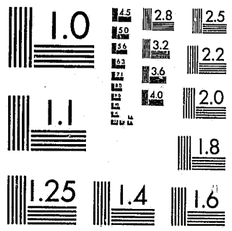

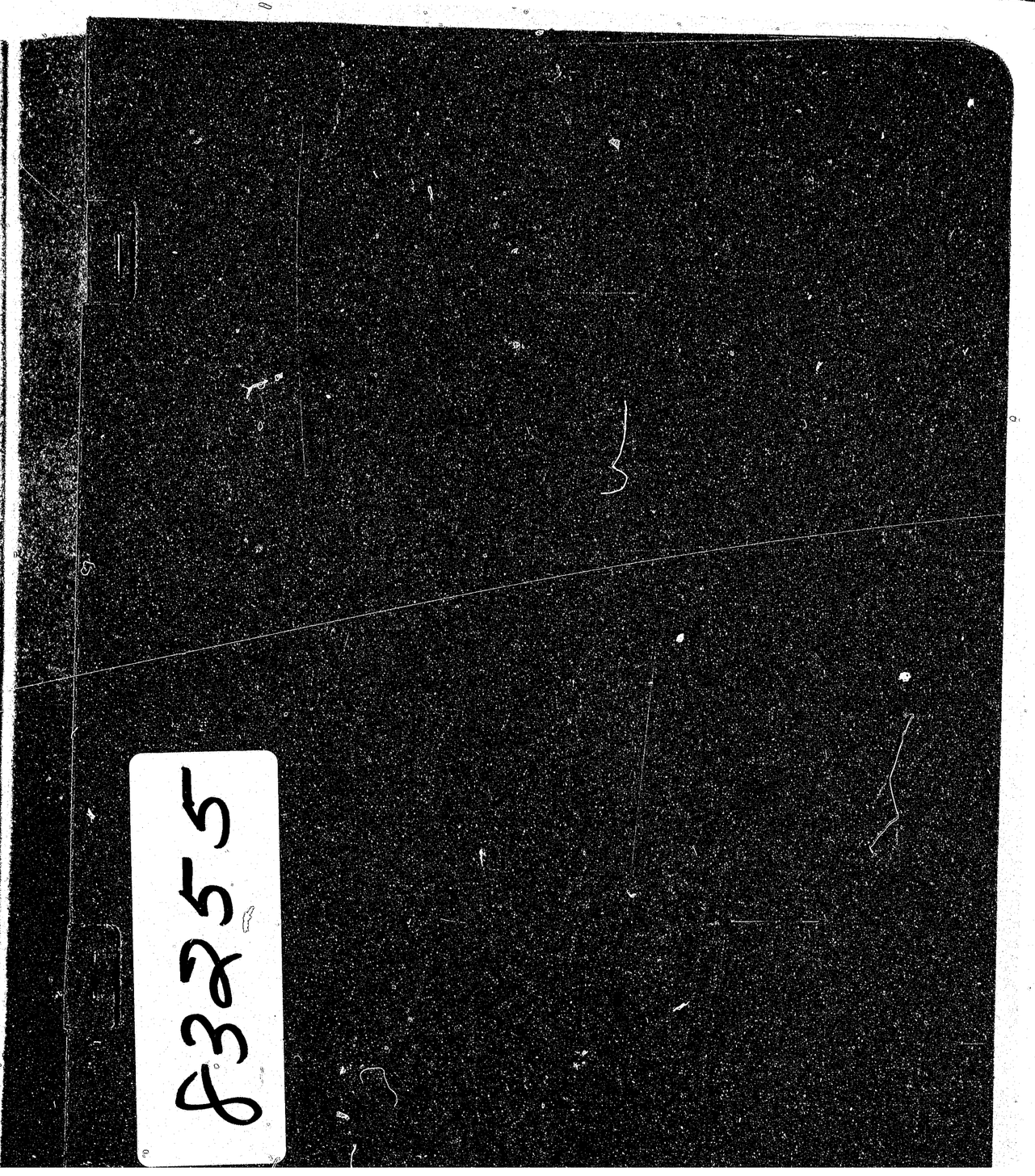

COURT REFORM IN THE TWENTIETH CENTURY: A CRITIQUE OF THE COURT UNIFICATION CONTROVERSY*

by
Susan Carbon**
Larry Berkson***
Judy Rosenbaum****

I. INTRODUCTION

Historically, state judiciaries have been plagued with excessive fragmentation and dysfunctional autonomy.[1] Jurisdiction hopelessly overlapped among the courts[2] causing the dismissal of cases for technicalities, and courts became so numerous that many states abandoned attempts to tabulate their number, type, and location.[3]

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** B.A., University of Wisconsin, 1974; currently enrolled DePaul University College of Law. Ms. Carbon is a Research Assistant, American Judicature Society.

*** B.A., Doane College, 1966; M.A., University of South Dakota, 1967; Ph.D., University of Wisconsin, 1973. Dr. Berkson is Director of Educational Programs, American Judicature Society.

**** B.A., University of Rochester, 1973; J.D., University of Michigan Law School, 1976. Ms. Rosenbaum is Staff Attorney, American Judicature Society.

[1] *See generally* Peck, *Court Organization and Procedures to Meet the Needs of Modern Society*, 33 IND. L.J. 182, 183 (1958); Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, address delivered at the annual convention of the American Bar Association in St. Paul, Minnesota (Aug. 29, 1906), *reprinted in* 20 J. AM. JUD. SOC'Y 178 (1937).

[2] Archibald Cox, Chairman of the Select Committee on Judicial Needs Appointed by the Governor of the Commonwealth of Massachusetts, describes Massachusetts' nonunified court structure as follows:

> The trial courts are fragmented in organization, jurisdiction, administration, physical facilities and finance. The trial of law suits is currently divided among the Superior Court, 14 separate and largely independent probate courts, 72 largely autonomous district courts, 4 juvenile courts, 2 housing courts, and the Municipal Court for the City of Boston. Each court operates with funds derived from several sources, with supporting personnel appointed by and answering to diverse authority, and often in facilities under separate control.

Cox, *The Report of The Governor's Committee on Judicial Needs*, 49 N.Y. ST. B.J. 374, 376 (1976).

[3] For example, when Kentucky was in the process of adopting a new judicial article in 1975, the Office of Judicial Planning undertook a survey of all trial courts. "In some instances, the staff was not able to locate judges or find the places where court was held." Davis, *Kentucky's New Court System*, KY. BENCH & B., Apr. 1976, at 20.

Judges possessed varying qualifications, a few presiding over criminal trials with no legal training whatsoever.[4] Methods of financing also varied; many courts were required to be self-supporting and were often expected to support other areas of local government as well. As a result, laws were variously enforced depending, for example, on the residence of the offender and the needs of the local political subdivision at the time.[5]

The pervasiveness of these problems during the past seventy years has caused scholars, academics, and various national and state commissions to advocate state court unification as one method of amelioration.[6] Court unification embodies two primary goals: reducing the organizational fragmentation which permeates traditional state judiciaries and centralizing administrative decision-making responsibility at the state level in order to provide an acknowledged locus of authority. Unification is an attempt to minimize unchecked discretion in the management of courts, to reduce the presence of local politics and patronage in the judiciary, and to transform the judiciary into a judicial "system." The concept comprises five principal elements: (1) consolidation of a state's numerous trial courts into a one- or two-tier system;[7] (2) centralized management of the judiciary by an accountable body, usually a state court administrator;[8] (3) a grant to the state supreme court of procedural and administrative rule-making authority;[9] (4) state funding, whereby the state assumes complete financial responsibility for the expenses of the judiciary;[10] (5) unitary budgeting,[11] whereby a single budget is prepared for all courts at the state level and administered by one agency, usually the court administrator's office.[12]

[4] For an excellent discussion of nonlawyer judges, see Ashman & Lee, *Non-Lawyer Judges: The Long Road North*, 53 CHI-KENT L. REV. 565 (1977).

[5] For a thorough examination of judicial financing, see C. BAAR, SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES 5-95 (1975).

[6] *See, e.g.*, GOVERNOR'S SELECT COMMITTEE ON JUDICIAL NEEDS, REPORT ON THE STATE OF THE MASSACHUSETTS COURTS (1976) [hereinafter cited as COX COMMISSION]; LOS ANGELES MUNICIPAL COURT, RESOURCE MATERIALS ON COURT CONSOLIDATION (1973) [hereinafter cited as COURT CONSOLIDATION]; O'Connell, *We Should Unify the Trial Courts in Oregon*, 51 ORE. L. REV. 641 (1972); Pound, *supra* note 1.

[7] *See* notes 20-100 *infra* and accompanying text.

[8] *See* notes 101-57 *infra* and accompanying text.

[9] *See* notes 158-217 *infra* and accompanying text.

[10] *See* notes 218-38 *infra* and accompanying text.

[11] *See* notes 239-60 *infra* and accompanying text.

[12] For a further elaboration on the history and elements of court unification, see Berkson, *The Emerging Ideal of Court Unification*, 60 JUDICATURE 372 (1977).

Since Roscoe Pound's endorsement in 1906,[13] the concept of court unification has generated an extensive literary debate.[14] Many articles have been written either by administrators who are committed to the concept and attest to its strengths,[15] or by judges who assail the concept as weak and disruptive.[16] Generally, the authors' arguments, whether pro or con, have failed to acknowledge or analyze countervailing considerations. This article, in contrast, will examine the arguments advanced for and against court unification, reaching some tentative conclusions about the strengths and weaknesses of the unification reform. Recognizing the differences in the court systems of the fifty states, the article will suggest options designed to achieve the goals of unification.

Within this framework, an extensive survey of national and state commission reports, law reviews, bar journals, and various academic journals was undertaken. The authors were also aided by information obtained from an investigative study of the history, politics, and implementation of court unification.[17] On-site interviews were conducted with over 100 appellate and trial judges, court administrators, governors, legislators, and citizens in eleven carefully selected states: Alabama, Colorado, Connecticut, Florida, Idaho, Kansas, Kentucky, New York, Ohio, South Dakota, and Washington.[18] Although the primary task of the study was not to evaluate unification, the investigators had a unique opportunity to observe some of its practical consequences. From these observations, the authors were able to draw some conclusions about the efficacy and utility of the reform.

[13] *See* Pound, *supra* note 1.

[14] *See, e.g.*, Ashman & Parness, *The Concept of a Unified Court System*, 24 DEPAUL L. REV. 1 (1974); Gallas, *The Conventional Wisdom of State Court Administration: A Critical Assessment and an Alternative Approach*, 2 JUST. SYS. J. 35 (1976); Saari, *Modern Court Management: Trends in Court Organization Concepts—1976*, 2 JUST. SYS. J. 19 (1976); Comment, *Trial Court Consolidation in California*, 21 U.C.L.A. L. REV. 1081 (1974) [hereinafter cited as *Trial Court Consolidation*].

[15] *See, e.g.*, Berg, *The District Courts of Massachusetts*, 59 JUDICATURE 344 (1976).

[16] *See, e.g.*, Burleigh, *Another Slant . . . Don't Consolidate the Trial Court*, 50 CALIF. ST. B.J. 266 (1975).

[17] *See* L. BERKSON & S. CARBON, COURT UNIFICATION: HISTORY, POLITICS AND IMPLEMENTATION (1978).

[18] Four days were spent in each state between January and April, 1977. Typically the interviews were conducted at the respondents' place of business and lasted one hour. Since all persons interviewed were promised anonymity, this article sometimes includes statements without specific citation or attribution.

It should be noted that the components of unification are closely interrelated. Adoption of one element is usually accompanied by adoption of others;[19] the benefits of one element are often synonymous with others. Thus, the categories of advantages and disadvantages are not entirely discrete. Although an attempt is made to segregate the categories, the reader should be mindful of the interrelated nature of the elements.

II. Trial Court Consolidation

A. *Arguments Supporting Trial Court Consolidation*

1. *Flexibility in Personnel Resources*

In arguing that trial court consolidation provides flexibility in the use of personnel, proponents claim that judges are allowed to function as generalists,[20] presiding over cases as exigencies dictate, regardless of the subject matter, the age of the defendant, or the amount in controversy.[21] This generalist function, however, does not preclude judges from developing expertise in particular areas of the law. Proponents suggest that judges often may serve in specialized divisions within the unified system on a fairly permanent basis.[22] As a result, the judiciary can benefit from the expertise cultivated by specialists[23] and yet retain the flexibility of having judges serve according to docket demands.[24] Judges' workload will thereby be equalized and court backlog reduced.[25]

[19] In Kentucky, for example, all five elements of unification were adopted in November, 1975, when the electorate approved a new judicial article to the constitution. *See* Ky. Const. § 109 (trial court consolidation into two-tier system); *id.* § 110(5)(b) (centralized management of judiciary under chief justice of the supreme court as "executive head of the Court of Justice"); *id.* § 116 (rule-making authority vested in the supreme court); *id.* § 120 (state funding of judiciary); *id.* § 110(5)(b) (single budget submission by supreme court chief justice).

