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Evidence Rulemaking: Balancing the Separation of Powers

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In State v. DeJesus, the Connecticut Supreme Court asserted its common law supervisory authority to adopt a rule of evidence that contradicts a rule on the same subject in Connecticut's Code of Evidence, adopted by the judges of the superior court in 2000. Questions raised by the DeJesus opinion relate to the inherent power of the judiciary, at any level, to adopt rules of evidence and the relationship among courts in a hierarchical system in which higher courts have supervisory authority over those below. Although decisional law suggests that a state's highest court has the inherent rulemaking and supervisory power to create evidence rules for trial courts, the unsettled judicial and legislative reaction to DeJesus provides a warrant for the Connecticut Supreme Court to adopt the Code of Evidence in collaboration with the General Assembly.

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Evidence Rulemaking: Balancing the Separation of Powers

THOMAS A. BISHOP*

I. INTRODUCTION

In 2008, the Connecticut Supreme Court issued an en banc opinion in *State v. DeJesus*, in which a plurality of the divided court asserted its common law supervisory authority to fashion a rule of evidence contrary to an applicable provision of the Connecticut Code of Evidence (the “CCE” or the “Code”) previously adopted by the judges of the superior court.¹ *DeJesus* has elicited lively reactions in Connecticut’s legal community, provoking debate regarding the nature and scope of a court’s rulemaking authority as it relates to the law of evidence, and casting doubt on the continuing reliability of Connecticut’s code as a definitive source of state evidentiary law.²

This Article is an effort to analyze the questions raised by *DeJesus* and to determine its implications for the future of the law of evidence in Connecticut. It starts with an overview of the *DeJesus* opinions. It then explores the nature and scope of the inherent powers of the judiciary generally, a consideration of the judiciary’s rulemaking power, and the interplay between a trial court’s rulemaking authority and a higher court’s supervisory role. This Article concludes that the judiciary’s authority to promulgate an evidence code in a legislative manner properly falls within the judiciary’s rulemaking power, but suggests, nevertheless, that it would be preferable for the Connecticut Supreme Court to adopt the CCE with the cooperation of the state’s General Assembly, rather than unilaterally adopt a code of evidence.

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¹ See *State v. DeJesus*, 953 A.2d 45, 59 (Conn. 2008) (agreeing with the defendant that the adoption of the CCE did not divest the court of its power to “develop and change Connecticut’s rules of evidence on a case-by-case basis”).

² In the 2010 Cumulative Supplement to Tait’s Handbook of Connecticut Evidence, the authors comment, in regard to the continuing viability of the CCE, that “[t]he net effect of the various opinions in *DeJesus* is cloudy at best,” and that “attorneys or trial judges who now rely on the Code do so at their peril.” COLIN C. TAIT & HON. ELIOT D. PRESCOTT, TAIT’S HANDBOOK OF CONNECTICUT EVIDENCE § 1.3.2 (4th ed. Supp. 2010). Colin C. Tait is a Professor of Law at the University of Connecticut School of Law and has served as the official reporter of the Judicial Branch’s Evidence Oversight Committee.

II. *STATE V. DEJESUS*

In *DeJesus*, the defendant was convicted of two counts of kidnapping in the first degree and two counts of sexual assault in the first degree.³ At trial, the jury heard evidence that Carlos DeJesus had kidnapped and sexually assaulted the same victim in 2000 and 2001.⁴ The trial court also admitted evidence that, in 2000, DeJesus had assaulted a different victim under circumstances similar to the incidents for which he was on trial.⁵ The State claimed, and the trial court agreed, that the evidence of prior misconduct was admissible to show intent, common plan, and scheme.⁶ A majority of the Connecticut Supreme Court determined that DeJesus was entitled to a new trial on the kidnapping charge relating to the 2000 incident on the basis of an instructional error.⁷ But the court was divided on the proper response to DeJesus's claim regarding the admission of uncharged misconduct evidence as it pertained to the sexual assaults.⁸ At trial, the court admitted this evidence on the basis of CCE § 4-5 which, while barring evidence of other crimes, wrongs, or acts to prove bad character or criminal tendencies, permits such evidence to prove intent, identity, malice, motive, common plan, or scheme.⁹ Although the supreme court disagreed with the trial court's reason for allowing the evidence, the court nonetheless deemed it admissible as propensity evidence.¹⁰ In doing so, the court fashioned a new exception to the CCE's prohibition against the admission of evidence of prior misconduct. Writing for the plurality, Chief Justice Chase Rogers stated:

First, evidence of uncharged sexual misconduct is admissible only if it is relevant to prove that the defendant had a propensity or a tendency to engage in the type of aberrant

³ *DeJesus*, 953 A.2d at 48–49.

⁴ *Id.* at 50.

⁵ *Id.* at 50–51.

⁶ *Id.*

⁷ *Id.* at 58–59.

⁸ Six of the seven justices agreed to reverse the kidnapping charge related to the 2000 incident and remand it for retrial on the basis that the trial court should have instructed the jury that, in order to find the defendant guilty of kidnapping, it had to find that the defendant intended to prevent the victim's liberation for a longer period of time or to a greater degree than was necessary to commit the sexual assault. *Id.* at 53. Justice Joette Katz, in dissent, expressed the view that the trial evidence was insufficient to find the defendant guilty of the 2000 kidnapping and, therefore, DeJesus was entitled to an acquittal on that charge. *Id.* at 91 (Katz, J., dissenting).

⁹ At the time of the *DeJesus* trial, CCE § 4-5 provided, in pertinent part, as follows:

(a) . . . [e]vidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character or criminal tendencies of that person. (b) . . . [e]vidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, malice, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony.

CONN. EVID. CODE § 4-5 (1999).

¹⁰ *DeJesus*, 953 A.2d at 49.

and compulsive criminal sexual behavior with which he or she is charged. Relevancy is established by satisfying the liberal standard pursuant to which evidence previously was admitted under the common scheme or plan exception. Accordingly, evidence of uncharged misconduct is relevant to prove that the defendant had a propensity or a tendency to engage in the crime charged only if it is: “(1) . . . not too remote in time; (2) . . . similar to the offense charged; and (3) . . . committed upon persons similar to the prosecuting witness.”¹¹

In adopting this new common law rule, the court effectively overruled CCE § 4-5 as to certain cases and adopted, in its place, a basis for admission that the rule had previously rejected.¹² Six of the seven members of the court agreed that, in the exercise of its common law powers, the court could adopt a rule at variance with Connecticut’s Code of Evidence, while Justice Joette Katz strongly disagreed. Based on the history of the development of the CCE, Justice Katz posited that the supreme court was bound by the terms of the CCE, and that the adoption of the CCE by the judges of the superior court had effectively abrogated the common law authority of the supreme court to adopt evidentiary rules in conflict with the CCE.¹³

The majority view that the court was not bound by the CCE was reported in three opinions, marked more by their dissimilarities than by their common conclusions. In her plurality opinion, Chief Justice Rogers wrote that although the language of the code was ambiguous as to whether its adoption was intended to oust the supreme court from common law

¹¹ *Id.* at 78 (quoting *State v. McKenzie-Adams*, 915 A.2d 822, 845 (Conn. 2007)).

¹² The rule itself was based on decisional law. *See, e.g.*, *State v. Kulmac*, 644 A.2d 887, 897 (Conn. 1994) (“As a general rule, evidence of prior misconduct is inadmissible to prove that a criminal defendant is guilty of the crime of which the defendant is accused. Such evidence cannot be used to suggest that the defendant has a bad character or a propensity for criminal behavior.” (internal citations omitted)). The history of the CCE is set forth in *DeJesus*, 953 A.2d at 74–78. It may be summarized as follows. In 1991, the then co-chairperson of the General Assembly’s Judiciary Committee asked the Connecticut Law Revision Commission to study the feasibility of legislative enactment of a code. Subsequently, a committee of judges and attorneys, led by Justice David Borden, drafted a proposed code, which was submitted to the Judiciary Committee for adoption in 1998. Instead of adopting the code, however, the co-chairperson of the Judiciary Committee communicated to (then) Chief Justice Robert Callahan a desire that such a code be adopted by the judges of the superior court through their rulemaking authority rather than by legislative enactment. In response, Chief Justice Callahan appointed a committee of judges and attorneys, led by Justice Katz, to review the proposed code, to recommend any changes and additions, and then to submit it to the Rules Committee of the superior court for consideration. Ultimately, the judges of the superior court adopted the code in 2000. In conjunction, the Evidence Code Oversight Committee was appointed by the Chief Justice and the judges of the superior court to monitor the development of the law of evidence and to make recommendations to the superior court for future revision and clarification of the CCE. Justice Katz was appointed to chair this committee.

¹³ *DeJesus*, 953 A.2d at 90–91, 103–04 (Katz, J., dissenting).

evidence-making, it would be “illogical to conclude that, by adopting the code for the purposes of ease and convenience, the judges intended to divest this court of its long-standing inherent common-law adjudicative authority over evidentiary law.”¹⁴ Chief Justice Rogers continued:

[W]e conclude that the judges of the Superior Court did not intend for the committee to recommend substantive changes to the common-law evidentiary rules codified in the code, but, rather, intended for the committee simply to recommend revisions reflecting common-law developments in evidentiary law, clarifications of the code to resolve ambiguities and additions to the code in the absence of governing common-law rules. Stated simply, we conclude that the code was not intended to displace, supplant or supersede common-law evidentiary rules or their development via common-law adjudication, but, rather, simply was intended to function as a comprehensive and authoritative restatement of evidentiary law for the ease and convenience of the legal community.¹⁵

In a concurring opinion, Justice Richard Palmer found no uncertainty in the language of the CCE or its commentary regarding whether the judges intended, by their adoption of a code, to supplant the supreme court’s evidentiary law-making ability.¹⁶ Rather, Justice Palmer affirmed the supreme court’s ultimate authority over the trial court in regard to the development of the law of evidence as well as to rules for practice and procedure generally.¹⁷

Justice Peter Zarella wrote a separate concurring opinion in which he agreed with the plurality’s conclusion regarding its continuing common law adjudicative authority, but, unlike Justice Palmer, Justice Zarella asserted a distinction, based on Connecticut’s particular history, between the supreme court’s rulemaking function regarding evidence and its authority to adopt rules of practice and procedure.¹⁸

At the outset, the separate opinions in *DeJesus* raise for discussion the nature and scope of the inherent authority of the judiciary, at any court level, to promulgate rules for the judicial process.

¹⁴ *Id.* at 66.

¹⁵ *Id.* at 68.

¹⁶ *Id.* at 83 (Palmer, J., concurring).

¹⁷ *Id.* at 83–86.

¹⁸ Although Justice Zarella drew a distinction between the court’s common law authority regarding the development of the law of evidence and the superior court’s rulemaking authority, he did not opine as to whether the result in this case would have been different if a provision of the Practice Book, rather than the Code of Evidence, had been at issue. *Id.* at 89–90 (Zarella, J., concurring).

III. THE NATURE AND SCOPE OF THE JUDICIARY'S INHERENT AUTHORITY

The term “inherent authority” is used in this Article to signify an unspoken but essential attribute of the judiciary, necessary for a court’s performance of its judicial function. One court defined inherent powers as those which the court may use “in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity” and which are “not derived from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities.”¹⁹

Since its onset, the American judiciary has claimed an inherent power to act in a manner it has perceived as necessary to maintain its integrity and to carry out the essential function of adjudication through an orderly and fair process. As early as 1812, the U.S. Supreme Court asserted that federal courts have certain implied powers simply because they are courts and that these powers “cannot be dispensed with in a Court, because they are necessary to the exercise of all others.”²⁰ Nine years later, in *Anderson v. Dunn*, the Court noted that “courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates”²¹ And, nearly a century later, the Court commented that “[i]n the very nature of things the courts of each jurisdiction must each be in a position to adopt and enforce their own self-preserving rules.”²²

¹⁹ *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979). *But see* Hon. James R. Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U. MIAMI L. REV 507, 517 (2002) (making a distinction between inherent and implied powers). Judge Wolf states:

Inherent powers refer to the exercise of powers that are reasonably necessary for the conduct of a court’s constitutional functions and that grow out of the court’s jurisdiction. Implied powers are those that arise out of and are necessary to carry out the authority expressly granted and contemplated either constitutionally or legislatively.

Id.

A sampling of decisions suggests that courts do not uniformly make Judge Wolf’s distinction between inherent and implied powers. *See, e.g., In Re* Petition of Fla. State Bar Ass’n, 21 So. 2d 605, 607 (Fla. 1945) (“So this Court has approached the rule making power in a pragmatic way and has not become involved in the niceties of such concepts as inherent power to make rules or the delegation of the rule making power. It is idle to contend that there is not an area in which constitutional courts may not exercise the inherent or implied power to prescribe rules of procedure.”); *Moity v. La. State Bar Ass’n*, 121 So. 2d 87, 90 (La. 1960) (“The courts of final jurisdiction of this and other states have discussed the inherent or implied power of the judiciary, and found that embraced therein is the power to prescribe rules and regulations for those seeking admission to the Bar”); *Vogel v. State*, 291 N.W.2d 838, 845 (Wis. 1980) (“All rules of evidence are intended to, and do, affect the integrity of the fact-finding process. . . . Sec. 908.01(4)(a) 1 was adopted with this goal in mind. As such, it represents an appropriate exercise of this court’s inherent and implied power. . . .”). While there may, in fact, be a distinction between inherent and implied powers, this Article follows those cases in which the terms appear to be used interchangeably.

