V.E. Voluntary, 606 P.2d 769, 777-79 (Alaska 1980) (statute providing for legislative veto held to violate state constitution); Opinion of the Justices, 121 N.H. 552, 558-59, 431 A.2d 783, 787 (1981) (legislative veto of rule-making authority of administrative agencies not *per se* unconstitutional); General Assembly v. Byrne, 90 N.J. 376, 388, 448 A.2d 438, 444 (N.J. 1982) (legislative veto unconstitutional); State *ex rel.* Barker v. Manchin, 279 S.E.2d 622, 634-35 (W. Va. 1981) (court held legislative veto violated separation of powers).

8. Schwartz, *supra* note 4, at 367 (two state attorneys general found legislative vetoes unconsti-

legislative veto.[9]

This article will focus on four aspects of a perceived conflict between state constitutional separation of powers principles and statutes or court rules providing for the speedy trial or speedy disposition of cases. The general development of state separation theory will be discussed,[10] and decisions regarding the constitutionality of the FSTA will be examined to provide a basis for the analysis of state court opinions, some of which expressly rely on the FSTA cases.[11]

The remainder of the article will investigate cases involving state speedy trial and speedy disposition acts or rules. Part A of that section will examine whether statutes mandating speedy decision making by the courts impermissibly encroach on the judicial power.[12] Part B will analyze the argument that a court's creation of a speedy trial rule unconstitutionally invades the legislative or executive realms.[13] Part C will examine the claim that a speedy trial statute is an invalid legislative infringement on the power of the courts.[14] Finally, Part D will assess the contention that a speedy trial provision is an unconstitutional intrusion on the prosecutor's power.[15]

I. THE BACKGROUND: HISTORY OF STATE SEPARATION OF POWERS

The state court cases in this area demonstrate an apparent conflict between notions of inherent and exclusive powers of the courts and prosecutors, on the one hand, and the theory of the plenary power of legislatures, on the other. "The view is frequently expressed that state legislatures have inherently all power not denied to them by state and national constitutions."[16] That theory stems from the early history of state constitution making. Before the United

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tutional) (citing 42 Op. Att'y Gen. 350 (Wis. 1954); Letter from Michigan Att'y Gen. Frank G. Millard to Hon. Adrian de Boom (Dec. 17, 1953)).

9. *See* Levinson, *The Decline of the Legislative Veto: Federal/State Comparisons and Interactions*, 17 Publius 115, 124-27 (1987) (discussing cases).

10. *See infra* notes 16-74 and accompanying text for a discussion of the general development of state separation theory.

11. *See infra* notes 75-169 and accompanying text for a discussion of cases examining the constitutionality of FSTA.

12. *See infra* notes 170-216 and accompanying text for a discussion of state speedy disposition statutes.

13. *See infra* notes 217-39 and accompanying text for a discussion of court rules mandating speedy trials.

14. *See infra* notes 240-54 and accompanying text for a discussion of whether speedy trial acts impermissibly infringe on the power of the courts.

15. *See infra* notes 255-99 and accompanying text for a discussion of the effects speedy trial statutes have on the prosecutor's power.

16. Dodd, *The Function of a State Constitution*, 30 POL. SCI. Q. 201, 201 (1915). *See also* G. TARR & M. PORTER, STATE SUPREME COURTS IN STATE AND NATION 50 (1988) ("According to traditional legal theory, the state government inherently possesses all governmental power not ceded to the national government, and thus a state constitution does not grant governmental power but merely structures and limits it"); Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 178 (1983) ("State constitutions are usually contrasted with their federal counterpart by characterizing the former as limits on governmental power rather than grants of power. When the Union was formed, the states retained almost plenary governmental power exercised primarily by their legislatures.")

States Constitution was written, the original states, given their experience with King George III and the "bitter rivalry between governors and assemblies"[17] in most but not all colonies,[18] "reduced the governor to a cipher and vested most power in the legislature."[19]

All of the early state constitutions regarded separation of powers as "an article of faith"[20] and incorporated the theory in some form.[21] Scholars have asserted, however, that those documents treated the separation principle as a "shibboleth"[22] or a "slogan; it meant that power was to be separated from the executive and given to legislatures."[23] According to that view, the framers of the early state constitutions embraced a paradox:[24] they professed the principle of separation of powers but did not practice it.[25]

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17. A. KELLY & W. HARBISON, THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT 91 (5th ed. 1976).

18. Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 7 (1975). The article states: "Connecticut was one of two colonies in which the legislature, representing the interests of the colonists, was not in continued confrontation with a governor representing the colonial proprietors or the English crown." *Id.* (footnote omitted).

19. J.W. COWARD, KENTUCKY IN THE NEW REPUBLIC: THE PROCESS OF CONSTITUTION MAKING 2 (1979). Most of the state constitutions prior to 1787 took the anti-Federalist position. *See* Erler, *The Constitution and the Separation of Powers*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 158 (1987) (states' failures to meaningfully separate powers concerned framers).

20. Howard, *"For the Common Benefit": Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816, 826 (1968) (by time of American Revolution, separation of powers became article of faith with Americans).

21. W.P. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 266 (1973) (separation of powers common to early state constitutions). *Cf.* Taylor, *Legislative Vetoes and the Massachusetts Separation of Powers Doctrine*, 13 SUFFOLK U.L. REV. 1, 5-6 (1979) (proposed Massachusetts constitution of 1778 rejected in part because it did not provide for separation of powers).

22. Blumoff, *Separation of Powers and the Origins of the Appointment Clause*, 37 SYRACUSE L. REV. 1037, 1045 (1987) (by 1776, separation of powers was shibboleth). *See also* Leiserson, *supra* note 3, at 423 ("separation of powers is to the Constitution what the Trinity is to Christianity"). *Cf.* Wright, *The Modern Separation of Powers: Would James Madison Have Untied Ulysses?* 18 COLUM. L. REV. 69, 72 (1987-88) (separation of powers not "totem").

23. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 374 (1976) (early separation of powers provisions used as means of controlling executive).

24. A similar paradox has been noted in recent proposals to change the federal constitution:

> If one makes a list of the most frequently proposed alterations in our constitutional arrangements, the odds are high that these proposals will call for a reduction in the separation of powers. . . . It is as if almost everybody were expressing devotion to the Constitution in general but not to the central principle on which it rests.

Wilson, *Does the Separation of Powers Still Work?* 86 PUB. INTEREST 36, 37 (1987).

25. *See* F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860, 83-84 (1971):

> [T]he principle of separation of powers was violated in practice by legislative exercise of judic[i]al and executive functions; by the election of the executive councils by and from the legislatures; by the appointment of judicial and executive officers by the legislature; by the presidency and vote of the vice-executive in the upper house; and by the exercise of judicial functions by the governor and his council.

See also Blumoff, *supra* note 22, at 1051-52 ("Separation dogma loomed larger in the rhetoric of those early state constitutions than in the reality of state politics. . . . [F]unctional separation of powers as we have come to know it was more apparent than real"); Howard, *supra* note 20, at 827

> Many states wrote explicit separation guarantees into their constitutions, but the meaning of the concept of separation was so subject to differing interpretations that those provisions were widely misunderstood. Some states (e.g., Massachusetts) had strong separation language competing with equally clear commandments in the constitution authorizing invasions of one branch's power by another branch. Other states had separation provisions in their constitutions which were ignored in practice.[26]

Even though six of the original states included express separation of powers provisions in their early state constitutions,[27] the state constitutions did not control the legislative power. "In all but two states the constitution was written by the legislature and could be altered or abolished by that body if it so chose."[28]

One commentator thus observed that "Americans in 1776 gave only a verbal recognition to the concept of separation of powers in their Revolutionary constitutions, since they were apparently not concerned with a real division of departmental functions."[29] That view, however, may have stemmed from an unfavorable comparison of the early state constitutions with the later federal charter and from confusion between the principle of separation of powers and the notion of coequal branches of government. It is true that "functional separation of powers as we have come to know it . . . was more apparent than real," and that "neophyte constitution-makers combined separation tenets with legislative supremacy."[30] The difference in allocation of power, however, merely reflected a divergence in the nature of state and federal governments and variation in views on the nature of legislative power vis-à-vis the other branches. The early state constitutions expressed a belief in an "extreme version of separation of powers"[31] but not in the later myth of three coequal branches, which devel-

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(proposals for Virginia Constitution of 1776 embodied doctrine of separation of powers, but all, including Jefferson's, "created a weak governor, elected by the Legislature and hardly coordinate with it in power or dignity"); A. KELLY & W. HARBISON, *supra* note 17, at 92 (contrast between legislative ascendancy and separation of powers provisions).

26. D. BRAVEMAN & W. BANKS, CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEM 36 (1987). The quotation from Braveman contains more than one erroneous notion. If the constitution gives a "clear commandment" to one branch, the exercise of authority thus conferred cannot be considered an "invasion" of the power of another branch. Furthermore, the fact that a constitutional provision is "ignored in practice" gives no clue to its intended meaning, as shown by the way in which men who voted for adoption of the first amendment to the United States Constitution also supported the obviously unconstitutional Sedition Act of 1798, 1 Stat. 596 (1798) (act expired by its terms in 1801). *See* New York Times Co. v. Sullivan, 376 U.S. 254, 276 (1964) (although Sedition Act never tested by Court, attack on its validity has carried day in "court of history"). *See generally* L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960) (struggle over Sedition Act).

27. Cox, *State Judicial Power: A Separation of Powers Perspective*, 34 OKLA. L. REV. 207, 211 (1981).

28. Belz, *Constitutionalism and the American Founding*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 333 (1987).

29. G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 153-54 (1969) (footnote omitted).

30. Blumoff, *supra* note 32, at 1052.

31. Belz, *supra* note 28, at 338.

oped around the federal constitutional scheme.

The fact that, under a state constitution, the legislature might exercise a power that under a later federal or state constitution would be regarded as judicial or executive in nature, does not mean that the earliest state documents paid only lip service to the notion of separation of powers. If a constitution gives a power to the legislature, then by definition the power is legislative in nature.[32] Furthermore, coequality of branches (which, despite the catechism of high school civics books, neither the state governments nor the federal government has ever truly exemplified) is not essential to a system of separated powers. The legislature may be more powerful than, yet "separate and distinct"[33] from, the other branches. Because most students of the federal constitution are accustomed to speaking of separation of powers and coequal branches in the same breath, the combination of separation provisions and the "ascendancy of legislature over executive,"[34] found in the early state constitutional systems, looks like a paradox, to be sure. The paradox, however, is an apparent contradiction, not a real one.[35]

The views of the state framers were to change as they gained greater experience with the excesses and vices of state legislatures,[36] experience many of these same framers brought to the drafting of the federal Constitution,[37] employing a

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32. *Accord* Burns & Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575, 582 (1987) (president's veto is exercise of executive power, not sharing of legislative power).

33. *See, e.g.*, ARIZ. CONST. art. III ("three separate departments . . . shall be separate and distinct"); ARK. CONST. art. IV, § 2 ("No person or coalition of persons, being one of the departments, shall exercise any power belonging to either of the others, . . ."); CONN. CONST. art. II (three distinct departments); GA. CONST. art. I, § II, para. III ("The legislative, judicial, and executive powers shall forever remain separate and distinct . . ."); KY. CONST. § 27 (three distinct departments); MD. CONST. art. VIII ("The Legislative, Executive and Judicial powers of Government right to be forever separate and distinct from each other . . ."); MISS. CONST. art. I, § 1 (three distinct departments); MO. CONST. art. I, § 1 (same); N.C. CONST. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other . . ."); OKLA. CONST. art. IV, § 1 ("The Legislative, Executive, and Judicial departments of government shall be separate and distinct . . ."); TEX. CONST. art. II, § 1 (three distinct departments); VT. CONST. ch. II, § 5 ("The Legislative, Executive, and Judiciary departments shall be separate and distinct . . ."); VT. CONST. art. III, § 1 ("The legislative, executive, and judicial departments shall be separate and distinct, . . ."); W. VA. CONST. art. V, § 1 (same).

34. A. KELLY & W. HARBISON, *supra* note 17, at 92.

35. *See* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1406 (2d ed. 1987), which defines the word paradox as "a statement or proposition that seems self-contradictory or absurd but in reality expresses a possible truth."

36. For examples of these excesses and vices, *see* Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS 33, 37-39 (1988).

37. *See* Williams, *"Experience Must Be Our Only Guide:" The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 405-06 (1988) (giving names); Webster, *Comparative Study of the State Constitutions of the American Revolution*, 9 ANNALS 380, 417 (1897). The author writes: "From one-third to one-half of the members of the federal convention had been members of the conventions which framed the several state constitutions, and a very large number of the members of the various ratifying conventions had also had a part in the formation of the respective state constitutions." *Id. See also* C.E. STEVENS, SOURCES OF THE CONSTITUTION OF THE UNITED STATES CONSIDERED IN RELATION TO COLONIAL AND ENGLISH HISTORY 249 (1927). Stevens states that the "constitutional movement which transformed individ-

different arrangement of powers adapted from the practice of various states.[38] Their outlook on separation of powers, however, never came to mirror the one reflected in the federal document, nor should it have. The theory of separation of powers as it appeared in many state constitutions before 1787 was entirely different from the British system,[39] and the federal Framers did not copy either the British model or any one state's arrangement.[40] While the federal Framers did reject a proposed amendment that would have included an express separation of powers provision in the Bill of Rights, it is doubtful that they did so because they all agreed which powers belonged to which branch.[41] "Separation meant different things to different theorists at different times, and it is clear that a few very divergent theories concerning separation were influential to our [federal] Framers."[42]

In the decade after the American colonies achieved independence, the largest question being debated by the framers of state constitutions was the proper scope of authority to be accorded the legislative and executive branches and the relationship of those branches to each other.[43] In the nineteenth century, the people developed a "deep distrust" of their legislatures,[44] which began to be seen as a threat to personal liberties. State constitutions thus were rewritten to limit the power of all branches of state government or to "institutionalize" separation of powers for the first time.[45] Still later constitutions addressed problems that were developing in other regions of the nation,[46] by seeking such goals as "a

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ual colonies into States" related to the national constitution in two ways: "[I]t prepared the members of the Philadelphia Convention for their task, and at the same time supplied them with much digested material for the work of construction." *Id.*

38. Webster, *supra* note 37, at 416. The federal constitution was "very largely the product of a wise selection of the best and most generally observed usages of the various states." *Id. But cf.* Williamson, *supra* note 37, at 424-26 (negative influences of state constitutions on federal framers).

39. Rossum, *The Courts and the Judicial Power*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION, 226-29 (1987) (differences between British and American separation of powers theories).

40. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 594-97 (1986) ("separation of powers as adopted by Constitution had no true precedents in either fact or theory).

41. Dry, *The Case Against Ratification: Anti-Federalist Constitutional Thought*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 288-89 (1987) (contents of bill of rights reflects struggle between federalists and anti-federalists); Rutland, *Framing and Ratifying the First Ten Amendments*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 310, 315 (1987) (current bill of rights determined through debate and compromise). *But cf.* Leiserson, *supra* note 3, at 449 n.100 (debates at federal convention not informative about role of judiciary because delegates took for granted meaning of judicial power).

42. D. BRAVEMAN & W. BANKS, *supra* note 26, at 33.

43. Williams, *Evolving State Legislative and Executive Power In the Founding Decade*, 496 ANNALS 43, 44 (1988).

44. A. KELLY & W. HARBISON, *supra* note 17, at 90.

45. Kay, *supra* note 18, at 6 (growing sentiment for institutionalizing separation of powers one of various forces that led to convening of Connecticut state constitutional convention in August 1818).

46. *See, e.g.*, J. MAUER, SOUTHERN STATE CONSTITUTIONS IN THE 1870'S: A CASE STUDY OF TEXAS (1983) (shift to restrictive constitution making can be traced to 1840s but spread rapidly after adoption of Illinois Constitution of 1870).

reduction, as much as possible, of all outside control of the state by 'big business' and its pawns; an expansion of individual rights; and a restriction of the power of state government."[47] Each new state had its own historical reasons for limiting the authority of the legislature, sometimes severely.[48] Within a century of the adoption of the federal Constitution, the states held two hundred constitutional conventions,[49] with a common result being the "hamstringing"[50] of the state legislatures. By 1900, state governments had changed radically from the days of "legislative omnipotence."[51] In light of such historical developments, state courts have rejected invocations of legislative plenary power as bases for the resolution of challenges to speedy disposition and speedy trial provisions.[52]

Whether or to what extent state judiciaries have inherent powers is a more difficult question to address historically than is the legislative plenary power issue. Although "English unwillingness to liberate colonial judges from royal and proprietary prerogative . . . gave impetus to the coming implantation of separation theory in the soon to be drafted state constitutions,"[53] the judicial branch did not figure prominently in the debate over separation of powers in early state constitutions.[54] In those documents, the courts were placed directly under the legislature; in colonial times, they had been under the executive.[55] The Framers of the federal Constitution, learning from the mistakes of the earlier state documents, removed the courts from the legislative branch's control, and later state

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47. Boughey, *An Introduction to North Dakota Constitutional Law: Content and Methods of Interpretation*, 63 N.D.L. REV. 157, 242 (1987). *See also* Friedman, *supra* note 36, at 38 (popular perception of big-business corruption of legislatures).