[20] *See* Cox Commission, *supra* note 6, at 16; H. Rubin, The Courts: Fulcrum of the Justice System 211 (1976); McWilliams, *Court Integration and Unification in the Model Judicial Article*, 47 J. Am. Jud. Soc'y 13, 17 (1963).

[21] *See* Cox Commission, *supra* note 6, at 14; *Trial Court Consolidation*, *supra* note 14, at 1112.

[22] *See* Truax, *Courts of Limited Jurisdiction are Passé*, 53 Judicature 326, 329 (1970).

[23] *See* Booz, Allen & Hamilton, Inc., California Unified Trial Court Feasibility Study 60, Exhibit III (1971) [hereinafter cited as Court Feasibility Study]; Levinthal, *Minor Courts—Major Problems*, 48 J. Am. Jud. Soc'y 188, 192 (1965); Pound, *Principles and Outline of a Modern Unified Court Organization*, 23 J. Am. Jud. Soc'y 225, 231 (1940).

[24] *See generally Trial Court Consolidation*, *supra* note 14, at 1099, 1107, 1109.

[25] *See* Brennan, *Efficient Organization and Effective Administration for Today's Courts . . . The Citizen's Responsibility*, 48 J. Am. Jud. Soc'y 145, 148-49 (1964); Cohn, *Trial Court Reform—Past, Present and Future*, 49 Calif. St. B.J. 444, 481-82 (1974); Cox Commission, *supra* note 6, at 14; Freels, *Illinois Court Reform—A Two-Year Success Story*, 49 J. Am. Jud. Soc'y 206, 209 (1966); O'Connell, *supra* note 6, at 646-47; *Trial Court Consolidation*, *supra* note 14, at 1102-03. *See generally* W. Willoughby, Principles of Judicial Administration 258 (1929).

With consolidation, it is argued, accompanying administrative personnel can be reduced. Duties of deputy court clerks may be merged, allowing the assignment of one clerk to an exclusive area of responsibility.[26] As distinguished from a nonunified structure, support personnel may be used interchangeably for any type of case.[27] Further, auxiliary personnel may become specialists and generalists in much the same manner as judges, depending upon the size and nature of the court.

Consolidation also increases the number of multi-judge courts which augments the advantages the judiciary gains from personnel flexibility.[28] For example, multi-judge courts provide substantial flexibility by allowing for a more even distribution of caseloads.[29] Similarly, they allow for support personnel to be assigned according to need.

2. *Flexibility in Use of Facilities*

Proponents suggest that a consolidated system promotes the efficient utilization of facilities and equipment. Courtrooms, deposition rooms, deliberation rooms, and office space may be used by any judge without restriction on subject matter.[30] Administrative facilities may also be coordinated for maximum efficiency: clerks' offices, microfilms, and records-storage space may be centrally located, thereby releasing space for other purposes. Such use of available space may eliminate the need to construct new facilities. If new courthouses and related administrative facilities are required, they

[26] In Wyandotte County, Kansas, for example, all clerks were centralized into one county office when the trial courts were consolidated in 1976.

[27] *See* Cox Commission, *supra* note 6, at 14.

[28] *See Trial Court Consolidation*, *supra* note 14, at 1103.

[29] As cases are filed, they may be assigned to any judge who is currently available to hear the case. In contrast, a judge in a decentralized system serves a limited geographic area. Depending upon the population, one judge may have an excessive backlog of cases, whereas a judge in a contiguous jurisdiction with a smaller population might have a current docket. Where courts are not unified, a litigant residing in the former jurisdiction is prohibited from filing in the latter. Consequently, even though a judge in another jurisdiction might be free to hear a case, a litigant must often wait months or even years to have his case heard by the judge in his jurisdiction.

[30] *See* Cox Commission, *supra* note 6, at 14.

may be located at the most convenient site so that branch courts may be rationally located "without regard to arbitrary political boundaries."[31] Finally, clerical equipment, especially expensive items such as computers and electric typewriters, may be shared by large numbers of personnel.[32]

3. *Procedural Simplification*

A common argument supporting trial court consolidation is that it simplifies trial and appellate procedure by eliminating overlapping and concurrent jurisdiction.[33] In a nonunified system, choosing the appropriate court and filing the requisite forms is a confusing process. Dismissal for lack of jurisdiction requires that litigation must begin anew, which not only necessitates the filing and processing of separate forms, but also squanders scheduled courtroom space and attorney, litigant, and judicial time. Moreover, if a case reaches trial only to be dismissed on jurisdictional grounds, litigants may be barred from undertaking further proceedings by a statute of limitation. Unification of a state's courts into a single general jurisdiction court may eliminate these problems.[34]

Proponents also claim that consolidated jury pools will simplify administrative procedures for trial.[35] Whereas in a decentralized system jury pools must be called for each judge, a unified system allows one panel to be called for the entire court of general jurisdiction. Veniremen dismissed from one case are retained for possible participation in another. Therefore, there may be fewer individuals in the single pool than the total number in the small pools.

[31] *See Trial Court Consolidation*, *supra* note 14, at 1097.

[32] *See generally* O'Connell, *supra* note 6, at 647.

[33] *See* W. WILLOUGHBY, *supra* note 25, at 259; Brennan, *supra* note 25, at 145-46; Pound, *supra* note 23, at 231.

[34] In a unified system there is simply one court in which to initiate all filings, for any type of case and by any type of litigant. Thus, no possibility of erroneous filing occurs which would necessitate duplication of effort and additional expense. As William F. Willoughby explained:

> [Consolidation] would do away with the bad practice of throwing causes out of court to be begun over again in cases where they are brought in the wrong place. They may be transferred simply and summarily to the proper branch or division, or rule may provide that the cause may be assigned at the outset to the place and division where it belongs and no question of jurisdiction of subject matter will stand in the way.

W. WILLOUGHBY, *supra* note 25, at 258; *see* Pound, *supra* note 23, at 231.

[35] *See* O'Connell, *supra* note 6, at 647.

A closely related procedural benefit is a simplified appellate process.[36] In a nonunified system, appeals are heard throughout various lower trial courts, depending upon the court in which the action was initiated.[37] Some of these cases are not heard on the record, but instead are tried de novo, effectively relegating the first trial to a status no greater than a mere discovery proceeding.[38] Proponents thus argue that unification provides a more efficient and economical method of processing appeals because all cases are heard by a court which handles appellate cases exclusively.[39]

4. *Economic Benefits*

Complementing the advantages of personnel flexibility and trial and appellate procedural simplification is the reduction of court operating costs. The flexible assignment of judges and auxiliary personnel allows maximum use of their services, resulting in a greater number of cases resolved annually.[40] Moreover, the functions and duties of judicial and auxiliary personnel may be consolidated to conserve both time and salaries expended for repetitive and overlapping tasks.[41] Certain positions may be eliminated entirely, thus providing substantial economic savings.

Proponents also argue that unification maximizes use of courtroom and office space and saves money since it is less expensive to support one large courthouse than to maintain several small independent facilities.[42] Abundant savings are realized from utilizing a

[36] *See, e.g.*, Elrod, *Practicing Law in a Unified Kansas Court System*, 16 WASHBURN L.J. 260, 270-74 (1977).

[37] This situation was prevalent in Kentucky before that state unified its courts in 1975. In the nonunified system there were four limited jurisdiction trial courts: quarterly courts, county courts, justices' courts, and police courts. *See* KY. CONST. §§ 139, 140, 142, 143 (§§ 139, 143 repealed 1976). Quarterly courts could hear appeals de novo from police and justices' courts in civil cases. KY. REV. STAT. § 25.440 (repealed 1978). Appeals from the quarterly courts and county courts could be heard de novo by the circuit (general jurisdiction) court. The circuit court could also hear appeals from the police courts and justices' courts in criminal cases. *Id.* § 25.070 (repealed 1978). *See generally* K. KNAB, COURTS OF LIMITED JURISDICTION: A NATIONAL SURVEY 132-40 (1977).

[38] *See* Levinthal, *supra* note 23, at 191; Truax, *supra* note 22, at 326; Uhlman, *Justifying Justice Courts*, 52 JUDICATURE 22, 22 (1968).

[39] *See* W. WILLOUGHBY, *supra* note 25, at 258; Pound, *supra* note 23, at 231.

[40] *See* Freels, *supra* note 25, at 209; O'Connell, *supra* note 6, at 646.

[41] *See* COX COMMISSION, *supra* note 6, at 14; COURT CONSOLIDATION, *supra* note 6, at A-2 to 3; Cohn, *supra* note 25, at 482; O'Connell, *supra* note 6, at 645-47; *Trial Court Consolidation*, *supra* note 14, at 1088.

[42] *See generally Trial Court Consolidation*, *supra* note 14, at 1088-89.

single clerk's office and common library[43] and from sharing equipment and clerical supplies.[44]

Abolition of concurrent jurisdiction and de novo trials also produces economic benefits.[45] Since these measures reduce the number of improper filings and second trials, they decrease the administrative time required to process cases, the judicial time to review and dismiss improperly filed cases, and the courtroom space needed for hearings. Moreover, litigants may be relieved of the expense of erroneous filings which indirectly saves attorneys' fees.

Finally, proponents contend that by consolidating jury panels, administrative costs involved in preparing jury lists and sending letters are lessened.[46] Fewer citizens are required to appear within a given period, thus saving juror fees and minimizing the loss of employment time.

5. *Enhanced Prestige*

Advocates of trial court consolidation assert that the status and prestige of lower courts are elevated when they are combined into a single-level trial court. Paul Nejelski has noted that one problem of a nonunified system is that "lower courts are at the bottom of a rigid caste system."[47] He relates the perception of one distraught juvenile court judge: " 'The lower courts are the latrine duty of the judiciary.' "[48] Apparently many judges in nonunified systems perceive themselves and their courts as having second-class stature.

Proponents argue that establishment of a single trial court will eliminate the labels "lower court" and "inferior court" from the judicial vocabulary[49] and thereby improve the self-perception of judges of those courts. This in turn will facilitate judicial recruitment because highly qualified judges will not be forced to serve in courts labeled "inferior."[50] Moreover, since part-time and nonlawyer judges are frequently excluded from unified systems, trial court consolidation often entails upgrading judicial qualifications,[51] which elevates the prestige of judges both in the judges' and the public's view.[52]

[43] *See* COURT CONSOLIDATION, *supra* note 6, at A-4.

[44] *See* COX COMMISSION, *supra* note 6, at 26-27; O'Connell, *supra* note 6, at 647.

[45] *See* Gazell, *Lower-Court Unification in the American States*, 1974 ARIZ. ST. L.J. 653, 657 (Eradication of concurrent jurisdiction is one of the advantages of the unification model "consisting of one state court of justice with a judicial council as a policy-making body . . ., one final appellate court . . ., and a general trial court . . . with appellate divisions.").

[46] *See generally* O'Connell, *supra* note 6, at 647.

[47] Address by Paul Nejelski, The Federal Role In Minor Dispute Resolution, National Conference on Minor Disputes Resolution, Columbia University School of Law (May 26, 1977). Mr. Nejelski is Deputy Assistant Attorney General and former Assistant Executive Secretary for the Judicial Department of Connecticut.

[48] *Id.*

[49] *See* Truax, *supra* note 22, at 329.

B. *Arguments Opposing Trial Court Consolidation*

1. *Displacement of Personnel*

Opponents contend that lower court consolidation may cause the displacement of judicial and auxiliary personnel. Lower court and lay judges in particular may be unable to satisfy the higher qualifications established for judicial personnel in the new system. Additionally, the total number of judicial and auxiliary positions may be reduced, thereby requiring employees of the nonunified court to compete for remaining positions.[53] If clerks, for example, are given appointments in the new system, they are likely to be relegated to positions of lesser responsibility and thus incur a substantial loss in prestige, if not in salary and benefits.

2. *Increased Costs*

A frequently cited argument against trial court consolidation is its expense.[54] First, it is argued that a consolidated system will increase personnel costs. When a single trial court of general jurisdiction is created to replace numerous specialized courts of limited jurisdiction, salaries of judicial personnel generally increase since judges must meet higher qualifications and serve on a full-time basis.[55] Pension plans and other related benefits must also be established and standardized for all judicial and auxiliary personnel.[56]

[50] *See id.* at 327, 329.

[51] *See generally* Ashman & Lee, *supra* note 4.

[52] *See* Litke, *Courts of Limited and Special Jurisdiction*, 28 ALA. LAW. 152, 155 (1967).

[53] *See* Hart, *A Modern Plan for Wayne County Court Reorganization*, 49 MICH. ST. B.J. 18, 20 (Dec. 1970).

[54] *See, e.g.*, Burleigh, *supra* note 16, at 266.

[55] For example, before passage of the Kentucky constitutional article in 1975, judges of the quarterly, county, justices', police and fiscal courts were not required to be lawyers. KY. CONST. §§ 139, 140, 142, 143, 144 (1891 §§ 139, 143 repealed 1976). The new judicial article of the constitution requires that all judges be licensed attorneys. *Id.* § 122 (1976).

