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Judicial v. Legislative Power in Kentucky: A "Comity" of Errors

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NOTES

Judicial v. Legislative Power in Kentucky: A "Comity" of Errors

Comity/ˈkɒmiːdi/. Courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right but out of deference and good will.1

INTRODUCTION

Struggles over separation of powers have recently become prominent in Kentucky, especially as between the Governor and the General Assembly.2 A more subtle but equally important struggle, however, has developed between the General Assembly and the Supreme Court of Kentucky.

In November 1975, Kentuckians adopted a new Judicial Article, amending Kentucky's Constitution and dramatically increasing the power of Kentucky's judicial department.3 The new Judicial Article brought about many changes in Kentucky's judicial branch, including a unified court system4 headed by the Chief Justice of the newly-created Kentucky Supreme Court5 and an express grant of rulemaking power to that Court.6

Because Kentucky's high court now possesses express power to make rules and to control the "Court of Justice,"7 in addition

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1 BLACK'S LAW DICTIONARY 242 (rev. 5th ed. 1979).
2 See Brown v. Barkley, 628 S.W.2d 616 (Ky. 1982). Barkley concerns the Governor's power to reorganize certain state administrative agencies without legislative sanction. See also Legislative Research Comm'n v. Brown, No. 82-CI-0780 (Franklin Cir. Ct. filed June 14, 1982).
3 See KY. CONST. § 109 compiler's notes (Bobbs-Merrill Supp. 1982).
4 See id.
5 Id. § 110(5)(b).
6 See id. § 116; see also id. § 115 (limited rulemaking power granted with regard to "expeditious and inexpensive appeals"). Section 116 provides:
   The Supreme Court shall have power to prescribe rules governing its appellate jurisdiction, rules for the appointment of commissioners and other court personnel, and rules of practice and procedure for the Court of Justice.
   The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.
7 The "Court of Justice" is the term used in the new Judicial Article for all levels
to the broad inherent power it previously claimed,8 conflicts have arisen between legislative enactments and court rules or court-announced policy. This Note focuses on the Supreme Court's unsuccessful attempts to resolve these conflicts under the name of "comity,"9 and suggests an analytical approach that embraces a true spirit of comity.

I. THE DEVELOPMENT OF THE PRINCIPLE OF COMITY

Kentucky's former high court, the Court of Appeals, exercised rulemaking power prior to the adoption of the new Judicial Article in 1975. The General Assembly long ago delegated rulemaking authority to the Court over various matters, including admission to and ethics of the bar10 and civil practice and procedure.11 In addition, the Court has long claimed inherent power over matters of judicial administration and procedure.12 The source of this inherent power, according to the Court, is "the act of division of powers among the three branches of government . . . and the grant of judicial power to the courts by the constitution."13 Thus, the reasons for use of the principle of comity are not new to Kentucky courts. In fact, recognition of separation of powers concerns is obvious in many of the early inherent judicial power cases, even though the decisions in many of these cases followed a judicial policy or rule contrary to statutes.

A. Early Developments Prior to the 1975 Judicial Article

In the 1938 case of Burton v. Mayer,14 the Court of Appeals refused to follow section 760 of the Civil Code of Practice,15 of courts in the state, including the Supreme Court, Court of Appeals, circuit courts and district courts. See id. § 109.

8 Kentucky's former Court of Appeals long ago claimed a broad inherent power over matters of judicial administration and procedure. See, e.g., Burton v. Mayer, 118 S.W.2d 547, 549 (Ky. 1938). See text accompanying note 14 infra for a discussion of this case.

9 The cases that have used the term "comity" include: O'Bryan v. Commonwealth, 634 S.W.2d 153 (Ky. 1982); Ex parte Auditor of Public Accounts, 609 S.W.2d 682 (Ky. 1980); Ex parte Farley, 570 S.W.2d 617 (Ky. 1978).


12 See note 8 supra.

13 Craft v. Commonwealth, 343 S.W.2d 150, 151 (Ky. 1961).

14 118 S.W.2d 547 (Ky. 1938).

which prohibited the Court from issuing a mandate until thirty
days after the date upon which its decision was rendered. In
Burton, the trial court had enjoined as unconstitutional the en-
forcement of legislation which, to have any effect, had to go into
operation immediately. The Court of Appeals reversed the lower
court as to the legislation's constitutionality but because of sec-
tion 760's thirty-day waiting period it was barred from mandating
a lift of the lower court injunction.

The Court decided to issue the mandate in spite of section 760,
applying the following reasoning:

So long as the rules of practice fixed by the legislature accord
with the proper and effective administration of justice, they
should be, and they are, followed to the letter . . . . Where,
however, a situation arises in which the administration is im-
paired or the general rules of practice are unworkable, the duty
undoubtedly rests on the courts to draw upon the reserve of their
inherent power . . . to carry out the purposes of the
Constitution.

In Commonwealth ex rel. Attorney General v. Furstel and
Craft v. Commonwealth, the Court reaffirmed the impairment
test announced in Burton. It applied a similar version of this test
in the landmark case of Arnett v. Meade. In Arnett, the Court
of Appeals found unconstitutional certain statutory limitations
placed on the judicial contempt power. The Court said judicial
contempt is a matter over which it has inherent control. Conse-
quently, the Court struck Kentucky Revised Statutes (KRS) sec-
tion 421.140, which limited the punishment of contempt for a
witness's refusal to testify. According to the Court, the statute's
limitations on its power to punish contempt were unreasonable

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16 Id.
17 118 S.W.2d at 548. The trial court could not lift its own injunction because, un-
til the Court of Appeals had issued its mandate, the case was deemed to be pending in
the Court of Appeals. Id. at 549.
18 Id. (emphasis added).
19 157 S.W.2d 59 (Ky. 1941).
20 343 S.W.2d at 150.
21 462 S.W.2d 940 (Ky. 1971).
cited as KRS].
and would “materially interfere with the administration of justice.”