48. *See, e.g.*, Snyder & Ireland, *The Separation of Governmental Powers Under the Constitution of Kentucky: A Legal and Historical Analysis of L.R.C. v. Brown*, 73 KY. L.J. 165, 206 n.209 (1984-85) (historical reasons why powers of legislature were severely limited by present state constitution, adopting separation of powers provision written by Thomas Jefferson).

49. Eaton, *Recent State Constitutions*, 6 HARV. L. REV. 53, 53 (1892). *See also* May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 153, 155 (1987) (more than 230 constitutional conventions held since 1776).

50. J. FORDHAM, THE STATE LEGISLATIVE INSTITUTION 26 (1959) (reality of state constitutional order is that legislatures are hamstrung by numerous limitations on power). *See also* Williams, *supra* note 16, at 201 (transition from early state constitutions granting unfettered legislative power to more recent constitutions restricting legislative power reflects one of most important themes in state constitutional law).

51. C. THATCH, THE CREATION OF THE PRESIDENCY, 1775-1789, at 34, 41 (1923).

52. *See, e.g.*, Meshell v. State, 739 S.W.2d 246, 274 (Tex. Crim. App. 1987) (Miller, J., dissenting) (legislature's power to enact laws is plenary); *id.* at 260 n.5 (Clinton, J., dissenting) (legislature's power to enact such laws as it finds necessary to effectuate constitutional provisions so elementary that constitutional provision giving legislature such power was repealed as being obsolete, superfluous, and unnecessary) (citing TEX. CONST. art. III, § 42 (1876, repealed 1969)); *In re* Grady, 118 Wis. 2d 762, 788-94, 348 N.W.2d 559, 572-73 (1984) (Abrahamson, J., concurring) (complaining that majority ignored plenary power of legislature).

53. Blumoff, *supra* note 32, at 1048-49.

54. *Id.* n.181 (citing J. GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 97 (1971)). *See* Williams, *supra* note 37, at 420 (judiciary almost forgotten during early revolutionary period).

55. Lutz, *The First American Constitutions*, in THE FRAMING AND RATIFICATION OF THE CONSTITUTION 75 (1987).

constitutional framers did the same.[56] Just as had occurred federally with *Marbury v. Madison*,[57] however, conflicts erupted in some states over the proper role of the judiciary,[58] and especially over its rule-making power.[59] Those conflicts continue today in the cases involving attacks on speedy trial and speedy disposition provisions.

The impossibility of precisely defining the boundaries separating the three branches of government was recognized even before the federal Constitution was written. Discussing the interpretation of the early state constitutions, Madison observed that

> [e]xperience has instructed us, that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.[60]

Since Madison's time, courts and commentators have provided some guidance about what is inherently a judicial power.[61] Nonetheless, the student of state separation of powers today can discern little basis, apart from the text and structure of an individual state's constitution,[62] for regarding a particular judicial (or prosecutorial) power as exclusive.[63] As in the federal Constitution, the theory of separation of powers in state constitutions "is not one that is capable of precise legal definition and it does not yield clear solutions to intragovernmental disputes."[64]

The rule-making issue and other conflicts between the branches of state government have led some courts to hold that explicit provisions for separation of powers, which are found in a majority of state constitutions,[65] "envision a

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56. *Id.* at 80-81.

57. 5 U.S. (1 Cranch) 137 (1803).

58. *See, e.g.*, Note, *Oklahoma's Legislative Veto: Combat Casualty in Separation of Powers War?* 12 OKLA. CITY U.L. REV. 129, 129 (1987) (early definitive decisions in state focused on power of judiciary).

59. *See, e.g.*, Browde & Occhialino, *Separation of Powers and the Judicial Rule-Making Power in New Mexico: The Need for Prudential Constraints*, 15 N.M.L. REV. 407 (1985) (thorough review of conflict between legislature and judiciary over rule-making power).

60. THE FEDERALIST NO. 37, at 286 (J. Madison) (J. Hamilton ed. 1904).

61. Cox, *supra* note 27, at 221-29 (history of attempts to define inherent judicial power).

62. *See, e.g.*, State v. Moore, 57 TEX. 307 (1882): "It must be presumed that the constitution, in selecting the depositaries of a given power, unless it is otherwise expressed, intended that the depositary should exercise an exclusive power." *Id.* at 314.

63. *Cf.* Kurland, *supra* note 40, at 602 (early members of federal government decided questions of power allocation among three branches not by asking whether power was legislative, executive, or judicial but by asking where it was allocated in the basic document); Meshell v. State, 739 S.W.2d 246, 270 (Miller, J., dissenting) (cases relied on by majority do not address issues by reference to separation of powers, but rather resolve disputes by referring to some specific power enumerated in Constitution). *See generally* Browde & Occhialino, *supra* note 59 (history and criticism of judicial exclusivity doctrine).

64. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 136 (2d ed. 1983).

65. Cox, *supra* note 27, at 212.

more rigid compartmentalization of the three departments of government than does the [merely implicit[66] principle in the] federal constitution."[67] That finding seems to comport with the wording of state constitutions mandating that the departments of government shall remain "forever separate and distinct."[68] It is also in harmony with the history of state separation of powers theory.

The principle of separation of powers has "evolved along parallel but distinctly different paths on the state and federal levels."[69] The main differences, which make reliance on supposedly analogous federal cases problematic,[70] are that (1) the states have express, and often strongly worded, separation of powers provisions,[71] while the federal principle is implicit;[72] (2) the distribution of power at the state level differs from that at the federal;[73] and (3) the state bias against legislatures is much greater than at the national level.[74] The "parallel but different" character of state/federal separation of powers theory is exemplified by the federal and state court opinions dealing with speedy trial and speedy disposition provisions. The federal cases will be discussed first, because they contained the earliest thorough exploration of the constitutional problems posed by speedy trial acts. The federal decisions provided the backdrop against which much of the state litigation was played out.

II. THE FEDERAL SPEEDY TRIAL ACT

The idea that the FSTA[75] might amount to an unconstitutional infringement by Congress on the federal judicial power found expression in 1976 in an

66. *But see* Burns & Markman, *supra* note 32, at 579 (in federal Constitution powers expressly separated in wording conferring legislative, executive, and judicial powers in separate articles).

67. Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 411 (1984) (citing State v. Hunter, 447 A.2d 797, 799 (Me. 1982) (separation of governmental powers mandated by Maine Constitution much more rigorous than same principle as applied to federal government). *See also* Malone Meekins, 650 P.2d 351, 357 (Alaska 1982) (declining to assume responsibility for ruling on validity of election of legislative officers); State *ex rel.* Barker v. Manchin, 279 S.E.2d 622, 630 (W. Va. 1981)) (separation of powers must be strictly construed); Powers, *Separation of Powers: The Unconstitutionality of the Arkansas Legislative Council*, 36 ARK. L. REV. 124, 131 (1982) (explicit Arkansas provision has been held to require stronger separation between departments than implicit separation of powers doctrine would) (citing Oates v. Rogers, 201 Ark. 335, 345-47, 144 S.W.2d 457, 462-63 (1940)).

68. *See, e.g.*, Orth, *"Forever Separate and Distinct": Separation of Powers in North Carolina*, 62 N.C. L. REV. 1 (1983) (examination of decisional law of North Carolina and other states).

69. Comment, *Treatment of the Separation of Powers Doctrine in Kansas*, 29 U. KAN. L. REV. 243, 243 (1981).

70. Fisher & Devins, *How Successfully Can the States' Item Veto Be Transferred to the President?* 75 GEO. L.J. 159, 162 (1986) ("state analogy" suffers from serious deficiencies).

71. *See, e.g., supra* note 33 for state constitutional provisions requiring the branches of government to be not only "separate" but also "distinct."

72. *Cf.* Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 715 (1984) (lack of explicit textual reference to separation rule in federal Constitution itself, coupled with other factors, has produced considerable confusion concerning meaning and relevance of separation principle).

73. Fisher & Devins, *supra* note 70, at 162.

74. *Id.*

75. 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986).

opinion by Tom C. Clark, former United States Supreme Court Justice, sitting on the United States Court of Appeals for the Second Circuit after his retirement from the high court. In that case, *United States v. Martinez*,[76] the trial court had denied a motion, made pursuant to the FSTA,[77] for the release of the defendants from incarceration during trial. The appellate court found at least two grounds for affirmance: "The first is a constitutional one which we will not elaborate further than to note that there is a question under the doctrine of separation of powers that the Congress can exercise judicial authority to the extent indulged here."[78] The court further remarked in a footnote that, even if one assumes Congress has the power to enact rules of procedure, "[s]ome of the language of the [FSTA] is so sweeping that it might well be construed as more than procedural."[79] Deciding the case on the second, statutory, ground, however, the court reserved the constitutional issue for another day.[80]

The question of the FSTA's constitutional validity surfaced a year later in a federal district court in the Fourth Circuit, in *United States v. Howard*.[81] The court declared the FSTA to be "an unconstitutional legislative encroachment on the judiciary."[82] As in *Martinez*, the defendants in *Howard* unsuccessfully invoked the FSTA in seeking release from custody during trial.[83] The trial court found statutory reasons for denying the motion but nevertheless held the FSTA to be unconstitutional.[84] Judge Young grounded his decision on several bases: (1) Justice Clark's dictum in *Martinez*,[85] (2) the *Federalist* papers,[86] (3) interpretations of the inherent powers of state courts by such courts[87] and commentators,[88] (4) the legislative history of the FSTA,[89] (5) Judge Young's own

76. 538 F.2d 921 (2d Cir. 1976), *cert. denied*, 434 U.S. 847 (1977).

77. *Id.* at 922. The defendants claimed that they were entitled to release under 18 U.S.C. § 3164 because the trial court had not started the trial before the expiration of ninety days after the beginning of their detention. *Id.*

78. *Id.* at 923 (footnote omitted).

79. *Id.* at 923 n.4.

80. *Id.* at 923. The Second Circuit held that "both Section 3164 [of the FSTA] and Rule 4 of the Southern District of New York Plan for Achieving Prompt Disposition of Criminal Cases (Interim) clearly require the exclusion of the time consumed in pre-trial matters." *Id.* at 923. The delay, attributed to the fault of the accused or his counsel, was not to be counted in the calculation of the FSTA time limits. Therefore, the FSTA was not violated, and there was no need to reach the separation of powers issue. *Id.* at 924.

81. 440 F. Supp. 1106 (D. Md. 1977), *aff'd on other grounds*, 590 F.2d 564 (4th Cir. 1979).

82. 440 F. Supp. at 1109.

83. *Id.* at 1107. The defendants relied on 18 U.S.C. § 3164. *Id.* The defendants in *Howard* also relied on the local court rules for the District of Maryland, which specified a time period but mandated release of a defendant only when the FSTA was violated. *Id.* at 1114. They then moved for dismissal of the indictment, which was denied. *Id.* at 1114.

84. *Id.* at 1108-09.

85. *Id.* at 1111 (citing *Martinez*, 538 F.2d at 923 (questioning extent to which Congress exercised judicial authority in passing FSTA)).

86. *Id.* at 1109 (citing THE FEDERALIST NOS. 47-51 (J. Madison & A. Hamilton)).

87. *Id.* at 1111. The court cited decisions from the courts of Oklahoma, Nevada, Arkansas, Indiana, New York, Ohio, and Pennsylvania. *Id.*

88. *Id.* at 1110 (quoting Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 30 (1958) (certain spheres of activity so

interpretation of *Barker v. Wingo*,[90] and (6) his experience with the "disruption" of criminal and civil dockets caused by the FSTA.[91] The court of appeals affirmed the trial court's holding without reaching the constitutional issue.[92]

Four years after *Howard*, Judge Young again held the FSTA unconstitutional, in *United States v. Brainer*.[93] In *Brainer*, the defendant moved for dismissal of the indictment on the ground that he had not been brought to trial within the time prescribed by the FSTA.[94] The sanction Brainer sought—dismissal of the indictment—was mandatory when the FSTA time limits had been violated.[95]

The government agreed that the FSTA requirements had not been met but argued that the act was "an unconstitutional legislative encroachment on the Judiciary and violate[d] the principle of separation of powers."[96] The stage was set for a decision based not on statutory or other subsidiary grounds, but squarely on the constitutional issue.

In *Brainer*, Judge Young borrowed heavily from his *Howard* opinion. He again relied on the *Federalist* papers, though he buttressed his analysis with citation to the debates at the Federal Convention.[97] The judge admitted that the theory of separation of powers "was never intended, nor has it proven to be, complete,"[98] but maintained that the concept "contemplates a zone of judicial power which must be free from interference by either the Legislative or Execu-

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fundamental and necessary to a court that to divest court of command within those spheres makes phrase "judicial power" meaningless)).

89. *Id.* at 1111-13 (citing various congressional reports).

90. *Id.* at 1111-12 (citing Barker v. Wingo, 407 U.S. 514 (1972)). In *Barker*, the Court declined to announce a precise time limit under the sixth amendment speedy trial provision, but the Court observed that the states were free to prescribe exact standards. 407 U.S. at 523. In *Howard* Judge Young saw *Barker* as not inconsistent with the view that the FSTA was unconstitutional. 440 F. Supp. at 1112.

91. *Howard*, 440 F. Supp. at 1112-13.

92. United States v. Howard, 590 F.2d 564, 568 n.4 (4th Cir. 1979), *cert. denied*, 440 U.S. 976 (1979). The case involved more than one defendant, and the pertinent one was not party to the appeal. 590 F.2d at 568 n.4.

93. 515 F. Supp. 627 (D. Md. 1981), *rev'd*, 691 F.2d 691 (4th Cir. 1982).

94. 515 F. Supp. at 629. Section 3161(c)(1) of the FSTA required the trial to begin within seventy days of the date the accused first appeared before a judicial officer. 18 U.S.C. § 3161(c)(1) (1980). Brainer had been indicted in mid-1980, but he remained a fugitive and was not apprehended until January 1981. 515 F. Supp. at 639. Upon arrest he was taken before a magistrate, at which time bail was set. *Id.* The FSTA clock began running at that point. The court was unable to try Brainer within the statutory seventy days, due to a crowded docket. *Id.* at 630. Therefore, the court dismissed the indictment on June 4, 1981. *Id.* at 640.

95. 515 F. Supp. at 629. Section 3162(a)(2) provides: "If a defendant is not brought to trial within the time limit required by section 3161(c) . . . the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2) (1980).

96. *Brainer*, 515 F. Supp. at 629.

97. *Id.* at 630 (citing THE FEDERALIST NOS. 47-51 (J. Madison & A. Hamilton) (examining theory of separation of powers)).

98. *Id.*

tive Branches."[99] Drawing on the analysis of Professors Levin and Amsterdam, who spoke of an "area of minimum functional integrity of the courts,"[100] Judge Young characterized the core idea of separation of powers as "institutional independence," "administrative autonomy," and a "zone of judicial autonomy."[101]

Judge Young treated the decision regarding when a trial is to begin as a docket control matter. He spoke of such matters as being "purely judicial functions" and "exclusively judicial concerns."[102] In that vein, he denied the validity of congressional attempts to exercise "control over the administration of the judicial function."[103]

Again, as in his *Howard* decision, Judge Young supported his assertion that a zone of "inherent power" exists in the judiciary by citing state court decisions and commentaries. He did so because "the states have historically encountered more instances of actual attempts by the Legislature to intrude upon the Judiciary."[104] The judge pointed to state court opinions invalidating legislative requirements that the judiciary act on civil matters,[105] as well as criminal cases,[106]

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99. *Id.* at 630-31.

100. *Id.* at 632 (citing Levin & Amsterdam, *supra* note 88, at 32 (referring to areas so crucial to efficient operation of courts as to be beyond power of legislature)).

101. *Id.* at 631-33.

102. *Id.* at 631-32.

103. *Id.* Judge Young cited James Madison for the idea that no one branch of government "ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers." *Id.* (quoting THE FEDERALIST NO. 48, at 382 (J. Madison) (J. Hamilton ed. 1904)). Judge Young regarded the FSTA as a congressional attempt to exercise the kind of "overruling influence" warned against by Madison. *Id.* at 632.

Although the state and federal opinions discussed in this article often refer to the *Federalist* papers, sometimes for opposing propositions, the reader should be aware of the fallacy of believing that the federal Framers' "public words and actions at the time of ratification and in the early years of the Republic constitute some catalogue of what the document must have meant to them. . . . The point of the criticism is that the wise Framers of the 'Golden Age,' like politicians of every age, had specific policy concerns which were sometimes best addressed by making politically inspired claims about constitutional requirements or prohibitions." Carter, *From Sick Chicken to Synar: The Evolution and Subsequent De-Evolution of the Separation of Powers*, 1987 B.Y.U. L. REV. 719, 740 n.92 (citing THE RESPONSES OF THE PRESIDENTS TO CHARGES OF MISCONDUCT xiv (C. Woodward ed. 1974)).

104. *Brainer*, 515 F. Supp. at 632.