²⁰ *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

²¹ 19 U.S. (6 Wheat.) 204, 227 (1821).

²² *McDonald v. Pless*, 238 U.S. 264, 266 (1915).

More recently, the Court characterized a court's implied power as that which is "squeezed from the need to make the court function."²³

The Wisconsin Supreme Court expressed the notion of inherent powers in this manner:

[W]hen the people by means of the Constitution established courts, they became endowed with all judicial powers essential to carry out the judicial functions delegated to them. . . . But the Constitution makes no attempt to catalogue the powers granted. . . . These powers are known as incidental, implied, or inherent powers, all of which terms are used to describe those powers which must necessarily be used by the various departments of government, in order that they may efficiently perform the functions imposed upon them by the people.²⁴

A review of decisional law reveals, as well, that while the notion of the inherent authority of the court is firmly ingrained in our jurisprudence, its assertion cannot be justified beyond that which is necessary for the proper functioning of the judiciary and the preservation of its integrity. In short, it is generally held that courts should not posit unstated authority beyond that which is necessary to carry out their allotted functions.²⁵

IV. RULEMAKING POWER

Courts have been held to have the inherent authority to act in a broad range of ways to promote a judicial process that features balance, fairness, and integrity.²⁶ At the trial level, a court's inherent powers include the

²³ *Chambers v. Nasco, Inc.*, 501 U.S. 32, 42 (1991) (quoting *Nasco, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696, 702 (5th Cir. 1990)).

²⁴ *State v. Cannon*, 226 N.W. 385, 386 (Wis. 1929).

²⁵ See, e.g., *Degen v. United States*, 517 U.S. 820, 823 (1996) (characterizing a court's inherent powers as those necessary to protect the court's proceedings and judgments); *Chambers*, 501 U.S. at 43 (characterizing inherent power as the power to do what is reasonably necessary to enable the court to discharge its judicial responsibilities and to provide for the orderly administration of justice). In 1984, the Court of Appeals for the Second Circuit commented: "Federal courts have both the inherent power and the constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions." *In re Martin-Trigona*, 737 F.2d 1254, 1261 (2d Cir. 1984), cited with approval in *In re McDonald*, 489 U.S. 180, 184 n.8 (1989).

²⁶ There are many examples of the exercise of a court's inherent authority, subject to the supervision of the jurisdiction's highest court. See, e.g., *Bank of N.S. v. United States*, 487 U.S. 250, 254-57 (1988) (dismissing an indictment because of prosecutorial misconduct before a grand jury); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 577-81 (1984) (disregarding a departmental seniority system in fashioning a remedy for plaintiffs who demonstrated that their employer's termination practices were discriminatory); *United States v. Payner*, 447 U.S. 727, 734 (1980) (suppressing evidence seized in violation of a defendant's constitutional rights); *United States v. Nobles*, 422 U.S. 225, 231 (1975) (requiring production of previously recorded witness statements); *Illinois v. Allen*, 397 U.S. 337, 346-47 (1970) (barring a disruptive defendant from the courtroom); *Link v. Wabash R.R. Co.*, 370 U.S. 626, 629-30 (1962) (dismissing a case sua sponte for lack of prosecution); *Hill v. Hawes*, 320 U.S. 520, 521, 523 (1944) (vacating a judgment and entering a new

following: the regulation of trial practice and procedure; docket control; and the supervision and discipline of attorneys. As to the federal courts, the U.S. Supreme Court opined in 1864 that “Circuit Courts, as well as all other Federal courts, have authority to make and establish all necessary rules for the orderly conducting [sic] business in the said courts, provided such rules are not repugnant to the laws of the United States.”²⁷

At the state level, the Connecticut Supreme Court stated in 1950:

Apart from legislative authority, courts acting in the exercise of common-law powers have an inherent right to make rules governing procedure in them. That right is an inheritance from the common-law practice in England. That the courts of this state, without any legislative authority, may make rules of procedure appears from a decision of the Supreme Court made in 1807.²⁸

More recently, the Connecticut Supreme Court observed that a court has the “inherent power to regulate proceedings before it to the extent reasonably necessary to discharge its judicial responsibilities and to provide for the efficient administration of justice.”²⁹ In a like-minded opinion, the Kentucky Supreme Court observed that, “[w]ith respect to the issue of trial court jurisdiction, ‘it has generally been recognized that courts . . . have inherent power to prescribe rules to regulate their proceedings and to facilitate the administration of justice.’”³⁰

The Colorado Supreme Court expressed a constitutional and pragmatic

one with the effect of extending a party’s right to appeal); *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (staying proceedings); *United States v. Swift & Co.*, 286 U.S. 106, 114–15 (1932) (modifying an injunction in adaption to changed conditions, even though it was originally entered by consent); *Wright v. Henkel*, 190 U.S. 40, 63 (1903) (admitting a defendant to bail); *Schoonmaker v. Lawrence Brunoli, Inc.*, 828 A.2d 64, 94 (Conn. 2003) (assessing attorney’s fees against a party who has acted in “bad faith, vexatiously, wantonly or for oppressive reasons” (quoting *Fattibene v. Kealey*, 558 A.2d 677, 685 (Conn. App. 1989))); *Audobon Parking Assocs. Ltd. P’ship v. Barclay & Stubbs, Inc.*, 626 A.2d 729, 733 (Conn. 1993) (summarily enforcing the terms of a settlement agreement); *Palomba v. Gray*, 543 A.2d 1331, 1333 (Conn. 1988) (setting aside an unreasonable jury verdict); *Friedlander v. Friedlander*, 463 A.2d 587, 593 (Conn. 1983) (stating that courts can disregard frivolous pleadings filed solely to interrupt the progress of a case). Apart from rules regulating trial practice and procedure, courts have also been held to have the inherent authority to regulate the practice of law, including the supervision and disciplining of lawyers, *In re Snyder*, 472 U.S. 634, 643 (1985), and to punish for contempt committed in the court’s presence, *Fisher v. Pace*, 336 U.S. 155, 159–60 (1949).

²⁷ *Heckler v. Fowler*, 69 U.S. (2 Wall.) 123, 128 (1864). It is significant that Congress has the authority to limit or override rules of the federal courts, because these courts are creatures of statute. See *Chambers*, 501 U.S. at 47 (“It is true that the exercise of the inherent power of lower federal courts can be limited by statute and rule, for ‘[t]hese courts were created by act of Congress.’” (quoting *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 511 (1873))).

²⁸ *Appeal of Dattilo*, 72 A.2d 50, 52 (Conn. 1950) (internal citations omitted); see also *Power of Court to Prescribe Rules of Pleading, Practice, or Procedure*, 158 A.L.R. 705, 706–07 (1945), and cases cited therein.

²⁹ *Wexler v. DeMaio*, 905 A.2d 1196, 1203 (Conn. 2006) (internal quotation marks omitted).

³⁰ *Ky. Farm Bureau Mut. Ins. Co. v. Wright*, 136 S.W.3d 455, 458 (Ky. 2004) (quoting *Craft v. Commonwealth*, 343 S.W.2d 150, 151 (Ky. 1961)).

rationale for a court's inherent rulemaking power as follows:

The judicial power of the state is vested in the courts; the legislative and executive departments are expressly forbidden the right to exercise it, and the courts, charged with the duty of exercising the judicial power, must necessarily possess the means with which to effectually and expeditiously discharge that duty; this duty can be performed and discharged in no other manner than through rules of procedure, and consequently this court is charged with the power and duty of formulating, promulgating, and enforcing such rules of procedure for the trial of actions as it deems necessary and proper for performing its constitutional functions.³¹

The New Hampshire Supreme Court has noted that "[t]he inherent rulemaking authority of courts of general jurisdiction in this state to prescribe rules of practice and rules to regulate their proceedings 'as justice may require' has an ancient lineage supported by consistent custom, recognized by statute and enforced by numerous judicial precedents."³²

In addition to numerous decisions asserting the judiciary's inherent authority to promulgate rules of practice and procedure, there was scholarly support for the judiciary's assumption of rulemaking responsibility from a policy perspective when this issue was debated in the twentieth century. In 1958, Professors Leo Levin and Anthony Amsterdam summarized the position in favor of judicial rulemaking as follows:

Long ago Pound and Wigmore propounded convincing arguments against relying upon legislative management of judicial procedure: legislatures have neither the immediate familiarity with the day-by-day practice of the courts which would allow them to isolate the pressing problems of procedural revision nor the experience and expertness necessary to the solution of these problems; legislatures are intolerably slow to act and cause even the slightest and most obviously necessary matter of procedural change to be long delayed; legislatures are subject to the influence of other pressures than those which seek the efficient administration

³¹ *Kolkman v. People*, 300 P. 575, 584–85 (Colo. 1931); *see also* Wolf, *supra* note 19, at 510 (discussing the theoretical bases for inherent judicial powers). The Colorado Constitution contains a provision regarding separation of powers that states that no branch shall exercise the power of any other branch. COLO. CONST. art. III. Such a clear delineation is not present in all state constitutions. When Connecticut first adopted a written constitution in 1818, an initial committee report proposed similar preclusive language, but this language was not ultimately adopted. WESLEY W. HORTON, *THE CONNECTICUT STATE CONSTITUTION: A REFERENCE GUIDE* 80 (1993).

³² *Op. of the Justices*, 688 A.2d 1006, 1011 (N.H. 1997) (quoting *Garabedian v. Donald William, Inc.*, 207 A.2d 425, 426 (N.H. 1965)).

of justice and may often push through some particular and ill-advised pet project of an influential legislator while the comprehensive, long-studied proposal of a bar association molders in committee; and legislatures are not held responsible in the public eye for the efficient administration of the courts and hence do not feel pressed to constant reexamination of procedural methods.

Moreover, it must be remembered that a very large part of maintaining maximum effectiveness in the courts does not lie in drastic wholesale procedural reform, but in the necessary minor alterations of single rules from time to time as experience dictates, and such small matters as these inevitably fare badly when they must compete for legislative attention. . . . [Court rules] are the work of an agency whose whole business is court business and for whom court efficiency can become a major interest, an agency keenly aware of the latest problems and fully capable of bringing to bear in their early solution a long and solid experience.³³

At this juncture, it appears well-settled that rulemaking power resides with state judiciaries, whether by constitutional or statutory grant, or as an attribute of the court's inherent authority to order its process.³⁴

³³ A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 10–11 (1958) (footnotes omitted).

³⁴ The highest state courts have been given rulemaking authority by the following constitutions and statutes: ALA. CONST. art. VI, § 150; ALASKA CONST. art. IV, § 15 (subject to change by the legislature); ARIZ. CONST. art. VI, § 5; ARK. CONST. amend. LXXX, § 3; CAL. CONST. art. VI, § 6; COLO. CONST. art. VI, § 21; DEL. CONST. art. IV, § 13(1); FLA. CONST. art. V, § 2(a) (subject to legislative repeal); GA. CONST. art. VI, § 9, para. 1 (providing that the supreme court shall created rules “with the advice and consent of the council of the affected class or classes of trial courts”); HAW. CONST. art. VI, § 7; ILL. CONST. art. VI, § 16; IOWA CONST. art. V, § 4 (giving the supreme court supervisory authority and administrative control over all inferior judicial tribunals in the state); KY. CONST. § 116; LA. CONST. art. V, § 5; MD. CONST. art. IV, § 18; MICH. CONST. art. VI, § 5; MO. CONST. art. V, § 5; MONT. CONST. art. VII, § 2; NEB. CONST. art. V, § 25; N.H. CONST. art. 73-a; N.J. CONST. art. VI, § 2, para. 3; N.C. CONST. art. IV, § 13(2) (giving the supreme court authority to make rules of practice and procedure for the appellate division, but giving the general assembly authority to make rules for the trial courts); N.D. CONST. art. VI, § 3; OHIO CONST. art. IV, § 5(B); PA. CONST. art. V, § 10(c); S.C. CONST. art. V, § 4 (subject to statutory law); S.D. CONST. art. V, § 12; TEX. CONST. art. V, § 31 (so long as not in conflict with statutory law); VT. CONST. ch. II, § 37 (subject to legislative revision); VA. CONST. art. 6, § 5 (so long as not in conflict with statutory law); WASH. CONST. art. IV, § 24; W. VA. CONST. art. VIII, § 3; IDAHO CODE ANN. § 1-212 (2004); IND. CODE ANN. § 34-8-1-3 (LexisNexis 2008); KAN. STAT. ANN. § 20-101 (2007); ME. REV. STAT. ANN. tit. 4, § 1 (2009); MASS. GEN. LAWS ANN. ch. 218, § 43 (West 2005); MINN. STAT. ANN. § 480.051 (West 2002); MISS. CODE ANN. § 9-3-61 (2002); NEV. REV. STAT. ANN. § 2.120 (LexisNexis 2008); N.M. STAT. ANN. § 38-1-1 (LexisNexis 1998); OKLA. STAT. ANN. tit. 12, § 74 (West 2000); OR. REV. STAT. § 1.006 (2009); R.I. GEN. LAWS § 8-6-2(a) (1997); TENN. CODE ANN. § 16-3-402 (2009); UTAH CODE ANN. § 78A-3-103 (LexisNexis 2008); WIS. STAT. ANN. § 751.12 (West 2001); WYO. STAT. ANN. § 5-2-114 (2009).

In New York, it appears that the historic authority to create rules lies with the legislature. N.Y. CONST. art. VI, § 30 (providing that “[t]he legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised”).

