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The Connecticut Evidence Code and the Separation of Powers Note

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Note

THE CONNECTICUT EVIDENCE CODE AND THE SEPARATION OF POWERS

AILLA WASSTROM-WELZ

Connecticut enacted its first formal evidence code in 2000. Initially, the rules set forth in the evidence code were understood as binding and not subject to appellate court revision. However, in State v. DeJesus*, a 2008 Connecticut Supreme Court decision, the court held otherwise. The* DeJesus *court interpreted the plain language and history of the code as not intending to bind the appellate courts. The plurality went on, in dicta, to conclude that such a holding was necessary to preserve the constitutionality of the code. The plurality asserted that the superior court judges, in their rulemaking capacity as delegated to them by the legislature, lack the constitutional authority to bind the appellate courts to such a code. This decision is one of several in a line of Connecticut cases raising the question of the extent to which the legislative and judicial branches exert control over state judicial procedure. This Note discusses the four opinions issued in* State v. DeJesus *and examines the ongoing constitutional questions surrounding the separation of powers between these branches and the newly raised question as to the separation of powers within the judicial branch itself.*

NOTE CONTENTS

THE CONNECTICUT EVIDENCE CODE AND THE SEPARATION OF POWERS

AILLA WASSTROM-WELZ*

It is one of the great legacies of the framers of our Federal Constitution . . . that the three branches of government must be separate and independent of one another. But, what will be the instruments of justice? The court structure; their jurisdiction; the number of judges; the sizes of the court houses; the selection of judges; the nature and number of Judicial Department personnel—the responsibility for all these decisions is reposed by our Constitution and the peoples' elected representatives—the Governor and the General Assembly. This is as it should be, for like the other two branches of Government, the Judicial branch exists solely to serve the people . . . . By its very nature . . . it is to a far greater degree than the other two branches, cloaked in an aura of majesty and mystery to the average citizen's eye. Yet, the Judicial branch exists but to serve the needs of the people and to that end it is incumbunt [sic] *upon the peoples' elected representatives to periodically examine the machinery of justice to determine if the people are being served as effectively, as efficiently, as intelligently and compassionately as they have a right to expect of their Judicial branch.*[1]

I. INTRODUCTION

Unlike most state courts, Connecticut courts did not have a formalized evidence code until 2000. With the advent of the Connecticut Evidence Code (the "Evidence Code" or the "Code"), it was thought that all Connecticut courts were bound by these rules, allowing common law changes only when the Code was ambiguous or silent on a particular issue. In 2008, however, the Connecticut Supreme Court held that Connecticut appellate courts were *not* intended to be bound by the Code. The court interpreted the Evidence Code's stated purpose—"to promote the growth and development of [evidence law] through interpretation of the Code and through judicial rule making"—as ambiguous, and so turned to the Code's

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* Saint Michael's College, B.A. 2003; University of Connecticut School of Law, J.D. Candidate 2010. I would like to thank Professor Richard Kay for his thoughtful comments and guidance throughout the writing process. I also wish to thank my colleagues at *Connecticut Law Review* for their hard work and insight. This Note is dedicated to my mother, Susan Wasstrom, whose endless support, encouragement, and pursuit of justice led me to the study of law.

[1] *Connecticut Commission to Study and Draft Legislation for the Reorganization and Unification of the Courts: Hearing Before the Commission to Study the Reorganization and Unification of the Courts* 100–01 (1973) (statement of Peter Cashman, Lieutenant Governor, Connecticut).

history to reach their decision.[2] This history persuaded the court that the Evidence Code did not divest the appellate courts of the common law power to make evidence rules. The court went on to conclude that such an interpretation was necessary to avoid any constitutional impediments.

Part II of this Note examines the history of the Connecticut Evidence Code—the drafting process, promulgation, and initial judicial dicta on its binding quality. Part III provides a detailed statement of the reasoning of the plurality opinion in *State v. DeJesus*,[3] as well as the two concurring opinions and the sole dissenting opinion. Part IV focuses on the constitutional questions raised in the various opinions—specifically, the proposition that the essential functions of the constitutional courts were frozen in 1818. Finally, Part V discusses the effects of *DeJesus* and possible legislative responses.