[56] Although not an opponent of unification, Harry Lawson addressed this issue at the National Conference of State Legislatures, Lincoln, Nebraska, May 6, 1977. At the time, Mr.

Second, expenses increase because judicial and administrative facilities often must be renovated or new facilities constructed to meet requirements of the new system.[57] To transform lower courts into courts of record, the judicial system incurs expenses for acoustical renovation of the courtrooms to record trials[58] and for additional filing and storage space for court records and transcripts.

Third, it is claimed that as jurisdictions increase in size, jurors and witnesses will be required to travel greater distances to the courthouse.[59] As a result, the state will be required to pay additional expenses to cover mileage costs, and veniremen will be absent from work for longer periods of time causing indirect expenses to their employers.

3. *Judges' Qualifications*

Opponents argue that trial court consolidation is ill-advised because lower courts should be used as a training ground or "career ladder" for positions requiring greater experience and competence on the general jurisdiction bench.[60] They contend that consolidation is unwise because limited-jurisdiction judges are often automatically elevated to the higher bench where they are given more significant responsibilities prematurely.[61]

Moreover, if superior court judges must assume the "lesser" duties of inferior courts, recruiting and retaining highly qualified judges may become difficult.[62] Many of these judges consider such responsibilities professionally and personally demeaning.[63] Also, paying highly competent judges to perform trivial tasks is an unjustified expense.

Lawson was the State Court Administrator of Colorado.

[57] Opponents of consolidation in Kentucky and South Dakota note that existing facilities had to be renovated to meet the demands of their new system as required by the constitutional amendments adopted in 1975 and 1972 respectively.

[58] In Kansas, for example, since many courts prior to 1976 had not been courts of record, courthouses had to be renovated acoustically to permit recording of cases.

[59] *See generally* Burleigh, *supra* note 16, at 266; *see also Trial Court Consolidation*, *supra* note 14, at 1097.

[60] *See* COURT FEASIBILITY STUDY, *supra* note 23, at 55; *Trial Court Consolidation*, *supra* note 14, at 1113, 1119-21.

[61] *See* COURT FEASIBILITY STUDY, *supra* note 23, at 54; *Trial Court Consolidation*, *supra* note 14, at 1113-19.

[62] *See generally Trial Court Consolidation*, *supra* note 14, at 1113, 1121-23.

[63] *See* COURT FEASIBILITY STUDY, *supra* note 23, at 55; *Trial Court Consolidation*, *supra* note 14, at 1124.

C. *Analysis*

One of the most compelling arguments in favor of trial court consolidation is that it allows flexible use of judicial and auxiliary personnel. In a unified system, judges and their support staffs are no longer encumbered by jurisdictional limitations.[64] For example, before Kentucky unified its judiciary in 1975,[65] trial judges were restricted in the cases they could hear: some could hear only probate matters and others were limited by the amount in controversy.[66] With unification, judges in the circuit court preside over all cases except those few retained by the limited jurisdiction district courts.[67]

The argument that trial and appellate procedures will be simplified is equally strong. Kentucky's decentralized system, for example, was plagued by overlapping jurisdiction.[68] Because litigants often had a choice of forums for original jurisdiction and some courts exercised both original and appellate jurisdiction, there was much confusion and many improper filings. Additionally, forum shopping was encouraged because the choice of trial court determined which court would eventually exercise appellate jurisdiction. The unified system eliminates this confusion by clearly delineating jurisdiction: each of the two trial courts has exclusive jurisdiction over a specific class of cases,[69] and the intermediate appellate court and supreme court handle only appeals.[70]

Proponents' contention that judges' self-esteem will be elevated when trial courts are consolidated is more difficult to evaluate, but it appears to have merit. In Connecticut, status problems resulting from a hierarchical scheme permeated the daily routines of judges in the pre-unified system. As Paul Nejelski states:

> In Connecticut, one main reason for the Court of Common Pleas merger with Superior Court was that the judges in misdemeanor cases could eat lunch at the same club as the judges who hear felony cases. The same problem is occurring with the

[64] *See* Cox, *supra* note 2, at 402.

[65] *See* note 19 *supra*.

[66] *See* note 37 *supra*.

[67] *See* KY. CONST. §§ 112(5), 113(6).

[68] *See* K. KNAB, *supra* note 37, at 132-40.

[69] *See* KY. REV. STAT. §§ 23A.010, 24A.010 (Cum. Supp. 1978).

[70] *Id.* §§ 22A.020, 21A.050.

> bankruptcy judges and whether they should be Article III judges. In part this involves such basic questions as whether or not the bankruptcy judges get to use the same elevator as district court judges and other perquisites of office. That such status problems creep into the judiciary is understandable but regrettable.[71]

Whether unification will ameliorate these problems remains to be seen. Nejelski suggests that, at a minimum, "lower court judges should receive roughly equal pay and equal status"[72] in order to mitigate problems of hierarchy.

The argument that unification permits greater flexibility in the use of facilities is not persuasive. Although detention blocks for defendants and deliberation rooms for juries may at times be shared among judges, the field investigations revealed that courtroom and office space is rarely shared. Indeed, attempts are nearly always made to provide each judge with a separate courtroom.[73]

Opponents' assertion that unification unfairly displaces judicial and auxiliary personnel is not compelling. The field observations suggest that employees of the judicial system are rarely fired at the time of unification. Kentucky, however, is a notable exception: almost 1,200 lower court judicial positions were reduced to approximately 125.[74] This reduction is clearly atypical. More representative is South Dakota, where forty-three lower court positions were reduced to forty-one after passage of the 1972 judicial article.[75] Most states provide some form of "grandfather" provision which enables judges serving in the nonunified system to be incorporated into the unified system;[76] those who do not otherwise qualify may serve temporarily, if not indefinitely. Similarly, strong attempts are made to employ all auxiliary personnel, although at times their

[71] Nejelski, *supra* note 47.

[72] *Id.*

[73] Idaho and Kansas provide two recent examples.

[74] *See* KY. CONST. § 113; KY. REV. STAT. 24A.030-.090 (Cum. Supp. 1978).

[75] *See* S.D. CONST. art. V, § 3 (1889, amended 1972); S.D. COMPILED LAWS ANN. § 16-5-1.2 (Supp. 1978).

[76] *See* Ashman & Lee, *supra* note 4, at 581-84 (Table B) (listing state courts which have lay judges only through grandfather clauses).

responsibilities may be somewhat altered. One county in Kansas, for example, had four clerkship positions under the decentralized system. When the courts were consolidated, only one chief clerk was required; the remaining three assumed deputy clerk positions.[77]

Opponents' argument that it is ill-advised to elevate inexperienced lower court judges to higher courts is also weak. Many states provide training programs for judges elevated or "grandfathered" into the unified system to enable them to meet their new responsibilities. Idaho is a good example; when the lower courts were consolidated in 1971, all new judges and those "grandfathered" into the system were required to attend training sessions.[78] Various states now offer refresher programs on a frequent basis to help judges acquire knowledge of current legal developments.[79]

Both proponents and opponents address the economic implications of consolidation, and because there is considerable evidence to support both positions, it is perhaps the most difficult argument to assess. Clearly unification makes certain economies possible. In a decentralized system court records, for example, are usually maintained in individual clerks' offices.[80] In a centralized system, however, it is possible and economical to maintain records in established storage centers. In Florida, the Office of State Courts Administrator undertook a study to determine if economies were possible. It found

> the average cost for office storage space (based on maintenance, utilities, services and security, filing cabinets, amortized over 10 years) to be $8.75 per cubic foot per year. On the other hand, the average cost in an established records storage center (based on maintenance, utilities, boxes rather than

[77] Interviews with Kansas judicial personnel and administrators.

[78] *See* ADMINISTRATIVE OFFICE OF THE COURTS, 1977 ANNUAL REPORT: THE IDAHO COURTS 19, which describes the Idaho system as follows:

> A comprehensive judicial education program was started, utilizing in-state seminars on Idaho laws and procedures and out-of-state resources such as the National College of the State Judiciary and the American Academy of Judicial Education. Federal grant applications were filed and federal funds were received for a number of court projects. A courts newsletter and legislative bulletin became familiar references for judges, a Judges Sentencing Manual and a Trial Judges Manual were published, and pamphlets explaining, "How to File a Suit in the Idaho Small Claims Departments" and "How to Collect a Small Claims Judgment," are now being distributed to all citizens who seek to use the small claims courts.

[79] *See, e.g.*, Fatzer, *The State of the Kansas Judiciary*, 12 WASHBURN L.J. 120, 122-23 (1973).

[80] *See generally* Berkson & Hays, *The Forgotten Politicians: Court Clerks*, 30 U. MIAMI L. REV. 499, 501-06 (1976).

> metal cabinets, and compact storage) was $0.54 per cubic foot per year.[81]

The study concluded that $300,000 could potentially be saved annually by centralization.[82] In Kansas several county judges and administrators estimated that centralized purchasing on a county-wide basis would reduce the costs of supplies and furniture by as much as twenty percent.[83] It would appear reasonable that even greater savings would be possible if statewide centralized purchasing could be instituted.

On the other hand, unification frequently entails many new and significant expenses such as the cost of adapting old facilities to meet new requirements. In Kansas, many courtrooms had been used for specialized matters such as probate and juvenile cases which required small hearing rooms and offices rather than jury rooms. When all civil and criminal matters were merged into one court, more rooms for juries and defendants, larger rooms for public trials, and more courtrooms for judges were needed.

Expenses also escalate dramatically when all courts become courts of record. Courtrooms must be renovated to meet acoustical requirements; one Kansas county alone spent $7,000 for rugs and acoustical tiles and $15,000 for transcription equipment.[84] These expenses are indeed substantial when magnified across the state. On balance, it appears that while certain economic benefits may be obtained from consolidation, overall expenses rise significantly.

Expense alone is not necessarily a compelling argument against unification. Generally, new programs designed to deliver better service cost more. If states desire to improve their judiciaries, they must expect to incur additional expenses.

D. *Options*

An examination of states which have adopted trial court consolidation reveals at least four methods of unification. One option is

[81] Carbon, *Records Management: Obscure Components Requisite to Efficient Court Administration*, in L. BERKSON, S. HAYS, & S. CARBON, MANAGING THE STATE COURTS 332 (1977) [hereinafter cited as BERKSON & HAYS].
[82] *Id.*
[83] Interview with Kansas court administrators.
[84] *Id.*

reflected by the Florida system.[85] There, municipal, juvenile, county, justice of the peace, probate, and small claims courts were consolidated into a unified two-tier trial court system consisting of a circuit court of general jurisdiction[86] and a county court of limited jurisdiction.[87] Although there is a clearly divisible court structure, the system is highly flexible. With few exceptions, judges serve interchangeably in either court as needed.[88] The general weakness of this system, however, is that the circuit judges rarely "go down" to preside in the county court. Moreover, many of the rural county judges are underworked, suggesting perhaps that Florida's county court system results in too many judges.[89]

A second option is exemplified by Idaho[90] and South Dakota,[91] where specialized divisions are created within the single trial court. In 1971 Idaho consolidated probate, municipal, and justice of the peace courts into a magistrate division of the district court.[92] In 1972 the South Dakota electorate approved an amendment which eliminated all constitutional courts except the supreme court and circuit court;[93] the magistrate division was then created in accordance with a clause in the amendment allowing the legislature to establish limited jurisdiction courts.[94]

A third option provides for the establishment of a single-tier trial court, while maintaining separate classes of judges. In 1976 the Kansas legislature abolished all courts of limited jurisdiction, with the exception of municipal courts, and transferred their jurisdiction to the district court.[95] Simultaneously, three classes of judges were

[85] *See* FLA. CONST. art. V (1956 amended 1973).
[86] *See* FLA. CONST. art. V, § 5; FLA. STAT. § 26.012 (1977).
[87] *See* FLA. CONST. art. V, § 6; FLA. STAT. § 34.01(2) (1977).
[88] *See* FLA. CONST. art. V, §§ 20(c)(3)-(4), 20(d)(7). FLA. STAT. § 26.57 (1977) provides in part:

> In each county where there is no resident circuit judge and the county court judge has been a member of the bar for at least 5 years and is qualified to be a circuit judge, the county court judge may be designated on a temporary basis to preside over circuit court cases by the chief justice of the supreme court upon recommendation of the chief judge of the circuit.