V. THE SUPERVISORY AUTHORITY OF HIGHER COURTS

Although decisional law makes it plain that trial courts have an inherent rulemaking authority, these courts are, nevertheless, subject to the supervisory authority of their jurisdictions' highest courts. Higher courts exercise this supervision when they adopt rules, as well as when they review trial court rules. Thus, while trial courts have the inherent authority to promulgate rules, this authority is subject to appellate review. This principle is illustrated by *Frazier v. Heebe*, in which the U.S. Supreme Court was confronted with a residency rule promulgated by a district court in Louisiana. In striking down the rule, the Court opined:

[A] district court has discretion to adopt local rules that are necessary to carry out the conduct of its business. This authority includes the regulation of admissions to its own bar. . . . This Court may exercise its inherent supervisory power to ensure that these local rules are consistent with "the principles of right and justice."³⁵

The same principle applies to rules of practice and procedure. In this regard, the U.S. Supreme Court has asserted its "supervisory authority over the federal courts . . . to prescribe rules of evidence and procedure that are binding in those tribunals."³⁶ One example of this exercise is found in

Connecticut stands alone in regard to its tradition of judicial rulemaking by the trial court. Rules of practice and procedure for the trial court have generally been adopted by the judges of the superior court and not the supreme court. In Connecticut, where the constitution is silent regarding the rulemaking power, Connecticut General Statutes section 51-14 grants to each constitutional court the power to promulgate rules for practice and procedure, subject to disapproval by the general assembly. CONN. GEN. STAT. § 51-14(a)-(b) (2005). The rule appears to be both a grant of power and a tacit acknowledgment of the authority of the respective courts to promulgate rules. In pertinent part, it provides:

The judges of the supreme court, the judges of the appellate court, and the judges of the superior court shall adopt and promulgate and may from time to time modify or repeal rules and forms regulating pleading, practice and procedure in judicial proceedings in courts in which they have the constitutional authority to make rules, for the purpose of simplifying proceedings in the courts and of promoting the speedy and efficient determination of litigation upon its merits.

Id. § 51-14(a).

The rule also, however, contains a provision purporting to authorize the General Assembly to review and reject any such rules. *Id.* § 51-14(b). For a detailed history of rulemaking in Connecticut, see Richard S. Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 8-9, 13-27 (1975).

³⁵ *Frazier v. Heebe*, 482 U.S. 641, 645 (1987) (quoting *In re Ruffalo*, 390 U.S. 544, 554 (1968) (White, J., concurring)).

³⁶ *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (citing *Carlisle v. United States*, 517 U.S. 416, 426 (1996)). In *United States v. Young*, the Supreme Court observed that

[w]e have long recognized that the courts of appeals may prescribe rules of conduct and procedure to be followed by district courts within their respective jurisdictions. . . . [A]n "appellate court will, of course, require the trial court to conform to constitutional mandates, but it may likewise require it to follow procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution."

Ortega-Rodriguez v. United States,³⁷ in which the U.S. Supreme Court stated, “[o]ur review of rules adopted by the courts of appeals in their supervisory capacity is limited in scope, but it does demand that such rules represent reasoned exercises of the courts’ authority.”³⁸

In addition to its review of district and circuit court rules, the U.S. Supreme Court has exercised its supervisory authority over lower federal courts in its adjudicative capacity to establish, prospectively, evidentiary and procedural rules to be followed in future cases, and it has, on occasion, exercised its inherent supervisory authority to reverse criminal convictions obtained against the Court’s sense of fair play and justice.³⁹

State court jurisprudence is in accord. In *State v. DeJesus*, as noted, the Connecticut Supreme Court asserted its supervisory authority over the administration of justice:

As this court repeatedly has stated, both the Supreme Court and the Appellate Court “possess an inherent supervisory authority over the administration of justice. . . . Supervisory powers are exercised to direct trial courts to adopt judicial procedures that will address matters that are of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . [The Supreme Court] ordinarily invoke[s] [its] supervisory powers to enunciate a rule that is not constitutionally required but that [it believes] is preferable as

United States v. Young, 470 U.S. 1, 24 n.3 (1985) (quoting *Cupp v. Naughten*, 414 U.S. 141, 146 (1973)).

Note, however, that the supervisory authority of the U.S. Supreme Court pertains only to lower courts in the federal system. The Court has no such authority over state courts except where it may involve a question of constitutional interpretation. See *Cicenia v. Lagay*, 357 U.S. 504, 508–09 (1958) (citing *McNabb v. United States*, 318 U.S. 332 (1943)) (“Were this a federal prosecution we would have little difficulty in dealing with what occurred under our general supervisory power over the administration of justice in the federal courts. But to hold that what happened here violated the Constitution of the United States is quite another matter.”). With respect to proceedings in state courts, the Court’s “authority is limited to enforcing the commands of the United States Constitution.” *Mu’Min v. Virginia*, 500 U.S. 415, 422 (1991); see also *Dickerson*, 530 U.S. at 438 (quoting the aforesaid language from *Mu’Min*); *Harris v. Rivera*, 454 U.S. 339, 344–45 (1981) (per curiam) (stating that “[f]ederal judges . . . may not require the observance of any special procedures [in state courts] except when necessary to assure compliance with the dictates of the Federal Constitution”).

³⁷ 507 U.S. 234 (1993).

³⁸ *Id.* at 244.

³⁹ See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (mandating that, during voir dire, the state may not excuse a prospective juror via a peremptory challenge based on the prospective juror’s race, because doing so would violate the Equal Protection Clause); *United States v. Hale*, 422 U.S. 171, 176 (1975) (establishing that a defendant’s silence after being given his *Miranda* rights is not admissible as proof of guilt); *Marshall v. United States*, 360 U.S. 310, 313 (1959) (exercising supervisory power to reverse the conviction of a defendant about whom jurors had read newspaper articles revealing a past criminal record); *Aldridge v. United States*, 283 U.S. 308, 314–15 (1931) (reversing the conviction of an African American based on the trial court’s refusal to permit voir dire regarding possible race prejudice of prospective jurors, and ordering that such questioning be permitted).

a matter of policy.”⁴⁰

When the Illinois Supreme Court was confronted with a claim that it had no authority to review a rule adopted by a district court, it asserted, consistent with the result in *DeJesus* and basing its decision largely on English common law antecedents, that it had the right to determine the reasonableness of a district court rule, notwithstanding the authority of the lower court to adopt its own rules.⁴¹ The Florida Supreme Court has similarly opined that, although Florida’s inferior courts have the inherent power to prescribe rules of practice and procedure, this power “is subject to the supervisory control of the [state] Supreme Court”⁴²

Furthermore, where a state’s highest court has itself adopted rules, any rules adopted by a trial court must be in accord. To that effect, the Arizona Supreme Court has stated that “[a]ny court may exercise its inherent power to make and amend rules governing its own local practice. But such rules cannot be inconsistent with the supreme court’s rules”⁴³

In sum, while a trial court has the inherent authority to control its proceedings, any rules it promulgates in furtherance of this objective are subject to review by the state’s highest court, and any such rules are subordinate to rules adopted by the state’s high court.

While the Connecticut Supreme Court traditionally has performed its rulemaking function in the course of appellate review,⁴⁴ other states’

⁴⁰ *State v. DeJesus*, 953 A.2d 45, 83–84 n.5 (Conn. 2008) (alterations in original) (quoting *State v. Ledbetter*, 881 A.2d 290, 318 (Conn. 2005)). In *State v. Valedon*, the Connecticut Supreme Court observed that “[u]nder our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process.” *State v. Valedon*, 802 A.2d 836, 839 (Conn. 2002) (quoting *State v. Santiago*, 715 A.2d 1, 19 (Conn. 1998)). The Massachusetts Supreme Judicial Court has similarly asserted a supervisory authority. In *In re DeSaulnier*, the court asserted that it possessed “inherent common law and constitutional powers . . . as the highest constitutional court of the Commonwealth, to protect and preserve the integrity of the judicial system and to supervise the administration of justice.” *In re DeSaulnier*, 274 N.E.2d 454, 456 (Mass. 1971).

⁴¹ *People v. Callopy*, 192 N.E. 634, 639 (Ill. 1934).

⁴² *Petition of Jacksonville Bar Ass’n*, 169 So. 674, 675 (Fla. 1936).

⁴³ *Bergeron ex rel. Perez v. O’Neil*, 74 P.3d 952, 961–62 (Ariz. Ct. App. 2003).

⁴⁴ Although the Connecticut Supreme Court has historically exercised its supervisory authority in the context of adjudication, the court has also exercised its rulemaking powers during certain periods, and acted legislatively in approving rules of criminal procedure in 1976. See generally Lucy Gordon Potter, Note, *Court Rule-Making in Connecticut Revisited—Three Recent Decisions*: *State v. King*, *Steadwell v. Warden*, and *State v. Canady*, 16 CONN. L. REV. 121 (1983) (discussing the constitutionality of rulemaking in Connecticut). See also William M. Maltbie, *The Rule-Making Powers of the Judges*, in CONN. PRACTICE 1, 1–2, 6–7 (William R. Moller ed., 1966) (discussing rulemaking by the court since 1806 and the court’s freedom to continue to make rules that do not conflict with laws passed by the general assembly). The Connecticut Supreme Court has exercised its supervisory authority in the course of adjudication to establish, prospectively, rules of procedure for the trial courts. See *State v. Gore*, 955 A.2d 1, 12–13 (Conn. 2008) (requiring the court to canvass the defendant directly to ensure that waiver is knowing, intelligent, and voluntary when confronted with a criminal defendant who seeks to waive the right to a jury trial); *DeJesus*, 953 A.2d at 79 (Conn. 2008) (requiring the court to give an appropriate cautionary instruction to the jury when admitting evidence of uncharged sexual misconduct); *State v. Ledbetter*, 881 A.2d 290, 318–19 (Conn. 2005) (requiring the court to give the jury an instruction regarding the risks inherent in certain

highest courts promulgate rules through a quasi-legislative process.⁴⁵ Through either means, several states' highest courts have asserted an inherent authority to create rules for their jurisdictions' lower courts. For example, in *Miller v. State*, the Arkansas Supreme Court observed that, regardless of a statute enabling the court to fashion rules, its promulgation of rules was consonant with the court's constitutional control over all trial courts.⁴⁶ In this case, the court rejected the notion that it had no inherent rulemaking authority over the lower courts absent an enabling statute. The court asserted that "[t]he enabling act here merely recognizes and is harmonious with this court's inherent powers rather than conferring an express power."⁴⁷ Similarly, in Indiana, notwithstanding an enabling statute, the state's appellate court held that "[t]he Indiana Supreme Court has the inherent power to establish rules governing the course of litigation in the trial courts."⁴⁸

In a strong assertion of its inherent power, the Mississippi Supreme Court, in spite of legislation enabling its rulemaking function, stated that "[t]he inherent power of [the] Court to promulgate procedural rules emanates from the fundamental constitutional concept of the separation of powers and the vesting of judicial powers in the courts."⁴⁹ In Tennessee, where legislation gives the Tennessee Supreme Court the power to prescribe rules of practice and procedure for all state courts, the court of appeals has nevertheless held that "[t]he authority to promulgate rules

eyewitness identifications); *Duperry v. Solnit*, 803 A.2d 287, 301–02 (Conn. 2002) (requiring that the court canvass the criminal defendant to ensure a plea is voluntary when the defendant pleads not guilty by reason of mental disease or defect and the state assents to the plea); *Roth v. Weston*, 789 A.2d 431, 448–49 (Conn. 2002) (establishing the burden of proof in third-party visitation cases); *Ireland v. Ireland*, 717 A.2d 676, 679, 682, 684–86, 689 (Conn. 1998) (establishing a burden-shifting scheme and factors to be considered in determining the best interests of children in parental-relocation cases); *State v. Coleman*, 700 A.2d 14, 23 (Conn. 1997) (requiring that, upon request, the sentencing court must articulate its reasons on the record for imposing a greater sentence after trial than the sentence previously imposed under the terms of a plea agreement); *State v. Gould*, 695 A.2d 1022, 1031 (Conn. 1997) (requiring that replay of videotaped deposition testimony be shown in open court under the supervision of the trial judge and in the presence of the parties and their counsel); *State v. Brown*, 668 A.2d 1288, 1303 (Conn. 1995) (directing courts to conduct an inquiry when presented with a claim of jury misconduct in a criminal case); *State v. Breton*, 663 A.2d 1026, 1049 (Conn. 1995) (holding that, in a death penalty case, there must be a prefatory statement regarding the jury's duty in the special verdict form); *Bennett v. Auto. Ins. Co. of Hartford*, 646 A.2d 806, 812 (Conn. 1994) (requiring an insurer to raise issues of policy limitation by special defense); *State v. Patterson*, 645 A.2d 535, 538–39, 543 (Conn. 1994) (holding that a judge must remain on the bench throughout voir dire in a criminal trial); *State v. Holloway*, 553 A.2d 166, 171–72 (Conn. 1989) (establishing the procedure to be followed during jury selection when a party claims that jurors are being excluded for impermissible reasons). *But see* *State v. Madera*, 503 A.2d 136, 141–42 (Conn. 1985) (refusing to adopt a procedure allowing criminal defendants to enter conditional pleas aside from those permitted by statute).

⁴⁵ See *supra* note 34 and accompanying text.

⁴⁶ *Miller v. State*, 555 S.W.2d 563, 564 (Ark. 1977).

⁴⁷ *Id.* at 564.

⁴⁸ *Owen Cnty. Bd. of Comm'rs v. Ind. Dep't of Workforce Dev.*, 861 N.E.2d 1282, 1287 (Ind. Ct. App. 2007).