II. HISTORY OF CONNECTICUT'S CODE OF EVIDENCE

A. *The Drafting and Approval of a Code of Evidence*

In 1999, the judges of the Connecticut Superior Court adopted a formal evidence code to be effective in 2000.[4] Prior to the Code's adoption, practitioners, judges, and parties relied on the common law, statutes, and an informal non-authoritative handbook to determine the rules of evidence. "The rationale for having a Code of Evidence [was] that it [would] be easier and more efficient for all of the relevant actors in the litigation process . . . to have a code, stated in concise and familiar 'black letter' form, to which to refer."[5]

In her 1984 biennial report, Connecticut Supreme Court Chief Justice Ellen Peters suggested that the General Assembly draft and enact a formal code of evidence.[6] Seven years later, the co-chair of the legislative Judiciary Committee initiated the code drafting process by asking the Law Revision Commission to research and draft a code of evidence.[7] A committee, consisting of attorneys, judges, and legislators, met monthly for four years to draft the Code.[8]

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[2] State v. DeJesus, 953 A.2d 45, 62 (Conn. 2008) (quoting CONN. CODE EVID. § 1-2 (2008)).

[3] 953 A.2d 45 (Conn. 2008).

[4] CONN. CODE EVID. foreword (2008).

[5] Justice David M. Borden, *The New Code of Evidence: A (Very) Brief Introduction and Overview*, 73 CONN. B.J. 210, 212 (1999).

[6] COLIN C. TAIT & ELIOT D. PRESCOTT, TAIT'S HANDBOOK OF CONNECTICUT EVIDENCE 6 (4th ed. 2008). After the Federal Rules of Evidence were enacted in 1975, several states followed and adopted their own procedural codes similar in form. By 2000, when Connecticut adopted its first evidence code, forty-one states had adopted rules of evidence "patterned on the Federal Rules." JACK B. WEINSTEIN & MARGARET A. BERGER, 6 WEINSTEIN'S FEDERAL EVIDENCE T-1 (Joseph M. McLaughlin ed., 2d ed. 2009).

[7] TAIT & PRESCOTT, *supra* note 6, at 6.

[8] The initial committee of the Law Revision Commission consisted of the following members:

The committee codified the existing evidence law rather than reforming it.[9] In the few instances where Connecticut common law was silent, prevailing nationwide evidence law was used to fill the gaps.[10] Although the Federal Rules of Evidence were loosely consistent with Connecticut common law, the committee decided against the wholesale adoption of the federal rules because the number of Connecticut lawyers practicing in federal courts did not justify "requir[ing] the bench and bar to learn a whole new evidentiary vocabulary."[11]

The committee also chose not to incorporate the many evidence rules from the Connecticut General Statutes into the Code.[12] These statutes were deemed "incomplete" and "inconsistent," thus requiring substantive reform beyond the scope of the initial rules promulgation.[13] Also, "the committee had no confidence that it could find all such statutes and to purport that it had done so would be inaccurate and misleading."[14] Later, the Code's drafting was transferred from the legislature to the judiciary, making this consideration irrelevant, as the courts cannot change statutes.[15]

The committee submitted the draft for public hearing, revisions were made, and the final draft of the Code and commentary was sent to the Law Revision Commission. The Commission adopted the Code, without further revisions, and sent it to the General Assembly for final approval in 1997.[16] The draft, however, never reached the floor of the General Assembly. Instead, on March 3, 1998, the co-chairs of the Judiciary Committee sent a letter to then Chief Justice Callahan requesting that the judicial branch, not the legislature, publish the Code as rules of court,