105. *Id.* at 632-33 (citing Sands v. Albert Pike Motor Hotel, 245 Ark. 755, 762, 434 S.W.2d 288, 291-92 (1968) (state statute which required court to enter order in worker's compensation case was unconstitutional exercise of judicial function by legislative branch of government); Kostas v. Johnson, 224 Ind. 540, 550, 69 N.E.2d 592, 596 (1946) (state statute which deprived court of jurisdiction for failure to determine issue under advisement an unconstitutional legislative interference with judicial functions); Lindauer v. Allen, 85 Nev. 430, 435, 456 P.2d 851, 854 (1969) (legislature that charged time for mandatory dismissal contravened separation of powers provision in state constitution); Riglander v. Star Constr. Co., 98 App. Div. 101, 105, 90 N.Y.S. 772, 774-75, *aff'd*, 181 N.Y. 531, 73 N.E. 1131 (1905) (mandatory law regulating preference in civil actions unconstitutional infringement upon judicial discretion); Atchinson, Topeka & Santa Fe Ry. Co. v. Long, 122 Okla. 86, 89, 251 P. 486, 489 (1926) (referendum state statute that required court to commence trial within ten days after defendant's pleading usurped judicial power contrary to state constitution)).

106. *Id.* at 633 (citing Schario v. State, 105 Ohio St. 535, 539, 138 N.E. 63, 64 (1922) (act of general assembly that prescribed time for exercise of judicial function unconstitutional and void)). Judge Young cited cases dealing with the power of the courts to protect court administration in the

within a specified period of time.

Judge Young then cited federal authorities, including Justice Cardozo, to the effect that the courts possess certain inherent powers, including the right to control the judicial docket.[107] None of those cases, however, directly addressed the issue in *Brainer*. Recognizing that the United States Supreme Court rarely had been faced with congressional intrusions upon the judicial power,[108] Judge Young pointed to the 1871 case *United States v. Klein*[109] as the one most on point. The judge assumed, for the purpose of the analysis, that Congress is constitutionally authorized to abolish the lower federal courts.[110] Nevertheless, he interpreted *Klein* to mean that, as long as such courts remain in existence, Congress "cannot unduly interfere with purely judicial functions," such as internal administration, including docket control.[111]

Missing entirely from *Howard* but present in *Brainer* was reference to the Supreme Court's more recent separation of powers analysis, in such cases as *United States v. Nixon*[112] and *Nixon v. Administrator of General Services*.[113] In the first case, Nixon had resisted a subpoena for tape recordings and documents relating to conversations in the President's oval office; in the second case, Nixon had challenged the transfer of presidential tapes and papers to the respondent for eventual public access. From those cases, Judge Young discerned the following balancing test: "The Court's approach . . . requires consideration of the extent to which a branch is prevented from accomplishing its constitutionally

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face of insufficient funds or inadequate quarters supplied by legislatures or county supervisors. *Id.* He also referred to cases involving the "inherent power of the Judiciary to regulate the practice of law," because he saw the zone of judicial independence recognized in such cases as extending to other areas, like court administration and docket control. *Id.*

107. *Id.* at 633-34 (citing Landis v. North American Co., 299 U.S. 248, 254 (1936) (inherent judicial power to control docket); United States v. Correia, 531 F.2d 1095, 1098 (1st Cir. 1976) (same); United States v. Inman, 483 F.2d 738, 740 (4th Cir. 1976) (same)).

108. *Id.* at 634.

109. *Id.* at 631 (citing United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871) (Congress prohibited from prescribing rules of decision to judicial department of government)). In *Klein*, the Radical Republican Congress had attempted to dictate an "arbitrary rule of decision" to govern the outcome of cases in which residents of the southern states were filing claims for compensation for property taken by the federal army during the Civil War. 80 U.S. at 146. By legislation, Congress provided that if the claimant had accepted the general pardon granted by President Johnson in 1868, the pardon was to be taken as proof that the claimant had aided rebellion against the United States. *Id.* at 129. Upon such proof, the courts were required by Congress to dismiss the claim for lack of jurisdiction. *Id.* The Supreme Court held that the legislation unconstitutionally intruded on both the judicial and the executive spheres. *Id.* at 147. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 3-5, at 50 (2d ed. 1988) (Congress may not force its interpretation of law upon federal courts).

110. *Brainer*, 515 F. Supp. at 631 (citing Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1371 (1953) (discussing theory that Congress can divest federal courts of jurisdiction to adjudicate federal constitutional rights).

111. *Id.* at 631. In *Howard*, Judge Young had cited *Klein* only in passing. 440 F. Supp. at 110. In *Brainer*, he placed more emphasis on the century-old case. 515 F. Supp. at 631.

112. 418 U.S. 683 (1974).

113. 433 U.S. 425 (1977). The Fourth Circuit later was to criticize Judge Young's application of the *Nixon* cases. *See Brainer*, 691 F.2d at 698.

assigned functions. When the potential for disruption is present, the Court then requires a balancing of the interest[s] involved."[114]

Proceeding to the final step of the *Nixon* analysis, Judge Young regarded the FSTA as flawed by "a major constitutional shortcoming" in that it infringed on the "independence and flexibility" of the judiciary without adequately taking into account all of the interests involved.[115] According to Judge Young, the FSTA addressed the interest of the defendant and society in speedy trials but ignored other societal interests, such as the effectiveness and efficiency of the federal criminal justice system.[116]

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114. *Brainer*, 515 F. Supp. at 630 (citing Nixon v. Adm'r, 433 U.S. at 442-43 (separation of powers doctrine interpreted to fulfill need for proper balance between coordinate branches of government). In thus stating the test, Judge Young paraphrased and abbreviated the Supreme Court's analysis. 515 F. Supp. at 630. In Nixon v. Adm'r, from which Judge Young drew the test, the Court actually reasoned as follows:

> [I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the [other] [b]ranch from accomplishing its constitutionally assigned functions. . . . Only where the potential for disruption is present must we then determine whether that impact is justified by an overwhelming need to promote objectives within the constitutional authority of Congress.

433 U.S. at 443 (citing United States v. Nixon, 418 U.S. 683, 703-07, 711-12 (absolute executive privilege under Article II of the Constitution conflicts with function of courts provided by constitution)). Judge Young's analysis contained only two steps: (1) evaluating the potential for disruption and (2) balancing the various branches' interests. 515 F. Supp. at 630. The Court's approach in the *Nixon* cases, however, involved three parts: (1) the potential for disruption, (2) the constitutional authority of Congress, and (3) the balancing test. Nixon v. Adm'r, 433 U.S. at 443; United States v. Nixon, 418 U.S. at 711-12. If there is no potential for disruption of the other branch's ability to carry out its constitutionally assigned functions, the analysis stops there, with a holding of the validity of the act in question. If potential for disruption is present, but no relevant grant of congressional power can be found, the analysis stops at that point, with a holding against the constitutionality of the act. Only if both the potential for disruption and the constitutional authority of Congress are found does the reviewing court need to engage in a balancing of interests. Judge Young, by omitting the second step in the *Nixon* approach, actually made it easier on Congress, by not requiring a showing that speedy trials are "objectives within the constitutional authority of Congress." *Id.* (citing United States v. Nixon, 418 U.S. at 711-12). Apparently he skipped the second step because he believed that Congress "certainly possesses authority under our constitutional scheme to take action designed to protect the interests embodied by the Sixth Amendment right to a speedy trial." *Brainer*, 515 F. Supp. at 639.

115. *Brainer*, 515 F. Supp. at 637.

116. *Id.* Judge Young spoke of the FSTA as resulting in misused resources, inadequately prepared cases, dismissals of indictments against guilty persons, forced severances in complicated cases, and excessive costs in dollars—all causing severe disruption, a decrease in the quality of justice, and a heavy burden on federal district courts. *Id.* at 637-40.

Judge Young was not the only federal judge to complain of the effects of the FSTA on the court's calendar. *See* Hibbs v. Yashar, 522 F. Supp. 247, 253 n.7 (D.R.I. 1981) ("The [FSTA's] effect on the calendar of this court has been unprecedented. This effect is largely attributable to the arbitrary time limitations imposed on the judiciary by the Act's terms."). Such effects were anticipated by some while the Act was being considered by Congress. *See* Statement of Joseph T. Sneed, former Deputy Attorney General, Dept. of Justice, later U.S. Circuit Judge, Ninth Circuit, Hearing on S. 754, before Subcommittee on Constitutional Rights of Committee on Judiciary, Senate, 93rd CONG., 1st SESS., 112 (1973).

Regarding civil cases, Judge Young identified the ability of the federal courts to function effectively and efficiently there as a separate societal interest that had been ignored by Congress in passing

After discussing the disruption generally caused by the FSTA, Judge Young criticized Congress's reliance on a 1972 United States Supreme Court case, *Barker v. Wingo*.[117] In *Barker*, the Supreme Court set out general guidelines for the lower courts to use in deciding whether the sixth amendment right to a speedy trial had been violated.[118] The Court declined to impose exact time limits, because "such a result would require this Court to engage in legislative or rule-making activity, rather than in the adjudicative process to which we should confine ourselves."[119] According to Judge Young, that quotation received much attention during the congressional hearings on the proposed FSTA,[120] and Congress interpreted that language as an invitation from the Court to Congress to pass a sweeping speedy trial provision with specific time limits.[121] Only when taken out of context, Judge Young reasoned, could the quotation be regarded as such an invitation to Congress.[122]

Barker arose in the state courts of Kentucky, not in the federal system. When the United States Supreme Court agreed to hear the case, the issue was whether the Court would set speedy trial time periods for state courts to follow as a matter of sixth amendment law. The Court declined to do so but invited the state legislatures to "prescribe reasonable periods."[123] Apparently the Court meant that a state legislature, relying on authority existing under the state con-

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the FSTA. *Brainer*, 515 F. Supp. at 638. With the flexibility of the federal courts reduced by the FSTA, he saw district judges as being hampered in the administration of the civil docket. *Id.* (citing Testimony of Hon. Robert Peckham, U.S. District Judge, Southern District of New York, Hearings on S. 961 and S. 1028, before Committee on Judiciary, Senate, 96th CONG., 1st Sess., 130 (1979)). Judge Young found that the FSTA, "with its myopic concern for rigid time limits in criminal cases, hinders the ability of the courts to focus sufficient resources on the adjudication of . . . important civil matters." *Id.*

117. 407 U.S. 514 (1972).

118. *Id.* at 530. Four factors to be considered are (1) length of delay, (2) reason for delay, (3) defendant's assertion of the right, and (4) prejudice resulting to defendant. *Id.* at 530-33. The four factors, which are to be employed in a balancing test, are not exclusive of others that might be relevant in a given case. *Id.* at 533.

119. *Id.* at 523.

120. *Brainer*, 515 F. Supp. at 638 (citing H.R. REP. No. 93-1508, 93rd CONG., 2D SESS. 1 (1974) reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7401, 7405 (quoting *Barker*); Statement of Congressman Cohen, Hearings on S. 754, H.R. 7873, H.R. 658, H.R. 773, & H.R. 4807, before Subcommittee on Crime of the Committee on the Judiciary, House, 93rd CONG., 2d SESS. at 214, 358 (1974) (referring to wording of *Barker*).

121. *Id.* *See* H.R. REP. No. 1508, 93rd CONG., 2D SESS. 5 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7405 (Committee noted *Barker* Court's refusal to engage in rule-making activity).

122. *Brainer*, 515 F. Supp. at 539.

123. 407 U.S. at 523. The remainder of the paragraph following the sentence relied on by Congress clearly shows that the Supreme Court was inviting state legislatures, not Congress, to experiment with speedy trial statutes:

> We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months. The States, of course, are free to prescribe a reasonable period consistent with constitutional standards, but our approach must be less precise.

Id.

stitution, could pass a speedy trial act if it did not operate to deprive a person of his sixth amendment right, as defined in guidelines set out by the Court in the *Barker* opinion and elsewhere.[124] As Judge Young noted, the *Barker* language relied on by Congress in passing the FSTA was nothing more than a "general comment on the role of an adjudicating court" and did not invite a congressional attempt to reduce the flexibility of the federal courts in their internal administrative functioning.[125] Judge Young regarded such legislative interference as an unconstitutional disruption of the judicial function of determining guilt or innocence (or presiding over a jury's determination of the issue), as well as an infringement on the courts' inherent power to control their internal administration and their dockets in both criminal and civil cases.[126]

On appeal,[127] the Fourth Circuit, in upholding the FSTA's constitutionality, perceived Judge Young's opinion to be composed of two distinct arguments: (1) The FSTA usurps the federal courts' adjudicative role by determining the "actual substantive outcome of individual criminal cases," and (2) the Act intrudes too far into the realm of judicial administration.[128] In writing for the court, Judge Winter recognized that the district court had gone too far in asserting that the FSTA "attempts to determine the actual substantive outcome of individual criminal cases."[129] Judge Young apparently made that unfortunate statement in an attempt to harmonize his reasoning with the holding of the *Klein* opinion, which regarded as unconstitutional statutes that "prescribe rules of decision to the judicial department of the government in cases pending before

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124. *Id.* at 530-33. Of course, when state legislatures create precise speedy trial time limits to govern trials in state courts, no federal separation of powers problems can result. As we will see later in this article, state constitutional separation of powers provisions could be implicated, but that would not create a federal question for the United States Supreme Court to review. Michigan v. Long, 463 U.S. 1032, 1037-40 (1983) (plain statement in state court opinion that decision is based on state law precludes review by United States Supreme Court). *Cf.* Dreyer v. Illinois, 187 U.S. 71, 77-78 (1902) (federalism bars due process attack on state separation of executive and judicial powers). *But cf.* Note, *Justice Without Favor: Due Process and Separation of Executive and Judicial Powers in State Government*, 94 YALE L.J. 1675 (1985) (challenging *Dreyer* rule).

125. *Brainer*, 515 F. Supp. at 639. The *Barker* opinion stressed that there is "no constitutional basis" for the notion that the sixth amendment speedy trial right "can be quantified into a specified number of days or months." *Barker*, 407 U.S. at 523.

126. *Brainer*, 515 F. Supp. at 636, 639-40.

127. United States v. Brainer, 691 F.2d 691 (4th Cir. 1982). On appeal the government switched its position and joined *Brainer* in supporting the FSTA's constitutionality. *Id.* at 692. The Court of Appeals appointed an amicus curiae to argue in favor of the district court's opinion. *Id.* at 692 n.5. The circuit court held that it had jurisdiction, despite the government's change in position, and upheld the constitutionality of the FSTA. *Id.* at 693, 699.

One of the amicus curiae was Eugene Gressman, now the William Rand Kenan, Jr., Professor Emeritus at the School of Law, University of North Carolina, Chapel Hill, N.C. As a judge in the 1982 J. Braxton Craven, Jr. Memorial Moot Court Competition, held at Chapel Hill (in which this author competed), Professor Gressman provided the initial impetus to this article.

128. United States v. Brainer, 691 F.2d 691, 694-95 (4th Cir. 1982) (quoting *Brainer*, 515 F. Supp. at 636).

129. *Id.* at 695 (citing *Brainer*, 515 F. Supp. at 636).

it."[130] *Klein*, however, involved a statute that arbitrarily dictated the outcome of a case on the merits, unlike the statute in *Brainer*.

The court of appeals seized on the weakest link in Judge Young's reasoning. By focusing on a single sentence about "substantive outcome," Judge Winter easily rebutted the trial judge's first argument merely by invoking the standard procedural/substantive dichotomy. According to Judge Winter, the FSTA disposes of cases on a procedural basis, much like a statute of limitations.[131] The Act does not dictate the substantive outcome of a particular case; that is, it does not decide the guilt or innocence of the accused. Although Judge Winter saw the FSTA as most closely analogous to a statute of limitations, he also saw "no difference" between the FSTA and other congressional regulations of federal court evidence and procedure, and "statutes prescribing who may sue and where and for what,"[132] which are well accepted.[133]

The appellate opinion did not address whether the FSTA violated the theory of separation of powers by interfering with the judicial function of deciding cases already committed to resolution by the courts.[134] The court apparently misunderstood the first issue to be whether the FSTA, rather than merely prescribing procedures for the courts to follow, actually determined the substantive outcome of Brainer's case.[135] Proceeding to review Judge Young's second point,

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130. United States v. Klein, 80 U.S. (13 Wall.) 128, 146-47 (1871) (congressional attempt to limit jurisdiction upon finding of disloyalty violated separation of powers).

131. *Brainer*, 691 F.2d at 696. Allowing a statute of limitations to prevent cases from being brought to a trial court in the first place, however, does not interfere with the court in its role of deciding cases. It is one thing for Congress to tell the courts which cases should not be filed; it is quite another to order the courts to dismiss cases properly committed to them. Note, *The Federal Speedy Trial Act: A Study in Separation of Powers*, 22 WASHBURN L.J. 299, 316 n.176 (1983) (distinction between deadline before case submitted to judicial process and on operating after that point).

132. *Brainer*, 691 F.2d at 695-96 (referring specifically to Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Federal Rules of Appellate Procedure, and Federal Rules of Evidence).