Whether the test for application of the Court’s inherent powers is called “interference” or “impairment,” the Court of Appeals consistently assumed prior to the adoption of the 1975 Judicial Amendment that reasonable legislative regulations over such functions as judicial administration and court procedure were permissible. It refused to follow the legislature’s acts only when those regulations became so restrictive as to “defeat or materially impair the [Court’s] exercise of those functions.” Significantly, in the foregoing cases the Court never asserted its inherent power over administrative or procedural matters to the exclusion of legislative control. The Court’s “interference” test merely served to limit the legislature’s exercise of concurrent authority over such matters.

B. Current Developments and Confusion

The Court first announced its reliance on the principle of comity for permitting legislative action on judicial matters in *Ex parte Farley*. In *Farley* as in *Arnett*, the Supreme Court considered the validity of a statute which purported to control a judicial administration of matter over which the Court had traditionally claimed inherent power.

*Farley* was a declaratory judgment action brought by Jack Emory Farley, a Public Advocate, against the justices of the Supreme Court, both individually and collectively. Farley argued that he had a right under Kentucky’s Open Records Law to see the materials accumulated by certain staff attorneys working with the Administrative Office of the Courts pursuant to a statute

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23 462 S.W.2d at 948.
24 The “interference” test was first spelled out in *Arnett*. Id. at 948. It is, however, merely a rendition of the “impairment” test applied in earlier inherent judicial power cases. See, e.g., *Burton v. Mayer*, 118 S.W.2d at 549.
25 462 S.W.2d at 946.
26 See id. (“the legislature may put reasonable restrictions upon constitutional functions of the courts”).
27 570 S.W.2d at 617. The Kentucky Supreme Court agreed to hear the case on transfer directly from the Franklin Circuit Court. Id. at 618-19.
29 The Administrative Office of the Courts is the administrative arm of the Court of Justice and is of particular importance to the Chief Justice of the Supreme Court. See
requiring those attorneys to prepare various materials relevant to the Supreme Court's review of a death penalty sentence.\textsuperscript{30}

The Court held that its records, including the materials being prepared by the attorneys, were within its inherent power like all court records and thus could not be regulated by statute, at least when such regulation interfered "with the orderly conduct of [the Court's] . . . business."\textsuperscript{31} But in dictum the Court added:

Where statutes do not interfere or threaten to interfere with the orderly administration of justice, what boots it to quibble over which branch of government has rightful authority? We respect the legislative branch, and in the name of comity and common sense are glad to accept without cavil the application of its statutes pertaining to judicial matters . . . .\textsuperscript{32}

The above quotation appears to subscribe to the \textit{Arnett} "interference" test. However, in \textit{Farley} the Court does not cite \textit{Arnett} or any of the earlier inherent power cases. Furthermore, parts of the opinion suggest that the Court considers its power over matters which are "inseparable from the judicial function" to be \textit{exclusive} of legislative action concerning the same matters.\textsuperscript{33} This carving out of an area of exclusive authority departs from the rationale of the earlier inherent power cases in which the Court of Appeals readily recognized \textit{concurrent} authority in the legislature over such matters, albeit a limited authority in case the legislature should impair the Court's administration of justice.\textsuperscript{34}

In \textit{Ex parte Auditor of Public Accounts},\textsuperscript{35} the Supreme Court further discussed the comity principle announced in \textit{Farley}. \textit{Auditor} did not link the "interference" test applied in \textit{Arnett} with the principle of comity announced in \textit{Farley}. However, it did limit comity to matters considered to be within the Court's inherent powers and to other matters not expressly granted to the Supreme

\textsuperscript{30} See KRS § 532.075(6)-(7) (Supp. 1982).
\textsuperscript{31} 570 S.W.2d at 625.
\textsuperscript{32} Id. at 624.
\textsuperscript{33} Id. ("[R]ecords generated by the courts in the course of their work are inseparable from the judicial function itself, and are not subject to statutory regulation"). Id.
\textsuperscript{34} See text accompanying notes 25-26 supra.
\textsuperscript{35} 609 S.W.2d at 682.
Court in the Constitution, a limitation predicted in the Farley intimation of an area of exclusive Court authority.

Auditor was an action brought directly in the Kentucky Supreme Court by State Auditor James K. Graham. Graham asked the Court to determine whether he must or could under state law audit the books and accounts of the Kentucky Bar Association. The Court not only refused to permit the audit, but voided the last four sections of KRS chapter 21A. The Court's rationale was that the new Judicial Article's express grant of rulemaking authority over bar admission and discipline "completely removed the subject [of bar admission and bar regulation] from any legislative authority and [thus] rendered obsolete and ineffective the statutes pertaining to it."

The State Auditor argued that he was statutorily authorized to audit the Kentucky Bar Association and that the audit was permissible under the Arnett test. He apparently assumed that Farley's principle of comity was fundamentally the same as the interference test of Arnett, and that this test applied to the Court's exercise of powers expressly conferred by the Judicial Article. Thus, he argued, the audit should be allowed because the legislation requiring him to audit the association was a reasonable restriction upon the judicial branch which did not "defeat or materially impair the exercise of" the Court's constitutional functions.

The Court rejected the Auditor's arguments, saying that "[t]he correct principle, as we view it, is that the legislative function cannot be so exercised as to interfere . . . with the functioning of the courts, and that any constitutional intrusion is per se unreasonable." The Court refused to apply the Arnett test on the ground that it pre-dated the adoption of the new Judicial Arti-

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36 See text accompanying notes 46-49 infra.
37 609 S.W.2d at 683.
38 Id. at 684.
39 Ky. Const. § 115.
40 609 S.W.2d at 684.
41 Id. at 687.
42 The Auditor specifically argued "that the exercise of such authority [authority to audit the Bar Association] would not interfere with judicial functions." This argument was sound in light of the history of inherent judicial power cases. Id. at 687.
43 Id. at 688.
44 Id.
cle. Moreover, to the extent that Arnett commented that the legislature could restrict judicial functions, the Court said such commentary "must be confined fundamentally to the area of comity."45

The apparent rule from Auditor is that the principle of comity does not apply to matters expressly granted to the authority of the Supreme Court under section 116 of the Judicial Article.46 Thus, although the Court declared in Auditor that the principle of comity exists because the Court "much prefer[s] cooperation over conflict" with the General Assembly,47 the limits it placed on the scope of comity leave it free to exercise exclusive control over those matters expressly granted to its authority. While the General Assembly and the Court may concurrently control, in "a spirit of comity,"48 those matters falling into that "gray area . . . between the legislative prerogatives of the General Assembly and the rule-making authority of the courts,"49 the Court is free to act unreasonably or unaccountably, with no readily effective check on its action,50 as to those matters now viewed as within its exclusive control and outside the scope of comity.