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Professor Chair: Connecticut Supreme Court Justice David M. Borden; Professor Colin C. Tait, University of Connecticut School of Law; Connecticut Supreme Court Justice Joette Katz; Connecticut Superior Court Judges Julia L. Aurigemma, Samuel Freed, and Joseph Q. Koletsky; Attorneys Robert Adelman, Jeffrey Apuzzo, Joseph Bruckman, William Dow III, David Elliot, Susann E. Gill, Donald Holtman, Houston Lowry, Jane Scholl, and Eric Wiechmann; Attorney Rick Taff, Legislative Commissioner's Office; Representative Arthur O'Neill and Judge Elliot Solomon, Law Revision Commission; Senator Thomas Upson; and Attorneys Jon FitzGerald, Eric Levine, and Jo Roberts, Law Revision Commission. Borden, *supra* note 5, at 210–11.

[9] TAIT & PRESCOTT, *supra* note 6, at 7.

[10] Borden, *supra* note 5, at 213–14. For example, there existed no rule at Connecticut common law resolving the issue of whether preliminary factual determinations regarding the admissibility of evidence are subject to the rules of evidence. The Commission turned to the Federal Rules of Evidence, the Uniform Rules of Evidence, and other learned evidence sources to find and apply the "generally . . . prevailing view." CONN. CODE EVID. § 1-1 cmt., at 2 (2008).

[11] Borden, *supra* note 5, at 214.

[12] *See, e.g.*, CONN. GEN. STAT. § 52-180 (2009) (stating the rules for the admissibility of business records); *Id.* § 52-146b (2009) (explaining that communications to clergymen are privileged and cannot be disclosed in civil or criminal cases); *Id.* § 52-180a (2009) (stating the rules for the admissibility of out of state hospital records); *Id.* § 52-184a (2009) (stating the rules for the inadmissibility of evidence obtained by electronic device).

[13] TAIT & PRESCOTT, *supra* note 6, at 7.

[14] *Id.*

[15] *Id.* at 7–8.

[16] *Id.* at 8.

similar to the rules of practice.[17] The co-chairs proposed that the Code be adopted pursuant to the rulemaking authority of the judiciary. The letter explained that judicial control was best, as it would isolate the Code from politically-motivated rule changes, be "responsive to judicial concerns," and simplify the amendment process by removing the more time-consuming restraints of the legislative process.[18]

Following this request, Chief Justice Callahan appointed a committee to draft and publish a judicial code of evidence.[19] This committee made minor changes to the legislative committee's draft and the Code was sent to the Rules Committee of the Connecticut Superior Court where it was unanimously approved. A public hearing was held, followed by a vote of the Connecticut Superior Court judges, who unanimously approved the Code on June 28, 1999, to be effective January 1, 2000. The judges of the superior court formally adopted the commentary to the Code as well. The case law cited in the commentary clarifies the meaning of the rules; consequently, the Code cannot be understood properly without the commentary.[20]

B. State v. Sawyer*: The Code in Question—Final and Binding?*

In *State v. Sawyer*, the defendant was charged and found guilty in the superior court on all counts of sexual assault.[21] The State submitted evidence of the defendant's past uncharged sexual misconduct and argued that the evidence was admissible under the common plan or scheme and identity exceptions to the character evidence bar[22] in section 4-5 of the Evidence Code which reads:

> Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character or criminal tendencies of that person. . . . Evidence of other crimes,

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[17] *Id.* at 8; Borden, *supra* note 5, at 211.

[18] *See* TAIT & PRESCOTT, *supra* note 6, at 8–9 ("We . . . believe that the code would more appropriately be promulgated as rules of court rather than as legislation of the Connecticut General Assembly. The code reflects existing court-made law and must, in the future, remain responsive to judicial concerns. We are, therefore, submitting the proposed code for consideration and possible adoption by the Judicial Department."); Borden, *supra* note 5, at 211.