⁴⁹ *Newell v. State*, 308 So. 2d 71, 76 (Miss. 1975).

which control the practice and procedure of the courts of [the] State is an inherent power of the Tennessee Supreme Court.”⁵⁰ And, in Washington, where there is statutory authorization for the supreme court to promulgate rules of practice, the supreme court has asserted:

These courts have operated under that statute for over half a century, and furthermore have determined that the court’s rulemaking power not only is derived from the statute but is a necessary adjunct of the judicial function. Its inherent power to govern court procedures stems from Const. art. 4, § 1, vesting the judicial power in the Supreme Court and other courts designated in the constitution.⁵¹

This review of decisional law and commentary reflects broad support for the notion that courts have the inherent authority to promulgate rules of practice and procedure flowing naturally from their existence as courts, and that the exercise of this authority is subject to review by the highest court in the particular judicial system.⁵² The proper exercise of this authority, however, is not unbounded.

VI. THE LIMITS OF A COURT’S INHERENT RULEMAKING POWER

When a court asserts its rulemaking power as inherent, with or without express constitutional or legislative affirmation, it is generally understood that the authority to promulgate rules is limited to practice and procedure and does not extend to abridge or modify substantive rights.⁵³

⁵⁰ *Dial v. Harrington*, 138 S.W.3d 895, 897 (Tenn Ct. App. 2003) (citing *Corum v. Holston Health & Rehab. Ctr.*, 104 S.W.3d 451, 454 (Tenn. 2003)).

⁵¹ *Seattle v. Hesler*, 653 P.2d 631, 635 (Wash. 1982) (citing *State v. Fields*, 530 P.2d 284 (Wash. 1975); *State v. Smith* 527 P.2d 674 (Wash. 1974)).

⁵² It is also noteworthy that the assertion of the right of a state’s highest court to formulate rules of practice and procedure for lower courts, as seen in these reported cases, appears not to be dependent on whether lower courts are creatures of statute or are constitutionally-made. The right adheres to the higher court by reason of its own inherent supervisory powers over lower courts.

⁵³ In several states where legislatures have enacted legislation regarding the court’s rulemaking authority, the enactment contains a limiting clause stating that judicial rules are not to abridge, enlarge, or modify the substantive right of any party. *E.g.*, ALA. CONST. art. VI, § 150; ARK. CONST. amend. LXXX, § 3; N.C. CONST. art. IV, § 13(2); OHIO CONST. art. IV, § 5(B); PA. CONST. art. V, § 10(c); ARIZ. REV. STAT. ANN. § 12-109 (2003); COLO. REV. STAT. § 13-2-108 (2009); CONN. GEN. STAT. ANN. § 51-14(a) (West 2005); DEL. CODE ANN. tit. 10, § 161(c) (1999); GA. CODE ANN. § 15-2-18(a) (West 2007); HAW. REV. STAT. § 602-11 (1993); IDAHO CODE ANN. § 1-213 (2010); MINN. STAT. ANN. § 480.051 (West 2002); MO. ANN. STAT. § 477.010 (West 2004); NEV. REV. STAT. ANN. § 2.120(2) (LexisNexis 2008); N.M. STAT. ANN. § 38-1-1(A) (1998); TEX. GOV’T CODE ANN. § 22.004(a) (West 2004); VT. STAT. ANN. tit. 12, § 1 (2002); WIS. STAT. ANN. § 751.12(1) (West 2001); WYO. STAT. ANN. § 5-2-115(b) (2009). Additionally, in those states in which either the constitution or legislation expressly grants the court rulemaking authority over practice and procedure, courts have treated their authority as excluding the right to abridge or modify substantive rights. *See, e.g.*, *State v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 405 (Alaska 2007) (concluding that a procedural rule granting courts a wide range of discretion to consider broad equitable factors when awarding attorney’s fees must be limited in its application to prevent an application of substantive law); *Van Bibber v. Hartford Accident & Indem. Ins. Co.*, 439 So. 2d 880, 883 (Fla. 1983) (finding that the statute in

Just as, in principle, courts may promulgate procedural but not substantive rules, state legislatures may enact laws which create or modify rights but they may not dictate court practice and procedure.⁵⁴ But these general pronouncements resting on the distinction between procedural and substantive law are often not useful in determining whether a particular rule or statute has crossed an impermissible boundary. That is because the differences between procedural and substantive law are often not easily discernable in the context of an actual case. One commentator aptly noted: “The distinction between substance and procedure is readily definable; procedural laws govern court activity, while substantive laws establish rights, set duties, and grant relief. However, this distinction is extremely difficult to apply, as substantive rights are often inextricably interwoven with procedural regulations.”⁵⁵ The Washington Supreme Court, while recognizing that the line of demarcation between substantive and procedural law is not always clear, set forth the classical distinction as follows: “Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the

question was substantive and operated in an area of legitimate legislative concern); *Quaker Oats Co. v. Cedar Rapids Human Rights Comm’n*, 268 N.W.2d 862, 868 (Iowa 1978) (finding that an administrative body cannot use its rulemaking powers to create substantive rights); *Paley v. Coca-Cola Co.*, 209 N.W.2d 232, 239–40 (Mich. 1973) (Swainson, J., dissenting) (emphasizing that rules of court cannot enlarge or restrict jurisdiction, or abrogate or modify substantive law); *Op. of the Justices*, 688 A.2d 1006, 1012–13 (N.H. 1997) (observing that a matter of substantive law contained within a procedural court rule does not immunize the rule from legislative change); *Ferreira v. Rancocas Orthopedic Assocs.*, 836 A.2d 779, 789 (N.J. 2003) (Zazzali, J., concurring in part and dissenting in part) (citing court precedent establishing that court rules involving procedural rather than substantive rights will be upheld over conflicting statutes); *State v. Robinson*, 972 A.2d 150, 159 (R.I. 2009) (finding that a court-made rule expanding the jurisdiction of the district court lies solely within the province of the legislature because it concerns substantive legislative matters); *Ryan v. Gold Cross Servs., Inc.*, 903 P.2d 423, 425 & n.2 (Utah 1995) (finding that a court rule of evidence regarding seatbelt use contains operative provisions that announce a substantive principle and is therefore subject to legislative alteration); *Sackett v. Santilli*, 47 P.3d 948, 951 (Wash. 2002) (citing court precedent that Washington constitutional authority allows courts to create rules for limited purposes of uniformity and not for the purpose of making broad and general rules).

⁵⁴ The Connecticut Supreme Court has asserted that, “[j]ust as the general assembly lacks the power to enact rules governing procedure that is exclusively within the power of the courts . . . so do the courts lack the power to promulgate rules governing substantive rights and remedies.” *In re Samantha C.*, 847 A.2d 883, 900 (Conn. 2004) (citations omitted) (internal quotation marks omitted). In a similar vein, the Kentucky Supreme Court has stated:

Just as it would be a violation of separation of powers for this Court to exercise power properly belonging to another branch, e.g., adopting substantive law under the guise of enacting a procedural rule since the enactment of substantive law is the exclusive prerogative of the Legislature under our Constitution, a similar constitutional violation of separation of powers occurs when the Legislature promulgates rules of practice and procedure for the Court of Justice or rules governing the appellate jurisdiction of this Court.

Elk Horn Coal Corp. v. Cheyenne Res., Inc., 163 S.W.3d 408, 423 (Ky. 2005) (internal citations omitted).

⁵⁵ Joanna C. New, Note, *The Bounds of Power: Judicial Rule-Making in Illinois*, 10 LOY. U. CHI. L.J. 100, 105 (1978) (internal citations omitted).

essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.”⁵⁶

The U.S. Supreme Court’s analysis of claims involving the Rules Enabling Act demonstrates the futility of relying on the theoretical distinction between procedural and substantive law when assessing whether legislation impermissibly encroaches on the judicial function or a judicially-fashioned rule invades the province of the legislature. The Rules Enabling Act authorizes the Court to adopt rules of practice and procedure for federal circuit and district courts with the limitation that such rules “shall not abridge, enlarge or modify any substantive right.”⁵⁷

Faced with claims that court-made rules have affected litigants’ substantive rights, the Court’s decisions reflect the difficulty of pinpointing with any precision the dividing line between substance and procedure. In confronting claims regarding the Rules Enabling Act, the Court has demonstrated a practical approach to assessing whether judicial rulemaking or legislative enactment runs afoul of separation of powers precepts.⁵⁸ While these cases do not concern inherent authority or deal with evidence law-making, their reasoning is instructive, by analogy, to our present inquiry regarding a court’s adoption of a code of evidence pursuant to its rulemaking authority regarding practice and procedure.

In *Erie Railroad Co. v. Tompkins*,⁵⁹ the Supreme Court clarified that there is no federal common law and therefore, in diversity actions, federal courts are obligated to follow the substantive law of the applicable state.⁶⁰ While *Erie* established the principle regarding the application of a state’s substantive law, however, it did not provide an analytical framework for distinguishing substantive from procedural law, an issue that arises when litigants claim a conflict between a state law and a federal rule. Three years after *Erie*, in *Sibbach v. Wilson & Co., Inc.*, the Court was confronted with the issue of whether Rule 35 of the Federal Rules of Civil Procedure, requiring a litigant in certain kinds of litigation to submit to a physical or mental examination, had the effect of abridging, enlarging, or modifying a litigant’s substantive rights in violation of the Rules Enabling Act.⁶¹ There, the Court found that the rule in question did not impermissibly affect a substantive right even though its requirement that a

⁵⁶ *State v. Smith*, 527 P.2d 674, 677 (Wash. 1974) (citations omitted). For the same formulation, see *Town of Middlebury v. Dep’t. of Envtl. Prot.*, 927 A.2d 793, 810 (Conn. 2007). One writer put it more simply, stating that a substantive law can be seen as one that defines a right, while a procedural law establishes the means for its enforcement. Eli J. Warach, Note, *The Rule-Making Power: Subject to Law?*, 5 RUTGERS L. REV. 376, 382–83 (1950).

⁵⁷ Rules Enabling Act, 28 U.S.C. § 2072(b) (2006).

⁵⁸ See *infra* notes 61–68 and accompanying text.

⁵⁹ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁶⁰ *Id.* at 78.

⁶¹ *Sibbach v. Wilson & Co.*, 312 U.S. 1, 6, 9–10 (1941).

litigant submit to an examination involved a substantial right.⁶² In fashioning a facially straightforward approach to determining whether a court rule could withstand a separation of powers challenge, the *Sibbach* Court stated: “The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.”⁶³

In dissent, Justice Frankfurter alluded to the difficulty in distinguishing procedure from substance. He commented:

Speaking with diffidence in support of a view which has not commended itself to the Court, it does not seem to me that the answer to our question is to be found by an analytic determination whether the power of examination here claimed is a matter of procedure or a matter of substance, even assuming that the two are mutually exclusive categories with easily ascertainable contents.⁶⁴

Following the reasoning of *Sibbach*, the U.S. Supreme Court in *Mississippi Publishing Corp. v. Murphree*⁶⁵ rejected a challenge to Rule 4(f) of the Federal Rules of Civil Procedure, regarding service of process, with this statement:

Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress’ prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. The fact that the application of Rule 4(f) will operate to subject petitioner’s rights to adjudication by the district court for northern Mississippi will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights. It relates merely to the manner and the means by which a right to recover . . . is enforced. In this sense the rule is a rule of procedure and not of

⁶² *Id.* at 16 (holding that the “rules under attack are within the authority granted”).

⁶³ *Id.* at 14.

⁶⁴ *Id.* at 17 (Frankfurter, J., dissenting).

⁶⁵ *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 445–46 (1946) (internal citations omitted).

substantive right, and is not subject to the prohibition of the Enabling Act.⁶⁶

As can be seen from these cases, although the basic tenet of *Erie* is that in a diversity action the court must apply substantive state law and federal procedural rules, *Erie* does not provide a clear analytical pathway for assessing whether a particular rule under scrutiny impermissibly crosses the line between the procedural and substantive law.⁶⁷ It does appear, however, that the application of a federal rule in a diversity action will not be held to violate the proscription of the Rules Enabling Act merely because of its incidental effects on a litigant's substantive rights where the rule is reasonably necessary to maintain the integrity of the federal practice and procedure system, and where the rule's impact on one's substantive rights is merely incidental.⁶⁸

This brief reference to the U.S. Supreme Court's treatment of separation of powers issues related to the Rules Enabling Act again illustrates the futility of attempting to distinguish between substance and procedure in assessing the viability of rules. The teaching of these federal cases is that the reference to the classic distinction between substantive and procedural law is often of little aid in determining whether a court rule impermissibly encroaches upon the law-making function of the legislature and, reciprocally, whether a legislative enactment invades the sole province of the judiciary. Rather than relying on this distinction, courts assessing judicially-made rules have focused on whether the thrust of a rule under scrutiny is to affect court practice and procedure; if so, courts have been unwilling to find unconstitutional a rule of practice or procedure merely because it may have an impact on a litigant's substantive rights.⁶⁹

⁶⁶ *Id.* at 445–46 (1946) (internal citations omitted) (quotation marks omitted).

⁶⁷ For a discussion of the progeny of *Erie* and continuation of the debate regarding application of the federal rules in diversity cases, see *Hanna v. Plumer*, 380 U.S. 460, 471–74 (1965).

⁶⁸ *Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 498 U.S. 533, 552–53 (1991).