45 Id.
46 Ky. Const. § 116. See note 6 supra for the text of this section.
47 609 S.W.2d at 688.
48 Id.
49 Id. This reading of Auditor—that comity applies only to matters falling into the "gray areas"—follows from other remarks the Court made in the opinion indicating that it considers its expressly granted rulemaking power to be exclusive. See id. at 684 ("constitutional amendment completely removed the subject from any legislative authority") (emphasis added). However, the Court qualified its own statement that it is per se unreasonable for the legislature to intrude upon the express constitutional powers of the Court with the phrase "unless it [the intrusion] . . . should be tolerated in a spirit of comity." Id. at 688. This savings clause conflicts with the holding of Auditor in that if the constitutional grant of power over bar admission and regulation is exclusive, then the Court would be acting unconstitutionally by allowing to stand, even in a spirit of comity, any legislation that impinges upon those matters over which it has rulemaking control. By definition, if the power is exclusive, no other branch can exercise it. Cf. Cooley v. Board of Wardens, 53 U.S. (12 How.) 143, 151 (1851) ("[i]f the Constitution excluded the States from making any law regulating commerce, certainly [Congress cannot regrant, or in any manner reconvey to the States that power]").
50 Because the Court itself exercises judicial review, no judicial check is available to oversee the propriety of any of the Court's actions. Contrast the Court's situation with that of the other branches over which there is judicial review. See, e.g., Brown v. Barkley, 628 S.W.2d at 616. Voters are the ultimate check on the Court under the state's method of popular election of judges. See Ky. Const. § 117; cf. Ex parte Farley, 570 S.W.2d at
II. COMITY'S LIMITATIONS AND EFFECTS

A. What Falls in the “Gray Area”?

Since *Auditor* limited the application of comity to the “gray area” between the legislative and judicial power, the natural question is: What falls into that gray area? But the easier question might be: What is not in the gray area? *Auditor* holds that since the constitution expressly grants the Court control of bar admission and regulation, such regulation falls within the Court’s *exclusive* rule-making domain.51 Similar reasoning suggests that all matters expressly granted in the new Judicial Article to the Court’s control fall within the Court’s exclusive domain and outside the “gray area.” However, the matters expressly granted to the Court involve many undefinable gray areas themselves.

For instance, section 116 of the constitution grants to the Court the power to promulgate rules regarding “practice and procedure for the Court of Justice.”52 But what is “practice” or “procedure,” and how does that differ from “substance”? The words “practice” and “procedure” have long been used to delegate rule-making authority by statute to the high court of Kentucky,53 but no significant historical meaning has attached to them.

In *O'Bryan v. Commonwealth*,54 the Supreme Court exhibited some confusion itself in delineating what is a “practice” or “procedure.” The Court indicated in dicta that the criminal change of venue statute,55 which has never been incorporated into either Kentucky’s criminal practice code or criminal rules of court, was capable of being “superseded by th[e] Court under the Court’s paramount rulemaking authority.”56 However, until the statute

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51 See text accompanying notes 39-40, 46-50 supra.
52 Ky. Const. § 116.
54 634 S.W.2d at 153.
55 KRS § 452.220 (1982).
56 634 S.W.2d at 158.
is superseded, the Court added, it "stands as enacted . . . under the principle of comity elucidated in" *Auditor*. The Court apparently viewed criminal change of venue as a "practice" or "procedure" within its exclusive control but then confused the issue by relying on the principle of comity which, under *Auditor*, should not apply to a matter within the Court's exclusive authority.

Without prior interpretations to supply the words "procedure" or "substance" with a definite meaning, any attempt to develop a definition is futile. 5

Thus, one of the most important powers expressly granted to the Kentucky Supreme Court in the new Judicial Article—the power to make rules over practice and procedure—remains ambiguous. 6

B. The Seeds of Unaccountability

Because *Auditor* limits the application of comity to only those matters not within the Court's constitutionally granted rulemaking power, no effective check exists to curb the Court's exercise

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57 Id.

58 Id. Implicit in the *O'Bryan* decision is the assumption that change of venue is a matter of "procedure." In a recent case, Evans v. Commonwealth, No. 82-SC-194 DG (Ky. Nov. 2, 1982), the Court may have recognized what it did not in *O'Bryan*: that treating criminal venue changes as a matter of procedure involves this implicit assumption. Id., slip op. at 3. This assumption, however, may be contrary to Kentucky's constitution, which guarantees a defendant the right to trial by a jury of the "vicinage" unless the General Assembly enacts a law changing the venue. KY. CONST. § 11. The constitution arguably does not allow the Court, as opposed to the legislature, to change criminal venue by rule. Cf. Brief for Appellee at 7, Evans v. Commonwealth, No. 82-SC-194-DG (courts have no inherent constitutional authority to transfer a criminal case on any basis other than that provided by statute).

59 Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and its progeny, as well as innumerable examples from the conflicts/choice-of-law field, amply demonstrate the fallacy of trying to draw a definite line between these terms. Cf. C. Grau, Judicial Rulemaking: Administration, Access and Accountability 3 (1978) ("No definitional solution has been found to this puzzle"). To confuse matters more, what may be characterized as substance or procedure in the context of one area of the law may be just the opposite in another area. See Laudemberger v. Port Auth., 436 A.2d 147, 153 (Pa. 1981) (pre-judgment interest rule of court can be "substantive" in context of federal diversity case of Bullins v. City of Philadelphia, 516 F. Supp. 758 (E.D. Pa. 1981) and still be "procedural" for purposes of validity under the Pennsylvania Supreme Court's rulemaking power over procedure).

60 See C. Grau, supra note 59, at 3.
Judicial accountability has recently become the focus of many scholars. Such scholars often conclude that although the judiciary should have primary control over procedural rulemaking, legislative action should not be completely foreclosed. One problem with placing exclusive rulemaking authority in the court is that the court may feel too assured that its rules are the final word on a procedural or administrative matter. If this happens, the court could easily become lax in its rulemaking procedures, so that the public, the bench and bar are denied sufficient notice and opportunity to be heard regarding proposed judicial policies are rules.