[19] The committee consisted of Connecticut Supreme Court Justice Joette Katz (Chair); Connecticut Appellate Judge Barry R. Schaller; Connecticut Superior Court Judges Thomas A. Bishop, Thomas J. Corradino, Samuel Freed, John Kavanewsky, Jr., Joseph Koletsky, and William B. Rush; Professor Colin C. Tait; and Attorney Eric Levine. *See* TAIT & PRESCOTT, *supra* note 6, at 9–10; Borden, *supra* note 5, at 211.

[20] Borden, *supra* note 5, at 211–13.

[21] State v. Sawyer, 904 A.2d 101, 104 (Conn. 2006), *overruled by* State v. DeJesus, 953 A.2d 45, 68 (Conn. 2008). In *Sawyer*, the defendant was charged with violating Connecticut General Statutes sections 53a-70(a)(1) (sexual assault in the first degree); 53a-72(a)(1)(A)–(B) (sexual assault in the third degree); 52a-62(a)(1) (threatening); 53a-63(a) (reckless endangerment); and 53a-101(a)(1) (burglary in the first degree). *Id.* at 105.

[22] *Id.* at 106.

> 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.[23]

Over the defendant's objection, the trial court allowed the evidence. It found the exception applicable in light of the similarly situated victims.[24] The appellate court affirmed,[25] but the Connecticut Supreme Court reversed, holding that the similarities between the cases were insufficient to show identity because they did not adequately demonstrate a signature crime.[26]

Most relevant to this Note is the first footnote of *Sawyer*, which precedes even the opening sentence of the decision. Following oral argument, the supreme court requested supplemental briefings and arguments from the parties on two issues: first, whether the court should liberalize the standard for admitting prior evidence of sexual misconduct; and second, whether the supreme court would be allowed to do so under the Evidence Code.[27] Writing for the majority, Justice Zarella asserted that the first issue should not be decided on the basis of ripeness as the facts presented did not warrant a change to the admissibility standard.[28] The majority did not stop there, but went on to comment that while the superior court judges, through their rulemaking function, were the proper body to change the rules of evidence, the supreme court had a historic common law power to resolve substantive evidentiary questions. Specifically, Justice Zarella asserted:

> 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

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[23] CONN. CODE EVID. § 4-5(a)–(b) (2008).

[24] *Sawyer*, 904 A.2d at 106.

[25] *Id.* at 109.

[26] *Id.* at 111, 113.

[27] *See id.* at 104 n.1 ("(1) 'Should this court determine that, in sexual assault cases, prior misconduct evidence admitted under the common scheme exception is also admissible to prove the identity of the defendant as the perpetrator of the assault on the victim?' (2) 'Should this court reconsider its holdings that, in sexual assault cases, prior sexual misconduct is viewed more liberally than other types of prior misconduct?' (3) '*To what extent, if any, is this court constrained by the Code of Evidence from answering either question 1 or 2 by changing our existing law*?'" (emphasis added) (citations omitted)).

[28] *Id.* at 104.

another day.[29]

This statement opened the door for what was later to come in *State v. DeJesus*.[30]

In her concurring opinion, Justice Katz strongly objected to delaying the response to the second issue—what constraint, if any, does the Evidence Code exert upon the supreme court? Justice Katz concluded that the supreme court *is* constrained by the Code and therefore cannot change the rules of evidence through common law adjudication.[31] In her words, "The Code governs where it speaks, and the courts' common-law rule-making authority [only] governs either where the Code does not speak or where the Code requires interpretation."[32]

Justice Katz, in contrast to Justice Zarella, asserted that the evidence rules in the Code are procedural.[33] She agreed that, where a rule of evidence is constitutionally challenged and substantive rights are at issue, the supreme court retains its authority to review the rule for constitutionality, just as in cases involving statutes or Practice Book rules.[34]

Justice Borden, concurring in part and dissenting in part, also asserted that the supreme court was constrained by the Evidence Code. Justice Borden concluded that the supreme court is limited to applying the black letter law of the Code and interpreting the Code when it is ambiguous.[35] To support this position, he cited the language of the Code itself. Section 1-2(a) of the Code states:

> The purposes of the Code are to adopt Connecticut case law regarding rules of evidence as rules of court and to promote the growth and development of the law of evidence through interpretation of the Code and through judicial rule making to the end that the truth may be ascertained and proceedings justly determined.[36]

Justice Borden also cited the commentary to the Code, which as previously noted, must be read in conjunction with the Code. The commentary to

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[29] *Id*.