133. Actually, the validity of legislative control over court procedure has been questioned at both the federal and state levels. *See* Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 277 (1928) (under state and federal constitutions, all judicial power except certain parts of jurisdiction and place of criminal trial is in judiciary). Like the FSTA, the evidence and procedure rules govern "cases pending." The latter rules, however, do not create docket nightmares that interfere with the judicial function of deciding cases. If the evidence or procedure rules were shown to cause such problems, they might be subject to the same constitutional attack as the FSTA. The very fact that, because the evidence and procedure rules do not severely hamper the courts and, therefore, are "requirements of unquestioned validity," *Brainer*, 691 F.2d at 696, means that such rules are not analogous to the FSTA. For that reason, citation to them does not support the circuit court's rationale.

134. *Brainer*, 691 F.2d at 695-99. Actually, as shown by the way in which the circuit court divided its opinion with subheadings, the court did not even regard that issue as one involving a claimed separation of powers violation. The circuit court prefaced its discussion of Judge Young's first point with the heading, "Claimed Determination of Outcome." *Id.* at 695. The circuit court entitled the discussion of the Judge Young's second ground of decision, involving the inherent power of a trial court to administer its own docket, "Claimed Violation of Separation of Powers." *Id.* at 696.

135. Judge Young's objection to the FSTA, however, was not limited to Brainer's case in par-

that the FSTA intrudes too far into the internal administration of the federal courts, the court first noted that the trial court had relied on state court decisions.[136] Making no attempt to dispute the inherent power of state courts, the court recognized as a question of first impression "[w]hether or to what extent the federal courts possess a power of self-administration which invokes the separation of powers doctrine. . . ."[137] Raising the possibility that federal courts have the power to make procedural rules only in the absence of congressional action, the court admitted that procedure and internal administration may be two different things, with inherent power in the federal judiciary over the latter.[138] The circuit court assumed for the purpose of its analysis that "federal courts possess some measure of administrative independence" so that interference by Congress would violate the separation of powers requirement "at some extreme point."[139] The fact that a power is inherent, however, does not mean that any degree of intrusion, however slight, constitutes a separation of powers violation.[140] In other words, "inherent" does not mean "exclusive."

Judge Winter criticized Judge Young's opinion for purporting to follow the *Nixon* test for separation of powers but in reality merely attacking the propriety of the FSTA.[141] Ironically, Judge Winter's opinion was even less faithful to the *Nixon* cases than was Judge Young's.[142] This opinion set up a requirement that the congressional interference must be actual and "extreme" in order to create a separation of powers concern, which was not part of the *Nixon* analysis.[143] Nevertheless, the court proceeded to examine the extent to which the FSTA repre-

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ticular or to criminal cases in general, as shown by the fact that the next paragraph in his opinion made the same point about civil cases. *Brainer*, 515 F. Supp. at 636. He observed that the duties of Article III courts also include the trying of civil cases and found that the FSTA interferes with that constitutionally assigned function by "severely hamper[ing] trial courts in their attempts to prepare civil cases for trial, find the time to try them, and assure that well-founded decisions are reached." *Id.*

136. 691 F.2d at 696.

137. *Id.*

138. *Id.* at 697. *See, e.g.*, Morrison v. Olson, 108 S. Ct. 2597, 2611 (1988) (federal courts possess inherent authority to initiate contempt proceedings for disobedience to orders, and authority necessarily includes ability to appoint private attorney to prosecute contempt) (citing Young v. United States *ex rel.* Vuitton Et Fils S.A., 107 S. Ct. 2124 (1987) (long-settled character of authority of courts to appoint private attorney)).

139. 691 F.2d at 697.

140. *Id.* at 697 n.10 (citing Michaelson v. United States, 266 U.S. 42, 65-66 (1924) (inherent contempt power of courts not immune from some regulation by Congress)).

141. *Id.* at 698. In questioning the propriety of the FSTA, Judge Young was not alone. Former Chief Justice Burger and others on the Judicial Council also had done so. *See* Burger, *What the Justices Are Saying*, 62 A.B.A. J. 992, 993 (1976) (passage of FSTA did not make sense because opposed by Judicial Council and no commensurate legislation to increase number of judges).

142. As discussed earlier, the trial court's opinion in *Brainer* did not merely question the wisdom of the FSTA. Judge Young applied *Nixon* in shortened form, skipping only the second step, because he conceded that Congress had some constitutional authority to formulate rules for the federal courts to follow in matters of procedure and evidence. *Brainer*, 515 F. Supp. at 634. *See supra* notes 120-26 and accompanying text for a discussion of *Brainer*.

143. *Brainer*, 691 F.2d at 697-99. The Fourth Circuit repeatedly used the word "extreme" as part of the test. *Id.*

sents such an extreme. In doing so, the court misconstrued the *Nixon* test. Paraphrasing *Nixon v. Administrator of General Services*, the *Brainer* court reasoned that for a separation of powers problem to arise, the congressional enactment in question must prevent the judiciary from "accomplishing its constitutionally assigned functions" and held that the FSTA could not fairly be cast "in such extreme terms."[144]

Judge Winter's interpretation of the *Nixon* test, however, led his analysis astray. The *Nixon* cases do not hold that, before a separation of powers issue can arise, a statute must actually prevent another branch of the government from performing its constitutional role. The threshold issue, and the wording omitted by Judge Winter, is the *extent to which* the statute interferes with another branch's ability to carry out its constitutionally assigned function and whether the statute establishes the "potential for disruption" of the other branch's ability to perform its proper role.[145] Actual and complete disruption is not the initial requirement.[146]

In explaining why it did not perceive a separation of powers violation in *Brainer* the court pointed to four purported aspects of the FSTA as ameliorating any disruption of the "zone of judicial self-administration,"[147] such as docket control: (1) the FSTA provides that the trial court may dismiss an indictment "without prejudice;[148] (2) the FSTA excludes from the time computation specified unavoidable delays;[149] (3) the FSTA arguably provides (in the face of explicit language to the contrary) for a continuance in the interests of justice because of scheduling conflicts,[150] and (4) the Act allows the judicial council of

144. *Id.*

145. Nixon v. Adm'r, 433 U.S. 425, 443 (1977).

146. *Id.* The difference between potential and actual interference is a nuance, to be sure, but an important one, especially in light of the circuit court's admission, later in its opinion, that the FSTA had the potential to disrupt the judiciary's function. *Brainer*, 691 F.2d at 699. Even at that point, however, the court emphasized that it would find a separation of powers violation only "in an extreme case," and the court believed that "that possibility would appear to be remote." *Id.*

147. *Id.* at 698. The court did not examine the actual extent to which the FSTA disrupted the judicial function of deciding or presiding over cases, because, as shown earlier, the court did not regard that issue as one involving serious separation of powers questions. *Id.*

148. *Id.* (citing 18 U.S.C. § 3162(a)(2)). *See generally* Steinburg, *Dismissal With or Without Prejudice Under the Speedy Trial Act: A Proposed Interpretation*, 68 J. CRIM. L. & CRIMINOLOGY 1 (1977). The circuit opinion, however, in no way made it clear how dismissal and refiling of indictments is itself anything but a disruption of the trial court's docket.

149. *Brainer*, 691 F.2d at 698 (citing 18 U.S.C. § 3161(h)). Once again, however, that provision is at best irrelevant to the inquiry in *Brainer*, and the opinion did not try to show otherwise. Perhaps that was because Judge Young expressly had found that "there were no periods of delay" that could be excluded under the FSTA in order to comply with the time limit. *Brainer*, 515 F. Supp. 630.

150. *Brainer*, 691 F.2d at 698. The court expressed that idea in the face of explicit FSTA provisions stating that the trial court cannot order a continuance because of "general congestion of the court's calendar," 18 U.S.C. § 3161(h)(8)(C)) even if the trial court finds that the "ends of justice served by [such a continuance] outweigh the best interest[s] of the public and the defendant." 18 U.S.C. § 3161(h)(8)(A). The circuit's reasoning was that the FSTA banned reliance on "general" congestion of the trial court's docket, not on "specific" congestion, which might have been the problem in Brainer's case. 691 F.2d at 698. Understandably, the circuit opinion cited no authority for

a circuit to suspend the prescribed time limits if a district, "due to the status of its court calendars," cannot meet the FSTA deadlines.[151] At least two problems arise from reliance on this last provision. First, such a gross calendar logjam for an entire district would go a long way toward establishing the "extreme case" that the court of appeals required before a separation of powers violation could be found. It seems that Congress could envision the extreme case, even if the court regarded it as "remote." Second, in light of *Immigration and Naturalization Service v. Chadha*[152] and *Bowsher v. Synar*,[153] the veto or suspension of the FSTA by a judicial circuit, subject to congressional oversight,[154] now appears itself to be of doubtful constitutionality.[155]

To buttress its holding, the court observed that the district court might have been able to squeeze Brainer's case into its schedule after all.[156] According to the appellate opinion, the record also failed to establish that the trial court could not have transferred Brainer's case to another court within the district, so that the trial could have taken place within the time limits set by the FSTA.[157]

In the final analysis, neither opinion is particularly persuasive. Judge Young's opinion is weakest when he attempts to analogize to *Klein*'s ban on a statutory rule of decision determining the substantive outcome of a pending case. The circuit court's reasoning is deficient when it attempts to show that the FSTA has built-in "safety valves"[158] designed to allow flexibility. At best, the alternative and safety-valve provisions are irrelevant to Brainer's case; at worst, they are subject to constitutional attack in themselves.

Moreover, neither court effectively employed the *Nixon* analysis. Judge Young attacked the FSTA on the basis that Congress, in passing the Act, did not take into account the interests of both the public and the judiciary in the judicial system's ability to operate effectively and efficiently in both criminal and civil cases. In making that point, the trial court referred to the legislative record at length. Congress, however, is not required to take any particular interest into

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that position, and the cases suggest that the law is to the contrary. *See, e.g.*, United States v. Andrews, 790 F.2d 803, 808 (10th Cir. 1986) (delay caused by heavy criminal docket, several legal holidays, and judge's seminar attendance was attributable to "general congestion" of court's calendar), *cert. denied*, 481 U.S. 1018 (1987); United States v. Crane, 776 F.2d 600, 605 (6th Cir. 1985) (judge's unavailability caused by his presiding over other case attributable to "general congestion" of court's calendar); United States v. Nance, 666 F.2d 353, 357 (9th Cir.) (general congestion), *cert. denied*, 456 U.S. 918 (1982); United States v. New Buffalo Amusement Corp., 600 F.2d 368, 376 (2d Cir. 1979) (general congestion); United States v. Didier, 542 F.2d 1182, 1186 (2d Cir. 1976) (general congestion).

151. 691 F.2d at 698 (citing 18 U.S.C. § 3174).

152. 462 U.S. 919 (1983).

153. 478 U.S. 714 (1986).

154. *See* 18 U.S.C. § 3174(d)(2) (1982).

155. Note, *supra* note 131, at 310-11.

156. *Brainer*, 691 F.2d at 699.

157. *Id.* It would seem, however, that requiring a trial court to transfer a case from its docket is just as much an interference with internal administration as dismissal of an indictment for failure to meet a time limit. Whether the device is dismissal or transfer, the autonomy of a trial court to control its own docket is hampered by forcing the judge to relinquish control of the case.

158. *See Brainer*, 691 F.2d at 699.

account.[159] The balancing-of-interests approach is a method of judicial review, not a constitutional requirement for the legislative process. Congress need not make a record of the interests it considered in passing legislation, in order to withstand a separation of powers attack. Judge Young would have been better advised to concentrate on marshaling evidence for the arguments that (1) the FSTA places a heavy burden on the judiciary and severely disrupts the administration of justice[160] and (2) the interests of the judiciary, the public, and individual litigants in an independent judiciary and effective and efficient administration of justice outweigh the interests of the Congress, the public, and the defendant in speedy trials.

The Fourth Circuit never engaged in the balancing of interests suggested by *Nixon*, because it did not accept Judge Young's assertions that the FSTA severely affected the courts in their internal administration.[161] The court demanded proof of actual and extreme disruption of judicial functions, not merely the "potential for disruption" required by the *Nixon* Court. The circuit's approach, tying the analysis closely to the record, or lack of it, pretermitted the balancing step of the analysis, with the result that we cannot know the relative weight the circuit would have assigned to the interests involved.

In the end, the Fourth Circuit held that the FSTA was not unconstitutional on its face or as applied in Brainer's case. The court left open the "remote" possibility, however, that, given a record showing an "extreme case," in which the judiciary actually was prevented from carrying out its assigned functions, the FSTA could be struck down.[162] Nevertheless, we are not likely to see another

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159. *Cf.* Meshell v. State, 739 S.W.2d 246, 273 (Tex. Crim. App. 1987) (Miller, J., concurring) (whether state speedy trial act employs *Barker* factors irrelevant to question of act's validity under state constitution).

160. As shown by nationwide statistics compiled in the *Annual Report of the Director of the Administrative Office of the United States Courts (Report)*, relatively few dismissals have resulted under the FSTA in recent years. 1987 *Report* 122 (20 dismissals in 1987); 1986 *Report* 121 (14 dismissals in 1986; 12 in 1985); 1984 *Report* 185 (19 dismissals in 1984; 16 in 1983); 1982 *Report* 148 (21 dismissals in 1982; 19 in 1981). A reported high level of compliance with the FSTA may be the result of nothing more than the availability of loopholes, especially in the form of time periods that are excludable from the computation of deadlines. Probably as a result of excludable time periods and "ends of justice" continuances, the processing of criminal cases was not significantly speeded by the FSTA, according to a five-year study. Bridges, *The Speedy Trial Act of 1974: Effects on Delays in Federal Criminal Litigation*, 73 CRIMINOLOGY 50, 71-72 (1982).

161. *Brainer*, 691 F.2d at 699. Apparently the circuit court was either not aware that the announced purpose of the FSTA was to cause the court system to be "shaken by the scruff of its neck" or believed that the FSTA had not accomplished that objective. Prepared Statement of the Assistant Attorney General (now Chief Justice of the United States Supreme Court) William H. Rehnquist, 1971 Senate Hearings 107, *reported in* A. PARTRIDGE, LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974 17 (1980).

162. *Brainer*, 691 F.2d at 699. In other words, if a trial judge could show that none of the FSTA safety valves or other alternatives to dismissal of the indictment were available, or that forcing the available alternatives upon the judge in itself was an unwarranted intrusion upon the judicial power, the FSTA would be unconstitutional as applied in that case. *Cf.* State v. Pachay, 64 Ohio St. 2d 218, 223, 416 N.E.2d 589, 592 (1980) (shortening of time limits, repealing of exceptions, or increasing of case load could result in state speedy trial act invalidity). *See infra* note 252 and accompanying text for a discussion of *Pachay*.

test of the FSTA's constitutionality, unless the government changes its position again and attacks the Act. A defendant will have difficulty persuading a court to reach the issue.[163]

The greatest problem with the Fourth Circuit's analysis of *Nixon v. Administrator of General Services* is that *Nixon* did not establish an all-purpose separation of powers test. Since its decision in that case, the Supreme Court has applied the *Nixon* formulation in one other separation of powers case involving Nixon himself and claims of encroachment on the executive power.[164] However, in *Chadha*[165] and *Bowsher v. Synar*,[166] cases involving clashes between executive and legislative power, the majority made no mention of *Nixon*. In the recent case of *Morrison v. Olson*,[167] the Court referred to the *Nixon* wording only as an afterthought.[168]

The Court has not favored the *Nixon* test for determining the constitutionality of a statute allegedly invading the judicial realm. Instead, the Court has rejected any particular formula in favor of a general balancing of the interests of the respective branches. In a clash between Congress and the courts, for example, the Supreme Court has balanced legislative interests, such as convenience and efficiency, against the judiciary's interest in judicial independence.[169] Because the Fourth Circuit in *Brainer* did not balance the interests involved, its method of analysis is not in harmony with the one developed later by the Supreme Court. Although the FSTA cases have been cited in the state decisions discussed below, the state courts have applied neither the *Nixon* analysis nor the later general balancing test to separation of powers issues. Instead, they have attempted to forge independent paths through the separation of powers thicket.

III. STATE STATUTES AND RULES MANDATING THE SPEEDY DISPOSITION AND TRIAL OF CASES

A. State Speedy Disposition Statutes

The trial judge in *Brainer* analogized to state court opinions that invali-

163. *See, e.g.*, United States v. Buonos, 730 F.2d 468, 471-72 (7th Cir. 1984) (separation of powers argument need not be addressed because, if successful in attacking dismissal/reindictment provision of FSTA, defendant would be left with reliance on sixth amendment speedy trial principles, which were not violated by dismissal/reindictment procedure).

164. *See* Nixon v. Fitzgerald, 457 U.S. 731, 753-54 (1982) (jurisdiction can be exercised over President, but must be balanced with separation of powers doctrine).

165. 462 U.S. 919 (1983). For discussion and criticism of the analysis in the *Chadha* opinion, *see* Leiserson, *supra* note 3, at 475-81; L. TRIBE, *supra* note 109, at 214-18.

166. 478 U.S. 714 (1986). For discussion and criticism of the analysis in Bowsher v. Synar, *see* Carter, *supra* note 103, at 797-98.

167. 108 S. Ct. 2597 (1988).

168. *Id.* at 2621.

169. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245 (1986) (applying balancing test in case concerning claim of intrusion on judicial power). *See also* Mistretta v. United States, 57 U.S.L.W. 4102, 4108 (U.S. Jan. 18, 1989) (citing *Nixon* cases for claims of intrusion on executive power, but *Schor* for "cases specifically involving the Judicial Branch"). The *Mistretta* Court seemed to prefer the *Schor* balancing test for cases dealing with the judiciary. *See id.* The Court also addressed the *Nixon* analysis because the petitioner urged that standard. *Id.* at 4115.

dated legislation requiring courts to decide cases or otherwise to act within specified time periods.[170] Since then, three state supreme courts—Oregon, Montana, and Wisconsin—have decided major "speedy disposition" cases, and each has referred to *Brainer*. Each of those cases, however, dealt with statutes mandating not speedy commencement of trials but speedy decisions by courts. In *State* ex rel. *Emerald People's Utility District v. Joseph*,[171] the Oregon Supreme Court upheld, against a state constitutional separation of powers challenge,[172] a statute requiring an appellate court to hear and determine a case within three months from the time the appeal was taken. The appellate court had ignored the statute, regarding it as an act that violated the state constitution's separation of powers provision.[173]

The state supreme court enunciated the separation of powers test as whether "legislative action unduly burdens or unduly interferes with the judicial department in the exercise of its judicial functions."[174] Recognizing that the highest courts in other jurisdictions, with "constitutional provisions regarding the separation of powers similar to those of Oregon,"[175] had invalidated similar statutes, the Oregon court nevertheless found no violation of its state constitution, because the statute on its face did not unduly burden or unduly interfere with the judiciary. The court defined "undue" in such a way that no separation of powers violation would be found unless the legislative act made it impossible for the courts to carry out their constitutionally assigned functions.[176] The supreme court noted that it was possible for the lower appellate court to have a case briefed, submitted, and decided in the time remaining between the delivery of the supreme court's opinion and the statutory deadline.[177] Even so, the

170. *Brainer*, 515 F. Supp. at 632-33.

171. 292 Or. 357, 640 P.2d 1011 (1982).

172. Article II, § 1 of the Oregon Constitution reads as follows:

> The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.

173. *Joseph*, 290 Or. at 359, 640 P.2d at 1012.

174. *Id.* at 359, 640 P.2d at 1013 (quoting Ramstead v. Morgan, 219 Or. 383, 399, 347 P.2d 594, 601 (1959) (legislation affecting judicial power upheld)).

175. *Id.* at 360, 640 P.2d at 1013 (citing State *ex rel.* Kostas v. Johnson, 224 Ind. 540, 547, 69 N.E.2d 592, 595 (1946) (three departments of government independent and, unless otherwise provided for, no department can be controlled or embarrassed by another department); Scharlo v. State, 105 Ohio St. 535, 538, 138 N.E. 63, 64 (1922) (legislature cannot tell judiciary when it can hear or determine any case within its lawful jurisdiction); Atchinson, T. & S.F. Ry. Co. v. Long, 122 Okla. 86, 92, 251 P. 486, 492 (1926) (legislative branch may not usurp constitutionally mandated powers of judicial branch)).

176. *Id.* at 362, 640 P.2d at 1014. According to the majority, "unduly" should be taken to mean "that it is impossible in the individual case, within the statutory deadline, for counsel to complete proper briefing or other documentation adequate for a responsible judicial decision, and for the court to arrive at a reasoned decision consistent with the judicial responsibility imposed by Art VII [of the Oregon Constitution]." *Id.* The court declined to "infer in the abstract" whether or not the act interfered with the judiciary in its constitutional function. *Id.*

177. *Id.* at 363, 640 P.2d at 1014. The Oregon Court thus employed the same "undue interference" wording that the *Brainer* trial court had drawn from state decisions. *See Brainer*, 515 F. Supp.

supreme court declined to order the lower court to comply with the statute, because the deadline would fall only six days from the supreme court's decision, and such an order "might well interfere unduly with the court's well-considered and responsible decision of the cases involved here."[178]

Justice Peterson, concurring, noted that "virtually every court which has considered this problem holds that such legislative action is prohibited"[179] and apparently would have adopted a stricter test, invalidating any legislative intrusion into areas that are purely judicial functions.[180] He seemed to envision an area of exclusive judicial power into which the legislature could not intrude at all without violating the state constitution's separation of powers provision. Along with Levin and Amsterdam, Justice Peterson regarded the generation of policy about when and how cases should be heard and decided as "a realm of proceedings which are so vital to the efficient functioning of a court as to be beyond legislative power."[181] In articulating that principle, his opinion presaged decisions in Montana and Wisconsin, to be discussed later in this article.[182] He also reasoned that the mere fact that it was possible for the lower appellate court to hear and decide a case within the prescribed time period was "largely irrelevant"[183] to the question of the statute's constitutionality: "[E]ven though the Court of Appeals could *possibly* hear and determine the appeal in this case within the statutorily prescribed time, the intrusion by the legislative branch into affairs which are peculiarly the responsibility of the judicial department violates the separation of powers clauses of the Oregon Constitution."[184] Justice Peterson's line of reasoning paralleled Judge Young's in *Brainer*, in mak-

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at 636. But the *Joseph* court employed the extreme requirement of actual and complete disruption of another branch's function—impossibility—which the *Brainer* appellate court later imposed before a violation of separation of powers could be found. *See Brainer*, 691 F.2d at 698. The *Joseph* decision, issued during the time between the district and circuit opinions in *Brainer*, noted the former in the appendix. *Joseph*, 292 Or. at 371, 640 P.2d at 1019.

178. 292 Or. at 363, 640 P.2d at 1014. The "undue interference" wording here appears to echo the separation of powers test the court was applying to the legislation in question. Presumably, however, the Oregon Supreme Court shied away from the possibility of undue interference with the lower court's decision-making process as a matter of prudence and did not purport to apply separation of powers principles between itself and another court in the same branch of state government.

179. *Id.* at 368, 640 P.2d at 1017 (Peterson, J., concurring). The appendix to the opinion collected prior cases from other jurisdictions, many of which appeared in Judge Young's *Brainer* opinion. *Id.* at 371-72, 640 P.2d at 1019. The concurring judge recognized two state court opinions upholding the validity of speedy trial acts, and noted that they stood in contradistinction to the trial court's decision in *Brainer*, but he regarded them as distinguishable in that they "turn upon the constitutional guarantee of a speedy trial." *Id.* at 368 n.6, 640 P.2d at 1017 n.6 (citing State v. Warren, 224 Kan. 454, 456, 580 P.2d 1336, 1338 (1978) (state has obligation to ensure that defendant enjoys speedy trial and legislature may enact statute to codify obligation); State v. Pachay, 64 Ohio St. 2d 218, 223, 416 N.E.2d 589, 592 (1980) (speedy trial statute is rational way to enforce constitutional speedy trial requirement)). What constitutional difference that distinction makes he did not say.

180. *Joseph*, 292 Or. at 366, 640 P.2d at 1018 (Peterson, J., concurring).

181. *Id.* at 370, 640 P.2d at 1018 (quoting Levin & Amsterdam, *supra* note 88, at 31-32).

182. *See infra* notes 186-214 and accompanying text for this discussion.

183. *Joseph*, 292 Or. at 366, 640 P.2d at 1016 (Peterson, J., concurring).

184. *Id.* (emphasis in original).

ing the point that the effect of the time limit in one case could spill over to undermine the effective and efficient administration of justice in other cases.[185]

One year after the Oregon decision, the Montana Supreme Court struck down a similar scheme in *Coate v. Omholt*.[186] Two Montana statutes placed time limits on district and supreme court cases and imposed sanctions on judges for failure to comply. The penalties included withholding a judge's salary. A district court declared the statutes unconstitutional, and the supreme court agreed.[187] Addressing the time limits as an issue separate from the withholding of pay, the court concluded that, based on the separation of powers clause of the state constitution,[188] "the question of when cases shall be decided and the manner in which they shall be decided is a matter solely for the judicial branch of the government."[189] The court regarded the authority to determine when a judicial decision is made to be an inherent and exclusive power of the judiciary, not one shared with the legislature.[190]

Noting Judge Young's opinions in *Howard* and *Brainer*,[191] and the fact that the decision of the Oregon Court in *Joseph* stood as the lone exception to the otherwise "virtual unanimity" among state courts,[192] the Montana court held

185. *Compare id.* at 370-71, 640 P.2d at 1018 (Peterson, J., concurring) ("Permitting the legislature to tell [the judiciary] when and how to hear and determine cases will impermissibly affect judicial functions—the manner in which cases are prepared, argued, considered and determined") *with Brainer*, 515 F. Supp. at 638 (FSTA "severely hamper[s] trial courts in their attempt to prepare civil cases for trial, find the time to try them, and assure that well-founded decisions are reached").

186. 203 Mont. 488, 622 P.2d 591 (1983).

187. The district court held that the pay forfeiture provisions of the statutes violated two provisions of the Montana Constitution: Article VII, § 7(1), barring diminution of judicial salaries during a term of office, and Article II, § 31, prohibiting the impairment of contracts. *Omholt*, 203 Mont. at 493, 662 P.2d at 593. The supreme court agreed. *Id.* at 497, 662 P.2d at 597.

188. MONT. CONST., art. III, § 1 provides:

> The power of the government of this state is divided into three distinct branches—legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

189. *Omholt*, 203 Mont. at 492, 662 P.2d at 593. The court also held that, even if the two statutes did not violate state constitutional provisions regarding separation of powers, diminution of judicial salaries, and impairment of contracts, the statutes would be invalidated for another reason. The legislature simply lacked authority to enact the statutes, because, although Article VII, § 2(3) of the Montana Constitution confers on the legislature a veto power over procedural rules promulgated by the courts, it does not empower the legislature to generate such rules. *Id.* at 505, 662 P.2d at 600.

190. *Id.* at 492, 662 P.2d at 593.

191. *Id.* at 496, 662 P.2d at 596. The Montana court did not note the Fourth Circuit opinion in *Brainer*.

192. *Id.* at 494-96, 662 P.2d at 594-96 (citing Sands v. Albert Pike Motor Hotel, 245 Ark. 755, 762, 434 S.W.2d 288, 291-92 (1968) (state statute requiring court to enter order was unconstitutional exercise of judicial power); Vaughan v. Harp, 49 Ark. 160, 163, 4 S.W. 751, 753 (1887) (legislature does not have authority to compel judiciary to write out records for every decision); Houston v. Williams, 13 Cal. 24, 28 (1859) (unconstitutional to require state supreme court to produce written opinion in every case); State *ex rel.* Kostas v. Johnson, 224 Ind. 540, 547, 69 N.E.2d 592, 595 (1946) (three departments of government independent); State v. Merialdo, 70 Nev. 322, 328-29, 268 P.2d 922, 926 (1954) (statute requiring trial judges to submit affidavits that they have no cases pending before receiving salary unconstitutional); Waite v. Burgess, 69 Nev. 230, 233, 245 P.2d 994, 996

that the power to determine when a case would be decided is in "the essential nature of a constitutional court," a matter "that the courts alone determine," and not one over which "the courts and the legislature have concurrent rule-making power."[193] In positing not only inherent but also exclusive authority in the judiciary, the Montana court went further than Judge Young had gone in *Brainer* and expressly held what Justice Peterson in Oregon had only implied in the *Joseph* case: the area of internal administration of the courts is one in which any intrusion by the legislature is invalid. With that rule, no balancing test is used; no weighing of competing interests is done.

Relying on the Montana Supreme Court's opinion in *Omholt*,[194] the Wisconsin Supreme Court took the same approach the following year, in *In re Grady*.[195] Like *Omholt, Grady* involved a separation of powers challenge to a statute imposing time limits on judicial decisions and monetary penalties for noncompliance.[196] The court's per curiam opinion expressly rejected the Fourth Circuit's argument in *Brainer*[197] that the legislature shared power with the judiciary to set such time periods:

> [T]he separation of powers doctrine does not render every power conferred upon one branch of government a power which may be shared by another branch and as to which the undue burden or substantial interference standard is applicable. There are zones of authority constitutionally established for each branch of government upon which any other branch of government is prohibited from intruding. As to these areas of authority, the unreasonable burden or substantial interference test does not apply; *any* exercise of authority is unconstitutional.[198]

The argument was made that the legislature has the authority to enact laws to advance public confidence in the judicial system,[199] but the *Grady* court perceived the issue to be whether establishing time limits within which judges are to decide cases lay in "an area of exclusive judicial authority."[200] The court was "not concerned with the reasonableness or substantiality of legislative interfer-

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(1952) (legislation intended to require judicial action within fixed period of time unconstitutional); Schario v. State, 105 Ohio St. 535, 538, 138 N.E. 63, 64 (1922) (legislature cannot tell judiciary when it can hear case within its lawful jurisdiction)).

193. *Id.* at 494, 662 P.2d at 594. The Montana court, like most courts discussing such issues, relied heavily on Levin & Amsterdam, *supra* note 88.

194. 203 Mont. 488, 662 P.2d 591 (1983).

195. 118 Wis. 2d 762, 348 N.W.2d 559 (1984).

196. *Id.* at 768 n.3, 348 N.W.2d at 562 n.3. Unlike most state constitutions, Wisconsin's does not contain an express separation of powers provision, but, like the federal constitution, it implicitly provides for separation of powers by vesting three different departments with the legislative, executive, and judicial powers, respectively. State v. Holmes, 106 Wis. 2d 31, 42, 315 N.W.2d 703, 708 (1982).

197. 691 F.2d 691 (1982).

198. *Grady*, 348 N.W.2d at 566 (emphasis by the court) (citing Thoe v. Chicago M. & St. P.R. Co., 181 Wis. 456, 465, 195 N.W. 407 (1923) (statute prohibiting directed verdict held invalid as intrusion on judicial power)).

199. *Grady*, 118 Wis. at 777-78, 348 N.W.2d at 567.

200. *Id.* at 776, 348 N.W.2d at 566.

ence; the sole question was whether the statute at issue was a legislative regulation of an area reserved exclusively to the judiciary."[201]

The *Grady* court saw the Fourth Circuit's opinion in *Brainer* as acknowledging that "not all governmental power is 'shared power' " and as turning on the finding that trial rights were an area of proper congressional action.[202] According to the Wisconsin Supreme Court, however, the generation of time limits for judicial decisions, unlike trial rights, involves the efficiency and effectiveness of the court system,[203] matters of internal court administration. "The legislature does not have the power to promulgate rules of court administration. . . . The setting and enforcement of time periods for judges to decide cases lies within an area of authority exclusively reposed in the judicial branch of government."[204] Furthermore, the *Grady* court saw the statute in question as being worse than an intrusion upon exclusive judicial power over court administration. The court condemned it as "an attempt to coerce judges in their exercise of the essential case-deciding function of the judiciary."[205]

In a concurring opinion, Justice Abrahamson wrote separately to express her disagreement with the majority holding that the statute violated the state constitution's separation of powers provision. Justice Abrahamson also exposed a gap in the majority's reasoning:

> While the majority opinion discusses the existence of areas of shared power in which both the legislative and judicial branches may act, it does not examine whether each branch has power to regulate the time in which decisions are rendered. In a quantum leap and with no explanation, it moves from recognizing that some areas of authority are exclusively reposed in the judicial branch to asserting that [the statute] falls within such an area.[206]

Justice Abrahamson correctly observed that merely applying the label "administrative" to certain issues concerning the efficiency and effectiveness of the court system does not explain why those matters are within the court's exclusive authority.[207] Beginning what was to become a recurrent theme of hers,[208] Justice

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201. *Id.*

202. *Id.* at 781, 348 N.W.2d at 569.

203. *Id.* at 782, 348 N.W.2d at 569. The Wisconsin court apparently believed that the protection of trial rights was a proper subject of legislation but that the public interest in effective and efficient court systems was not a matter within the legislature's authority. *See id.* at 781-82, 348 N.W.2d at 569. The Fourth Circuit, however, seemed to think that Congress had the power to pass statutes designed to advance or protect the public interest in the efficiency and effectiveness of the judicial system. *See Brainer*, 691 F.2d at 698.

204. *Grady*, 118 Wis. at 782-83, 348 N.W.2d at 569.

205. *Id.* at 782, 348 N.W.2d at 569. The mention of interference with the "case-deciding function" recalls to mind the opinion of Judge Young in United States v. Brainer, 515 F. Supp. 627, 636 (D. Md. 1981), and that of Judge Peterson in State *ex rel.* Emerald People's Util. Dist. v. Joseph, 292 Or. 357, 640 P.2d 1011, 1018 (1982) (Peterson, J., concurring).

206. *Grady*, 118 Wis. at 795, 348 N.W.2d at 575 (Abrahamson, J., concurring).

207. *Id.* at 799, 348 N.W.2d at 576-77 (Abramson, J., concurring). *Cf.* Carter, *supra* note 105, at 721 (U.S. Supreme Court opinions generally seem justifications for results reached, rather than explanations of analytical pathways that led Justices to conclusions).