A good example of this occurred on June 12, 1981, when the Supreme Court entered an order effecting several changes in Kentucky's Rules of Criminal Procedure (RCr). In that order, the Court altered RCr 7.26 so that it was meaningless. The Court

61 See note 50 supra.


64 See generally Parness & Manthey, supra note 62 (notice and opportunity to be heard should be provided to public in rulemaking process).


67 The rule as originally typed read as though the Commonwealth must produce its witnesses' statements for the judge rather than for the defendant.
then amended the rule in a "correcting" order\textsuperscript{68} that came down about a week before the original order was to take effect.\textsuperscript{69} According to former Chief Justice Palmore, the rule was merely mistyped in the original order and later corrected.\textsuperscript{70} The problem, of course, is not so much that the error occurred, but that the error went completely unnoticed until a week before the rule was scheduled to go into effect.\textsuperscript{71} The Court simply had not allowed the public, the bench and bar ample notice and opportunity to comment on the proposed draft of the rule.\textsuperscript{72}

Even as corrected, RCr 7.26 presents problems that may haunt Kentucky courts for some time to come.\textsuperscript{73} Recently, in \textit{Wright v.}

\footnotesize

\textsuperscript{69} In a series of three judicial seminars sponsored by the Office of Continuing Legal Education, two University of Kentucky law professors pointed out several errors in the original Order 81-5. In the second of the seminar series, conducted in Owensboro, Kentucky, on Friday, Aug. 21, 1981, former Chief Justice Palmore of the Kentucky Supreme Court happened to be present. He noted the professors' concerns, and the following Monday, Aug. 24, 1981, promulgated the order correcting the original Supreme Court Order 81-5. \textit{See generally Continuing Legal Education, supra} note 68. Order 81-5, as corrected, took effect Sept. 1, 1981.

\textsuperscript{70} He explained the situation at a seminar on the criminal rule changes in Owensboro. \textit{See note 69 supra.}

\textsuperscript{71} See note 69 supra.

\textsuperscript{72} The story of the drafting process behind the criminal rule amendments established by Supreme Court Order 81-5 typifies the lack of sufficient public access to the Kentucky Supreme Court's rulemaking process. The Criminal Rules Revision Committee, appointed by the Supreme Court in May 1978, studied the criminal rules for more than two years, making numerous proposals for change, which were submitted to the Judicial Council in July 1980, and then forwarded to the Supreme Court. The Supreme Court received comments and held a public hearing on the rules proposed by the Criminal Rules Revision Committee on Dec. 9, 1980. Justice Robert Stephens, the present Chief Justice, was appointed to chair a committee of the Court to consider the written and oral suggestions, and on June 12, 1981, the Court entered its order effecting the changes in the rules. The Court did not, however, conduct another public hearing on the changes made by the Court's committee. Thus, the rules which were finally promulgated completely differed from the proposed rules on which the public's comments were received and a public hearing held, and were adopted without the benefit of any public comment.

Many scholars have condemned this lack of public process. \textit{See, e.g., C. Grau, supra} note 59, at 49-66.

\textsuperscript{73} The rule as it currently reads, and as amended and corrected, provides that "\textit{Before a witness called by the Commonwealth testifies on direct examination the attorney for the Commonwealth shall produce any statement of the witness . . . .}" RCr
Commonwealth, the Court construed RCr 7.26, not as a slightly modified Jencks Act provision, but rather as a "modest" discovery rule. In Wright, the Court discussed the history behind RCr 7.26 and why the rule was amended in the first place. The Criminal Rules Revision Committee had proposed that Kentucky adopt a more liberal criminal discovery. The Supreme Court rejected this proposal, but amended RCr 7.26 to allow discovery of witness statements before instead of after a witness testifies. Wright construed the new language of RCr 7.26 to allow discovery of witness statements any time before trial "within the trial court's sound discretion."

Wright clearly suggests that the Court thought the changes it made in RCr 7.26 were a "middle ground" between the liberal discovery rules proposed by the Criminal Rules Revision Committee and Kentucky's traditionally conservative criminal discovery rules. However, the Court did not allow the public, the bench and bar an adequate opportunity to comment on the desirability

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7.26(1) (emphasis added). Does "before" a witness is called mean only before the witness physically takes the stand after trial begins or some time before trial? This ambiguity has created significant problems. See Plymale & McSwain, *Developments in Criminal Procedure: RCr 7.26, An Open File Discovery Rule?*, KY. BENCH & BAR, Jan. 1983, at 14.

74 637 S.W.2d 635 (Ky. 1982)
75 18 U.S.C. § 3500 (1976). The "Jencks Act" is so called because it is a codification of Jencks v. United States, 353 U.S. 657, 668-69 (1957) (Jencks was entitled to an order directing the government to produce reports touching on the content of prosecution witnesses' testimony to enable Jencks to prepare his defense). Cf. Lynch v. Commonwealth, 472 S.W.2d 263, 267 (Ky. 1971) (RCr 7.26 referred to as "our counterpart to the Jencks Act").

The original RCr 7.26 was functionally identical to 18 U.S.C. § 3500. Both provided for a court order to produce the statement of a prosecution witness after that witness had testified and on motion of the defendant. See 18 U.S.C. § 3500(b); RCr 7.26(1). RCr 7.26 as amended provides that the prosecution "shall produce" witness statements before that witness testifies. Implicitly, neither a motion by defendant nor action by court is necessary.

76 637 S.W.2d at 636. See Plymale & McSwain, supra note 73, at 14.
77 637 S.W.2d at 636.
80 637 S.W.2d at 636.
81 Id. (objective of amended version of RCr 7.26 was "modest indeed" when compared with liberal criminal discovery rules). See generally Plymale & McSwain, supra note 73, at 14.
of expanding criminal discovery or on the question of how such an expansion should be incorporated into the rules.\textsuperscript{82}

Another example of a rule adopted without the benefit of consideration by the General Assembly or the bench and bar is RCr 9.56.\textsuperscript{83} While it usually is difficult to discover why the Court has promulgated, repealed or otherwise changed a rule, a series of cases\textsuperscript{84} forming in effect a colloquy between the Kentucky and United States Supreme Courts sheds some light on the Kentucky Court's perhaps emotional basis for adopting RCr 9.56.