[30] 953 A.2d 45, 68–69 (Conn. 2008); *see also infra* Part III.

[31] *Sawyer*, 904 A.2d at 120 (Katz, J., concurring).

[32] *Id.* at 121.

[33] *Id.* In reaching this conclusion, Justice Katz cited two Connecticut appellate decisions that have made this assertion verbatim. State v. Almeda, 560 A.2d 389, 395 (Conn. 1989); Kelehear v. Larcon, Inc., 577 A.2d 746, 749 (Conn. App. 1990).

[34] *Sawyer*, 904 A.2d at 120–21 n.3 (Katz, J., concurring). Justice Katz emphasized that "the Code is essentially an extension of the Practice Book," because like the Practice Book, the Code makes the law uniform and accessible, by providing a compilation of procedural rules that must be reviewed and approved by the rules committee of the superior court. *Id*. at 122.

[35] *Id*. at 124 (Borden, J., dissenting and concurring).

[36] CONN. CODE EVID. § 1-2(a) (2008).

section 1-2(a) reads:

> Case-by-case adjudication is integral to the growth and development of evidentiary law and, thus, *future definition of the Code will be effected primarily through interpretation of the Code and through judicial rule making*. . . . Because the Code was intended to maintain the status quo, i.e., preserve the common-law rules of evidence as they existed prior to adoption of the Code, its adoption is not intended to modify any prior common-law interpretation of the rules.[37]

Justice Borden concluded that, when read together, this language limits Code revisions to the judicial rulemaking process—the Evidence Code oversight committee drafts rule changes and the superior court judges, as a whole, approves such changes. The role of the appellate courts is thus limited; interpretation is only permissible when the Code is silent or unclear.[38] Justice Borden also cited other evidence to emphasize that when the Code was adopted, the judges of the superior court intended to establish a Code that would not be subject to common law changes. Therefore, both the language and intent of the Code bar the appellate courts from changing the rules of evidence unless substantive constitutional rights are violated.[39]

III. *STATE V. DEJESUS*: THE SUPREME COURT TRUMPS THE CODE

In *State v. DeJesus*, the Connecticut Supreme Court answered the question left open in *Sawyer*, holding that the supreme court is not constrained by the Code, but is free to change the rules therein.[40] As in *Sawyer*, the case presented the question of whether the court should change the Code by expanding the exceptions to the admissibility of character evidence.[41] The court obliged, making a new rule allowing character evidence when used to prove the defendant's propensity for aberrant and compulsive sexual behavior. Under such an exception, evidence of past uncharged sexual misconduct is admissible if substantially similar to the facts on trial.[42] In *DeJesus*, the evidence in question was the testimony of a woman claiming to have been sexually assaulted by the defendant. Like

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[37] *Id.* § 1-2(a) cmt. (a) (emphasis added).

[38] *See Sawyer*, 904 A.2d at 125–27 (Borden, J., dissenting and concurring) ("[T]he Code provides the courts with our full panoply of traditional powers in interpreting the Code and our full common-law powers in fashioning new rules of evidence for instances that are not covered by the Code either explicitly or implicitly.").

[39] *See id.* at 124–26 (Borden, J., dissenting and concurring).

[40] 953 A.2d 45, 59 (Conn. 2008).

[41] *Id.* at 48–49. "Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character or criminal tendencies of that person." CONN. CODE EVID. § 4-5(a).