⁶⁹ Consistent with the unwillingness of the U.S. Supreme Court in *Sibbach v. Wilson*, 312 U.S. 1 (1941), to confine its analysis of a court rule under separation of powers attack to parsing the difference between substantive and procedural law, some state courts have similarly expressed the futility of relying on that dichotomy in assessing the propriety of rules under scrutiny. For example, in *Busik v. Levine*, 307 A.2d 571 (N.J. 1973), the New Jersey Supreme Court, in rejecting an argument that a court-fashioned rule providing for prejudgment interest in tort actions was unconstitutional because it affected substantive rights, observed that “it is simplistic to assume that all law is divided neatly between substance and procedure.” *Id.* at 578. Similarly, the Pennsylvania Supreme Court opined, in response to a claim that its prejudgment interest rule was unconstitutional because it affected substantive rights:

Undeniably, Rule 238 embodies both procedural and substantive elements. Its purpose and effect are procedural, yet its performance will touch upon substantive rights of both parties. However, the fact that a rule does involve the substantive rights of litigants should not mean that the rule is an inappropriate topic for Supreme Court rule-making. Most rules of procedure will eventually reverberate to the substantive rights and duties of those involved.

This approach is in accord with the tack the Connecticut Supreme Court took in assessing a statute under attack as an impermissible legislative assumption of the judicial rulemaking role. In *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*,⁷⁰ the court stated:

In the context of challenges to statutes whose constitutional infirmity is claimed to flow from impermissible intrusion upon the judicial power, we have refused to find constitutional impropriety in a statute simply because it affects the judicial function, so long as it is an exercise of power assigned by the constitution to the legislature. In many situations, executive, legislative and judicial powers necessarily overlap. In such situations, a statute is not unconstitutional unless it represents an effort by the legislature to exercise a power which lies exclusively under the control of the courts . . . or if it establishes a significant interference with the orderly conduct of the Superior Court's judicial functions.⁷¹

The teaching of cases involving claims that legislation impermissibly encroaches upon a judicial function or that judge-made rules improperly affect substantive rights is that reference to generalities regarding substantive and procedural law does not aid the analysis. Rather, some courts have utilized a purpose-driven analysis. That is, in determining the constitutionality of such rulemaking or legislation, some courts have

Lauderberger v. Port Auth., 436 A.2d 147, 155 (Pa. 1981). In rejecting the dichotomy between substance and procedure as the correct analytical path, the *Lauderberger* court adopted, instead, a purposive approach to assess the viability of the rule under scrutiny. The court commented:

The tacit assumption that the precise point at which the line between the two is to be drawn is the same for all purposes . . . is of course connected with the other assumptions . . . namely, that the 'line' is to be 'discovered' rather than 'drawn' and that it can be located without keeping in mind the purpose of the classification. If once we recognize that the 'line' can be drawn only in the light of the purpose in view, it cannot be assumed without discussion that as our purposes change the line can be drawn at precisely the same point. We must therefore seek to determine the purpose of the rule in order to properly characterize its nature.

Id. at 150 (internal quotation marks omitted) (internal citation omitted).

The Wisconsin Supreme Court, when faced with a claim that the dismissal of a suit on the basis of a court-fashioned rule requiring the filing of law suits within a certain time period affected a party's substantive rights observed:

In this case, the application of the rule has a collateral effect of giving the defendant a defense of barring the cause of action. However, this does not make the rule one of substantive law. And, this is true although it has been said in this state that the statute of limitations extinguishes the right or cause of action as well as creating a defense or defensive remedy. Most procedural rules may have some collateral substantive effect but do not become substantive in nature because of such indirect effect.

Fehrenbach v. Fehrenbach, 167 N.W.2d 218, 220–21 (Wis. 1986).

⁷⁰ *Heslin v. Conn. Law Clinic of Trantolo & Trantolo*, 461 A.2d 938 (Conn. 1983).

⁷¹ *Id.* at 944 (internal citations omitted) (quotation marks omitted).

looked to the purpose of a rule or statute to determine whether its aim is to create a right or to carve a procedure for the enforcement of a right. Such an approach appears in opinions assessing whether evidence rulemaking belongs solely to the judiciary, to the legislature, or to both branches as a shared responsibility, because evidence laws often contain features that implicate both judicial procedure and public policy.

VII. THE DEVELOPMENT OF EVIDENCE LAW

Just as in a separation of powers assessment of a federal rule of procedure, the determination of whether a judicially-made evidentiary rule or a legislative enactment of evidence law crosses an impermissible boundary is not likely to be aided by labeling the act or rule as procedural or substantive. Nor is the question of whether evidence rulemaking belongs to the judiciary answered solely by reference to the fact that the U.S. Supreme Court and several state supreme courts have asserted the authority to promulgate rules of evidence for lower courts in their supervisory capacity.⁷² And, while it is significant to this discussion that many states' supreme courts have adopted rules of evidence in a legislative manner pursuant to their authority to promulgate practice and procedure rules, that phenomenon does not alone lead inescapably to a broad conclusion that the making of evidence law belongs exclusively to the judiciary,⁷³ nor does the fact that some courts have stated that evidence law

⁷² See *McNabb v. United States*, 318 U.S. 332, 341 (1943) ("In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. . . . And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance." (internal citations omitted)). Numerous state supreme courts have established evidentiary rules for lower courts. See, e.g., *State v. DeJesus*, 953 A.2d 45, 49 (Conn. 2008) (carving out an exception to the state's code of evidence rule regarding the admission of prior misconduct in certain cases); *State v. Ledbetter*, 881 A.2d 290, 317–18 (Conn. 2005) ("Appellate courts possess an inherent supervisory authority over the administration of justice Under our supervisory authority, we have adopted rules intended to guide the lower courts in the administration of justice in all aspects of the criminal process." (quoting *State v. Valedon*, 802 A.2d 836, 839 (Conn. 2002))); *State v. McGlew*, 658 A.2d 1191, 1196 (N.H. 1995) (guiding the trial court regarding the admissibility of evidence under a specific rule of evidence); *Van Tran v. State*, 6 S.W.3d 257, 260 (Tenn. 1999) (holding that the rules of evidence should not be applied to limit the admissibility of reliable evidence bearing on a prisoner's competency); *State v. Wareham*, 772 P.2d 960, 965 (Utah 1989) (adopting, pursuant to the court's supervisory authority, a bifurcated hearing process in sexual abuse cases); *In re Jerrell C.J.*, 699 N.W.2d 110, 123 (Wis. 2005) (adopting a rule regarding juvenile confessions).

⁷³ In the following states, the highest courts have adopted rules of evidence pursuant to their authority to promulgate rules of practice and procedure: Alabama (ALA. CONST. amend. 328, § 6.11; ALA. CODE § 12-2-7 (2005); ALA. R. EVID.); Arizona (ARIZ. CONST. art. 6, § 5; ARIZ. REV. STAT. ANN. § 12-109 (2003); ARIZ. R. EVID.); Arkansas (ARK. CONST. OF 1874, amend. 80, § 3; ARK. CODE ANN. § 16-11-301 (2010); ARK. UNIF. R. EVID.); Delaware (DEL. CONST. art. IV, § 13 (1); 10 DEL. CODE ANN. § 161(a) (1999); DEL. UNIF. R. EVID.); Idaho (IDAHO CODE ANN. § 1-212 (2010); IDAHO R. EVID.); Indiana (IND. CODE § 34-8-1-3 (2008); IND. R. EVID.); Kansas (KAN. STAT. ANN. §§ 20-101, 20-342 (2007); KAN. R. EVID.); Maryland (MD. CONST. art. IV, Pt. II, § 18(a); MD. CODE ANN., CTS. & JUD. PROC. § 1-201 (2003); MD. R. EVID.); Michigan (MICH. CONST. art. VI, § 5; MICH. COMP. LAWS §

is procedural.⁷⁴

Notwithstanding the judiciary's authority regarding evidence, there remain areas of evidence law that embody significant public policy. Thus, the promulgation of codes in several states should not be seen as a determination by those states that all evidence law belongs in the exclusive domain of the judiciary. And, even though many courts have asserted the right to promulgate codes of evidence pursuant to an inherent practice and procedure rulemaking authority, the fact that evidence law spans substantive and procedural law is sufficient reason to warrant inter-branch cooperation in the promulgation of a code by the judiciary as well as

600.223 (2001); MICH. R. EVID.); Montana (MONT. CONST. art. VII, § 2; MONT. CODE ANN. § 3-1-112 (2010); MONT. R. EVID.); New Hampshire (N.H. CONST. art. 73-a; N.H. R. EVID.); New Mexico (N.M. STAT. ANN. § 38-1-1 (1998); N.M. R. EVID.); North Dakota (N.D. CONST. art. VI, § 3; N.D. R. EVID.); Ohio (OHIO CONST. art. IV, § 5(B); OHIO. R. EVID.); Pennsylvania (PA. CONST. art. V, § 10(c); PA. R. EVID.); Rhode Island (R.I. GEN. LAWS § 8-6-2(a) (1997); R.I. R. EVID.); South Carolina (S.C. CONST. art. V, § 4; S.C. R. EVID.); South Dakota (S.D. CONST. art. V, § 12; S.D. CODIFIED LAWS § 16-3-2 (2004); S.D. R. EVID.); Washington (WASH. CONST. art. IV, § 24; WASH. REV. CODE § 2.04.180 (2010); WASH. R. EVID.); West Virginia (W.VA. CONST. art. VIII, § 3; W.VA. CODE § 51-1-4 (2008); W.VA. R. EVID.); and Wyoming (WYO. STAT. ANN. § 5-2-114 (2009); WYO. R. EVID.). This phenomenon suggests, at least, a perception by these courts that evidentiary law is sufficiently procedural to fall within the judicial ambit. And by implication, these courts have determined that the promulgation of evidence law by rule does not impermissibly cross the divide between the proper function of the court and the exclusive realm of the legislature. Certainly, the adoption in Connecticut of a code of evidence in 2000 by the judges of the superior court pursuant to their inherent rulemaking authority reflects the collective belief of the judges that such action does not transgress the boundaries of appropriate judicial action. In Colorado, Maine, Minnesota, Mississippi, Texas, and Virginia, there is legislation authorizing the supreme court to adopt rules of evidence. See COLO. REV. STAT. § 13-25-128 (2010); ME. REV. STAT. ANN. tit. 4, § 9-A (2008); MINN. STAT. ANN. § 480.0591 (2002); MISS. CODE ANN. § 9-3-61 (2002); TEX. GOV'T CODE ANN. § 22.109 (2004); VA. CODE ANN. § 8.01-3(A) (2007). In Utah, there is a constitutional provision directing the supreme court to make rules of evidence. See UTAH CONST. art. VIII, § 4. In Florida, where the legislature has adopted an evidence code, the Florida Supreme Court has adopted it as well to the extent it is procedural in order to avoid a constitutional confrontation. See FLA. STAT. § 25.371 (2010). It appears that the Florida Supreme Court adopted evidence rules as procedural pursuant to its authority over procedure in the courts. See FLA. CONST. art. V., § 2(a). Some state legislatures have adopted rules of evidence. See GA. CODE ANN. § 24-1-1 et seq. (1863); HAW. REV. STAT., ch. 626 (1980); KAN. STAT. ANN. § 60-401 (1964); La. Acts 1988, No. 515, § 1; NEB. REV. STAT. § 27-101 et seq. (1975); 1971 Nev. Stat., 775; 1983 N.C. Sess. Laws 666; OKLA. STAT. § 12-2101 (1978); CAL. EVID. CODE (stating, in the introduction, that the Evidence Code was enacted by Chapter 299 of the Statutes of 1965); OR. EVID. CODE (1981).

⁷⁴ Indeed, the Connecticut Supreme Court has stated its belief that the law of evidence is procedural. In *State v. Lorain*, which dealt with the question of whether the admissibility of a defendant's statement should be governed by the *lex loci* or the *lex fori*, the court concluded that it would be the latter on the basis that "it is the rule that the admissibility of evidence relates to judicial procedure and is determined by the law of the forum." 109 A.2d 504, 507 (Conn. 1954). More broadly, the Connecticut Supreme Court has stated that "[t]he rules of evidence are procedural." *State v. Almeda*, 560 A.2d 389, 395 (Conn. 1989). This dicta would be a thin reed upon which to rest the right of the court to promulgate a code of evidence. That evidence is essentially procedural is also apparently the view of the drafters of the *Restatement of Conflicts of Law*, which sets forth the rule that in matters of conflict, where the substantive law of the *lex loci* and the procedural law of the *lex fori* control, the admissibility of proffered evidence is controlled by the latter. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 584 & cmt. b, 585 & cmt. a (1934). More to the point, the U.S. Supreme Court has succinctly stated: "[O]ur separation-of-powers analysis does not turn on the labeling of an activity as 'substantive' as opposed to 'procedural.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 606 (1992) (Blackmun, J., dissenting) (quoting *Mistretta v. United States*, 488 U.S. 361, 393 (1989)).

recognition, by the judiciary, of the legislature's historic role in the enactment of evidence law as an expression of public policy.