For a long time, Kentucky's criminal rules did not require a presumption of innocence instruction, even if the defendant requested it, on the ground that a charge to the jury concerning reasonable doubt obviated the necessity for such an instruction.\textsuperscript{85} Kentucky procedures generally avoided instructions concerning any presumptions, adopting instead a "bare bones" approach.\textsuperscript{86} Kentucky's rules did, however, require an instruction on reasonable doubt,\textsuperscript{87} defined, if at all, as "substantial doubt" or "real doubt."\textsuperscript{88}

The United States Supreme Court's 1978 opinion in Taylor v. Kentucky\textsuperscript{89} raised serious questions concerning the validity of Kentucky's "bare bones" approach and of the Kentucky courts' typical definition of reasonable doubt.\textsuperscript{90} In response to Taylor, the Kentucky Supreme Court promptly amended RCr 9.56 to re-

\textsuperscript{82} See Plymale & McSwain, supra note 73, at 14. Although the Court held a public hearing on the rules proposed by the Criminal Rules Revision Committee, see note 72 supra, RCr 7.26 was deleted altogether from that Committee's proposals. Thus, the public was allowed absolutely no opportunity to comment or debate on RCr 7.26.

\textsuperscript{83} RCr 9.56. See note 91 infra for the pertinent section of this rule.


\textsuperscript{86} See Whorton v. Commonwealth, 570 S.W.2d at 632; cf. Cox v. Cooper, 510 S.W.2d 530, 535 (Ky. 1974) (instructions ought to provide "only the bare bones").

\textsuperscript{87} See Linden v. Commonwealth, 79 S.W.2d 202 (Ky. 1935); Lester v. Commonwealth, 67 S.W.2d 485 (Ky. 1934).

\textsuperscript{88} See, e.g., Merritt v. Commonwealth, 386 S.W.2d 727, 729 (Ky. 1965).

\textsuperscript{89} 436 U.S. at 478.

\textsuperscript{90} Id. at 488 ("The trial court's truncated discussion of reasonable doubt . . . was hardly a model of clarity . . . [its] definition, though perhaps not in itself reversible error, often has been criticized as confusing.").
quire a presumption of innocence instruction \[\text{"in every case" and to prohibit any instruction that "attempts to define reasonable doubt."}^{91}\] But in \textit{Whorton v. Commonwealth},\textsuperscript{92} handed down by the Kentucky Supreme Court only a few weeks after the Court amended RCr \textsuperscript{9.56},\textsuperscript{93} both the plurality and concurring opinions exhibit the Kentucky justices' resentment of \textit{Taylor}.	extsuperscript{94} However, their rule change proved to be an overreaction to \textit{Taylor}. In \textit{Kentucky v. Whorton},\textsuperscript{95} the United States Supreme Court held that a presumption of innocence instruction is not constitutionally required in every case.\textsuperscript{96} Nevertheless, RCr \textsuperscript{9.56}, changed in reaction to \textit{Taylor}, remains the same today.

The unaccountability and seeming unreasonableness in the history of the new RCr \textsuperscript{7.26} and \textsuperscript{9.56} could be curbed if the legislature is deemed to have concurrent authority over rulemaking. In \textit{Ex parte Auditor of Public Accounts},\textsuperscript{97} however, the Court clearly indicates that it will not recognize legislative enactments, even in a spirit of comity, when they concern matters expressly granted as within the Court's rulemaking power.

\textsuperscript{91} RCr \textsuperscript{9.56}. Subsection (1) of the rule provides in part: "In every case the jury shall be instructed . . . the law presumes a defendant to be innocent of a crime." Subsection (2) goes on to provide: "Instructions should not attempt to define the term "reasonable doubt."" \textit{Id.} at 9.56(2).

\textsuperscript{92} 570 S.W.2d at 627.

\textsuperscript{93} RCr \textsuperscript{9.56} became effective July 1, 1978, and the opinion in \textit{Whorton} was issued on July 25, 1978. See 570 S.W.2d at 627, 630 n.2.

\textsuperscript{94} The Court in fact took the opportunity to scold the United States Supreme Court for the latter's decision in \textit{Taylor}. See 570 S.W.2d at 631, 633-35. Justice Lukowsky, as a result of \textit{Taylor}, was apparently willing to give up trying to defend Kentucky's unique criminal procedural rules. See 570 S.W.2d at 635 (Lukowsky, J., concurring). He suggested amending Kentucky's rules in more drastic ways, including: adopting the Federal Rules of Criminal Procedure; "permitting the trial judge to charge the jury orally after closing argument;" "requiring the trial judge to fix all penalties other than death;" and "adopting the Federal Rules of Evidence in toto." \textit{Id.} (Lukowsky, J., concurring).

Many of the rule changes suggested above may not be within the Court's rulemaking power. Changes in rules of evidence might require legislative input. Cf. \textit{Rybeck v. Rybeck}, 358 A.2d 828, 843 (N.J. Super. Ct. Law Div. 1976) (the branch of government that has responsibility to enact evidence rules is a "touchy subject in New Jersey;" the rules of evidence finally adopted were the product of a cooperative effort between all the branches). Even if such changes fall clearly within the Court's authority, they seem significant enough to warrant public hearings.

\textsuperscript{95} 441 U.S. at 786.

\textsuperscript{96} \textit{Id.} at 789.