[89] Judge Chester Chance made this suggestion in his testimony before the Florida Constitutional Revision Commission Hearings, Miami, Florida, September 9, 1978.
[90] *See generally* IDAHO CONST. art. 5, §2.
[91] *See generally* S.D. CONST. art. V.
[92] *See* IDAHO CODE §§ 1-103, -2201, -2208 (Cum. Supp. 1978).
[93] *See* S.D. CONST. art. V, Historical Note.
[94] S.D. COMPILED LAWS ANN. § 16-12A-2 (Cum. Supp. 1978).
[95] *See* KAN STAT. § 20-335 (Cum. Supp. 1977).

created to preside in the court: district court judges, associate district court judges, and district magistrate judges.[96] While the first two classes may hear most cases,[97] the magistrates are primarily assigned to cases of lesser magnitude.[98]

A final option is to upgrade lower courts generally, but to exclude certain politically sensitive courts from the unified system. This approach was followed in Colorado where the Denver probate, juvenile, and superior courts were excluded when the remaining courts were unified into the two-tier system.[99] Politically powerful judges controlled these courts and would have intensely resisted the entire unification effort. For similar reasons the Kansas legislature also chose to exclude municipal courts from their "unified" structure.[100]

In conclusion, these four options provide palatable and politically realistic means for consolidating trial court structures. Each has been successfully utilized in at least one state. The variety of these options indicates that states can establish consolidated systems and yet remain responsive to local needs.

III. Centralized Management

A. *Arguments Supporting Centralized Management*

The concept of centralized management entails vesting the chief justice of the state court of last resort with ultimate responsibility for administering the entire state judiciary.[101] The chief justice is ordinarily assisted by a state court administrator, who in turn is assisted by regional trial court administrators. Typical responsibilities assumed under a unified management system include development of a statewide personnel plan, uniform record keeping, intercourt assignment of judges to equalize workloads, and annual budget preparation.[102] Although the utility of centralized management as a method of improving the state judiciary is widely contested, three principal arguments support the measure: (1) efficiency is enhanced;[103] (2) uniformity is promoted; and (3) interbranch coordination is increased.

[96] *See id.* § 20-301(a).

[97] *See id.* § 20-302, -302(a).

[98] *See id.* § 20-302(b).

[99] *See* Colo. Const. art. VI, § 1; Colo. Rev. Stat. §§ 13-7-101, -8-101, -9-101 (1973).

[100] *See generally* Elrod, *supra* note 36, at 262, 270.

[101] *See* American Bar Association, Standards Relating to Court Organization, 81-85 (1974); Cox, *supra* note-2, at 419.

[102] *See, e.g.*, Kan. Stat. § 20-101 (Cum. Supp. 1977), which provides in part:

> The chief justice [of the Kansas Supreme Court] shall be the spokesman for the supreme court and shall exercise the court's general administrative authority over all courts of this state. The chief justice shall have the responsibility for executing and implementing the administrative rules and policies of the supreme court, including supervision of the personnel and financial affairs of the court system . . . .

[103] As noted in the introduction, *see* text accompanying note 19 *supra*, the asserted advantages of one element may be nearly synonymous with others. This is one example of the benefits of a consolidated court structure resembling those of centralized administration. Trial court consolidation promotes equity and efficiency because judges become members of one court system; they are not autonomous. They may preside over any type of case because they are no longer encumbered by jurisdictional limitations. Centralized administration promotes equity because of the assignment and transfer power vested in the supreme court and state court administrator. Generally the two elements are adopted concurrently and in reality promote efficiency and equity together. Thus, it is difficult to separate the alleged advantages of each.

[104] *See* Court Feasibility Study, *supra* note 23, at 60, Exhibit III; W. Willoughby, *supra* note 25, at 258.

[105] *See* Levinthal, *supra* note 23, at 192; O'Connell, *supra* note 6, at 646; *Trial Court Consolidation*, *supra* note 14, at 1099-1100.

1. *Enhanced Efficiency*

Unlike a nonunified system, where no one is responsible for managing the entire network of state courts, a unified system vests the chief justice and indirectly the state court administrator with managerial authority over all the state courts. With this power of assignment, proponents maintain, the chief justice can reduce congestion and delay by transferring underworked judges and support staff to districts with heavier caseloads.[104] Also, master calendars and judge pools promote efficiency since many potential conflicts in judges' and attorneys' time and scheduled use of courtrooms are reduced.[105]

2. *Uniformity*

Proponents claim that under a centralized system of court management, administrative and clerical uniformity are promoted. Three major benefits result: (1) court system administration is greatly simplified and economized; (2) a more equitable system of justice for litigants, especially defendants, is fostered; and (3) a more equitable personnel system for court employees is promoted.

First, unlike a nonunified system in which each court has its own filing and record-keeping system, a state court administrator can

create a uniform system for managing records and forms.[106] Litigation throughout the state is simplified by providing standardized forms which can be filed in any court. A state court administrator can also gather statistics on judicial business,[107] which not only facilitates caseflow monitoring, but is helpful for short-term and long-range planning as well as experimentation to meet current and future needs of the judiciary.[108] Finally, adopting uniform clerical operations allows for a system of central purchasing to be established.[109]

Second, proponents claim that litigants benefit from uniformity. In a nonunified system, bail practices and fine schedules often vary widely throughout the state. In a unified system, however, standardized schedules are usually developed and more equitable administration of justice results.[110]

Third, proponents assert that unification is more equitable for employees. They suggest that a centralized system of administration promotes the development of a uniform statewide personnel plan. Uniformity is considered desirable because standards are established for hiring, promotion, tenure, and removal;[111] the development of a merit system is also facilitated. Several scholars have noted the potentially detrimental effects of local, rather than statewide, control over auxiliary personnel. Some commentators suggest that personnel standards cannot be developed if courts are staffed according to patronage rather than occupational proficiency.[112] Professor Steven Hays underscores this problem: "Local control over judicial personnel . . . inhibits the coordination and responsiveness of court systems to central control, in addition to

[106] *See* COURT FEASIBILITY STUDY, *supra* note 23, at 60, Exhibit III; COX COMMISSION, *supra* note 6, at 19; COURT CONSOLIDATION, *supra* note 6, at A-4; *Trial Court Consolidation*, *supra* note 14, at 1103.

[107] *See generally* Greenhill & Odam, *Judicial Reform of Our Texas Courts—A Re-examination of Three Important Aspects*, 23 BAYLOR L. REV. 204, 216-17 (1971); Hall, *Court Organization and Administration*, 28 ALA. LAW. 148, 151 (1967).

[108] *See* COX COMMISSION, *supra* note 6, at 14; COURT CONSOLIDATION, *supra* note 6, at A-2; Schwartz, *The Unification and Centralization of the Administration of Justice*, 51 JUDICATURE 337, 338-39 (1968).

[109] *See* Greenhill & Odam, *supra* note 107, at 215-18; Hall, *supra* note 107, at 151.

[110] *See* O'Connell, *supra* note 6, at 646; *Trial Court Consolidation*, *supra* note 14, at 1103-04.

[111] *See* Hall, *supra* note 107, at 151; O'Connell, *supra* note 6, at 648.

[112] Hazard, McNamara, & Sentilles, *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286, 1297-98 (1972) [hereinafter cited as Hazard & McNamara].

providing a large reservoir of patronage positions for local political figures."[113]

3. *Interbranch Coordination*

Proponents contend that a professional court administrator's office will facilitate coordination and cooperation among the three branches of government.[114] State court administrators can serve as liaisons with the legislature and the executive, providing each with continuous information and research assistance on matters relating to the entire state judiciary. The absence of this capacity impairs the work of other branches of government. One commentator suggests that "[t]he effect of two sub-systems, one with a high degree of operation control—the police agency—and the other [the courts] with essentially little, if any, centralized administration is a definite dysfunctional intrasystems element."[115] He believes that vesting a professional state court administrator's office with some degree of centralized control will ameliorate these interbranch conflicts.

4. *Miscellaneous Arguments*

Proponents argue that a statewide management system, accompanied by professional administrators at the state and regional levels, relieves judges of myriad administrative responsibilities, such as caseflow management, supervision of auxiliary personnel, records management, statistics gathering, and budget preparation. Thus, judges may direct energy toward their principal responsibility of adjudication.[116] The system also allows for the hiring of personnel who are interested in court management and better prepared to manage the courts than are judges.[117] Thus, a unified court system should attract better qualified judges as well as more competent managers.[118]

[113] Hays, *Contemporary Trends in Court Unification*, in BERKSON & HAYS, *supra* note 81, at 127.

[114] *See, e.g.*, Greenhill & Odam, *supra* note 107, at 217.

[115] Pettigrew, *Court Administration Reform and Police Operational Effectiveness—A Critical Analysis*, POLICE, Feb. 1972, at 35.

[116] *See* Hays & Berkson, *The New Managers—Court Administrators*, in BERKSON & HAYS, *supra* note 81, at 188-98; Tydings, *Courts of the Future*, 13 ST. LOUIS U.L.J. 601, 601, 603 (1969).

[117] *See* Hays & Berkson, *supra* note 116, at 188-89.

[118] *See* Tydings, *Court of the Future*, 13 ST. LOUIS U.L.J. 601, 603 (1969).

Proponents also contend that a state office of administration could supervise training programs on matters of statewide or regional concern for new judges and auxiliary personnel. Although these programs are considered most important when judges ascend the bench for the first time or are assigned new responsibilities, refresher programs on new developments in the law have been advocated for even the most experienced judges.[119]

Finally, proponents assert that professional court administrative offices may succeed in obtaining more funds from state legislatures.[120] With increased financial resources, the judiciary can more easily attract and maintain qualified personnel, adopt new and experimental programs, and purchase modern equipment, thereby remaining abreast of other branches of government and private industry in its future growth.

B. *Arguments Opposing Centralized Management*

Although centralized administration has been advocated since the turn of the century,[121] it has recently come under attack.[122] Opponents of a statewide system of administration pose three principal arguments.

1. *The Benefits of Localism are Reduced*

A chief argument advanced is that centralized management diminishes the benefits of localism enjoyed in traditional systems. In a nonunified system judges are deemed sensitive to local customs and accountable to the local community[123] because they are usually drawn from the locale and therefore share common attitudes, beliefs, and values. Moreover, given the political and fiscal relationship between the courts and local governmental entities, the local electorate is able to influence the administrative and judicial behavior of judges. Similarly, local legislative bodies are able to greatly influence the court clerk who is the chief administrator of local

[119] *See* Greenhill & Odam, *supra* note 107, at 217.
[120] *See* Flango, *Court Administration and Judicial Modernization*, 35 PUB. AD. REV. 619, 621-23 (1975).
[121] *See* Pound, *supra* note 1.
[122] *See, e.g.*, Gallas, *supra* note 14; Saari, *supra* note 14.
[123] *See* Sherry, *The 1967 New York Constitutional Convention: An Opportunity for Further Court Structural and Jurisdictional Reform*, 18 SYRACUSE L. REV. 592, 598 (1967); *Trial Court Consolidation*, *supra* note 14, at 1093-96.

courts.[124] It is argued that in a unified system these ties to the community are lost.[125] When backlogs occur in local courts, judges from other communities with different value systems will be assigned to try cases. These individuals, it is claimed, will not be responsive to local needs or sensitive to local customs.

Additionally, primary responsibility for managing the system shifts from local judges and clerks to a state court administrator, appointed by, and accountable to, the state supreme court. Opponents argue that the chief justice of the supreme court will regulate local management through the appointment of trial court administrators who will encroach upon judges' traditional independence[126] and will assume many of the clerk's duties and responsibilities. Since appointees are generally responsible to the authority that appoints them, and since the chief justice of the supreme court in a unified system will often be empowered to select the chief or presiding judge of the local court, opponents assert that appointees' loyalty in the unified system will be to the state court administrator or supreme court rather than to the locality they serve.

Finally, opponents assert that local courts and political subdivisions vary in the nature of their citizenry, their size and geography, the amount and type of litigation they handle, and the judicial and auxiliary personnel that serve them.[127] The flexibility and discretion needed to cope with these environmental differences, however, is precluded by a centralized system which encourages adherence to uniform policies and procedures.[128] Such uniformity also discourages experimentation with innovative, individualized programs designed to ameliorate local problems and promote more equitable dispensation of justice within the locale.[129]

2. *Excessive Bureaucratization*

Centralized administration has been widely criticized as necessitating an excessive bureaucracy. Frank Zolin, Executive Officer of the Los Angeles County Superior Court, suggests that centralized

[121] For an extensive and detailed analysis of this issue, see Berkson & Hays, *supra* note 80.
[122] *See* Sherry, *supra* note 123, at 599.
[124] *See* Hays, *supra* note 113, at 127.
[127] *See* Gallas, *supra* note 14, at 36; Gazell, *supra* note 45, at 655.
[128] *See* Gallas, *supra* note 14, at 38-39; Saari, *supra* note 14, at 21, 32-35.
[129] *See* H. RUBIN, *supra* note 20, at 211.

administration in a highly populous state such as California might create a cumbersome and needless superstructure. Further, he questions whether such a bureaucracy could meet the implicit goals of a unified system:

> When you consider the size, number, and complexity of the trial courts in California, it is apparent that reorganization into a unified system will establish a new bureaucracy. A unified organization of thousands of employees physically decentralized in hundreds of work locations will create new, heretofore unknown problems of communication and coordination. Control and supervision of such a large, complex organization will be difficult.
>
> The trial courts in Los Angeles County alone represent a judicial organization larger than those found in 43 of the 50 states. To assume that unification of all trial courts of California into a single system will necessarily increase efficiency is fallacious.[130]

Opponents claim that centralized administration is a closed system or bureaucratic approach to management which seeks to maximize efficiency at the expense of local administrative discretion and flexibility; it places greater emphasis on promoting employees' efficiency than on generating favorable employee morale.[131] Ironically, they note, this emphasis results in a high rate of employee turnover, which in the long run is far less efficient.