The overlay between substantive rights and procedure in evidence law is aptly illustrated by reference to rape shield statutes, which many state legislatures have enacted. While these statutes generally provide for the exclusion of evidence of a sexual complainant's prior sexual activity,⁷⁵ and, therefore, deal arguably with court procedure, they also reflect a public policy in favor of protecting the privacy of sexual assault victims and encouraging them to come forward.⁷⁶ The U.S. Supreme Court has noted that Michigan's rape shield statute "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy."⁷⁷

Similarly, a number of states have found that their rape shield statutes do not violate the separation of powers doctrine even though the statutes purport to determine the inadmissibility of certain evidence in the trial process.⁷⁸ While not in the context of a separation of powers claim, the Connecticut Supreme Court has noted the public policy purposes of the state's rape shield statute:

"Our legislature has determined that, except in specific instances, and taking the defendant's constitutional rights into account, evidence of prior sexual conduct is to be excluded for policy purposes. Some of these policies include protecting the victim's sexual privacy and shielding her from undue harassment, encouraging reports of sexual assault, and enabling the victim to testify in court with less fear of embarrassment. . . . Other policies promoted by the law include avoiding prejudice to the victim, jury confusion and

⁷⁵ See, e.g., ARK. CODE ANN. § 16-42-101; CONN. GEN. STAT. § 54-86f; FLA. STAT. § 794.022.

⁷⁶ See *infra* note 82.

⁷⁷ Michigan v. Lucas, 500 U.S. 145, 150 (1991).

⁷⁸ See, e.g., State v. Gilfillan, 998 P.2d 1069, 1077 (Ariz. Ct. App. 2000) (finding that Arizona's Rape Shield Law "neither impermissibly infringes upon the Arizona Supreme Court's rulemaking authority nor violates the doctrine of the separation of powers"); People v. McKenna, 585 P.2d 275, 279 (Colo. 1978) (holding that a state rape shield statute was not an unconstitutional legislative attempt to create a rule of procedure for the judiciary); State v. Mitchell, 424 N.W.2d 698, 706 (Wis. 1988) (upholding the state's rape shield statute against a separation of powers attack). But, courts have not been uniform in their approaches to separation of powers claims regarding particular facets of evidentiary law. For example, the New Mexico Supreme Court found that rules of privilege are procedural on the basis that they relate to the obligation of everyone to give testimony or furnish evidence in court. The court opined:

[R]ules of evidence are procedural, in that they are a part of the judicial machinery administered by the courts for determining the facts upon which the substantive rights of the litigant rest and are resolved. Rules of evidence do no more than regulate the method of proceeding by which substantive rights and duties are determined.

Ammerman v. Hubbard Broad., Inc., 551 P.2d 1354, 1357 (N.M. 1976). One could fairly argue that a purposive analysis might have led the court to a dissimilar result.

waste of time on collateral matters.”⁷⁹

Recognizing the futility of attempting to categorize all evidence law as either substantive or procedural, various courts and commentators have devised alternate tests when confronting separation of powers issues. The Michigan Supreme Court fashioned a practical approach, concluding that a statutory rule of evidence violates the state constitution’s separation of powers clause only when “no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified. . . .”⁸⁰ The court concluded:

“[I]f a particular court rule contravenes a legislatively declared principle of public policy, having as its basis something other than court administration . . . the [court] rule should yield.” We agree with Professor Joiner that [m]ost rules of evidence have been made by courts. Now and then the legislature has, as a result of policy consideration over and beyond matters involving the orderly dispatch of judicial business, enacted rules of evidence. The distinction previously pointed out between policy considerations involving the orderly dispatch of judicial business on the one hand and policy considerations involving something more than that on the other hand is the distinction that must be carried through into the evidence field.⁸¹

In 1956, Professors Charles Joiner and Oscar Miller proposed a test to assess the appropriateness of adoption of rules of evidence by the court. Rejecting the substance-procedure distinction as unworkable because “what may be considered procedural for one purpose may be considered substantive for another,” they embraced the earlier suggestion that when confronting a proposed rule, an assessment should be made: whether a given rule of evidence is a device with which to promote the adequate, simple, prompt, and inexpensive administration of justice in the conduct of a trial or whether the rule, having nothing to do with procedure, is

⁷⁹ *State v. Cecil J.*, 970 A.2d 710, 717 (Conn. 2009) (quoting *State v. Christiano*, 637 A.2d 382, 389 (Conn. 1994)). Another example is Connecticut’s version of the dead man statute. Although it represents an exception to the hearsay rule, typically within the domain of procedure, one court has found that it exists “to remove the disparity in advantage previously possessed by living litigants as against the representatives of persons whose voices were stilled by death, by permitting the declarations and memoranda of the latter to be received and weighed in the evidential balance as against the assertions of the living.” *Doyle v. Reeves*, 152 A. 882, 884 (Conn. 1931). Thus, the dead man statute reflects a public interest beyond an orderly judicial process.

⁸⁰ *McDougall v. Schanz*, 597 N.W.2d 148, 156 (Mich. 1999) (quoting *Kirby v. Larson*, 256 N.W.2d 400, 406 (Mich. 1977)).

⁸¹ *Id.* (second and third alterations in original) (quoting Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 650–51 (1957)).

grounded upon a declaration of general public policy.⁸²

Another approach has been referred to as the “primary effects” test, which requires an examination of the primary and incidental effects of a rule. If the rule “primarily regulates the truth-seeking function of the court, but only incidentally affects a legislative concern, then it is subject to judicial regulation.”⁸³ On the other hand, if the primary effect of the rule “is the promotion of extrajudicial policies,” and if the rule “has only incidental effects on the truth-seeking function of the courts, then [it] can only be prescribed by the legislature.”⁸⁴

The common theme of these pragmatic approaches is the recognition of the overlap between substance and procedure in the law of evidence. These analyses reflect the reasonable conclusion that, while courts may adopt rules of evidence as procedure, legislatures likewise have a role to play in the development of evidentiary laws that may affect judicial procedure, if the primary purpose of these laws is to give effect to public policy and not merely to control the flow of judicial business.

In 2006, the Connecticut Supreme Court, in *State v. Sawyer*, did not decide whether the adoption of a code of evidence by the judges of the Connecticut Superior Court in 2000 had effectively ousted the supreme court from its common law evidence law-making function.⁸⁵ As to this issue, the court commented:

[W]e acknowledge that, since 2000, the year in which the Connecticut Code of Evidence was adopted, the authority to change the rules of evidence lies with the judges of the Superior Court in the discharge of their rule-making function.

⁸² Joiner & Miller, *supra* note 81 at 635. The authors further commented:

[W]hile it is clear that inherent rule-making power is possessed by the courts, the scope of the power cannot be defined until we ascertain the purpose for which a rule is promulgated and the fullness of its impact. If the purpose of its promulgation is to permit a court to function and function efficiently, the rule-making power is inherent unless its impact is such as to conflict with other validly enacted legislative or constitutional policy involving matters other than the orderly dispatch of judicial business.

Id. As we have seen, although rape shield statutes purport to limit the scope of cross examination in certain cases, they serve important public policy purposes regarding privacy and the willingness of sexual assault victims to come forward. The statutory laws of privilege reflect public concern for the importance of confidentiality in certain relationships even though they include provisions aimed at protecting the confidentiality during judicial proceedings. In whatever state statutory form, the parol evidence rule and the statute of frauds, both bearing on permissible evidence, are rooted in notions driven by public policy concerns.

⁸³ Terry A. Moore, *Does the Alabama Supreme Court Have the Power To Make Rules of Evidence?*, 25 CUMB. L. REV. 331, 347–48 (1995).

⁸⁴ *Id.* at 348; see also Thomas Fitzgerald Green, Jr., *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?*, 26 A.B.A. J. 482, 484 (1940) (concluding that courts will exercise their rulemaking power if the subject at hand is a method “by which rights and duties are to be protected and enforced,” but that they will make policy evaluations “if [the] character [of the subject] is doubtful”).

⁸⁵ *State v. Sawyer*, 904 A.2d 101, 104 n.1. (Conn. 2006).

Of course, prior to that date, changes to substantive evidentiary rules were accomplished by our courts in the exercise of their common-law authority. To the extent that our evidentiary rules may be deemed to implicate substantive rights, we believe that it is unclear whether those rules properly are the subject of judicial rule making rather than the subject of common-law adjudication. Because that question raises an issue on which we did not request briefing by the parties, however, we leave it for another day.⁸⁶

Two years later, in *State v. DeJesus*, the court stated that, to the extent it had indicated in *Sawyer* that the authority to alter the rules of evidence resided with the Connecticut Superior Court, and not the state's appellate court "in the exercise of their common-law [adjudicative] authority," that determination was no longer good law.⁸⁷

While *DeJesus* answered the question whether the supreme court continues to have the common law authority to develop the law of evidence in its adjudicative mode, the supreme court has not addressed whether it has the authority to adopt a code of evidence in a legislative manner as the judges of the superior court did in 2000. The court's reticence in this regard may be due, in part, to Connecticut's history of rulemaking by the superior court and the absence of such a tradition on the supreme court.⁸⁸ Neither factor should, however, prevent the court

⁸⁶ *Id.*

⁸⁷ *State v. DeJesus*, 953 A.2d 45, 68 n.23 (Conn. 2008) (alteration in *DeJesus*) (quoting *State v. Sawyer*, 904 A.2d 101, 104 n.1 (Conn. 2006)).

⁸⁸ As noted, the Connecticut Supreme Court has asserted the inherent authority of the judges of the superior court to adopt rules of practice and procedure, *Appeal of Dattilo*, 72 A.2d 50, 53 (Conn. 1950), and the corresponding inability of the General Assembly to enact procedural legislation. See also *State v. Clemente*, 353 A.2d 723, 731 (Conn. 1974) (holding unconstitutional a statute which required the court to order disclosure of a witness's prior statements at the close of the witness's testimony). *Clemente* has been criticized for the court's assertion of an exclusive inherent rulemaking authority in light of Connecticut's history of significant legislative involvement in this regard. See Kay, *supra* note 34, at 22–23. But, Connecticut's history of legislative hegemony in this area during the nineteenth century and the later assertiveness of the judiciary is not unique. As noted by Professor Kay, the transition in Connecticut from substantial legislative involvement to judicial primacy in rulemaking was a reflection of developments throughout the nation during the same span of time. *Id.* at 27–28. In the early part of the twentieth century, Deans Roscoe Pound and John H. Wigmore led a movement to establish the judiciary, rather than the legislative branch, as the proper source of rulemaking. See Roscoe Pound, *The Rulemaking Power of the Courts*, 12 A.B.A. J. 599, 603 (1926) (arguing against legislative pronouncement of procedural rules and in favor of judicial freedom to prescribe rules); John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 276 (1929) ("[T]he legislature . . . exceeds its constitutional power when it attempts to impose upon the judiciary any rules for the dispatch of the judiciary's duties; and . . . therefore all legislatively declared rules for procedure, civil or criminal, in the courts, are void, except such as are expressly stated in the Constitution." (emphasis removed)). While Professor Kay was critical of the *Clemente* court's view of Connecticut's history regarding rulemaking, it is significant looking forward that, although the court has, since *Clemente*, continued to affirm the proposition that rulemaking belongs to the judiciary, it has also found facially procedural statutes constitutional on the basis that they represent an acceptable overlap in responsibility for the same

presently from adopting a code of evidence, as many other state supreme courts have done.⁸⁹

The adoption of codes of evidence by several state supreme courts and the Connecticut Superior Court in a legislative manner should also put to rest any concerns of whether the Connecticut Supreme Court may adopt a code in this manner. In adopting codes of evidence, supreme courts of other states decided, by necessary implication, that the development of evidence law, at least to large extent, is a proper activity for the judiciary, and that evidence law could be promulgated as rules in a legislative-style process and not only through adjudication.

VIII. COURTS ACTING IN A LEGISLATIVE MANNER

While deciding cases is the core function of the judiciary, judicial activity also includes rulemaking and judicial administration.⁹⁰ As we

subject area. For instance, in a case dealing with statutes relating to the transfer of certain cases from the juvenile docket to the regular docket of the superior court, the appellate court stated:

In the present case, the respondent challenges the constitutionality of §§ 46b-127 and 54-46a (b) because their provisions require the trial court to deny any motion for discovery in connection with a transfer hearing, except motions to discover exculpatory information. These statutory provisions do not control or limit the judiciary's discretion in discovery matters to the same extent as the statute in *Clemente* because they apply only to a preliminary stage of the proceedings and have been held constitutional.

In re Jonathan M., 700 A.2d 1370, 1376 (Conn. App. 1997), *cert. denied*, 701 A.2d 661 (Conn. 1997); *see also* *Bartholomew v. Schweizer*, 587 A.2d 1014, 1018 (Conn. 1991) (declining to find a statute regarding closing argument during trial unconstitutional even though it bore directly on the trial process). The court commented:

In the context of challenges to statutes whose constitutional infirmity is claimed to flow from impermissible intrusion upon the judicial power, we have refused to find constitutional impropriety in a statute simply because it affects the judicial function. . . . A statute violates the constitutional mandate for a separate judicial magistracy only if it represents an effort by the legislature to exercise a power which lies exclusively under the control of the courts . . . or if it establishes a significant interference with the orderly conduct of the Superior Court's judicial functions.

Id. at 1017 (internal citations omitted) (internal quotation marks omitted). In an even more deferential expression of the same principle, the supreme court a year later, in *Bleau v. Ward*, when dealing with the statute regarding the right of counsel in a civil action seeking a specific amount of damages from the jury, observed that "[i]t is only when compliance with § 52-216b would require a trial court to disregard its constitutional obligation to guarantee a fair trial to the litigants that the statutory mandate may be deemed to be superseded by that higher law." 603 A.2d 1147, 1150 (Conn. 1992).

⁸⁹ *See supra* note 73 and accompanying text. Indeed, if a higher court's authority to adopt rules for lower courts flows from the organic nature of the court itself, the fact that Connecticut's supreme court has not traditionally adopted rules in a legislative manner may be a reflection on tradition but not on the court's essential authority.