\textsuperscript{97} 609 S.W.2d at 682.
III. COMMON SENSE REASONS FOR EXPANDING COMITY

The new Judicial Article grants express rulemaking powers to the Supreme Court of Kentucky, but why should that express grant be construed as exclusive of legislative action and outside the reach of comity? As a matter of practical common sense, such a construction is undesirable. Treating the rulemaking authority granted in the new Judicial Article as being held concurrently by the Court and the legislature has the practical advantage of downplaying constitutional confrontation with the legislature.98 The Court can best avoid confrontation with the legislature by recognizing that the most significant source of friction with the legislative branch regarding the rulemaking power lies in the Court's attempt to draw constitutional dividing lines over matters in which the public may have a great deal of interest.99

When the public becomes acutely aware of a matter concerning the judicial system, both the executive and the legislature will want to influence the judicial rulemaking or administrative process.100 A judicial attitude of exclusivity that effectively precludes any input from the other branches of government appears illegitimate and undemocratic.101 Rulemaking is generally considered a legislative power102 which, when vested in the highest court, is exercised by a body that not only makes the rules but interprets them as well.103 That same body also must deter-

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98 Many commentators suggest a concurrent power approach. C. Grau, supra note 59, at 15.
99 Court rules in Kentucky cover subjects from attorney advertising to bail procedure, many of which are of general public interest. Cf. Levin & Amsterdam, supra note 63, at 35 (courts serve an important public function and therefore the efficiency of their administration is of general societal importance).
100 Cf. C. Haines, The American Doctrine of Judicial Supremacy 257-59 (1932) (historical synopsis of the early 1800s struggle in Kentucky concerning the nature of the Kentucky judicial department—the legislature and governor were greatly involved in the politics of the issue).
101 See C. Grau, supra note 59, at 430-31. Cf. Parness & Manthey, supra note 62, at 130 ("As a matter of political legitimacy, our democratic system requires that the public have a voice in judicial rulemaking.")
102 J. Weinstein, supra note 63, at 408; Parness & Manthey, supra note 62, at 130.
103 Compare 81 Ky. Op. Att'y Gen. 423, at 2-939 (Dec. 21, 1981) ("it is difficult to render an opinion on this question when the body which would ultimately decide the constitutionality of KRS 30A.050(4) is the same body that has promulgated rules in conflict with the statute") with Mississippi Publishing Corp. v. Murphree, 326 U.S. 438, 444
This insistence on exclusivity in rulemaking has the potential for a great deal of confrontation with the legislature. The Court cannot appear neutral with regard to challenges made to its own rules. It may, for example, have justices sitting on the bench who participated in the formulation of the rule. Moreover, the Court may be faced with a case challenging one of its rules as being outside its constitutional rulemaking authority. In such a case, the Court decides not only the validity of a rule, but also the limits of its own power. Thus, the Court's exercise of judicial review in this kind of case can have the appearance of an arbitrary exercise of judicial supremacy.

An attitude of judicial exclusivity also fosters public discontent with the courts that could result in unseemly or undesirable political consequences. The judiciary could, for example, be denounced by the media or the political branches. Further-

(1946) ("fact that this Court promulgated the rules as formulated and recommended . . . does not foreclose consideration of their validity . . . ").

104 Cf. Hanna v. Plumer, 380 U.S. 460, 471 (1965) (Court will refuse to apply its rule in an Erie situation only if Congress, the Court and Advisory Committee erred in their prima facie judgment that the rule does not transgress the Constitution).

105 Cf. In re Tennessee Bar Ass’n, 539 S.W.2d 805, 806 (Tenn. 1976) (Supreme Court of Tennessee overruled petitioner's motion for the recusal of the justice who helped promulgate the rule). It is interesting to note, however, that the justice who helped write the rule took no part in the decision that announced the Court's adoption of the rule. See In re Tennessee Bar Ass’n, 532 S.W.2d 224, 230 n.4 (Tenn. 1975).

106 See, e.g., State v. Leonardis, 375 A.2d 607, 613 (N.J. 1977) (pre-trial diversion rule for criminal defendants upheld as valid exercise of constitutional rulemaking authority despite its effect on legislative and executive functions); Laudenberger v. Port Auth., 436 A.2d at 153-55 (pre-judgment interest rule upheld even though it has collateral effect on substantive rights).

107 Cf. C. Grau, supra note 59, at 12 ("The combination of rulemaking and rule-applying roles, can arguably deny due process because the deciding judges are 'interested' in the outcome of the litigation").

108 See the reaction of one commentator, Kay, The Rule-Making Authority and Separation of Powers in Connecticut, 8 Conn. L. Rev. 1 (1975), to the case of State v. Clemente, 353 A.2d 723 (Conn. 1974), where the Connecticut Supreme Court asserted an exclusive rulemaking power in the absence of express constitutional authority to do so.

109 See, e.g., The Supreme Disgrace: An Editorial Investigation of Pennsylvania's Supreme Court, Philadelphia Inquirer, March 1978 (reprinted in C. Grau, supra note 59, at 50). The editorialist concluded that the Supreme Court should "lift its veil of secrecy and become accountable to the public." Id.

more, it is conceivable that the people might alter or even withdraw constitutional rulemaking authority from the courts.\footnote{111}{A bill was introduced in the 1980 General Assembly by Rep. Robert Heleringer, which, if it had passed and been ratified by voters, would have explicitly given the Kentucky General Assembly rulemaking power concurrent with that of the Supreme Court over those same matters which Ky. Const. § 116 presently grants to the Supreme Court alone. H.B. 228, 1980 Ky. General Assembly. The bill may have been a legislative backlash to the Kentucky judiciary's emerging claim of exclusive rulemaking power.}\footnote{112}{See Report of the Efficiency Commission of Kentucky, The Government of Kentucky 511-17 (1924).}

That the high court should possess rulemaking power has long been recognized in Kentucky.\footnote{113}{J. Weinstein, supra note 62, at 11.}\footnote{114}{Levin & Amsterdam, supra note 63, at 36.} However, the Court should not ignore common sense and attempt to exercise rulemaking power to the exclusion of political or popular input. The General Assembly could provide the public a forum for its views and its petitions for redress from undesirable court rules. If the legislature was to act as a political check on judicial rulemaking, the rules adopted by the Court would have a greater "aura of legitimacy."\footnote{113}{J. Weinstein, supra note 62, at 11.} Moreover, the Court could then be "less hesitant in giving wide and effective sweep to its own power."\footnote{114}{Levin & Amsterdam, supra note 63, at 36.}

To deem that the General Assembly possessed concurrent rulemaking authority would require the Court to redefine comity as something to be applied not only in those cases where there is no express rulemaking authority, but rather in all cases of judicial policy making and rulemaking. Conflicts between the Court's policies or rules and those statutes passed by the General Assembly pose a difficult problem. The following section suggests a manner of resolving such conflicts in a true spirit of comity.