208. *See, e.g.*, Abrahamson, *Criminal Law and State Constitutions: The Emergence of State*

Abrahamson called for state constitutional law decisions to be made on historically sound, principled bases.[209]

She pointed out that the majority, in holding that the legislature does not have the power to promulgate rules for the efficient and effective functioning of the court system, was forgetting that the legislature has plenary power to act for the general welfare.[210] Finding nothing in the state or federal constitution or federal law proscribing the legislature from so acting, Justice Abrahamson concluded that "the regulation lies within the zone of authority shared by the legislature and the judiciary,"[211] because the statute was in "[t]he overlap of . . . the court's power to adopt measures necessary for the due administration of justice and the legislature's power to protect the public welfare by promoting the efficient and impartial administration of justice."[212]

Justice Abrahamson further argued that, even if the regulation fell within the judiciary's exclusive power, the court should have chosen not to strike it down,[213] because the statute did not interfere with the court in its exercise of that power. Apparently conceding part of her point, the majority recognized the desirability of a reasonable time limit for judicial decisionmaking. Ironically, while declaring the statute to be unconstitutional, the court adopted as an appendix to the *Grady* opinion a similar rule with the same time period but without the monetary sanction.[214]

The speedy disposition cases analyzed here, while containing some of the clearest assertions of the exclusivity of judicial power, were not the first of their kind. As the opinions show, the question of the constitutionality of the legislature's attempt to dictate the actions of the judiciary was litigated as far back as the previous century.[215] The FSTA cases and the state speedy disposition cases are important not only in themselves, but also because they prompted attacks on

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Constitutional Law, 63 TEX. L. REV. 1141, 1179-80 (1985) (highlighting need for well-reasoned, not result-oriented, decision making).

209. *Grady*, 118 Wis. at 792, 348 N.W.2d at 572 (Abrahamson, J., concurring). *See also* State v. Jewett, 146 Vt. 221, 224, 500 A.2d 233, 235 (1985) (decisions must be principled, not result-oriented); Whitten & Robertson, *Post-Custody, Pre-Indictment Problems for Fundamental Fairness and Access to Counsel: Mississippi's Opportunity*, 13 VT. L. REV. 247, 247-48 (1988) (state constitutional law a response to arbitrary, result-oriented decisions of federal constitutional jurisprudence).

210. *Accord* Meshell v. State, 739 S.W.2d 246, 260 n.5, 274 (Tex. Crim. App. 1987) (Clinton and Miller, J.J., respectively, dissenting) (legislature has plenary power).

211. *Grady*, 118 Wis. 2d at 792, 348 N.W.2d at 572 (Abrahamson, J., concurring).

212. *Id.* at 795, 348 N.W.2d at 575 (Abrahamson, J., concurring).

213. *Id.* at 800, 348 N.W.2d at 577-78 (Abrahamson, J., concurring). *Accord* Browde & Occhialino, *supra* note 59, at 474 (court should not override procedural statutes not necessary to protect essential judicial functions or when court rule is better than inefficient statutory procedure). *But cf.* Carter, *supra* note 103, at 748 ("It is unclear what constitutional warrant the courts have for permitting the Congress free aggrandizement of its own authority in the guise of exercising its judgment on what institutional arrangements new problems require"); Note, *Eroding the Separation of Powers: Congressional Encroachment on Federal Judicial Power*, 53 BROOKLYN L. REV. 669, 690-91 (1987) (acquiescence by one branch in intrusion by another is inconsistent with system of checks and balances).

214. *Grady*, 118 Wis. at 786-87, 348 N.W.2d at 571.

215. *See, e.g.*, Houston v. Williams, 13 Cal. 24, 25 (1859) (invalidating statute requiring California Supreme Court to render written opinion with reasons).

the constitutionality of state speedy trial acts and rules.[216] Some of the same arguments advanced in the state and federal cases discussed above reappeared in the state speedy trial cases.

B. Court Rules Mandating Speedy Trials

Even before state speedy trial statutes were being attacked as legislative intrusions on judicial power, speedy trial rules promulgated by the courts were challenged as judicial incursions into the domain of the legislature or the executive. In such cases, the usual contention was that the courts, in promulgating rules setting speedy trial time limits, were creating a substantive right to a speedy trial, which was a power residing in the legislature. Nevertheless, the universal ruling in those cases was that such rules merely prescribed procedures by which the constitutional or statutory right to a speedy trial was obtained in a judicial proceeding.

In *State ex rel. Uzelac v. Lake Criminal Court*,[217] decided in 1965, the Indiana Supreme Court held that a time limit set by the court was within the court's constitutional authority, even though the legislature had attempted to fix different time limits based on terms of court.[218] The Arkansas Supreme Court took a similar position in 1981, upholding a court rule that permitted a delay longer than that allowed by a former statutory limit.[219] During the 1970s, the Florida Supreme Court decided a pair of cases establishing the court's authority to promulgate speedy trial rules. First, in 1973 the court reversed a trial court ruling that had held the speedy trial rule unconstitutional.[220] Two years later, the court reiterated and explained its earlier holding as based on the difference between substantive and procedural law: "Therein this Court declared that the questioned rule merely provides the procedures through which the constitutional right to a speedy trial is enforced in this state and is a proper exercise of this Court's constitutional power to promulgate rules of practice and procedure."[221]

During the 1980s, the attacks on speedy trial rules broadened to include the contention that the rules infringed on the power of the executive, as well as the

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216. *See, e.g.*, State v. Pachay, 64 Ohio St. 2d 218, 219, 416 N.E.2d 589, 589-90 (1980) (question of constitutionality of state speedy trial act prompted by holdings in previous cases where attempts by general assembly to dictate judicial action within specified time struck down or ignored as legislative invasions of judicial power).

217. 247 Ind. 87, 212 N.E.2d 21 (1965).

218. *Id.* at 91, 212 N.E.2d at 23.

219. Cassell v. State, 273 Ark. 59, 69-70, 616 S.W.2d 485, 490-91 (1981). The court held that, like a speedy trial statute or a statute of limitations, the court rule was procedural, even though it had a substantive effect. *Id.* The Fourth Circuit took a similar approach in *Brainer*, 691 F.2d at 695-96 (speedy trial act only proscribes rules of practice and procedure).

220. State *ex rel.* Maines v. Baker, 254 So. 2d 207 (Fla. 1971) (court has constitutional power to promulgate rules governing practice and procedure).

221. State v. Lott, 286 So. 2d 565, 566 (Fla. 1973), *cert. denied*, 417 U.S. 913 (1974). *But cf.* Fulk v. State, 417 So. 2d 1121, 1125 (Fla. Dist. Ct. App. 1982) (Cowart, J., concurring) (just as legislature/judiciary boundaries breached in creation of rule, executive/judiciary boundaries breached in scope of rule).

legislature. In *State v. Edwards*,[222] the Washington Supreme Court faced both challenges. The state's first contention was that the court's speedy trial rule created a "substantive 'statute of limitations' " that infringed on the legislative function. The court held that it had the inherent authority, independent of any statutory grant of power, to make rules of practice and procedure.[223] It then invoked the familiar substantive/procedural distinction and held that the speedy trial rule was "clearly within the power and necessary to the operation of the courts."[224] The court also responded to the state's argument that the rule, which included a mandatory provision for dismissal with prejudice upon failure to comply, interfered with the prosecutor's constitutionally granted discretion in charging persons with crimes. Observing that the rule did not begin to operate upon the prosecutor until he or she had exercised the discretion to arrest or charge a person, the court concluded that the rule did not violate the state's right to prosecute.[225]

Four years later, the Alaska Supreme Court, in *State v. Williams*,[226] relied heavily on the Washington Supreme Court's decision in *Edwards*. The contention in *Williams* was the standard one, that the court's rule violated separation of powers principles,[227] intruding on the legislative power by creating a substantive right to a speedy trial. While recognizing that "the line between substance and procedure is an elusive one,"[228] the Alaska court, like the Washington court in *Edwards*, nevertheless invoked the substance/procedure dichotomy.[229] The state alleged that the court's speedy trial rule usurped the legislature's authority by affording the accused protections greater than those provided by the federal and state constitutions.[230] The court concluded, however, "that any additional protections which [the rule] arguably confers upon criminal defendants are justified by the fact that these are incidental to the efficient implementation of the

222. 94 Wash. 2d 208, 616 P.2d 620 (1980).

223. *Id.* at 213, 616 P.2d at 623.

224. *Id.*

225. *Id.* at 213, 616 P.2d at 623. As will be shown later, the Texas Court of Criminal Appeals was to reach the opposite conclusion regarding a statute mandating that the prosecution be ready for trial within specific time limits. *See* Meshell v. State, 739 S.W.2d 246, 257 (Tex. Crim. App. 1987) (act guaranteeing dismissal with prejudice when County Attorney delayed, deprived County Attorney of prosecutorial discretion).

226. 681 P.2d 313 (Alaska 1984).

227. *Id.* at 315. Like the Federal Constitution, and unlike most state charters, the Alaska Constitution had no express separation of powers provision. *Id.* at 315 n.2. The court reiterated earlier holdings that the principle of separation of powers is implicit in the Alaska Constitution. *Id.* Unlike the Washington Constitution, the Alaska Constitution expressly vests procedural rule-making power in the state supreme court, so the Alaska court did not have to rely on the notion of inherent power. *Id.* at 315 (Alaska constitution vests power to make and promulgate rules governing practice and procedure in supreme court of Alaska) (quoting Thomas v. State, 566 P.2d 630, 637 (Alaska 1977)).

228. 681 P.2d at 316 n.4 (quoting Smiloff v. State, 579 P.2d 28, 33 n.19 (Alaska 1978)).

229. *Id.* at 315.

230. *Id.* at 316. The Fourth Circuit, in *Brainer*, rejected a similar notion that Congress could not accord an accused "more protection than the [federal] Constitution requires." 691 F.2d 691, 698 (4th Cir. 1982).

constitutional right to a speedy trial,"[231] which the court discerned as one of the two purposes to be served by the rule. In reaching that ruling, the *Williams* court borrowed the reasoning of the Indiana Court in the *Lake Criminal Court* case,[232] mentioned earlier.[233] The *Williams* court also employed the Washington court's reasoning in *State v. Edwards*[234] to counter the argument that the rule established a substantive statute of limitations, an infringement on the power of the legislature.[235]

The rule's other purpose, according to the *Williams* court, was to advance the societal interest in speedy prosecution. The court saw that goal as "a matter of calendaring, a function generally considered to be within the judiciary's domain."[236] After reviewing cases from eleven jurisdictions, including some of the opinions discussed herein,[237] the court concluded that its speedy trial rule was a valid exercise of its constitutionally granted authority over rules of practice and procedure and did not infringe on the powers of the executive or legislative branches.[238]

Taken as a whole, the state decisions dealing with court rules mandating speedy trials, turning as they did on the obscure distinction between substantive law and procedural rules (as did the *Brainer* appellate opinion, in part)[239] provided little guidance for the resolution of the question of the constitutionality of speedy trial legislation. The cases were resolved through a definitional approach that displayed only superficial analysis. Once it was determined that the courts had the authority to promulgate procedural rules and the rule was pronounced procedural, not substantive, the result followed automatically. Perhaps because the cases lacked significant analysis, they played little or no part in the decisions regarding state speedy trial acts, despite the surface similarity of issues.

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231. 681 P.2d at 317 (footnote omitted).

232. 247 Ind. 87, 212 N.E.2d 21 (1965).

233. *See supra* note 217 and accompanying text for a discussion of the *Lake Criminal Court* case.

234. 94 Wash. 2d 208, 616 P.2d 620 (1980).

235. 681 P.2d at 318-19. The reliance of the Alaska and Washington state governments, in attacking the rule, on a purported resemblance between the court-created speedy trial rules and statutes of limitations, is ironic in light of the Fourth Circuit's use of the same analogy to uphold the FSTA in *Brainer*, 691 F.2d at 696.

236. 681 P.2d at 317-18.

237. *Id.* at 319 n.19 (citing Cassell v. State, 273 Ark. 59, 70, 616 S.W.2d 485, 491 (1981) (court can supersede speedy trial statute by procedural rule permitting longer delay); State v. Lott, 286 So. 2d 565, 566 (Fla. 1973) (same); State *ex rel.* Maines v. Baker, 254 So. 2d 207, 208 (Fla. 1971) (same); State *ex rel.* Uzelac v. Lake Criminal Court, 247 Ind. 87, 91, 212 N.E.2d 21, 23 (1965) (same); State v. Edwards, 94 Wash. 2d 208, 213, 616 P.2d 620, 623 (1980) (same)). The Alaska court also analogized to State v. Estencion, 63 Haw. 264, 268, 625 P.2d 1040, 1043 (1981) (court's speedy trial rule valid and distinct from constitutional right to speedy trial). *See Williams*, 681 P.2d at 317 n.12 (purpose of Hawaii rule to increase efficiency of criminal process).

238. 681 P.2d at 318.

239. United States v. Brainer, 691 F.2d 691, 695-96 (4th Cir. 1982). *See supra* notes 131-33 and accompanying text for a discussion of the *Brainer* court's substantive/procedural distinction. *But see* Mistretta v. United States, 57 U.S.L.W. 4102, 4110 (U.S. Jan. 18, 1989) (separation of powers analysis does not turn on whether activity is substantive or procedural).

C. Speedy Trial Acts and the Courts

A year after Judge Young ruled on the constitutionality of the FSTA in *United States v. Howard*,[240] the Kansas Supreme Court, in *State v. Warren*,[241] dismissed the contention that its state speedy trial act constituted a legislative encroachment on the judiciary, in violation of state separation of powers principles. Without engaging in any analysis, the *Warren* court stated that it found the *Howard* opinion unpersuasive, noting that no other state or federal court had followed it.[242]

Taking the issue (and the *Howard* opinion) more seriously, while ignoring the Kansas Supreme Court's *Warren* opinion, the Ohio Supreme Court, in *State v. Pachay*,[243] examined the question of whether the state speedy trial statutes violated the state constitution by encroaching on judicial power. As early as 1977, the Ohio court had begun to suggest that the state speedy trial statutes could be viewed as an invasion of judicial autonomy.[244] In the later case of *State v. Pachay*,[245] the court stayed its hand and declined to invalidate the act as a usurpation of judicial power.[246]

The court recognized a line of its own cases striking down or ignoring legislative attempts to dictate judicial action within a specified time.[247] It also admitted that "[c]ogent arguments" had been made in *United States v. Martinez*,[248] *United States v. Howard*,[249] and elsewhere against the validity of the FSTA and other such acts.[250] As the Fourth Circuit later would do in *Brainer*, however, the *Pachay* court failed to find persuasive evidence in the record to establish that the statutes usurped judicial power. Even so, the court, invoking the spirit of judicial exclusivity, hinted that the procedural area in question might be "solely

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240. 440 F. Supp. 1106 (D. Md. 1977).

241. 224 Kan. 454, 580 P.2d 1336 (1978).

242. *Id.* at 457, 580 P.2d at 1339. The *Warren* court did not mention the fact that no other court could have followed *Howard* because no other court had addressed that issue yet.

243. 64 Ohio St. 2d 218, 416 N.E.2d 589 (1980). The Ohio Constitution contains no separation of powers provision. In *Pachay*, the Ohio court interpreted article IV, § 1, which vested judicial power in the courts. *Id.* at 219 n.2, 416 N.E.2d at 589 n.2.

244. *See* State v. Ladd, 56 Ohio St. 2d 197, 201, 383 N.E.2d 579, 582 (1978) (court will not apply such statutes when judicial autonomy will be derogated by enforcement), *cert. denied*, 441 U.S. 926 (1979); State v. Singer, 50 Ohio St. 2d 103, 105-06, 362 N.E.2d 1216, 1218 (1977) (legislative time limit upheld as rational, although different from court rule). State v. Ladd, 56 Ohio St. 2d 197, 383 N.E.2d 579 (1978) (court will not apply such statutes when judicial autonomy would be derogated by enforcement).

245. 64 Ohio St. 2d 218, 416 N.E.2d 589 (1980).

246. *Id.* at 222, 416 N.E.2d at 592.

247. *Id.* at 220-21, 416 N.E.2d at 590.

248. 538 F.2d 921, 923 & n.4 (2d Cir. 1976) (sweeping language of act may be more than procedural).

249. 440 F. Supp. 1106, 1109 (D. Md. 1977) (speedy trial act an unconstitutional legislative encroachment on judiciary).

250. *Pachay*, 64 Ohio St. 2d at 221, 416 N.E.2d at 591. *See also* State v. Pugh, 53 Ohio St. 2d 153, 156, 372 N.E.2d 1351, 1352 (1978) (Herbert, J., concurring) (questioning constitutionality of state speedy trial time limits).

within the domain of the judiciary."[251] The *Pachay* court also put the legislature on notice that the issue would be reexamined if the burdens on the trial courts were to increase because of (1) legislative shortening of the time periods, (2) legislative elimination of existing exceptions to the application of those limits, or (3) an increase in the number of cases.[252] The *Pachay* decision thus cannot be taken as a general ruling on the constitutionality of the Ohio speedy trial statutes.[253]

To date, no state supreme court has held that a speedy trial statute constitutes a legislative infringement on the power of the courts[254] in violation of state constitutional separation of powers principles. The Kansas court, which upheld a statute against such a challenge, left nothing to examine because it provided no analysis. The Ohio Court, while showing evidence of research into analogous cases from its own and other jurisdictions, in the end left the question open and gave little indication of the test it would apply in the future.