⁹⁰ In *O'Coin's, Inc. v. Treasurer of the County of Worcester*, the Massachusetts Supreme Judicial Court stated: "[I]mplicit in the constitutional grant of judicial power is 'authority *necessary* to the exercise of . . . [that] power'. . . . [That] authority is not limited to adjudication, but includes certain ancillary functions, such as rule-making and judicial administration, which are essential if the courts are to carry out their constitutional mandate." 287 N.E.2d 608, 611 (Mass. 1972) (quoting *Op. of the Justices*, 180 N.E. 725, 727 (Mass. 1932)). Citing *O'Coin's* with approval, the Washington Supreme Court observed:

[T]he judicial function extends beyond the determination of questions in controversy

have seen, nearly all the states' highest courts have adopted rules of practice and procedure for trial courts, including the rules of evidence, through a legislative-type rulemaking process.⁹¹ And, because courts act legislatively when adopting rules, this activity does not run afoul of the prohibition against courts rendering advisory opinions in their adjudicatory role.⁹² Support for this conclusion can be found in the U.S. Supreme Court's adoption of rules of practice and procedure for appeals on its docket in spite of its traditionally rigid adherence to the case and controversy limitation set forth in Article III of the Constitution.⁹³ These rules could not properly be promulgated by the Court if it believed that the constitutional case and controversy limitation precluded it from promulgating rules in a legislative manner untethered to a pending appeal.

There is, however, a corollary to the proposition that the promulgation of rules by a court acting in a legislative capacity does not violate the case and controversy limitation or analogous state limitations on rendering

and includes functions necessary or incidental to the adjudicative role. A court's authority "is not limited to adjudication, but includes certain ancillary functions, such as and judicial administration, which are essential if the courts are to carry out their constitutional mandate." This overlapping of functions allows for the scheme of checks and balances which . . . evolved side-by-side with and in response to the separation of powers concept.

In re Salary of Juvenile Dir., 552 P.2d 163, 169 (Wash. 1976) (internal citations omitted). Also explicitly agreeing with *O'Coin*'s, the Mississippi Supreme Court commented that its inherent power to ensure the fair administration of justice may be invoked "through the adjudication of cases, the promulgation of rules, or the development of internal management practices." *Tighe v. Crosthwait*, 665 So. 2d 1341, 1347 (Miss. 1995). For an examination of the sources of rulemaking authority in Mississippi and how other states have dealt with the tension between legislative and judicial rulemaking powers, see generally F. Keith Ball, Comment, *The Limits of the Mississippi Supreme Court's Rule-Making Authority*, 60 Miss. L.J. 359 (1990).

⁹¹ See *supra* notes 34 and 73 and accompanying text.

⁹² It should be noted that the Case and Controversy Clause in Article III of the U.S. Constitution pertains to the court's decisional function and operates as a limitation on the exercise of jurisdiction by federal courts and not state courts. *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952). Also, in *Asarco Inc. v. Kadish*, Justice Kennedy, writing for the Court, noted: "We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability . . ." 490 U.S. 605, 617 (1989). For the proposition that the case and controversy limitation is a prohibition against giving advisory opinions, see *Richardson v. Ramirez*, 418 U.S. 24, 59 (1974) (Marshall, J., dissenting) (quoting *Herb v. Pitcairn*, 324 U.S. 117, 125–26 (1945)), and *McGrath v. Kristensen*, 340 U.S. 162, 167 & n.6 (1950). In some states, the constitution expressly permits or mandates the issuance of advisory opinions in specified circumstances, and where it has arisen, courts have generally been very careful not to expand the power or mandate beyond its stated confines. *E.g.*, *Town of Cedar Bluff v. Citizens Caring for Children*, 904 So. 2d 1253, 1255 (Ala. 2004); *Op. of the Justices*, 396 A.2d 219, 223 (Me. 1979); *Answer of the Justices to the Governor*, 829 N.E.2d 1111, 1113 (Mass. 2005); *Chiropractic Council v. Comm'r of the Office of Fin. & Ins. Servs.*, 716 N.W.2d 561, 577 (Mich. 2006) (Markman, J., concurring in part and dissenting in part); *Sullivan v. Chafee*, 703 A.2d 748, 752 & n.5 (R.I. 1997). Nevertheless, even without a specific constitutional limitation akin to Article III of the federal Constitution, many state courts have adopted such a limitation on separation and balance of powers principles. Connecticut follows this path. See, *e.g.*, *Domestic Violence Servs. of Greater New Haven v. Freedom of Info. Comm'n*, 688 A.2d 314, 317 (Conn. 1997) ("We have consistently held that we do not render advisory opinions.").

⁹³ See generally SUP. CT. R. 13.5, 25.2–25.3, 29.2–29.3, 30.2, 32, 39.2, 44.6 (revised 2003).

advisory opinions. If rulemaking does not involve the determination of a party's rights or responsibilities in the context of a specific dispute, a court may not be constrained by the rule when adjudicating an actual controversy involving the application of the rule. While there are not many cases in which courts have confronted this question, some courts, including the U.S. Supreme Court, have determined that a rule promulgated by the court is not invariably binding on the court when it is later confronting an actual case and controversy. The U.S. Supreme Court considered this issue in *United States v. Ohio Power Co.*⁹⁴ There, the Court was confronted with a petition that was untimely in accordance with the requirement of rules it had adopted for the prosecution of appeals. In a closely contested vote, the Court decided to entertain the petition on the basis that "finality of litigation must yield where the interests of justice would make unfair the strict application of our rules."⁹⁵ Justice Harlan, joined by Justices Frankfurter and Burton, dissented on prudential grounds and not on the basis that the Court's promulgation of a rule limiting the time for bringing such an appeal prevented it from hearing the case.⁹⁶

Similar to the *Ohio Power* majority, the New York State Court of Appeals has stated:

The adoption of the rule in question by the Judges of this Court acting in their administrative capacity does not preclude them from deciding, in their adjudicatory capacity, a subsequent case challenging the validity of the rule. The exercise of the Court's rule-making power does not carry with it a decision that the amended rules are all constitutional. For such a decision would be the equivalent of an advisory opinion which . . . we are without constitutional power to give. The fact is that our promulgation of the rule is not a prior determination that it is valid and constitutional. That determination must await the adjudication in this or a future case.⁹⁷

While the New York Court of Appeals case dealt with an

⁹⁴ 353 U.S. 98 (1957).

⁹⁵ *Id.* at 99.

⁹⁶ In dissent, Justice Harlan commented:

To my way of thinking, it would be preferable to meet this problem by adding to our Rules, rather than by making *ad hoc* exceptions to Rule 58. The latter course, I fear, is bound to lead to the sort of thing that has happened in this case, leaving litigants in uncertainty as to when they may safely consider their cases closed in this Court.

Id. at 104 n.13 (Harlan, J., dissenting). For other instances in which the Court appears to have overridden a rule of its own making in order to accommodate the interests of justice, see *Flast v. Cohen*, 392 U.S. 83, 92-94, 104-06 (1968) and *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25, 26-27 (1965).

⁹⁷ *In re N.Y. State Ass'n of Criminal Def. Lawyers v. Kaye*, 744 N.E.2d 123, 127 (N.Y. 2000) (internal citations omitted) (internal quotation marks omitted).

administrative order regarding payment of counsel fees in certain types of cases, the Supreme Court of Texas faced an analogous situation in a case involving the court's supervision of the bar. In responding to a claim regarding an administrative rule, the court commented:

Hopefully, this Court does not abandon its collective knowledge of the Constitution when it exercises its rule-making authority, and surely it would not knowingly promulgate any rule it regarded as violating the United States or Texas Constitutions. However, we are not omniscient. It is simply beyond the capacity of this or any other court to envision every possible constitutional ramification or factual application of its orders or rules, particularly before it has the benefit of a case and controversy that vigorously explores both sides of the issues.⁹⁸

Although cases dealing with the assessment of administrative rules are illuminating for the distinction they draw between the court's adjudicative and administrative functions, their reasoning may not be directly applicable to the court's review of judicially-legislated evidentiary rules because, unlike administrative rules that bear on the judicial system, rules of evidence relate directly to the trial process. For that reason, perhaps, courts have appeared less likely to ignore or override evidentiary rules in the course of deciding cases. For example, in Maryland, where the state's highest court had adopted rules of evidence through a legislative-type process, the court faced a request in a criminal appeal to expand its rule of evidence pertaining to uncharged sexual misconduct to permit propensity evidence.⁹⁹ In response, the court commented:

The plain language of Md. Rule 5-404(b) does not permit the admissibility of propensity evidence. . . . If the Maryland Rule is to be "expanded" in its scope, there is an established process to be followed. That is by action of this Court sitting in its legislative capacity, not by judicial fiat.¹⁰⁰

⁹⁸ *State Bar of Texas v. Gomez*, 891 S.W.2d 243, 249–50 (Tex. 1994). To the same effect, see *Scheehle v. Justices of the Supreme Court*, which involved a rule requiring service by attorneys as arbitrators. There, the Supreme Court of Arizona noted: "Our adoption of a rule does not constitute a prior determination that the rule is valid and constitutional against any challenge. . . . Such a determination awaits a judicial proceeding in which opposing interests are provided a full opportunity to be heard." *Scheehle v. Justices of the Ariz. Supreme Court*, 120 P.3d 1092, 1108 (Ariz. 2005).

⁹⁹ *Hurst v. State*, 929 A.2d 157, 160–61 (Md. 2007).

¹⁰⁰ *Id.* at 168. The issue on appeal in *Hurst* regarding uncharged prior misconduct has parallels to *State v. DeJesus*. One cannot glean from *DeJesus* whether the court would have been as willing to vary

Other states appear to have taken this approach as a matter of prudence and deference to the evidence rulemaking process. For example, in *State v. Nicholas H.*,¹⁰¹ the New Hampshire Supreme Court reversed a conviction on the basis that the trial court had admitted hearsay evidence in a juvenile transfer hearing in violation of the applicable rule of evidence.¹⁰² While the court, on review, made no change to the rule under scrutiny, the rule was subsequently amended through a legislative-type rulemaking process to permit the kind of hearsay disallowed in *Nicholas H.*¹⁰³ Showing equal deference to its rulemaking process, the North Dakota Supreme Court declined the invitation to adopt the *Daubert* rule regarding the admissibility of expert testimony in the context of litigation.¹⁰⁴ In *State v. Hernandez*, the court commented: “This Court has a formal process for adopting procedural rules after appropriate study and recommendation by the Joint Procedure Committee, and we decline Hernandez’s invitation to adopt *Daubert* by judicial decision.”¹⁰⁵

To similar effect, the Texas Court of Criminal Appeals, in refusing to adopt a rule—regarding past misconduct—contrary to established common law and to its rules of evidence stated:

Other than demonstrating that our current case law might be “wrong,” the State advances no reasons for disregarding principles of *stare decisis*. With these considerations in mind, this case presents a scenario where it is probably “better to be consistent than right.” Any changes in current law should come via amendment to the Texas Rules of Evidence or by legislative enactment.¹⁰⁶

The Wisconsin Supreme Court, as well, appears to follow this prudential route. In responding to a suggestion that a particular rule be changed and applied to the appeal at hand, the court responded: “We have traditionally construed our superintending power broadly as authority to control litigation in the courts. Our superintending authority, however, is not lightly invoked. This court ordinarily has refused to modify rules of practice or procedure on appeal.”¹⁰⁷

the rule if the rule had been its own making; nor is it possible to discern from *Hurst* whether that court would have been equally reticent if the rule had been made by a lower court.

¹⁰¹ 560 A.2d 1156 (N.H. 1989).

¹⁰² *Id.* at 1158.

¹⁰³ *In re Eduardo L.*, 621 A.2d 923, 930 (N.H. 1993).

¹⁰⁴ *State v. Hernandez*, 707 N.W.2d 449, 453 (N.D. 2005) (discussing *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993)).

¹⁰⁵ *Id.*

¹⁰⁶ *Robbins v. State*, 88 S.W.3d 256, 261 (Tex. Crim. App. 2002) (quoting *Awadelkariem v. State*, 974 S.W.2d 721, 725 (Tex. Crim. App. 1998)). It should be noted that here the court upheld the trial court’s admission of the disputed testimony on other grounds rendering this language surplus to the case at hand. *Id.* at 266.

¹⁰⁷ *State v. Shaefer*, 746 N.W.2d 457, 490 (Wis. 2008) (footnotes omitted).

Finally, in regard to judicial deference to its rulemaking function, the Vermont Supreme Court has stated, in dicta, that any considerations of changing the law regarding the applicability of the patient privilege to involuntary guardianship proceedings “are appropriate for consideration by Vermont’s Advisory Committee on Rules of Evidence.”¹⁰⁸

A different approach was taken by the Michigan Supreme Court in conjunction with its adoption of rules in 1978. There, the court’s adopting order included this language preserving its common law evidence-making role: “In adopting these rules, the Court should not be understood as foreclosing consideration of a challenge to the wisdom, validity or meaning of a rule when a question is brought to the Court judicially or by a proposal for a change in a rule.”¹⁰⁹

In spite of this language, it appears that, as a matter of prudence, the Michigan court has declined to stray from a rule in deciding an appeal. In *Lichon v. American Universal Insurance Co.*, the issue involved a rule of evidence regarding the use of a nolo contendere plea in a criminal action in subsequent litigation.¹¹⁰ In asserting its adherence to the rule, the court observed:

The public interest might be served better by a rule that prevents an individual who pled nolo contendere to criminal charges from excluding evidence of that plea in an action in which the pleader seeks to establish some entitlement arising out of the crime of which the pleader was convicted. Such a rule, however, would be different from [the] current rules Such a change in the law would be more properly accomplished through our administrative powers to amend the Rules of Evidence, because the administrative process gives us greater opportunity to deliberate the effects of such a change and to gather input from the public, the bench, and the bar.¹¹¹

With an obviously different point of view in Mississippi, where the state supreme court adopted the rules of evidence,¹¹² the court has

¹⁰⁸ *In re Guardianship of S.C.*, 768 A.2d 1290, 1291 (Vt. 2001). Since the appeal was dismissed as moot, however, one cannot be completely certain that the court’s comment reflects deference to its rulemaking process or if it was simply a refusal to give an advisory opinion.