IV. A SUGGESTED APPROACH TO APPLYING COMITY

"At very root, comity is courtesy. In jurisprudence, however, comity is a kind of courtesy which, subject to exceptions, is administered by fixed rules of law and rises to the dignity of a legal
right, as over against mere politeness in social intercourse." In Ex parte Farley the Court seemed to recognize an unexpressed connection between “comity” and the “impairment” or “interference” test developed in the earlier inherent power cases. However, Auditor severed even that tenuous connection, leaving no “fixed rule” by which to apply the principle in Kentucky.

Instead of no rule or even the “interference/impairment” test, the Court could adopt an interest-balancing approach to deciding when to defer to the legislature in “a spirit of comity.” When a court rule conflicts with a statute, comity would dictate an analysis of the underlying policies of the rule or statute in relation to the legitimate interests of the enacting body to determine whether, and under what circumstances, the rule or statute should predominate. The policies to keep in mind throughout this analysis should be furtherance of justice and accountability to the public.

This approach can be demonstrated with an analysis of the conflict between KRS section 21A.070(1) and Kentucky Rules of Civil Procedure 76.28(4)(a). Under the court rule, the Court

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115 Hughes v. Winkleman, 147 S.W. 994, 997 (Mo. 1912) (emphasis added).
116 570 S.W.2d at 617.
117 See text accompanying notes 44-45 supra for a discussion of the Court’s rejection of the interference/impairment test.
118 Looking at the underlying policies of law is certainly not a new idea in the area of conflict resolution. Brainerd Currie first developed a governmental interest analysis in the conflicts/choice-of-law problems in the late 1950s and early 1960s. See generally, B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963).
119 Examining the legitimate interest of a governmental exercise of power has been used to resolve potential conflicts between laws. The United States Supreme Court has tolerated state regulation of interstate commerce, for instance, so long as the state’s attempt to legislate has concerned matters in which it has a legitimate interest and has not unduly burdened interstate commerce. See South Carolina Highway Dep’t v. Barnwell, 303 U.S. 177 (1938) (reasonable for state to legislate to protect roads built and maintained by it despite the effect on interstate commerce since no illegitimate purpose, such as an attempt to discriminate or to burden commerce, could be shown); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).
120 This policy underlaid the early inherent judicial power cases. See the discussion of these cases in the text accompanying notes 14-25 supra.
121 Commentators have amply demonstrated that this is an overriding consideration in the judicial exercise of power. See generally, e.g., C. GRAU, supra note 59; J. WEINSTEIN, supra note 62; Parness & Manthey, supra note 62.
122 KRS § 21A.070(1) (Supp. 1982).
123 KY. R. CIV. P. 76.28(4)(a).
publishes only those opinions which it so designates. However, the statute unequivocally says, "All opinions of the Supreme Court shall be published." Chief Justice Stevens has suggested that the Court follow its own rule because the expense of reporting all the Court's opinions far exceeds any benefit that could ever be derived from publishing decisions that merely restate settled principles of law.

Policy choices between the cost and the desirability of publication are more appropriately matters of concern for the General Assembly. The General Assembly has a legitimate interest in seeing that the public be informed of what the Supreme Court has said the law is. The statute is a rational means of achieving that interest. The General Assembly in passing the statute has counted the potential costs of publishing all opinions and decided in favor of publication. Thus, the Court should accept the statute as the norm for opinion publication and deviate from it only in those instances where the ends of justice would be "materially impaired."

The facts of Commonwealth v. Schumacher also illustrate how this interest-balancing approach could work. In Schumacher, the defendant argued that the Commonwealth's appeal of a lower court's dismissal of his indictment must fail because the provisions of KRS section 22A.020(4)(b) had not been followed. That statute conditions the Commonwealth's right to appeal in criminal cases on the Attorney General's approval after being fully "satisfied that review by the Court of Appeals is important to the correct and uniform administration of the law." To carry out this purpose, the circuit court clerk is required to transmit the case record

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124 Id.
125 KRS § 21A.070(1) (Supp. 1982).
127 The power over matters affecting the public's welfare and concerning the public's purse is universally deemed a legislative rather than a judicial concern. Cf. 16 Am. Jur. 2d Constitutional Law § 318 (1979) (legislature has power to control, direct and shape public policy for state).
128 Cf. Arnett v. Meade, 462 S.W.2d at 946.
129 566 S.W.2d 762 (Ky. Ct. App. 1978).
130 KRS § 22A.020(4)(b) (1980).
131 566 S.W.2d at 763.
to the Attorney General. The court of appeals struck the statute as unconstitutional because, it said, matters of appeal procedure fall within the Supreme Court's exclusive rulemaking domain.

The court of appeals' short analysis of the statute does not show appropriate comity. The interest the legislature is trying to promote with the statute is a unified prosecutorial system headed by the Attorney General. This unified system is best achieved when the Attorney General is informed of the criminal cases in which the Commonwealth as a party is appealing, and when he or she has a say as to whether those appeals will be carried out.

The Supreme Court, on the other hand, has an interest in seeing that court records are kept in the hands of court personnel

133 Id.
134 566 S.W.2d at 764. The court then addressed the merits of whether the trial court erred in dismissing the indictment. Id. The court of appeals in Schumacher could have avoided the constitutional rulemaking power issue and still reached the merits of the case by narrowly construing the statute as being solely for the benefit of the state and its unified prosecutorial system and not for the benefit of the defendant.
135 Cf. KRS § 15.700 (1980) (Attorney General, as the chief prosecutor of the Commonwealth, is to try to maintain "efficient enforcement of the criminal law and the administration of justice").

Casting the issue in Schumacher in terms of the statute's placing a condition on appellate procedure misses the point of the statute. A unified prosecutorial system requires that someone be able to determine whether, and under what circumstances, the Commonwealth will take an appeal. The effect of the Schumacher case is to put the power to make that determination in the hands of the commonwealth or county attorney. This, of course, militates against the legislature's desire to have a unified prosecutorial system as expressed in KRS § 15.700 (1980). If the legislature desires the commonwealth's attorneys not to take criminal appeals except upon approval by the Attorney General, the Court should not interfere with that determination.