Opponents also argue that centralized administration encourages judges and court administrators to control too closely the actions and activities of other judges in the state.[132] They suggest that decision-making authority in a highly centralized system is predicated on position in the bureaucratic hierarchy rather than on competence.[133] Because power is emphasized, rather than consensus and compromise,[134] they doubt the efficacy of establishing policy only at the apex of the system.[135] Centralized administration reduces widespread participation in the decision-making process, thereby minimizing the likelihood of support for and compliance with the established policies.[136]

[130] Letter from Frank Zolin, Executive Officer of the Los Angeles Superior Court, to National Center for State Courts (Oct. 11, 1972), *quoted in* C. BAAR, *supra* note 5, at 138.
[131] *See* Saari, *supra* note 14, at 20.
[132] *See* Gallas, *supra* note 14, at 39.
[133] *See id.*
[134] *See id.*
[135] *See id.*; Saari, *supra* note 14, at 25.

3. *Lack of Research*

Opponents assert that little statistical research has been undertaken to determine whether a highly centralized administration is more effective than a decentralized system in securing the goals of court unification.[137] In light of all the arguments against this measure, it may not be advisable to adopt a centralized system until some countervailing benefits can be demonstrated.

C. *Analysis*

It would appear that one of the strongest arguments in support of centralized administration is that efficiency can be enhanced by locating responsibility for management at the state level. Where centralized administration has been adopted, states frequently transfer judges to relieve case backlogs, even on a fairly permanent basis. In Florida, for example, it was observed that one county judge had been reassigned to the circuit court continuously for over one year. The assignment power has also been effectively utilized in Colorado. Recently a Fourth of July religious festival resulted in the arrest of numerous youths. Five judges, twenty auxiliary employees, and a photocopy machine were promptly transferred to the district to handle the trials.[138] Because of this system, a potential crisis was averted; in a nonunified system, the trials could not have been completed as quickly.

An equally strong argument favoring centralized administration is that uniformity in clerical operations is promoted. Unification mitigates the problems associated with a system of autonomous courts, where records, forms, files, filing procedures, and stationery vary from one jurisdiction to the next. It simplifies litigation and provides fiscal economies without seriously infringing on local discretion. In Florida it has been estimated that approximately $3,000,000 per year can be saved by adopting a statewide plan of

[136] *See* Gazell, *supra* note 45, at 655.
[137] *See* Gallas, *supra* note 14, at 39.
[138] *See* Berkson, Carbon, & Rosenbaum, *Organizing the State Courts: Is Structural Consolidation Justified* (forthcoming in BROOKLYN L. REV., Vol. 45, No. 3, Spring 1979).

records and paperwork management.[139] Part of these economies can be realized by reducing approximately 16,000 "different versions of forms."[140] Similarly, in Alabama it has been estimated that the 10,000 individual court forms can be reduced to 200-300, resulting in "sizable savings."[141]

There also appears to be support for proponents' argument that professional court administrators are effective in obtaining funds from state legislatures. Victor Flango notes:

> In the 25 states which had court administrators with fiscal duties, 16.6 per cent of the criminal justice budget was devoted to judicial activities as contrasted to 9.9 per cent of the expenditures devoted to court operations by states which did not delegate financial responsibilities to the office of state court administrator. This clearly demonstrates that an office of state court administrator with fiscal responsibilities can aid the judiciary in the competition for scarce criminal justice funds.[142]

He concludes that professional administrators "are successful financial representatives of the judiciary."[143]

The argument that interbranch coordination is promoted by centralized administration does not appear frequently in the literature nor was this aspect observed in the field investigations. Therefore it would not appear to be a particularly significant argument and to suggest more would be mere speculation at this time.

Opponents' claim that the benefits of localism are diminished in a unified system is weak. The field observations reveal that judges temporarily reassigned to relieve backlogs are nearly always drawn from neighboring locales whose customs and value systems are similar, if not identical.

It has been suggested that lower court judges may participate in the selection of managerial personnel in a unified system. For example, the chief or presiding judges may be selected jointly by state

[139] OFFICE OF STATE COURTS ADMINISTRATOR, RECORDS MANAGEMENT STUDY: FLORIDA STATE COURTS SYSTEM 5-11 (1975).

[140] *Id.* at 38.

[141] State of the Judiciary Address by C.C. Torbert, Jr., Alabama State Bar (July 15, 1977).

[142] Flango, *supra* note 120, at 622-23.

[143] *Id.* at 623.

and local officials.[144] This approach contemplates that the supreme court would establish general criteria for the position, but final selection would be determined by a two-thirds approval of the local judges.[145] As a result, administrative experience would supersede seniority as a criterion for selecting a chief judge.[146]

It is also suggested that a similar process be developed for selecting trial court administrators.[147] The supreme court once again would establish general qualifications for the position. Candidates would submit applications to the state judicial administrator for screening, after which a list of qualified applicants would be submitted to the relevant judges.[148] At this point, one of two alternatives would be followed: either the trial administrator would be chosen by a majority of the judges with the chief judge retaining veto power,[149] or the chief judge would select the candidate initially, but with veto power retained by a majority of the judges.

The opponents' argument that centralized management will result in rigid policies and procedures is not persuasive and was not supported by field observations. In practice, lower court personnel usually participate in the policy-making process. For example, although the Colorado judiciary is technically centralized, the practice has been to allow a great deal of local input. The state supreme court has adopted the philosophy that "administration of the trial courts should be decentralized as much as possible on the ground that overcentralization tends to reduce the interest and cooperation of the lower courts and their desire to participate in the operation and improvement of the court system."[150] Thus, local judges and administrators are encouraged to work closely with the state admin-

[144] *See* Berkson & Hays, *Applying Organization and Management Theory to the Selection of Lower Court Personnel*, 2 CRIM. JUST. REV. 81, 84-85 (1977).

[145] *Id.*

[146] Panel remarks by Justice Robert Hall of the Georgia Supreme Court, Court Administration: National Application of the Georgia Experience, American Society for Public Administration, Atlanta, Georgia (Apr. 2, 1977).

[147] *See* Berkson & Hays, *supra* note 144, at 85-88.

[148] A variation of this system has been used successfully in Maryland. Since 1974, the Maryland state court administrator has established qualifications for four of the seven trial court administrators serving the circuit (general jurisdiction) courts. Applications are submitted to the state court administrator who screens them and submits the names of qualified applicants to the relevant courts for their selection. Telephone conversation with Robert McKeever, Deputy State Court Administrator of Maryland (Oct. 20, 1978).

[149] Such an approach is generally suggested by H. RUBIN, *supra* note 19.

[150] O'Connell, *supra* note 6, at 648.

istrative office. Harry Lawson, former Colorado state court administrator, describes the system as follows:

> The Colorado Supreme Court has been concerned with the dangers of overcentralization and resultant local impediments to the successful operation of the system, while at the same time recognizing the Court's constitutional administrative responsibilities. Accordingly, . . . [e]ach chief judge, who is appointed by the Chief Justice, is delegated the administrative responsibility for his district in line with fiscal, personnel, and other administrative procedures established by the Supreme Court. The position of judicial district administrator has been created in most of the districts to provide the chief judge with competent administrative assistance.[151]

Kansas provides another example of lower court participation in a unified system's decision-making process. The general policies for the Kansas judiciary are collectively established by the state supreme court, the judicial council representing all levels of courts, and the state judicial administrator; specific implementation of these policies is the responsibility of district-level officials.[152] Although local courts must adopt plans consistent with the general guidelines and policies established earlier, they may tailor their plans to meet individual geographic and demographic variations. These plans must be submitted to the supreme court and judicial administrator for approval prior to implementation.

One of the most compelling arguments offered by opponents is that little statistical evidence exists to suggest that centralized administration is preferable. At least one scholar notes: "You can't say that . . . the administration of justice is any better or worse . . . [in Georgia, a nonunified state, than in Colorado, a highly unified state]. That would take measuring what actually happens in the courts, measuring the output of justice. Nobody has gotten around to doing that yet."[153] However, the lack of statistical evidence proving that a unified system is better than a nonunified one should not prevent states from experimenting with the innovation. Indeed, it

[151] Letter from Harry Lawson to the Administrative Assistant to the Chief Justice of the Supreme Court of Oregon (Nov. 9, 1970), *quoted in* O'Connell, *supra* note 6, at 648.

[152] Interviews with Kansas judicial personnel and administrators.

[153] Panel remarks by Russell Wheeler, Court Administration: National Application of the Georgia Experience, American Society for Public Administration, Atlanta, Georgia (Apr. 2, 1977).

would appear unreasonable to delay reform when considerable evidence suggests that unification can be beneficial, especially if the judiciary is suffering from problems associated with traditional, nonunified systems.

D. *Options*

A principal option available for developing a system of centralized administration is based on the concept of "participatory management," in which members from all levels of the judiciary are involved in establishing and implementing policy. Participatory management may be effectuated in a variety of ways. A judicial council consisting of judges representing all courts in the state may be created and granted advisory power,[154] or an advisory board of judges may be convened when necessary to consider and evaluate new programs and policies.[155] Another alternative is to establish an informal system of consulting with all judges through regional and statewide meetings to discuss the development of new programs and policies.[156] Such a system provides an opportunity for every member of the judiciary to participate in the policy-making process.

A second option is to adopt a scheme such as Kansas instituted,[157] consisting principally of lower court management with some hierarchical control. Several advantages are provided by this system of management. First, extensive and individualized local participation is allowed. Second, innovation and experimentation is encouraged. Local courts may relate advantages or problems with a particular approach to the state judicial administrator's office which then functions as a clearinghouse for the entire judiciary. As a result, local courts may capitalize on the experimentation of other courts in the state. Third, plans are designed to meet local needs and conditions; local courts are not required to adopt a single statewide plan which may be inapplicable to the local environment.

As with trial court consolidation, a number of alternatives are available to achieve the goals of centralized management. Implicit

[151] *See* Pound, *supra* note 23, at 232. For more information on judicial councils, see Wheeler & Jackson, *Judicial Councils and Policy Planning: Continuous Study and Discontinuous Institutions*, 2 JUST. SYS. J. 121 (1976); note 208 *infra*.

[155] *See* Wheeler & Jackson, *supra* note 154, at 122-25.

[156] Colorado and Ohio provide but two examples.

[157] *See* KAN. STAT. § 20-329 (Cum. Supp. 1977).

in these options is the notion that a coordinated system must be developed, but individual differences within the state, including political, demographic, and geographic factors, must be considered to provide a truly effective system.

IV. Centralized Rule-Making Authority In The Supreme Court

A. *Arguments Supporting Supreme Court Rule-Making Authority*

Although numerous reasons are advanced to support vesting rule-making authority[158] in the state's highest court, two major arguments emerge: (1) the judiciary is an independent branch of government and should govern its own affairs; and (2) the supreme court is the preferred rule-making body.

1. *Judicial Independence*

Support for placing the rule-making authority in the supreme court derives from the separation of powers doctrine. Proponents claim that the doctrine vests the judiciary with primary responsibility for regulating and monitoring its internal affairs. In *The Federalist No. 78,* Alexander Hamilton wrote: "The complete independence of the courts of justice is peculiarly essential in a limited constitution."[159] Thus, if courts are required to defer to the legislature, they may be perceived as a legislative arm rather than an independent branch of government.[160] The separation of powers doctrine is considered the theoretical basis for another concept supporting judicial rule-making authority—namely, that such authority is one of the judiciary's inherent powers.[161] This doctrine suggests that under the Constitution, courts have the inherent responsibility to take reasonable steps to effect the efficient and equitable administration of justice.[162]

[158] *See generally* American Bar Association, *supra* note 101, at 71-75.

[159] The Federalist No. 78 (A. Hamilton), *quoted in* Weinstein, *Reform of Federal Court Rulemaking Procedures,* 76 Colum. L. Rev. 905, 914 (1976).

[160] *See* Kay, *The Rule-Making Authority and Separation of Powers in Connecticut,* 8 Conn. L. Rev. 1, 4 (1975).

[161] *See* Comment, *Courts—Rule-Making Power—CPLR 3216 Held Unconstitutional as an Interference with the Inherent Power of the Court,* 43 N.Y.U.L. Rev. 776, 785 (1968) [hereinafter cited as *Courts*]; *see also* Berg, *Assumption of Administrative Responsibility by the Judiciary: Rx for Reform,* 6 Suffolk U.L. Rev. 796, 808-09 (1972).

[162] *See* Hall, *Judicial Rule-Making is Alive but Ailing,* 55 A.B.A.J. 637 (1969); *see also Courts, supra* note 161, at 785; Note, *The Judiciary and the Rule-Making Power,* 23 S.C.L. Rev. 377, 381 (1971).