[42] *See DeJesus*, 953 A.2d at 59–60 (adopting an exception to the prohibition of admitting bad character evidence in sexual crime cases when such evidence demonstrates a common scheme or plan).

the victim, she had a learning disability and worked at the same store where the defendant was her manager.[43] For policy reasons, the Court adopted this exception to the propensity rule, though it is not found in the Code.[44]

A. *Plurality Opinion*

Chief Justice Rogers, joined by Justices Norcott and Vertefeuille, advanced two reasons to justify the court's common law departure from the rules in the Code. First, the purpose of creating the Code was to provide a "restatement," not a binding Code.[45] By setting forth black letter law, a "restatement" guides the development of a specific area of law, but is not binding on the courts.[46] In contrast, a "code" is a binding and "complete system of positive law, carefully arranged and officially promulgated; a systematic collection or revision of laws, rules, or regulations."[47]

Second, the plurality's conclusion—that the Code was not intended to bind the appellate courts—was strongly influenced by its doubts about the constitutional power of the superior court to bind, with its rules, the common law authority of the appellate courts.[48] While this constitutional issue is the driving force behind the plurality opinion, the holding itself is not constitutional, but is instead grounded in the laws of statutory construction. When a statute's meaning is plain and unambiguous, courts cannot interpret or construe that statute.[49] However, when "a literal reading places a statute in constitutional jeopardy . . . [courts] are bound to assume that the legislature intended . . . to achieve its purpose in a manner which is both effective and constitutional."[50] Accordingly, courts may apply a judicial gloss and liberally interpret otherwise plain and unambiguous but constitutionally suspect statutes.[51] Following this tenet of statutory construction, the plurality in *DeJesus* broadly interpreted the plain language and intent of the drafters to alter but maintain the Evidence Code, and only addressed the constitutional question in dicta.[52]

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[43] *Id.* at 50–51.

[44] *See id.* at 76 (supplying two policy based arguments: first, that sex crimes are committed in private locations where neutral witnesses are not likely to be present; and second, because sex crimes are "of the unusually aberrant and pathological nature . . . [so past acts] are deemed to be highly probative because they tend to establish a necessary motive or explanation for an otherwise inexplicably horrible crime").

[45] *Id.* at 68.

[46] BLACK'S LAW DICTIONARY 1428 (9th ed. 2009).

[47] *Id*. at 292.

[48] *DeJesus*, 953 A.2d at 68–69.

[49] State v. Peters, 946 A.2d 1231, 1234–35 (Conn. 2008).

[50] Moscone v. Manson, 440 A.2d 848, 851 (Conn. 1981).

[51] State v. Floyd, 584 A.2d 1157, 1160 (Conn. 1991).

[52] *DeJesus*, 953 A.2d at 68–69.

The plurality began its analysis with an interpretation of section 1-2(a), which reads, "The purposes of the Code are to adopt Connecticut case law regarding rules of evidence as rules of court and to promote the growth and development of the law of evidence through interpretation of the Code and through judicial rule making . . . ."[53] Here, the court found that this language, when read together with the commentary, was ambiguous. Writing for the plurality, Chief Justice Rogers argued that the term "interpretation" as used in section 1-2(a), could have been intended to limit "courts to explaining and construing the code in a manner similar to that in which they explain and construe statutes enacted by the legislature."[54] This section of the Code, however, also states that its purpose is "to promote the growth and development of the law of evidence through interpretation of the Code and through judicial rule making."[55] The word "interpretation" when read together with the language "to promote the growth and development of the law of evidence," indicates that the traditional common law adjudicative method still could apply.