D. The Effect of a Speedy Trial Statute on Prosecutors

The final case to be examined in this exploration of state constitutional separation of powers challenges to speedy trial and speedy disposition statutes and rules is the most recent one, and is the only case involving a successful attack on a state speedy trial statute. In 1987, after struggling for nearly ten years to interpret the state's speedy trial statute, the Texas Court of Criminal Appeals,[255] in *Meshell v. State*,[256] held that the statute violated an express separation of powers provision in the state constitution,[257] by encroaching impermissibly on the prosecutorial discretion of the county attorney.[258] Curiously, that encroachment constituted an infringement on the judicial branch, not the executive, be-

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251. *Pachay*, 64 Ohio St. 2d at 222, 416 N.E.2d at 591.

252. *Id.* at 223, 416 N.E.2d at 592.

253. *See* State v. Hatcher, 2 Ohio Misc. 2d 8, 9, 436 N.E.2d 557, 558 (1982) where the court stated:

> . . . *Pachay* did not rule generally on the constitutionality of the speedy trial statutes, but rather simply elected to enforce them at that time in that particular case. The Court held with the facts before it that the statutes represented a rational effort to enforce the constitutional guarantee of a speedy trial.

Id.

254. *But see* State v. Meshell, 739 S.W.2d 246, 252-54 (Tex. Crim. App. 1987) (statute invades judiciary by infringing not on courts but on prosecutor, member of judicial branch).

255. Texas (like Oklahoma) has two courts of last resort. The court of criminal appeals handles criminal cases; the supreme court decides civil cases. Tex. R. App. P., Secs. 15 & 9, respectively.

256. 739 S.W.2d 246 (Tex. Crim. App. 1987).

257. *Id.* at 257. The Texas Constitution devotes an entire article to the separation of powers:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one, of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

TEX. CONST. art. II, § 1.

258. 739 S.W.2d at 257. The court noted that "the usurpation of power will not receive sanction by reason of a long and unprotested continuation." *Id.* at 252 n.8 (citing Immigration & Natu-

cause the Texas Constitution places the office of county attorney within the judicial department.[259] Although some of the duties of the county attorney appear executive in nature,[260] *Meshell* involved a conflict between the legislative and judicial branches.[261]

The constitutionality of the state statute was questioned soon after it was adopted. In 1979, Judge Clinton[262] suggested that the statute could be viewed as violating the state constitution's separation of powers provision because it "deprives prosecuting attorneys of their right to exercise judgment and discretion in performing their exclusive prosecutorial functions."[263] Judge Clinton also suggested that the speedy trial statute encroached on the authority of the courts to control their dockets,[264] the claim that had been made in *United States v. Howard*[265] two years earlier. No claim based on docket control was made in *Meshell*, and the majority focused instead on legislative interference with the prosecutor's discretion in preparing for trial.[266] That concentration was dictated by the fact that the statute itself "focused upon prosecutorial readiness for trial rather than actual commencement of trial."[267]

The statute required that the state be ready for trial within 120 days after commencement of a felony criminal action.[268] Otherwise, the trial court would have to dismiss the indictment with prejudice.[269] In Meshell's case, the criminal

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ralization Serv. v. Chadha, 462 U.S. 919, 944 (1983) (provision providing Congressional veto declared unconstitutional)).

259. *Id.* at 253 (citing TEX. CONST. art. V, § 21 (*controlling legislative creation of prosecutor's office*)). Texas is not alone in placing the prosecutor's office in the judicial article of the state constitution. *See, e.g.*, Fulk v. State, 417 So. 2d 1121, 1126 n.2 (Fla. App. 1982) (Cowart, J., concurring) (constitutional provision for state attorneys and public defenders provided by FLA. CONST. art. V, §§ 17-18, denoted as judiciary article).

260. *Meshell*, 739 S.W.2d at 253 n.9.

261. *Id.* at 253. One member of the court expressed doubt that the county attorney had standing to speak for the judiciary. *Id.* at 269 (Teague, J., dissenting).

262. Members of the Texas Court of Criminal Appeals carry the official title of "Judge," not "Justice." Rule 201(a), TEX. R. APP. P. Any comments in this article regarding the opinions of Judge Clinton should be read in light of the fact that the author was a briefing attorney (law clerk) for Judge Clinton during the 1982-83 term.

263. Ordunez v. Beam, 579 S.W.2d 911, 915 (Tex. Crim. App. 1979) (Clinton, J., concurring).

264. *Id.*

265. 440 F. Supp. 1106 (D. Md. 1977).

266. 739 S.W.2d at 254-57. Presumably, because the prosecutor is a member of the same branch of government as the courts, a judicially created rule requiring the prosecutor to be ready for trial within a specified time could not be held to violate the separation of powers provision of the state constitution, at least not on the basis that the rule was an infringement on prosecutorial discretion.

267. *Id.* at 255-56 n.15.

268. The statute provides: "A court shall grant a motion to set aside an indictment . . . if the state is not ready for trial within . . . 120 days of the commencement of a criminal action if the defendant is accused of a felony. . . ." TEX. CODE CRIM. PROC. ANN. Art. 32A.02, § 1(1) (Vernon 1983).

269. *Meshell*, 739 S.W.2d at 250. In this respect, the Texas act differs from the FSTA, which allows dismissal without prejudice to the government's ability to seek another indictment for the same offense. *See supra* note 148 and accompanying text for the FSTA provision permitting dismissal without prejudice.

action commenced when he was indicted, but for more than twelve months the state failed to arrest or try him.[270] The trial court agreed with Meshell that the state had failed to comply with the statute, but, without stating its reason, the court held the statute unconstitutional.[271] In an unpublished opinion, the appellate court summarily rejected the contention that the statute violated separation of powers principles but held it unconstitutional on other grounds.[272] Despite problems with the procedural posture of the case, the court of criminal appeals decided to address the separation of powers issue.[273]

As noted above, the government argued that in passing the speedy trial statute, the legislature had intruded on the judiciary by restricting the prosecutorial discretion of the county attorney, a member of the judicial branch.[274] Although the legislature had treated some counties differently by establishing the office of district attorney or criminal district attorney,[275] in the jurisdiction in question only the county attorney had the constitutional "duty to represent"[276] the state in criminal cases. As a member of the judicial branch, the county attorney was entitled to the protection of the separation of powers precept contained in the state constitution. Previously, the legislature had been unable to remove or limit the duties of county attorneys unless an express provision of the constitution authorized it to do so.[277]

The court of criminal appeals regarded prosecutorial discretion in the preparation of the government's case for trial as an "obvious corollary" to a county

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270. 739 S.W.2d at 249. Although an arrest warrant had issued, it stated the wrong home address. Unaware of the warrant or indictment, Meshell continued to reside at his usual address until he was arrested. *Id.*

271. *Id.*

272. *Id.* at 251. The court of appeals held that, when the bill proposing the act was before the legislature, the caption or introduction to the bill failed to provide the legislature with sufficient notice of its contents, in violation of Article III, § 35 of the Texas Constitution. *Id.* Meanwhile, however, Section 35 had been amended to prevent the courts from invalidating legislation on that basis and leaving such questions in the hands of the legislature alone. *Id.* The issue thus became moot. *Id.*

273. *Id.* at 248 n.3. The high court's justifications for reaching that question, despite procedural obstacles, were criticized by Judge Clinton at one point as "utterly fatuous" and elsewhere as "a masterly bit of disingenuousness." *Id.* at 259, 260 n.3 (Clinton, J., dissenting). Another dissenter agreed that Judge Clinton was "technically correct" in objecting to the exercise of discretionary review over the separation of powers issue but believed that to refrain from reaching the question would amount to "judicial wheelspinning." *Id.* at 261 n.1 (Teague, J., dissenting).

274. *Id.* at 253. *But cf.* People v. Guenther, 740 P.2d 971, 977 (Colo. 1987) (statute authorizing court to order pretrial dismissal of criminal charges does not impermissibly encroach on executive prosecutorial function in violation of state constitution).

275. *Meshell*, 739 S.W.2d at 253 n.10 (citing 1 THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 463-467 (G. Braden ed. 1977) (explaining manner in which Texas Constitution controls legislative creation of prosecutor's office)).

276. TEX. CONST. art. V, § 21 (county attorney shall represent state). *But see Meshell*, 739 S.W.2d at 271 (Miller, J., dissenting) (doubting that stated "duty to represent" is actually "power" protected from infringement by other departments because of separation of powers clause).

277. *See* Hill County v. Sheppard, 142 Tex. 358, 364, 178 S.W.2d 261, 264 (1944) (unconstitutional for legislature to place criminal duties of county attorney in office of criminal district attorney).

attorney's constitutional duty to prosecute criminal cases.[278] Thus, without express constitutional authorization, the legislature could not restrict the county attorney's ability to prepare for trial.[279] The Court rejected the argument that the legislature's constitutionally granted power to make rules for the courts operated as express authority to infringe on the prosecutor's discretion in preparing for trial.[280] The rule-making authority presupposed the existence of a substantive right of the defendant for which the legislature was merely to provide procedures. The legislature was not given "unlimited power to infringe upon the substantive power of the Judicial department under the guise of establishing 'rules of court,' thus rendering the separation of powers doctrine meaningless."[281]

The right for which the statute was meant to provide procedural guidelines was the constitutional right to a speedy trial.[282] The flaw in the plan was that the Act did not provide for the speedy commencement of trial but merely directed the prosecutor to be ready for trial within a certain time period. "[T]he Act is directed at speeding the *prosecutor's preparation and ultimate readiness for trial*."[283] The federal and state constitutional provisions, the court noted in contrast, were "directed at assuring a speedy *commencement of trial*."[284]

Furthermore, the statute did not take into account that well-established constitutional speedy trial doctrine regarded as major factors to be considered in determining whether the right to a speedy trial had been abridged: (1) the reason for the delay; (2) the defendant's assertion of his or her right; and (3) prejudice to the defendant.[285] Under the Texas speedy trial statute, it made little

278. *Meshell*, 739 S.W.2d at 254. *But see id.* at 272 (Miller, J., dissenting) (express wording of constitution and cases relied on by majority speak of power to represent state, not prosecutorial discretion in preparation of cases for trial).

279. *Id.* at 254-56. *But see id.* at 272. (Miller, J., dissenting): "[S]imply because a power is specified in the Constitution, and is therefore subject to protection . . . does not imply that any incident to that power is also accorded the same protection. . . . Absent an articulable power, the enumerated powers doctrine . . . and the separation of powers clause . . . are irrelevant." *Id.* (Miller, J., dissenting).

280. *Id.* at 255. The Texas Constitution "clearly intends that the Legislature have ultimate control over establishment of procedural rules of court." *Id.* (quoting TEX. CONST. art. V, § 25 ("The Supreme Court shall have power to make and establish rules of procedure *not inconsistent with the laws of the State* for the government of said court and the other courts of this State to expedite the dispatch of business therein") (emphasis added)).

281. *Id.* The court noted that "the Legislature could establish a new right under its general plenary power if that right did not infringe upon another department's separate power." *Id.* at 255 n.13.

282. *Id.* at 255. For background to the statute, *see* Clinton, *Speedy Trial—Texas Style*, 33 BAYLOR L. REV. 707, 743-46 (1981) (act has not induced pace of speedy trial which serves public policy of Act); Cohen, *Senate Bill 1043 and the Right to a Speedy Trial in Texas*, 7 AMER. J. CRIM. L. 23, 24 (1979) (liberal provisions for extending intervals likely to result in litigation to determine meaning of provisions).

283. *Meshell*, 739 S.W.2d at 255 (emphasis by the court). A caption to an amendment described the provision as "[a]n Act relating to the time limits *for the state to be ready for trial. . . .*" *Id.* at 255 n.15 (emphasis by the court).

284. *Id.* at 256 (emphasis by the court).

285. *See* Barker v. Wingo, 407 U.S. 514, 530 (1972) (deprivation of right to speedy trial deter-

difference what reason the state had for the delay, and it made no difference whether the defendant had been prejudiced by the delay or had requested a speedy trial before seeking dismissal.[286] The legislature's failure to incorporate those factors, combined with its focus on the prosecutor's readiness for trial rather than the commencement of trial, caused the court to conclude that the statute infringed on the prosecutor's discretion, while failing to ensure a defendant a speedy trial.[287] The dissenters regarded the effectiveness or efficiency of the statute,[288] as well as the factors discussed above, to be irrelevant, and they saw no practical difficulties being imposed on prosecutors by the act.[289] Finding no other express provision of the state constitution authorizing the statute, however, the majority held that the legislature had "exceeded its authority to protect appellant's substantive right to a speedy trial through procedural legislation."[290]

Although the *Meshell* opinion is open to criticism,[291] it is significant in several respects.[292] It was the first decision to hold a state speedy trial act unconstitutional. The *Meshell* majority did so in a way that provided an example of truly independent state constitutional analysis: without reference to federal separation of powers decisions, to federal cases dealing with the constitutionality of the FSTA, or even to the decisions from other jurisdictions concerning speedy trial or speedy disposition provisions,[293] despite the similarity of the Texas separation of powers provision to those of other states.[294] Unlike most of the deci-

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mined by *ad hoc* balancing test). A fourth factor, the length of delay, is taken into account by the statute. The federal and Texas constitutions provide the same speedy trial right. *Meshell*, 739 S.W.2d at 255 n.14.

286. *Id.* at 256. *See* TEX. CODE CRIM. PROC. ANN. art. 32A.02, § 3 (Vernon Supp. 1988).

287. *Meshell*, 739 S.W.2d at 256. *But see id.* at 275 (Miller, J., dissenting) (whether statute accords defendant speedy trial in most efficient way is irrelevant).

288. *Meshell*, 739 S.W.2d at 263 (Teague, J., dissenting) (Speedy Trial Act governed by statutory interpretation and legislative history, while Supreme Court's analysis in Barker v. Wingo, applies only to assertion by defendant of federal constitutional speedy trial right); *Meshell*, 739 S.W.2d at 274 (Miller, J., dissenting) (whether Speedy Trial Act adequately addresses four factors set out in *Barker* wholly irrelevant to determination of viability of Act vis-à-vis separation of powers clause).

289. *Id.* at 739 (Teague, J., dissenting) (Act is so easy for prosecutor to comply with that failure to do so "closely resembles an attorney losing an uncontested divorce case. It can be done, but it is awfully hard. . . .").

290. *Meshell*, 739 S.W.2d at 257.

291. Because the dissenting opinions cited herein did such a thorough job of it, this article will not elaborate on the possible shortcomings of the majority opinion.

292. *See* Rose v. State, 752 S.W.2d 529, 538 (Tex. Crim. App. 1988) (opinion on reh'g) (Miller, J., concurring) (*Meshell* must be most important separation of powers opinion in recent times).

293. One dissenter, however, discussed federal separation of powers decisions in general: United States v. Brainer, 691 F.2d 691, 698 (4th Cir. 1982) (FSTA not unconstitutional encroachment on judiciary); and a similar act in Ohio considered in State v. Pachay, 64 Ohio St. 2d 218, 222, 416 N.E.2d 589, 591 (1980) (speedy trial provisions are rational effort to enforce constitutional right to speedy trial). *Meshell*, 739 S.W.2d at 264-68 (Teague, J., dissenting).

294. *See supra* notes 33, 172, 188 for examples of state separation of powers provisions similar to that of Texas. *See also supra* note 257 for the Texas provision. States often have borrowed from one another constitutional provisions and legal reasoning in a form of "horizontal federalism." Tarr & Porter, *Introduction: State Constitutionalism and State Constitutional Law*, 17 *Publius* 1, 9 nn.17-18 (1987). For other discussions and examples of horizontal federalism, *see* Elazer, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS 11, 18-22 (1982) (suggests six constitu-

sions from other jurisdictions, the *Meshell* majority and dissenting opinions displayed the results of extensive debate about the text, structure, and function of the state constitution and the statute in question.[295] Perhaps most significant, as a sweeping victory for the state, which also promises to clear many cases from the appellate dockets,[296] the *Meshell* opinion demonstrated that far-reaching[297] and activist[298] state constitutional decision making was not the province of only liberal or defense-oriented judges.[299]

CONCLUSION

As noted in some of the opinions discussed above, vigorous scholarly debate over the question of inherent judicial control over rule making has spanned several decades.[300] Although some form of inherent judicial power is a widely,

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tional patterns among states based, *inter alia*, on regional differences); Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS 27, 43 (1982) (written constitutions express existing political cultures and reflect respective values); McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions"*, 13 VT. L. REV. 179, 191 (1988) (some states copied from other state constitutions rather than from federal fourth amendment); Sturm, *Development of American State Constitutions*, 12 PUBLIUS 57, 74 (1982) (survey of current development of state constitutions).

295. The majority and dissenting opinions fill more than thirty pages in the reporter. A single footnote in one of the dissenting options covers four full pages. *See Meshell*, 739 S.W.2d at 276-80 n.2 (Miller, J., dissenting).