2. *Supreme Court as Preferred Rule-Making Body*

The argument that the supreme court is the preferred rule-making body is in part based on management theory: the objectives of an organization cannot be achieved if its operations are controlled by members outside the organization. As applied to the judiciary, it is argued that priorities should be established by members of the judicial branch, especially members of the supreme court, rather than by those outside it such as legislative bodies.[163] E. Freeman Leverett of the Georgia Bar explains: "Experience does show that the rule-making power is effective in practice only where favored by the highest state court, for unsympathetic interpretation can ruin any good law."[164] In other words, the supreme court is less likely to implement externally imposed rules than those drafted from within.

Another argument offered by proponents is that judges are more interested in improving the judicial machinery than are legislators. Judges not only take a greater interest in periodically reviewing rules and assessing their impact,[165] but they are also in a better position to do so than are legislators. Judges' familiarity with court operations and needs[166] gives them the necessary expertise to develop a coherent body of administrative and procedural rules.[167] In contrast, legislators are widely criticized for their lack of expertise in this area[168] and have been characterized as amateurs who lack familiarity with judicial operations, problems, and potential solutions.[169]

Proponents further argue that the rule-making process is more flexible when placed in the judiciary than in the legislature.[170] Rules can be promulgated and amended at any time with greater expe-

[163] *See* Berg, *supra* note 161, at 804-05.

[164] Leverett, *Georgia and the Rule-Making Power,* 23 Ga. B.J. 303, 307 (1960).

[165] *See* Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making,* 55 Mich. L. Rev. 623, 643 (1957).

[166] *See* Note, *Substance and Procedure: The Scope of Judicial Rule Making Authority in Ohio,* 37 Ohio St. L.J. 364, 383 (1976) [hereinafter cited as *Scope of Judicial Rule Making Authority*].

[167] *See* Heflin, *"Rule-Making Power,"* 34 Ala. Law. 263, 267 (1973); Leverett, *supra* note 164, at 306.

[168] *See* Joiner & Miller, *supra* note 165.

[169] *See* Berg, *supra* note 161, at 805; Kay, *supra* note 160, at 34.

[170] *See* American Bar Association, *supra* note 101, at 71-75; Brennan, *supra* note 25, at 148.

diency[171] and phrased in precise terms, unlike statutes which are often necessarily vague.[172] Moreover, legislatures in many states meet infrequently,[173] and are too pressed by countless other demands to devote more than intermittent attention to the concerns of the courts. When legislatures adopt rules, the entire code is rarely considered; rather, legislation is passed in a piecemeal fashion, which ultimately produces an "incongruous hodge-podge" of statutes.[174]

Proponents also contend that because of legislators' partisan nature, they should not develop judicial rules.[175] Since legislators are often motivated by a variety of irrelevant political considerations, they may establish rules as a result of political compromise which cannot satisfy the needs of the judiciary.[176]

Finally, it is argued that the citizenry tends to hold judges accountable for the proper functioning of the judiciary.[177] Therefore, judges rather than legislators should be given the authority to fulfill their public responsibilities.

B. *Arguments Opposing Supreme Court Rule-Making Authority*

1. *Lack of Safeguards*

Opponents argue that vesting rule-making authority exclusively in the supreme court conflicts with the concept of checks and balances[178] inherent in the separation of powers doctrine. As Professor Richard Kay notes: "It is in the protection against uncircumscribed power in any department of government that the real value of the separation of power lies."[179] The legislative process of rule making provides several safeguards: legislators are subject to periodic public reelection; potential legislation must be approved by an executive,

[171] *See* Heflin, *supra* note 167, at 266-67; Leverett, *supra* note 164, at 306; *Scope of Judicial Rule Making Authority*, *supra* note 166, at 383-85.
[172] *See* Joiner & Miller, *supra* note 165, at 643; *Scope of Judicial Rule Making Authority*, *supra* note 166, at 383-85.
[173] *See* Joiner & Miller, *supra* note 165, at 623, 643.
[174] Leverett, *supra* note 164, at 306.
[175] Kay, *supra* note 160, at 34.
[176] *See Scope of Judicial Rule Making Authority*, *supra* note 166, at 383.
[177] *See* Heflin, *supra* note 167, at 267; Joiner & Miller, *supra* note 165, at 643; Leverett, *supra* note 164, at 306; *Scope of Judicial Rule Making Authority*, *supra* note 166, at 383.
[178] *See* Kay, *supra* note 160, at 40-41.
[179] *Id.* at 41.

who is also subject to public removal; and statutes may be challenged by the public in court.[180]

Yet no equivalent safeguards exist when the supreme court is vested with exclusive rule-making authority. Judicially-promulgated rules are not subject to scrutiny by the executive or legislative branches. Judges are deliberately insulated from politics; only rarely are they subject to public review, either through retention, election, or disciplinary proceedings; even when judges are scrutinized, few are removed from office. Additionally, there is no direct public access to the judicial process of drafting rules as there is with statutory drafting.[181] Moreover, lawyers and litigants who are dissatisfied with a rule lack a neutral forum in which to assert their objections.[182] Finally, lower court judges will be reluctant to criticize rules if they are promulgated by a higher court. As Professor Kay states: "The immunity from political interests of which judicial rule-making advocates boast may also insulate judges from legitimate public dissatisfaction with the procedural aspects of the judicial system."[183]

2. *Rule Making as a Legislative Function*

In 1825 Chief Justice John Marshall asserted that rule making is properly viewed as a legislative responsibility, although it may be delegated in part to the courts.[184] Affirming the continued validity of this statement, opponents note that the states rarely give exclusive control over rule making to the courts.[185] State reluctance in this matter derives in part from the federal government's continued explicit recognition that rule making is a legislative function. Although Congress has delegated substantial authority to the judiciary,[186] it nevertheless retains ultimate control over federal rules.

The rules that courts promulgate concern administrative or procedural rather than substantive matters. However, as one writer

[180] *Id.*
[181] *See* Weinstein, *supra* note 159, at 933.
[182] *See* Kay, *supra* note 160, at 41.
[183] *Id.* at 36.
[184] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41-43 (1825).
[185] *See* Weinstein, *supra* note 159, at 924-25.
[186] *See id.* at 927 (Congress retains ultimate control over rule making but has delegated authority to courts over matters such as bankruptcy and evidence rules and rules of civil, criminal, and appellate procedure.).

notes: "A clear-cut distinction [between substantive and procedural law] for all purposes is impossible of formulation."[187] Substantive matters are considered to be within the province of legislatures, and procedural rule making has so many substantive implications that opponents view it as "lawmaking of the most serious and significant kind."[188] Thus, opponents believe that there is a great likelihood courts will encroach upon the legislative right to enact substantive laws when they engage in procedural rule making.[189] They assert that, at the very least, the legislature should exercise concurrent rule-making authority with the supreme court over administrative and procedural matters.[190]

3. *Supreme Court as Inappropriate Rule-Making Body*

It is argued that supreme courts should not promulgate rules relating to an entire state judiciary because courts, as conservative institutions, are not responsive to change. Some opponents contend that justices are steeped in a status quo mentality and may be so old by the time they reach the state's highest bench that "'all change seems abhorrent.'"[191]

Opponents also claim that supreme court justices lack the interest and capacity to draft cogent rules. Justices are too removed from actual practice to be concerned with the bar's problems[192] and too isolated to comprehend problems in lower court trial proceedings.[193] If courts are authorized to draft cohesive rules, they may be reluctant to exercise the authority, fearing potential conflicts with the legislature. Consequently, courts may not be innovative and may refrain from taking action except when faced with an urgent need.[194]

C. *Analysis*

A persuasive argument in favor of granting the supreme court

[187] Joiner & Miller, *supra* note 165, at 635.
[188] Kay, *supra* note 160, at 40; *see generally* Note, 27 RUTGERS L. REV. 345, 347-48 (1974).
[189] *See* Levin & Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 29-33 (1958).
[190] *See id.*
[191] *Id.* at 13 (quoting Warner, *The Role of Courts and Judicial Councils in Procedural Reform*, 85 U. PA. L. REV. 441, 451 (1937)).
[192] *See id.*
[193] *See* Leverett, *supra* note 164; Weinstein, *supra* note 159, at 934.
[194] *See* Note, *The Rulemaking Power of the Florida Supreme Court: The Twilight Zone Between Substance and Procedure*, 24 U. FLA. L. REV. 87, 90 (1971).

exclusive rule-making authority is that it is the appropriate body to promulgate rules. Courts, more than legislatures, have the experience and knowledge required to draft and implement rules; justices are more likely than legislators to understand court functions and the rules necessary for smooth operation. This argument is bolstered by the fact that the number of lawyer-legislators, who at least theoretically should possess greater familiarity with the judiciary than nonlawyer legislators, is rapidly declining.[195] Indeed, the argument that state legislatures are composed primarily of members with substantial legal expertise is no longer accurate in most cases.

The countervailing suggestion that the supreme court is too far removed from both the practice of law and the problems of lower courts appears to lack merit. State supreme courts are not so isolated as to make plausible the notion that they will promulgate rules without consulting lower court judges and members of the bar. Indeed, they often create bench-bar committees to study the court system and prepare initial drafts of rules. Alabama adopted this approach in 1971 when the legislature conferred rule-making authority on the supreme court.[196] To help promulgate new rules of civil procedure, the state court appointed a fifteen-member committee composed of judges, lawyers, and law professors.[197] The court also solicited advice and recommendations from the Alabama Association of Circuit Judges, the Alabama Board of Bar Commissioners, and the Alabama Law Institute, as well as from other judges, lawyers, and members of the public.[198]

The Supreme Court of Ohio adopted a unique and highly successful approach to the promulgation of rules governing the state's trial courts. The late Chief Justice O'Neill invited twelve of the most capable trial judges in the state to confer with him on rules which could be enacted to eliminate the causes of court delay. He also met with numerous other state judges before promulgating fifteen rules. Although during the next four years case filings increased by

[195] In 1977, there were approximately 7,562 state legislators, of whom 1,599 (21%) were attorneys. The state legislature of Virginia had the largest attorney representation (57%); Delaware had the smallest (none was an attorney). *See* M. ZUGER, OCCUPATIONAL PROFILES OF STATE LEGISLATURES 32-33 (1977).
[196] *See* Nachman, *Alabama's Breakthrough for Reform*, 56 JUDICATURE 112 (1972).
[197] *See id.* at 113-14; Heflin, *supra* note 167, at 264.
[198] *See* Heflin, *supra* note 167, at 264.

twenty-five percent, with the enactment of these rules only one additional judge was required.[199]

Another compelling argument offered by proponents is that the process of judicial rule making is more flexible than legislative enactment. Courts, unlike legislatures, are not constrained by infrequent legislative sessions, a constantly changing membership, partisan politics, and a variety of competing interests; these attributes can combine to produce a confusing code of rules and obstruct equitable and efficient dispensation of justice, as illustrated by the development of the Field Code of Civil Procedure. When the code was adopted in 1848, 391 distinct sections were provided. By 1915, however, the code had grown by geometric proportions: well over 3,000 sections had been created, making it nearly unmanageable.[200]

The most troublesome aspect of the proponents' position is their insistence that rule-making authority be placed exclusively in the supreme court. Opponents note that the framers intended the three branches to be independent, but never intended for them to be unchecked. United States District Judge Jack Weinstein suggests that "there has never been a fully compartmentalized separation of powers."[201] He finds support in a recent decision of the United States Supreme Court which noted the draftsmen of the Constitution perceived that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."[202] Weinstein concludes that "[j]udicial independence cannot be absolute."[203]

D. *Options*

States can meet the most compelling arguments of both sides by choosing either of two options. First, a state can vest the supreme court with nonexclusive rule-making authority allowing some legislative review, consistent with the concept of checks and balances. In Ohio, for example, all court-promulgated rules are effective un-

[199] *See* Address by C. William O'Neill, Judicial Planning, Budgeting and Management, presented to the National Conference of State Criminal Justice Planning Administrators, Seattle, Washington (July 19, 1976).

[200] *See* Leverett, *supra* note 164, at 306.

[201] Weinstein, *supra* note 159, at 915.

[202] *Id.* at 916 (quoting Buckley v. Valeo, 424 U.S. 1, 121 (1976)).

[203] *Id.*

less disapproved by concurrent legislative resolution.[204] Two scholars pinpoint the thrust of this approach:

> The whole aim of the balance of powers . . . is the creation of a scheme whereby the courts may maintain an effective, flexible and thorough-going control over their own administration and procedure, with the possibility of ultimate legislative review in cases where important decisions of public policy are necessarily involved. This is the aim of safe efficiency: immediately practical, fundamentally democratic.[205]

This option allows the judiciary primary control over its affairs. As a safeguard, it provides legislative review of important public policy matters.