136 The Attorney General, in the furtherance of his or her duty to oversee the unified prosecutorial system, see id., needs to be informed of when the Commonwealth has taken a criminal appeal. Even if it were deemed that the constitutional grant of rulemaking power over appellate procedure to the Kentucky Supreme Court precluded this statute's conditioning the Commonwealth's right to appeal upon the Attorney General's approval, certainly the notice function of this statute—i.e., keeping the Attorney General informed of criminal appeals taken on behalf of the Commonwealth—would not violate that constitutional grant. So to the extent this statute involves a notice function, the court of appeals should have refrained from striking it as void.

137 Obviously, the most effective way for the Attorney General to oversee the prosecutorial system is to help choose the cases which the Commonwealth should pursue on appeal. See id.
and not dispersed to other governmental bodies such as the Attorney General's Office.\textsuperscript{138} The Court, in addition, has a legitimate interest in protecting a private party or criminal defendant from having the right to appeal conditioned in any way by a statute.\textsuperscript{139} But an interest by the Court in preventing the state from conditioning its own right to appeal in criminal cases seems totally lacking.\textsuperscript{140} Thus, an interest-balancing approach to comity would dictate upholding the statute because no real conflict exists between the Supreme Court's interest in controlling access to court records and the state's interest in having the Attorney General review and approve appeals by the state.

Taking this analysis a step further to consider the overriding policies of furthering administration of justice while accounting to the public, the Court could have legitimately declared the statute unconstitutional to the extent it requires circuit court clerks to transmit records to the Office of the Attorney General. It could do so if the Court thought that placing court records in the hands of persons other than court personnel might jeopardize the administration of justice. However, even if the statute was declared unconstitutional in this regard, the Court would need to accommodate the statute's function in giving notice to the Attorney General. The Court could require circuit court clerks to give at least some sort of notice to the Attorney General of criminal cases in which the Commonwealth has appealed.

The foregoing examples show that it is important for the courts to look behind statutes and rules to the underlying policies and interests in order to accord proper comity when considering enactments by the General Assembly. Frequently, statutes and rules

\textsuperscript{138} Cf. Ex parte Farley, 570 S.W.2d at 624 (Court has inherent power to control its own records).

\textsuperscript{139} This duty to protect private litigants from having their right to appeal impaired by a statute is derived from KY. CONST. § 115, which guarantees to any party, except the Commonwealth in double jeopardy situations, the right to at least one appeal.

\textsuperscript{140} That the Commonwealth has a right to an appeal in criminal cases under certain narrow circumstances, see id., such as those in Schumacher, does not mean that the General Assembly did not have the power to impose a duty upon the Attorney General to determine whether an appeal should be taken. The legislature has traditionally been deemed able to prescribe duties for the Attorney General. Commonwealth v. Southern Pac. Co., 105 S.W. 466, 467 (Ky. 1907).
can be read together without invalidating either.141 If legitimate underlying policies and interests are articulated, conflicts between court rules and statutes can often be avoided; even if they cannot be avoided, the Court can choose whether to follow the rule or the statute, keeping in mind the overriding considerations of the administration of justice and accountability to the public.142

CONCLUSION

The Supreme Court of Kentucky has indicated that it wants to show comity toward the General Assembly. It has said it respects the legislative department as a co-ordinate of government.143 However, it has staked out for itself an exclusive claim over judicial rulemaking and administration such that no statute concerning a matter that arguably falls within the Court's constitutionally granted power can be allowed to stand.144 Comity has thus become a concept with no fixed rules of application. Rather, the Court invokes comity as a way of saying that it will allow a statute to remain on the books until it promulgates a contrary rule.145

This Note has attempted to offer, in order to provide some semblance of fixed rules with which to invoke comity, an interest-analysis approach appropriately adapted to resolving conflicts between statutes and court rules. Such an analysis requires looking behind statutes and rules to the legitimate interests underlying them to determine whether a conflict actually exists. If there is a conflict, this analysis suggests that two important policy considera-

141 See an example of this in the discussion of the Schumacher case in the text accompanying notes 129-40 supra.
143 See Ex parte Farley, 570 S.W.2d at 624.
144 See text accompanying notes 33-50 supra.
145 See text accompanying notes 44-45 & 117 supra.
146 See Evans v. Commonwealth, No. 82-SC-194-DG, slip op. at 3 (Court will allow statute concerning matter within judicial province to stand until it promulgates a rule otherwise); O'Bryan v. Commonwealth, 634 S.W.2d at 158 (same); Spanski v. Commonwealth, 610 S.W.2d 290, 291-92 (Ky. 1980) (Supreme Court will allow trial court to convene grand jury absent express statutory authority to do so). But cf. Department for Human Resources v. Paulson, 622 S.W.2d 508, 509 (Ky. Ct. App. 1981) (exclusive rulemaking authority of Supreme Court does not include the assessing of legal fees against the Commonwealth when the amount is beyond legislatively established funds).
tions—accountability and administration of justice—should influence the Court in choosing which of the rules or statutes to follow.

The analytical framework here suggested is necessarily limited and complex. But perhaps the Supreme Court of Kentucky will at least be aware that a strict, exclusive separation of powers view of rulemaking is inimical to a proper concept of comity and that accountability to the public, in addition to the Court's traditional concern with the administration of justice, must become an important consideration when the Court exercises its rulemaking power.

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147 This Note, for example, does not discuss how to resolve conflicts between a Court choice to have no rule regarding a matter within its rulemaking power and a statute regarding that same matter. In this instance, the analysis might be analogous to that used for finding negative implications of the commerce power contained in U.S. Const. art. I, § 8, cl. 3. See, e.g., Southern Pac. Co. v. Arizona, 325 U.S. at 770-71 (Supreme Court of the United States applied a benefits versus burdens balancing test to determine whether state regulation of matters affecting interstate commerce could stand).

148 Weinstein noted in his book that differences of opinion with regard to court rulemaking procedures may exist, but that he hoped those who differed with him "would speak out so that the matter could be thoroughly debated." J. Weinstein, supra note 62, at 153. It is hoped that others will speak out on this important separation of powers issue so that it can be "thoroughly debated" in the Commonwealth.