296. On a single day, May 25, 1988, the Texas Court of Criminal Appeals disposed of eight speedy trial cases, merely by citing *Meshell*. Some of the cases had been pending for three or four years. *See* Ballenger v. State (No. 632-84); Beddoe v. State, 752 S.W.2d 564, 565 (Tex. Crim. App. 1988) (No. 589-84); Garcia v. State, 751 S.W.2d 507, 508 (Tex. Crim. App. 1988) (No. 1118-85); Hoffman v. State, 751 S.W.2d 512, 512 (Tex. Crim. App. 1988) (No. 448-85); Massey v. State, 751 S.W.2d 505, 506 (Tex. Crim. App. 1988) (No. 1111-86); Orn v. State, 753 S.W.2d 394, 395 (Tex. Crim. App. 1988) (No. 466-87); Stevenson v. State, 751 S.W.2d 508, 509 (Tex. Crim. App. 1988) (No. 928-85); Wright v. State, 751 S.W.2d 506, 507 (Tex. Crim. App. 1988) (No. 1217-85). The last two digits of the case number denote the year in which the high court received the petition for discretionary review.

297. *See Meshell*, 739 S.W.2d at 262 (Teague, J., dissenting): ("[T]he majority opinion is a mere step away from holding that the prosecuting attorneys of the State, which presently number at least 1,085 . . . can never be subject to *any* procedural laws promulgated by the Legislature of this State"); *id.* at 275 (Miller, J., dissenting) ("[W]hat act of the legislature regulating the prosecution is ever safe from our attack?") *Id.*

298. *See id.* at 258 (Clinton, J., dissenting) (majority of court demonstrates will and determination to cast aside carefully drawn rules for orderly procedure to reach result that law and procedural circumstances have previously put beyond its reach); *id.* at 269 (Teague, J., dissenting) (referring to "aggressive and assertive majority team").

299. *See* Miller, *Separation of Powers: An Ancient Doctrine Under Modern Challenge*, 28 ADMIN. L. REV. 299, 324-25 (1976) (separation of powers is profoundly conservative device to block innovations). *But cf.* Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429, 433 (1988) (overwhelmingly liberal impact of state court activism). For an idea of the Texas Court of Criminal Appeals' activism (from a court about evenly divided between liberal and conservative judges), *see* Rose v. State, 752 S.W.2d 529, 536-37 (Tex. Crim. App. 1987) (parole law jury instruction violates separation of powers and due course of law); Long v. State, 742 S.W.2d 302, 319 (Tex. Crim. App. 1987) (admission of videotape of child witness violates right of confrontation and due course of law).

300. *See* Kaplan & Greene, *The Legislature's Relation to Judicial Rule-Making: An Appraisal*

though not universally,[301] accepted concept,[302] some observers have argued that control of court administration is the only truly inherent power of the judiciary.[303] Virtually every state now allows judicial control over the rules of practice and procedure, but the source of that authority is often a statute by which the legislature has expressly delegated the power.[304] Alternatively, rule-making authority is now explicitly granted to the courts in many state constitutions,[305] though often with legislative oversight.[306] Constitutional authorization for legislative and judicial sharing of control over rules of procedure, however, does not settle the question of whether the legislature can dictate the internal administration of the courts or impede the discretion of the prosecutor.[307]

Because state constitutions expressly vest the judicial power in the judiciary,[308] some commentators have suggested that the real questions involve not whether a power is inherent, but whether it is judicial in nature and exclusively so.[309] Unfortunately, the typical state court opinion leaps from the premise that some judicial power is exclusive to the conclusion that the power in question is

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of Winberry v. Salisbury, 65 HARV. L. REV. 234, 239 (conflict between N.J. legislature and supreme court) (1951); Levin & Amsterdam, *supra* note 88, at 30 (some powers of courts must be free from legislative control); Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28, 37-40 (1952) (judicially established rules of procedure bring speed and efficiency to administration of justice); Pound, *The Rulemaking Power of the Courts*, 12 A.B.A. J. 599, 601-02 (1926) (procedure of courts belong to courts, not legislature); *see generally* Wigmore, *supra* note 133 (claiming all legislative rules for judicial procedure are unconstitutional).

301. *See* Dodd, *supra* note 16, at 201 (political philosophy of 1776 did not recognize existence of inherent governmental power); Burns & Markman, *supra* note 32, at 581 (denying existence of inherent powers in branches of federal government).

302. In re Clerk of Court's Compensation v. Lyon County Comm'rs, 308 Minn. 172, 177, 241 N.W.2d 781, 784 (1976) (doctrine of inherent judicial power is established law in virtually all American jurisdictions).

303. Cox, *supra* note 27, at 229.

304. Kay, *supra* note 18, at 28.

305. *See* Levin & Amsterdam, *supra* note 88, at 5 (recent history of constitutional drafting in this country reflected consistent concern with rule making by judiciary, with new constitutions expressly granting power to courts).

306. Williams, *supra* note 10, at 208-09 (citing for examples and further discussion A. KORBAKES & C. GRAU, JUDICIAL RULEMAKING IN THE STATE COURTS—A COMPENDIUM (1978); Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 639-42 (1957); Kay, *supra* note 18, at 28; Means, *The Power to Regulate Practice and Procedure in Florida Courts*, 32 U. FLA. L. REV. 442, 458 (1980)).

307. Coate v. Omholt, 203 Mont. 488, 497-98, 667 P.2d 591, 596 (1983) (legislative power to regulate procedure does not include control of court dockets); *In re* Grady, 118 Wis. 2d 762, 782, 348 N.W.2d 557, 569 (1984) (efficient and effective administration of court is matter within exclusive authority of judiciary); State v. Meshell, 739 S.W.2d 246, 257 (Tex. Crim. App. 1987) (authority of legislature to regulate procedure is not authority to encroach on power of prosecutor in trial preparation).

308. *See, e.g.* KY. CONST. § 27: "The powers of the government . . . shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative to one; those which are executive to another; and those which are judicial to another . . . ."

309. *See* Williams, *supra* note 16, at 211 ("State constitutions . . . place the judicial power in the judiciary; consequently, rather than debating whether a court's power is inherent, the inquiry should focus on whether the claimed power is properly a judicial function").

(or is not) exclusive.[310] In the ordinary case, however, it does not matter whether the power in question is inherently or exclusively judicial, as long as the legislature demonstrates that it is exercising some other authority of its own.[311]

If the power in question is judicial, and the legislature cannot demonstrate that it has independent authority of its own, then any legislative exercise of that power should be regarded as a violation of separation of powers principles. The undue interference test should not apply.[312] If the power at issue is judicial, but the legislature is not actually exercising that power[313] and merely is using its own constitutional authority to affect how the court exercises judicial power, the inquiry should be whether the legislation unduly interferes with the judicial branch's power.[314]

In every challenge to a speedy trial statute, the legislature can point to its authority to implement the constitutional right to a speedy trial as a power source independent of both the judiciary's authority over rule making and the prosecutor's authority over case preparation.[315] The legislature is authorized to effectuate the constitutional right by creating a statutory right to a speedy trial. In speedy trial statute cases, therefore, the question of inherent or exclusive power of the courts or prosecutors becomes irrelevant. Because the legislature has its own power source independent of the authority of the other branches, the only question is whether the speedy trial act unduly interferes with the other branches in the exercise of their power.

Similarly, unless the state constitution indicates otherwise, the legislature has general policymaking authority to pass statutes designed to protect or advance the interests of the public and litigants in an effective and efficient system of justice, including the speedy disposition of cases.[316] No state has a provision expressly limiting the legislature in this regard. To the contrary, most states

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310. *See, e.g., Grady*, 118 Wis. 2d at 795, 348 N.W.2d at 575 (Abrahamson, J., dissenting) (in areas of shared powers, majority does not examine whether each branch has power to regulate time in which decisions are rendered).

311. *But cf.* Morrison v. Olson, 108 S. Ct. at 2627-31 (Scalia, J., dissenting) (emphasizing importance of exclusivity).

312. *See Grady*, 118 Wis. 2d at 776, 348 N.W.2d at 566 (areas of authority exclusive to judicial branch are free from intrusion by other branches of government).

313. Some state constitutions contain express wording, not only calling for separation of powers, but also forbidding a member of one branch of government from exercising the powers of another branch. *See, e.g.*, OR. CONST. art. II, § 1, *supra* note 172; MONT. CONST. art. III, § 1, *supra* note 188; TEX. CONST. art. II, § 1, *supra* note 257. The argument can be made that such provisions prohibit only the actual exercise of one branch's power by another branch, not actions by one branch that affect other branches.

314. *See* State *ex rel.* Emerald People's Util. Dist. v. Joseph, 292 Or. 357, 362, 640 P.2d 1011, 1013 (1982) (statute imposing three month time limit for appeals court to hear and determine cases did not unduly interfere with exercise of judicial functions). A similar approach could be taken to shared powers. If the power is not exclusive but is shared by the legislature and another branch, the question should be whether the statute unduly interferes with the proper exercise of authority shared with the other branch.

315. *See, e.g.*, Meshell v. State, 739 S.W.2d at 255 (recognizing, *inter alia*, legislature's authority to effectuate right to speedy trial).

316. *See, e.g., supra* notes 199, 210-11 and accompanying text for a discussion of the legislative ability to establish new rights.

have legislative/judicial sharing of rule-making power.[317] Therefore, when the legislature enacts a statute directing internal administrative procedures for the courts, it is exercising either independent legislative policymaking power or shared legislative/judicial rule-making authority, not exclusive judicial power. For that reason, it does not matter whether the power that the courts are concerned with protecting is inherently or exclusively judicial, because, again, the legislature is exercising power of its own.

The action of the legislature may still be unconstitutional, however, if it unduly interferes with the judiciary's power. Even interference with the judiciary's exercise of shared authority can be a separation of powers violation, should that interference become too substantial or extensive.[318] As long as the legislature is exercising authority of its own, the standard of undue interference should be applied to a claim of legislative interference, whether or not the judicial power at issue is exclusive or inherent.

For example, in *Meshell* the power to prepare the state's criminal cases for trial was viewed as the exclusive province of the prosecutor, a judicial officer. Had a legislative committee undertaken to prepare a criminal case for trial, it would have been exercising an exclusive prosecutorial power, thus violating the separation of powers provision.[319] The legislature in *Meshell*, however, was not exercising a prosecutorial power. The Texas legislature undoubtedly has the constitutional authority to effectuate the state constitutional right to a speedy trial.[320] It merely passed a statute that, while creating a statutory right in order to implement the constitutional speedy trial right, affected the prosecutor in the exercise of case preparation. Because the statute did not amount to an exercise of prosecutorial power, but had an effect on that power, it should be evaluated on an undue interference standard.[321] "Undue interference" or "undue burden" should not be defined to include only a result that completely prevents a branch from carrying out its constitutionally assigned function,[322] or makes it impossible for the other branch to perform its constitutional role.[323] Rather, the standard should be broadly read to invalidate any threat to the independence of another branch that is not justified by a constitutionally assigned power and an overriding need of the acting branch to protect or advance constitutionally

317. *See supra* notes 302-03 and accompanying text for a discussion of authority shared by legislature and judiciary.

318. *See In re* Grady, 118 Wis. 2d 762, 776, 348 N.W.2d 559, 574 (Abrahamson, J., concurring) (in area of shared authority, legislation constitutional unless unduly burdens or substantially interferes with judicial branch).

319. *See* Meshell v. State, 739 S.W. 246, 277-78 n.2 (Tex. Crim. App. 1987) (Miller, J., dissenting) (separation of powers violation might occur if legislative investigating committee undertook to dismiss prosecution, rather than creating conditions under which court must dismiss indictment after legislative grant of statutory transactional immunity).

320. *See supra* notes 52, 281 (plenary power of Texas legislature).

321. *Compare Meshell*, 739 S.W.2d at 267 (Teague, J., dissenting) (advocating undue interference standard) *with* Morrison v. Olson, 108 S. Ct. at 2620 (using "undue interference" wording but not as well-defined test).

322. *Brainer*, 691 F.2d at 698.

323. *Joseph*, 292 Or. at 362, 640 P.2d at 1014.

rooted interests.[324]

The approach proposed here draws from the state cases the undue interference language and from the federal cases elements of the *Nixon* analysis and the later general balancing test. It takes the middle ground between those who would seek rigid compartmentalization and those who would find no separation of powers violation until one branch completely disrupted another branch's ability to function. The rigid compartmentalization theory undermines the efficiency of government and undervalues the availability of checks and balances.[325] The other extreme looks only for the completed coup and underestimates the incremental effect of interbranch intrusions. As Justice Frankfurter warned, "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."[326]

The theory of separation of powers, "variously decried as vaguely foolish or praised as truly fundamental,"[327] continues to be a source of contention among the branches of both the state and federal governments. At both levels of government, it remains true that "there is no fruitful rule or test which governs decisions relating to separation of powers."[328] No commentator seriously believes that the courts are even attempting "to follow a consistent set of interpretive rules."[329] The lack of "analytical coherence"[330] in the opinions has led

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324. Arguably, only interests with roots in the federal or state constitution should figure in the balance. Whether or to what extent, in the face of separation principles, the federal Constitution embodies an interest in governmental efficiency, which the United States Supreme Court has thrown into the balance before, has been a much debated topic. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 863 (1986) (Brennan, J., dissenting) (legislative interest in efficiency should not be weighed against judicial independence). *Compare* United States v. Brown, 381 U.S. 437, 443 (1965) (separation of powers obviously not instituted with idea that it would promote governmental efficiency) *and* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (doctrine of separation of powers adopted by Convention of 1787 not to promote efficiency, but to preclude exercise of arbitrary power) *with* Banks, *Efficiency in Government: Separation of Powers Reconsidered*, 35 SYRACUSE L. REV. 715, 717 (1984) (record reveals that efficiency tells half or more of tale leading to separated powers in Constitution) *and* Miller, *An Inquiry into the Relevance of the Intention of the Founding Fathers, with Special Emphasis Upon the Doctrine of Separation of Powers*, 27 ARK. L. REV. 583, 587 (1973) ("powers separated in 1787 as much to promote efficiency as anything else). Some state courts have recognized that separation of powers advances efficiency in government. *See, e.g.*, Redmond v. Ray, 268 N.W.2d 849, 858 (Iowa 1978) (efficient functioning of government depends on adherence by each branch to delicate balance that must be maintained under separation of powers precept); Galloway v. Truesdell, 83 Nev. 13, 22, 422 P.2d 237, 244 (1967) (separation of powers necessary to most efficient functioning of governmental system).

325. *See* Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 OKLA. L. REV. 447, 481 (1985) (separation of powers makes sense only when combined with checks and balances); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (in most cases rigid compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances).

326. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

327. L. TRIBE, CONSTITUTIONAL CHOICES 67 (1985) (footnotes omitted).

328. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 64, at 137.

329. Carter, *supra* note 103, at 781 n.248.

some commentators to suggest radical solutions, such as regarding almost all separation of powers issues as "political questions," to be resolved through the checks and balances available to the executive and legislative branches.[331] Declaring an issue to be a political question, however, and thereby allowing the courts to refrain from deciding it, would be little more than "the judicial equivalent of throwing up one's hands in despair."[332]

In the final analysis, it may be said of state constitutional separation of powers theory, as is true of federal, that two centuries "of partisan debate and scholarly speculation [yield] no net result but only [supply] more or less apt quotations from respected sources on each side of any question."[333] Without the benefit of coherent or consistent guidance by the federal courts,[334] lacking a history of truly independent analysis,[335] and faced with different constitutional frameworks, the state courts must struggle to develop separation of powers theories that rest on principled bases.[336] The state decisions regarding speedy trial and speedy disposition statutes and rules provide useful starting points for such an endeavor.

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330. *Id.* at 721.

331. *See generally* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). Choper regards legislative encroachment on individual rights or on the power of the judiciary as proper reasons for judicial intervention. *Id.* at 60-128, 380-415.

332. Carter, *supra* note 103, at 806.

333. *Youngstown Sheet & Tube*, 343 U.S. at 634-35 (Jackson, J., concurring).

334. *Cf.* Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U.L. REV. 143, 168 n.115 (1986-87) (in area of inherent power of judiciary over internal court administration "there is no analogous federal doctrine to complicate matters").

335. *See* McCabe, *supra* note 294, at 217 (even when purporting to engage in independent analysis, state courts often seem unwilling or unable to analyze independently).

336. *See* Abrahamson, *supra* note 208 (calling for principled decision-making). One reason why some opinions interpreting state constitutions have been poorly reasoned may be that most practitioners, because they lack experience in formulating state constitutional arguments, have given the courts little aid. *See* Utter & Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 638 (1987) (failure of litigators to make state constitutional claims). The federal decisions also have been criticized as unprincipled:

> *Chadha* must remain something of a mystery. Neither the near unanimity with which the Court decided *Chadha*, nor the breathtaking sweep of the Court's holding, are easily explained by anything in the Constitution's text, history, or structure; by the force of the Court's own logic; or by the thrust of any analysis thus far advanced, at least to my knowledge, in the decision's defense.

L. TRIBE, *supra* note 327, at 76.