The same authors offer the following statement as a constitutional model for states to consider:

> 1. The supreme court shall make rules governing the administration, practice and procedure, including evidence, of all courts in the state.
> 2. Such rules, or any statute enacted under this paragraph may be repealed, amended or supplemented by the legislature by two-thirds vote of the members elected to each house, and any such enactment shall have the force and effect of statute during the six years next following the date of its taking effect and shall thereafter have effect as rule of court until repealed or amended by the supreme court or by the legislature.
> 3. In consideration of any bill proposing an enactment under this section, the chief justice of the state shall be given opportunity to be heard.[206]

This approach is consistent with the separation of powers doctrine and the concept of checks and balances, for while a court may initiate action, the legislature is empowered to curb abuses. Moreover the ubiquitous definitional problem of substance versus procedure is ameliorated by providing for legislative review. If legislatures perceive that courts are enacting substantive law, they have authority to disapprove such rules. Additionally, because this is a constitutional statement and not a statutory enactment, the court

[204] *See* OHIO REV. CODE ANN. § 2503.36 (Page 1954) (enabling the supreme court to prescribe rules of practice); *id.* § 2505.45 (power of courts to make rules not inconsistent with laws of the state).

[205] Levin & Amsterdam, *supra* note 189, at 42.

[206] *Id.*

may be less reluctant to exercise its authority, and the legislature will lack authority to revoke the court's rule-making power regardless of its displeasure with the court's rules. Also, the requirement of review and approval by two-thirds of the legislature will discourage rash intervention by the legislature in the judicial sphere.

The second principal option is to vest rule-making authority in a judicial council. Although judicial councils originated in the 1920s and spread rapidly,[207] their existence and utility has declined within the past few decades. Today, however, there appears to be a renewed interest in the viability of councils.[208] Russell Wheeler and Donald Jackson suggest the reason for this trend is that "judges and court administrators are coming to realize that one part of effective management is effective and good faith consultation with various actors in the system."[209]

Judicial councils vary dramatically in their composition and authority. The judicial council in the State of California exemplifies perhaps the strongest body of this sort.[210] Composed of eleven judges representing all courts in the state, the council is vested with constitutional authority to adopt rules for administration, practice, and procedure.[211] The judicial council in Washington, on the other hand, has a broader composition; however, it is statutorily created and vested with authority only to propose changes. Its members include eight judges, four members from each house, a dean from each recognized school of law in the state, eight members of the bar, the attorney general, and one county clerk.[212]

Generally, judicial councils are beneficial. They allow participation by judges from all levels of a state's judiciary, as well as by members of the bar. Coupled with the direct participation of legislators, this system avoids the pitfalls of exclusive judicial involvement. The establishment of a permanent council also brings continuity to the study of judicial rules. After a period of time, council members achieve familiarity with the history, operations, and needs of the judiciary, thus enabling them to promote rational and cogent change.

[207] *See* Wheeler & Jackson, *supra* note 154, at 125-30.

[208] *See, e.g.*, KAN. STAT. § 20-2201 (Cum. Supp. 1977), which provides:

> A judicial council is hereby established and created which shall be composed of one justice of the supreme court, one judge of the court of appeals, two district judges of different judicial districts, four resident lawyers, the chairperson of the judiciary committee of the house of representatives, and the chairperson of the judiciary committee of the senate.

[209] Wheeler & Jackson, *supra* note 154, at 139.

[210] *See id.* at 132-33.

[211] CALIF. CONST. art. 6, § 1a.

[212] WASH. REV. CODE § 2.52.010 (Supp. 1977).

Whether nonexclusive rule-making authority is vested in the supreme court or in a judicial council, it appears desirable to obtain as much extrajudicial participation as possible. Two methods may be employed. The first method is to utilize an expert advisory committee.[213] This approach is supported by at least two prominent jurists. Former Chief Justice Howell Heflin of the Alabama Supreme Court contends that substantial participation from the bar would be helpful.[214] Similarly, Georgia Supreme Court Associate Justice Robert Hall suggests that in addition to the bar's participation, involvement of trial court judges is essential.[215] The second method is to conduct public hearings on proposed rules.[216] In Connecticut, for example, open hearings are required at least once annually to allow the public to propose changes.[217] This procedure lends legitimacy and credibility to the rule-making process.

V. STATE FINANCING

Before discussing the purported advantages and disadvantages of state financing and unitary budgeting, some preliminary definitions and remarks are necessary. In a state-financed system, the state, rather than cities and counties or some combination of the three, assumes full responsibility for funding the judiciary. State financing answers the questions, "Who pays?" and to a lesser extent, "How much?" Unitary budgeting, on the other hand, is a method of distributing fiscal resources; it is an administrative tool which greatly facilitates planning and addresses the question, "How will the money be used?" Aaron Wildavsky defines budgeting as follows:

> [B]udgeting is concerned with the translation of financial resources into human purposes. A budget, therefore, may be characterized as a series of goals with price tags attached. Since funds are limited and have to be divided in one way or

[213] *See* Weinstein, *supra* note 159, at 939.

[214] Heflin, *supra* note 167.

[215] Hall, *supra* note 162, at 639-40.

[216] *See* Weinstein, *supra* note 159, at 943.

[217] CONN. GEN. STAT. § 51-14(c) (1977).

> another, the budget becomes a mechanism for making choices among alternative expenditures. When the choices are coordinated as to achieve desired goals, a budget may be called a plan. . . . If emphasis is placed on . . . obtaining the desired objectives at the lowest cost, a budget may become an instrument for ensuring efficiency.[218]

Thus, state financing is a method of gathering money, whereas unitary budgeting is a method of distribution.

While these two elements of unification are intimately interrelated, they have aspects which are distinct and separable. Since unitary budgeting and state financing are relatively new aspects of court reform which few states have yet adopted, the concepts are not fully understood and are often used interchangeably in the literature.[219] The following presentation attempts to overcome this problem.

A. *Arguments Supporting State Financing*

A principal argument favoring state financing is based on the belief that local governments are fiscally incapable of supporting local courts.[220] The major source of revenue for local governments is property taxes. Although property taxes may adequately support courts in wealthy counties, they have been criticized as regressive and burdensome for relatively poorer counties.[221] In contrast, state revenues are generated primarily from sales taxes, which are less regressive and require a smaller financial commitment of state funds than equivalent funding at the county level.[222]

Proponents argue that "the quality of court services varies dramatically according to the locality's ability to pay."[223] Residents of

[218] A. WILDAVSKY, THE POLITICS OF THE BUDGETARY PROCESS 1 (1964), *quoted in* Hazard & McNamara, *supra* note 112, at 1294.

[219] *See, e.g.*, COX COMMISSION, *supra* note 6, at 28; Hazard & McNamara, *supra* note 112, at 1294-95.

[220] *See, e.g.*, Address by Edward Pringle, Fiscal Problems of a State Court System, presented to the Conference of Chief Justices, Seattle, Washington (Aug. 11, 1972).

[221] *See* COX COMMISSION, *supra* note 6, at 28 ("The cost of municipal government is already high and will continue to increase. The burden of the increase falls on the property tax and is beginning to depreciate the value of urban properties."); Skolar, *Financing the Criminal Justice System: The National Standards Revolution*, 60 JUDICATURE 32, 37 (1976).

[222] *See* 2 MISSISSIPPI CRIMINAL JUSTICE PLANNING DIVISION, COURTS STRATEGY 135-40 (1976).

[223] Hazard & McNamara, *supra* note 112, at 1297. *See also* AMERICAN BAR ASSOCIATION, *supra* note 101, at 98 ("Financing by local government leads to fragmented and disparate levels of financial support, particularly for auxiliary court services.").

affluent counties receive "more justice" than residents of less prosperous counties simply because more funds are available. Affluent counties may employ an adequate number of well-qualified judges to reduce caseloads and ensure a high quality of justice. Poorer counties, on the other hand, often must hire lay judges who serve only part-time; in addition, poorer counties are less likely to be able to afford attractive courthouses with sufficient and competent staff and modern equipment. When all court functions are financed by the state, and funds are distributed to localities according to need, disparities may be eliminated and dispensation of justice equalized.[224]

Additionally, proponents assert that it is extremely difficult for the judiciary to obtain funds from a county treasury.[225] County boards, faced with competing demands to support roads and schools, are generally unfamiliar with judicial operations and thus are less willing to appropriate funds to support courts than to support other services regarded as more important.

It is also argued that judges must become involved in local politics to ensure at least minimal funding in a nonunified system. Because this is considered inappropriate behavior for judicial officials, proponents support state funding where the need to lobby is obviated.[226]

A final argument offered for state funding is that it facilitates the development and implementation of a unitary budget.[227] Proponents suggest that the administrative process of preparing and administering a budget is greatly simplified when the state, rather than its numerous political subdivisions, is the source of funding. Consequently, the benefits obtained by unitary budgeting are augmented through the adoption of full state financing.[228]

B. *Arguments Opposing State Financing*

It is argued that when the state assumes fiscal responsibility for the entire judiciary, counties will lose control over the policy-

[224] *See* Address by Jim Dunlevey, presented to the National Conference of State Legislatures, Panel on Structure and Financing of Judicial Systems, Lincoln, Nebraska (May 6, 1977).

[225] *See id.*

[226] *See id.*

[227] *See id;* Pringle, *supra* note 220.

[228] *See* C. BAAR, *supra* note 5, at 56; Pringle, *supra* note 220. See Section VI for a full discussion of the advantages of unitary budgeting.

making process.[229] Even if budget preparation remains a local responsibility, it is feared that state officials will nevertheless attempt to control the expenditure of state-provided revenues.[230] Opponents resent the possibility that the state will encroach upon local prerogatives in this manner.

Opponents also assert that state financing does not guarantee a larger budget for courts than does local government financing. State funds, like local government funds, are not unlimited,[231] and state legislatures may be as unresponsive and unsympathetic to judicial needs as county boards. Moreover, judges may be required to lobby for adequate funding at the state level, which may be more difficult than lobbying at the local level. As stated in one article: "Where a judge previously sought to provide for the needs of his court by influencing a local county supervisor or town chairman, he will now have to do so by influencing the court administrator, chief justice, or planning committee of his fellow judges."[232] Thus, the problems of inadequate financing in a state-supported system may be shared by many courts, rather than a few.[233] Finally, wealthy counties in particular will suffer because their resources will be redistributed to poorer locales.

C. *Analysis*

Proponents of state financing raise two compelling arguments. First, it appears that many local governments are incapable of or are unwilling to adequately support their judicial systems. Local courts often do not have enough judges or auxiliary personnel. Physical structures are frequently archaic and in need of repair while others are simply beyond renovation; plaster is falling from the walls and the acoustics make "public" trials a sham, buildings often lack adequate air conditioning and heating units, and equipment in many areas is inoperable. In Alabama, for example, a recent survey

[229] *See* Dunlevey, *supra* note 224.
[230] *See* Pringle, *supra* note 220.
[231] *See id.*
[232] Hazard & McNamara, *supra* note 112, at 1300.
[233] *See* Dunlevey, *supra* note 224. Mr. Dunlevey stated:

> Whether state financing will prevent parsimony in the provision of needed resources is another question. The power to appropriate is vested in the legislature in every state. And, a legislature may be just as parsimonious as a county board. In that event, the problems of inadequate financing can be shared by all the courts, rather than just some. This may not be an advantage.

Id.

found that almost none of the county-owned typewriters were functional.[234]

Another strong argument is that state financing facilitates the development of a unitary budget and augments its advantages. Such a system allows employees to be transferred to meet new or unusual situations. For example, in Colorado inmates of the state penitentiary rioted and, as a result, fifty-eight trials had to be scheduled and conducted within ninety days. Since the prison was located in a sparsely populated rural area, there were too few judges and support personnel to handle the cases. Because of the state-financed and centrally-managed system, however, the problem was readily solved. Appropriations from the state budget were made available and judges and other personnel from different areas within the state were temporarily assigned to help with the trials. Retired judges were called into service and additional reporters and clerical staff were employed to expedite trial of these cases.[235]

A weaker argument is that state funding will preclude judges' participation in the political process. In state-financed systems local judges no longer appear before city councils and county commissions to request funds; instead the state court administrator appears before appropriate legislative committees. Nonetheless it is clear that even in a state-funded system, important local judges, members of the supreme court, and the chief justice in particular maintain close working relationships with key legislative leaders and actively engage in lobbying on behalf of the judiciary.[236]

Proponents' weakest argument is that full state funding will correct the disparate levels of support which exist in a decentralized system. It does not necessarily follow that because revenues are gathered centrally these monies will be fairly or evenly distributed. The unitary budget, not state funding, makes possible more equitable resource allocation throughout the state.

Both arguments against state funding appear theoretically sound. It is logical that much local control will be lost when the state assumes fiscal responsibility for the entire judicial system. Put simply, the axiom "dollars control policy" is not without merit.[237] Fur-

[234] Interview with Alabama judicial personnel.
[235] *See* Berkson & Carbon, *supra* note 138.
[236] Interviews with Alabama and Kentucky judicial personnel and administrators.
[237] *See* Dunlevey, *supra* note 224.

ther, opponents' argument that state funding does not guarantee greater or even adequate funding also seems convincing. State revenues, like those of the county, are limited and there is an equally wide variety of competing interests for these same resources. If the judiciary is not successful in making competitive claims in the legislature, it may lack adequate funding.