¹⁰⁹ See MICH. R. EVID. (1978); see also MINN. R. EVID. §§ 101–102 & historical notes (West 2006) (reserving the common law power to refine evidentiary standards through case law).

¹¹⁰ *Lichon v. Am. Universal Ins. Co.*, 459 N.W.2d 288, 290 (Mich. 1990).

¹¹¹ *Id.* at 297.

¹¹² See, e.g., *Mitchell v. State*, 539 So. 2d 1366, 1371 (Miss. 1989) (stating that the court’s “inherent rule-making authority to regulate practice and procedure within the Judicial Branch has long been recognized” by the Order Adopting Mississippi Rules of Evidence dated September 24, 1985).

exercised the right to amend the rules in a decisional context.¹¹³ And, in *Fisher v. State*,¹¹⁴ where the court was dealing with the assertion of a spousal testimonial privilege, as provided by Mississippi's rules of evidence, the court reversed the defendant's capital rape conviction because evidence had been adduced at trial in violation of an applicable rule.¹¹⁵ Within the contents of the opinion, however, the court prospectively amended the pertinent rule to create certain exceptions to the spousal privilege rule, which, if in place at the time of the occurrence at hand, would have made the evidence under scrutiny admissible.¹¹⁶

It thus appears that, although some state supreme courts that have legislatively adopted codes of evidence have expressly reserved a continuing common law right to affect evidentiary law in the decisional process, and other courts have suggested the existence of that right, nearly all courts have, nevertheless, declined to exercise this authority in the context of judicial review of lower court judgments.

IX. BRANCH HARMONY AND INTERBRANCH COMITY

Even if a state's highest court retains the right to change code-made evidence law through adjudication, it would, nevertheless, be beneficial for the Connecticut Supreme Court to re-adopt the Code of Evidence. Adoption of the code, particularly in consort with the General Assembly, would put to rest any doubt that the code is, in fact, a binding set of rules. Since its promulgation in 2000 by the judges of the superior court, the CCE has served the useful function of being the repository of evidence law that relates, primarily, to judicial process. After *State v. DeJesus*, however, its continued viability as a reliable source of definitive law is suspect because the superior court is subject to the supervision of the supreme court.

As the *DeJesus* court observed, scholars had noted, before the adoption of the Code, that "the law of evidence applied in Connecticut courts was found [solely] in decisions and rules of the court and in enactments of the legislature."¹¹⁷ The court also cited with approval a statement in an earlier report of the Judiciary that, before the adoption of the Code, "[d]isputes about evidentiary rules [contributed] to time consuming arguments both at the trial court level and on appeals."¹¹⁸ A review of appellate decisions

¹¹³ See MISS. CONST. art. 6, § 144; *Hall v. State*, 539 So. 2d 1338, 1345–46 (Miss. 1989); *Hudspeth v. State Highway Comm'n*, 534 So. 2d 210, 213 (Miss. 1988).

¹¹⁴ *Fisher v. State*, 690 So. 2d 268 (Miss. 1996).

¹¹⁵ *Id.* at 269.

¹¹⁶ *Id.* at 269, 274–75.

¹¹⁷ *State v. DeJesus*, 953 A.2d 45, 63–64 (Conn. 2008) (alteration in original) (quoting COLIN TAIT & HON. ELIOT D. PRESCOTT, TAIT'S HANDBOOK OF CONNECTICUT EVIDENCE xlix (4th ed. 2008)).

¹¹⁸ *Id.* at 64 (alterations in original) (quoting CONN. JUD. DEP'T, 1982–1984 BIENNIAL REPORT 57 (1984)).

since 2000 demonstrates that the Code's availability to the bench and the bar has proven to be beneficial.¹¹⁹

As a result of the uncertainty following *DeJesus* regarding the continued viability of the CCE, the General Assembly has shown new interest in adopting the Code, even though before *DeJesus* the judicial and legislative branches of Connecticut's government had not experienced interbranch uncertainty in dealing with the Code's promulgation.¹²⁰ As has been noted, most states have resolved the debate over whether the judiciary or the legislature should have primary responsibility for the development of evidence law through the adoption of judicially-fashioned codes of evidence, often with the specific approbation of state legislatures.¹²¹ This phenomenon represents tacit acknowledgment that judges, often with the support of advisory committees comprised of lawyers and judges, are in an optimum position to make and amend the evidentiary rules that guide the trial process. While the *DeJesus* opinion may provide an impetus for the supreme court, rather than the superior court, to bear responsibility for the Code, there is no basis in the reasoning of *DeJesus* for altering the judicial branch's primary responsibility in this regard.

To be sure, in the growth and development of the Code of Evidence by rulemaking, the judiciary must be mindful to avoid areas of evidence law that have traditionally been the subject of legislation. To the extent feasible, the Code should consist of rules that are purely procedural except where the Code incorporates common law changes in the law of evidence. And, to the extent the Code includes rules whose genesis is in legislation,

¹¹⁹ One manifestation of the utility of the CCE is evident in the frequency of its usage in judicial decision-making. Since the CCE's adoption in 2000, 332 state appellate and supreme court opinions have cited its rules. See www.loislaw.com (follow "Case Law" hyperlink; then follow "Connecticut Appellate Decisions" hyperlink and search for "code of evidence") (last visited Sept. 22, 2010) (subtracting the number of cases referencing the model code of evidence from the gross search results to arrive at 322).

¹²⁰ Judiciary Committee Co-Chairperson Andrew McDonald questioned Justice Richard Palmer during the public hearing on Justice Palmer's reappointment to the supreme court, and raised the topic of the "healthy tension" between the legislature and the judicial branch regarding rules of practice and rules of evidence:

I've had the chance to ask some questions of Justice Zarella when he was here about the issue. And it seems pretty clear that the legislature has the authority to adopt statutes—or pass statutes that impact on evidentiary issues and, perhaps, even adopting an entire code of evidence as a legislative matter. I guess if that is true—and let's accept that as true for a moment—in your mind, is there a distinction between the authority of the legislature to adopt rules of evidence and the authority of the legislature to adopt rules of practice or to be involved in the rules of practice within the court system?

Conn. Gen. Assemb., Judiciary Comm. Hearing Transcript for Feb. 2, 2009, available at <http://search.cga.state.ct.us/> (last visited Sept. 23, 2010); see also Conn. Gen. Assemb., Judiciary Comm. Hearing Transcript for Jan. 28, 2009, available at <http://search.cga.state.ct.us/> (last visited Sept. 23, 2010) (concerning the reappointment of Justice Joette Katz to the Connecticut Supreme Court, in which Committee Chairperson McDonald engaged in a conversation with Justice Katz regarding whether it would be prudent for the General Assembly to adopt the CCE).

¹²¹ See *supra* note 73 and accompanying text.

the Code should mirror those statutes unless it is absolutely clear that such rules have no implication for substantive rights and it is mandatory, for the integrity of the judiciary, that such rules be adopted.¹²² The experience with the Code to date demonstrates that its overseers have shown a sensitivity to the limitations of a judicially-promulgated code and a concomitant deference to the legislative branch in those areas of evidence law that have typically been the subject of legislation. There is no reason to believe this attitude of cooperation would change with the assumption of responsibility for the Code by the Connecticut Supreme Court.

To the contrary, adoption and maintenance of the CCE by the supreme court is likely to ensure stability in the law and its orderly development. As noted, when the judges of the superior court adopted the code, the Evidence Oversight Committee—comprised of judges and lawyers—formed for the purpose of monitoring the law of evidence by periodically updating the Code and making recommendations to the judges of the superior court regarding the development of the law of evidence. As a consequence of *DeJesus*, the committee's role in the development of the law of evidence has been narrowed to updating the Code in accordance with appellate decisions and legislation. To the extent the committee believed it was also responsible for making recommendations regarding changes in the common law, *DeJesus* has made it clear that the supreme court does not look to the trial bench to enact rules inconsistent with its decisional law. And yet, one benefit of having a code is that the law may grow and develop in a thoughtful, inclusive process not dependent on the existence of a case whose particular facts may not make the law amendable to a beneficial change. If the supreme court were to re-adopt the CCE, it would have the ultimate authority to determine whether to accept or reject any recommendations of the Evidence Oversight Committee. The history of other state supreme courts' deferential treatment of their own evidentiary rules in the context of appellate review is reason for the bench and bar to be reasonably confident that the Connecticut Supreme Court would follow a similar path and defer to its rulemaking process if asked, in the context of litigation, to alter a particular rule. Additionally, the transfer

¹²² It is clear from a cursory review of the contents of the Connecticut Code of Evidence that it mostly follows this course. The Code largely consists of rules to ensure a fair and efficient judicial process and avoids subjects more traditionally addressed in legislation. Where the Code includes provisions that mirror statutes, an appropriate notation is made. In this regard, it is noteworthy that even though the Code has chapter headings for "Presumptions" and "Privileges," these chapters contain similar notations that, in the case of presumptions, the law "shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience" and, in the case of privileges, they are to "be governed by the principles of common law." CONN. EVID. CODE §§ 3-1, 5-1. There are a few rules in the Code that also exist as legislative enactments. In such cases, the rules appear as verbatim recitations of the corresponding legislation. See, for example, section 4-11, "Admissibility of Evidence of Sexual Conduct," which restates the language of Connecticut's Rape Shield Statute. *Id.* § 4-11 (quoting CONN. GEN. STAT. § 54-86f (2009)).

of authority from the superior court to the supreme court for the responsibility for the Code would in no way diminish the legislature's authority to enact evidence laws that flow from public interest and need.

X. CONCLUSION

By their very nature, courts have the inherent authority to promulgate rules of practice and procedure, including rules of evidence. As a matter of comity, motivated by ideals of balance of power, a court should act unilaterally in asserting its control over the law of evidence only when it is necessary to its proper functioning. Since the law of evidence bridges both court procedure and public interests, the development of this law, as a shared responsibility, presents an opportunity for interbranch cooperation.¹²³ While there may be efficiencies in having all of the law of evidence congregated in one judicially-promulgated and developed code, the legislature continues to have the right and responsibility to enact evidence laws reflecting public interests and policy considerations beyond the orderly functioning of the courts.

Mindful of the legitimate role of the legislature in areas of evidence law reflecting public policy, the judiciary should be reticent to assert as exclusive an inherent authority over the field just as the legislature should be mindful that much of the law of evidence relates, primarily, to judicial processes. In assessing whether particular legislation encroaches on the court's evidence-making function, a 1999 statement of the Michigan Supreme Court serves as a useful guide:

We will not continue mechanically to characterize all statutes that resemble rules of evidence as relating solely to practice and procedure. . . . We instead adopt a more thoughtful analysis that takes into account the undeniable distinction between *procedural* rules of evidence and evidentiary rules of substantive law. . . .

We conclude that a statutory rule of evidence violates Const 1963, art 6, § 5 only when no clear legislative policy reflecting considerations other than judicial dispatch of litigation can be identified.¹²⁴

Cooperation between the legislative and judicial branches in the development of evidence law reduces the likelihood of interbranch friction attendant to unilateral action in this area by either branch. More than

¹²³ The Connecticut Supreme Court implicitly recognized this in *State v. James*: "[T]he rules of evidence, including those relating to the competency of witnesses, have never in this state been regarded as exclusively within the judicial domain." 560 A.2d 426, 430 (1989).

¹²⁴ *McDougall v. Schanz*, 597 N.W.2d 148, 155–56 (Mich. 1999) (internal citations omitted) (internal quotation marks omitted).

seventy years ago, one commentator observed, in support of judicial adoption of rules in cooperation with the legislature, that when the court promulgates rules with legislative sanction, "there is a proper balance of powers, and the court and legislature will by experience and decisions mark at least roughly the boundary between what constitutes procedure and what has traditionally been conceived to be exclusively within legislative control."¹²⁵

Twenty-five years ago, in response to a claim that a legislative enactment was an unconstitutional usurpation of a judicial function, then Judge David Borden, later Justice Borden, wrote:

Within the great edifice of our constitution, the rooms assigned to the legislative and judicial magistracies are not always separated by impenetrable walls. Rather, they often open onto each other so that each can accommodate the proper functions of its occupants and can also properly aid the occupants of the neighboring rooms in the proper performance of their functions.¹²⁶

Within the judicial branch, assumption of responsibility by the supreme court for the CCE would improve the orderly development and growth of the law of evidence. Legislative confirmation of the supreme court's authority in this respect would be a clear affirmation of the interbranch harmony our constitution contemplates.

¹²⁵ Silas A. Harris, *The Extent and Use of Rule-Making Authority*, 22 J. AM. JUDICATURE SOC'Y 27, 29 (1938).

¹²⁶ *Fishman v. Middlesex Mut. Assurance Co.*, 494 A.2d 606, 615 (Conn. App. 1985).