Unfortunately, the field interviews do not provide adequate information to evaluate opponents' claims. The lack of complaints about the level of appropriations in state-funded jurisdictions, however, may indicate that, at a minimum, preexisting levels are maintained.

D. *Options*

States that wish to finance less than 100% of the judiciary's expenses have two options. A state may support certain levels of courts, such as the supreme court and other appellate courts, while local governments continue to support trial courts. Or the state may assume certain costs, such as judicial salaries, while local governments fund facilities and equipment.[238] The principal benefit obtained from partial state financing is that local governments, which continue to provide some degree of financial support, are able to participate in the planning and decision-making processes.

VI. Unitary Budgeting

A. *Arguments Supporting Unitary Budgeting*

1. *Executive Excluded from Participation*

Proponents claim that one of the major advantages of a unitary budget[239] is that the executive does not participate in budget preparation[240] and cannot eliminate programs from budget requests before they are submitted to the legislature. The judiciary, therefore, is allowed to establish its own goals and objectives without interference.[241] Proponents further contend that the separation of powers doctrine precludes executive participation; because the judiciary is not involved in developing the executive budget, there is no logical justification for the converse situation.

[238] Florida provides one example of this type of state funding. *See* C. Baar, *supra* note 5, at 8.

[239] For a more extensive definition of unitary budgeting, see Berkson, *supra* note 12, at 379-81. *See also* C. Baar, *supra* note 5, at 5-7; Hazard & McNamara, *supra* note 112, at 1294.

[240] *See* C. Baar, *supra* note 5, at 165; Pringle, *supra* note 220.

[241] *See* O'Connell, *supra* note 6, at 648.

2. *Simplification of the Budgetary Process*

Proponents also argue that a unitary budget greatly simplifies the traditionally cumbersome process of budget preparation and presentation.[242] In a nonunified system each local judge prepares a budget for his own court and presents it to a county board. The board, therefore, must review as many budgets as there are courts in the county. Because each judge prepares his budget autonomously, there is little uniformity in the methods of presentation, which thereby increases the difficulty of evaluating requests. Moreover, where the state finances some portion of judicial expenses, such as salaries, a judge must submit a separate budget to the state legislature for that item. The state legislature must then review the judges' requests separately. This process becomes more complicated when the expenses financed by the state vary with the different levels of courts. For example, the state may finance only salaries for judges of the trial courts, whereas it might assume responsibility for all appellate court expenses. Consequently, the legislature must review countless budgets, for divergent needs, from many different courts.

In a centralized system, on the other hand, one state office is responsible for gathering all fiscal data and requests from throughout the state and for compiling a single judicial budget for presentation to the state legislature.[243] Individual judges no longer prepare and submit separate budget requests, and county boards and the legislature are relieved of the burden of reviewing countless disparate requests.[244]

[242] *See* Cox Commission, *supra* note 6, at 27, in which it was concluded:
> [A] single statewide budget for the Judicial System prepared under the supervision of the Chief Justice of the Supreme Judicial Court would reduce . . . waste and correct . . . deficiencies. . . . Such a budget would also give the Legislature a measure of financial control which today it totally lacks—the opportunity for knowledgeable annual review of the business operations of the Judicial Branch. The Legislature could then measure the cost against effectiveness in the managerial and administrative aspects of the distribution of justice.

[243] *See* C. Baar, *supra* note 5, at 11-20.

[244] *See, e.g.*, Colo. Rev. Stat. § 13-3-106 (Cum. Supp. 1976).

3. *Facilitates Planning*

Proponents claim that a unitary budget is a useful tool for judicial planning. Because one central administrative office gathers all fiscal information and prepares a single budget, current programs can be analyzed, future needs can be predicted, system-wide goals can be formulated, and statewide policies can be implemented.[245] Carl Baar supports this view:

> The development of annual budget requests and multi-year budget projections becomes an opportunity for components of a court system to examine their work patterns and provide information to the central judicial administrative office about their resource needs including needs for personnel, equipment, and space. The budget exercise also provides central court system administrators with an opportunity to develop and test management and performance measures suited to the distinctive needs of the judicial process.[246]

Proponents also note that budget preparation is a highly sophisticated and complex process, and that without expertise, little comprehensive planning is possible. They argue that in a unified system an individual skilled in fiscal management will be responsible for preparing the budget.[247] This is claimed to be an important improvement over decentralized systems where local judges and clerks, vested with the responsibility of budget preparation, have little training in this area.

4. *Promotes Equity in Resource Allocation*

Proponents assert that a unitary budget facilitates redistribution of resources and personnel throughout a state court system.[248] They claim that disparities in funds for equipment and auxiliary personnel may be corrected when a single budget is prepared. Policy decisions on the relative needs of different courts can be determined centrally by evaluating the various courts' requests. Understaffed courts with burgeoning caseloads may thereby receive greater appropriations for personnel and equipment than courts with current

[245] *See* Hazard & McNamara, *supra* note 112, at 1294. *See also Unitary Budgeting: A Financial Platform for Court Improvement*, 56 JUDICATURE 313 (1973) [hereinafter cited as *Unitary Budgeting*].

[246] *See* C. BAAR, *supra* note 5, at 168.

[247] *See id.*

[248] *See Unitary Budgeting*, *supra* note 245.

dockets and modern equipment. As a result, a greater uniformity in the quality of judicial service will be available throughout a state.

B. *Arguments Opposing Unitary Budgeting*

1. *Promotes Excessive Uniformity*

Unitary budgeting is criticized because it "implies substantial uniformity in procedure and court services throughout the state."[249] Opponents fear that a strict mathematical formula will be employed to determine each court's fiscal appropriation, and that differences in a particular court's needs will be ignored.[250] They speculate that distributing fiscal resources in this manner may undermine a local court's ability to develop innovative programs to meet future needs. Frank Zolin suggests that there will be a reduction of financial support for local court development programs:

> This reduction will be necessitated by a mandatory policy for a state budget officer to provide an equal level of financing for all courts under his control. Unified state budgeting will repeatedly place the state budget officer in the position of choosing between the financing of new, experimental programs and providing resources to a poorly financed court to bring it up to the generally accepted level of staffing. The pressures on the budget officer to bring the poorly financed court up to standard will be irresistible. How can he refuse to provide the level of clerical support, judges' libraries, and facilities that are generally available throughout the state to a jurisdiction that has heretofore been unable to provide them?[251]

Mr. Zolin believes that this aspect of unitary budgeting will ultimately hinder the evolution of a better judicial system by impeding innovation in those local jurisdictions able to afford experimentation.

2. *Administrative Burdens*

Unitary budgeting is opposed because it places additional administrative burdens on judges and auxiliary personnel.[252] Unlike a de-

[249] Hazard & McNamara, *supra* note 112, at 1299.

[250] *See id.* at 1300.

[251] Letter from Frank Zolin, Executive Officer of the Los Angeles Superior Court, to National Center for State Courts (Oct. 11, 1972), *quoted in* C. BAAR, *supra* note 5, at 139.

[252] *See* Pringle, *supra* note 227.

centralized system, where there are few record-keeping responsibilities and local courts often need not document budget requests, an extensive record-keeping system is required in a centralized system to account for each court's expenditures. Since the method of recording data is standard throughout the state, courts must adopt new methods of monitoring these data. Court personnel must also develop the capacity to plan for future needs by carefully evaluating past and present requirements.

3. *Excessive Supreme Court Control*

A unitary budget is also criticized because it gives the supreme court too much control. With such authority, the court may be able to ignore certain requests by local courts, or force the development of programs which are unacceptable to lower courts.[253] Further, the court may use the budget as a tool for manipulating local judges. One author argues that the court may withdraw funds from any lower court to "punish those judges with whom it disagrees."[254] Another concludes: "Such manifestations of an unequal power distribution . . . indubitably undermine the morale and professionalism of the lower court judiciary."[255]

C. *Analysis*

Because unitary budgeting probably cannot be implemented without complete state funding,[256] this analysis is predicated on the assumption the latter reform has also been adopted.

Clearly one of the most compelling arguments offered by proponents is that unification simplifies procedures for preparing and submitting the budget. The Cox Commission studied Massachusetts, where unitary budgeting has not been adopted, and it reports:

> There are 417 budgets, each prepared by separate officers or employees with scant regard to any other budget. There are separate budgets for each court and each of the 14 county sittings of the Superior Court. Most courts draw funds from both State and county; therefore, there must be a budget for each. Nor is this all. For each county sitting of the Superior Court and for 64 of the 72 district courts, four separate budgets are submitted for the funding of different salaries, services, equipment and building maintenance.[257]

[253] *See* Saari, *supra* note 14, at 30-31.
[254] *Id.* at 31.
[255] *See* Hays, *supra* note 113, at 130.
[256] *See* C. Baar, *supra* note 5, at 139-40.

The problems associated with this budgetary morass can be greatly alleviated by vesting budget preparation in one central administrative office.

Although not observed in the field, another aspect of unitary budgeting which seems compelling is that the mechanism allows greater planning potential. Unlike a decentralized system, where fragmented courts and disparate sources of support prevent statewide long-range planning, a centralized system allows the development of programs to improve the judiciary, the analysis of all state court requirements, and the prediction of future needs.

There is also merit in the claim that extraneous political considerations are less likely to influence judicial priorities when the executive is excluded from budget preparation. Perhaps more important, the executive will no longer have an opportunity to eliminate programs from judicial budget requests.[258] In short, the judiciary will be allowed full benefits of coequal status.

Both proponents and opponents address the issue of equitable resource allocation through unitary budgeting. Unfortunately, the field observations did not yield clear evidence to support or refute this idea. However, Colorado's experiences with the religious festival and prison riots related earlier indicate that at least in emergency situations, resources can be made available to disadvantaged locales.[259] Ideally, the wealth of political subdivisions should be irrelevant in determining the quality and availability of justice throughout a state.

Opponents' concern about vesting the supreme court with too much control seems reasonable on the surface. Certainly too much centralization can be as debilitating as excessive fragmentation. The field observations, however, did not produce any examples of a supreme court abusing its authority. Indeed, they tended to undermine opponents' concerns. In most states utilizing a unitary budget, numerous judges and administrators participate in preparing the

[257] Cox Commission, *supra* note 6, at 26.
[258] Colorado and Ohio are two examples. *See* C. Baar, *supra* note 5, at 29.
[259] *See Organizing the State Courts*, *supra* note 138.

budget. In Colorado local judges submit their budget requests to the chief judge who then consolic ites all requests into a single district budget. This single budget is submitted to the state court administrator who consolidates all district budgets into one state judicial budget.[260] It would be difficult for a supreme court to intervene at this stage for the purpose of "punishing" a lower court judge whose request had been approved by the district chief judge and state court administrator.

Opponents' claim that unreasonable administrative demands will be imposed on local court personnel is not compelling. Although local clerks may be inconvenienced by learning new record-keeping procedures, new methods are not likely to be any more difficult than the systems employed prior to unification. If judicial systems are to be adequately administered, a strong record-keeping system must be maintained.

D. *Options*

Unitary budgeting is in a very early stage of development. Although states are currently experimenting with different methods of preparing and submitting unitary budgets, it is too soon to evaluate their approaches. Nevertheless, reformers should not be reluctant to initiate novel, untested methods in light of the advantages which can be obtained from this mechanism.

VII. Conclusion

For the past seventy years, court unification has been advocated as a method to improve traditional state judiciaries. During the 1960s and early 1970s the reform gained wide acceptance. Study after study recommended it as a panacea for ills which plagued the courts. Recently, however, the concept has come under strong attack by scholars and practitioners alike. Both proponents and opponents have made substantial arguments to support their beliefs. From this analysis, however, it appears that on balance the proponents maintain the stronger position.

It is the authors' tentative conclusion that the unified model is a useful and rational means of state court organization and management. Perhaps the most attractive feature of the concept is that it

[260] Colo. Rev. Stat. § 13-3-106 (Cum. Supp. 1976).

makes one official or group of officials responsible for administering the entire state judiciary. The absence of this important element appears to be the primary reason why many court "systems" have degenerated into such archaic institutions.[261] Even the strongest critics of unification readily admit that excessive fragmentation must be reduced, and that some form of management system to coordinate the courts must be established.[262]

Despite a generally positive feeling about the unification concept, the authors have strong reservations about making more definitive claims for it. As stated in the introduction, the larger study from which this article's observations were gleaned was not designed specifically to evaluate the impact of unification. But hopefully this preliminary analysis will stimulate researchers to undertake further investigation. Certainly the time is ripe, and the need paramount, for rigorous evaluation of the concept of state court unification.

[261] The state of Tennessee is one classic example. *See* Institute of Judicial Administration, The Judicial System of Tennessee 4-7, 9 (1971). For an elaboration and comparison of the 50 state court systems, see Berkson, *Unified Court Systems: A Ranking of the States*, 3 Just. Sys. J. 264 (1978).

[262] *See* Gallas, *supra* note 14, at 36.

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