To support this claim, Chief Justice Rogers pointed to the commentary to section 1-2(a), which states, "Case-by-case adjudication is integral to the growth and development of evidentiary law and, thus, future definition of the Code will be effected primarily through interpretation of the Code and through judicial rule making."[56] Such a reference, she argued, was included to allow for an expansive process of "interpretation." Chief Justice Rogers also asserted that "judicial rule making," in this context, could include both changes made by the Code oversight committee, *and* changes via common law rule making.[57] Because of this ambiguity, the court found that a plain language interpretation could not resolve the question of whether appellate courts are confined by the Code. Therefore, the plurality turned to the history of the Code.[58]

From this history, the court concluded that the Code was created to establish a restatement for the convenience and ease of practitioners and judges; not to divest the supreme court of its common law authority to create rules of evidence.[59] The court emphasized that the Code's history did not include any discussion of divesting the supreme court of its common law authority over evidence, citing the transcript from the annual meeting of the judges of the superior court where the Code was adopted. Such a large change to over two hundred years of evidence law would likely have been discussed. As Chief Justice Rogers stated:

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[53] CONN. CODE EVID. § 1-2(a) (2008).
[54] *DeJesus*, 953 A.2d at 62.
[55] CONN. CODE EVID. § 1-2(a).
[56] *Id.* § 1-2(a) cmt. (a).
[57] *DeJesus*, 953 A.2d at 63.
[58] *Id.*
[59] *Id.* at 66.

> [D]ivesting this court of its inherent common-law and constitutional adjudicative authority over evidentiary law, an authority which this court has enjoyed since its inception, is not a minor or picayune detail. One would assume that, at a minimum such a sweeping consequence would merit a brief mention in Justice Borden's summation concerning the purpose and impact of the code.[60]

The plurality went on to state that this conclusion was consistent with the court's responsibility to "interpret statutes in a manner that avoids placing them in constitutional jeopardy."[61] The plurality explained that interpreting the Code as divesting the supreme court of its evidentiary powers could violate article V, section 1 of the Connecticut Constitution, which reads, "The judicial power of the state shall be vested in a supreme court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law."[62]

The plurality noted that many state constitutions specifically enumerate the roles and responsibilities of the various courts.[63] Article V, section 1, on the other hand, merely reads, "The powers and jurisdiction of these courts shall be defined by law."[64] The plurality asserted that the reason for this difference is "obvious."[65] When Connecticut formally adopted its constitution in 1818, it did so with the intention of freezing the jurisdiction of the court system as it was in 1818—with a "'Supreme Court as the state's highest court of appellate jurisdiction and . . . the Superior Court as the trial court of general jurisdiction.'"[66]

The court explained that, at the time of the Connecticut Constitution's inception, there was a supreme and superior court, each with its own powers. The superior court was a court of general jurisdiction with authority over the trial of causes, while the supreme court only had authority over the correction of errors in law. According to the plurality, when the constitution was enacted, these powers froze, and were insulated from any changes short of a constitutional amendment.[67]

The court went on to examine evidence law from this era and determined that, at the time of enactment, the Connecticut Supreme Court had final authority over the rules of evidence. The court explained that historically, beginning with English common law and moving forward to

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[60] *Id.* at 67 n.20.
[61] *Id.* at 68.
[62] CONN. CONST. art. V, § 1.
[63] *DeJesus*, 953 A.2d at 69.
[64] CONN. CONST. art. V, §1.
[65] *DeJesus*, 953 A.2d at 69.
[66] *Id.* (quoting Szarwak v. Warden, 355 A.2d 49, 59 (Conn. 1974)).
[67] *DeJesus*, 953 A.2d at 69–70.

colonial common law, "the ultimate authority over the rules and standards governing the admissibility of evidence rested with the highest court of the state."[68]

Having interpreted article V as making such pre-constitutional, judicial powers permanent, the court reasoned that denying the supreme court the authority to make evidence rules would violate the state constitution.[69] The plurality contrasted the history of evidence rule making to that of the rules of practice. Prior to the Connecticut Constitution, the rules of practice, unlike the rules of evidence, were exclusively in the hands of the superior court judges who adopted the *regulae generales*, or general rules of pleading, practice, and procedure.[70]

According to the plurality, this pre-constitutional superior court function justified the exclusive control the superior court exercises over the rules of practice.[71] Making such a distinction was necessary to complete the frozen jurisdiction argument. Prior to *DeJesus*, the superior court judges exercised "unquestioned rule-making authority in matters of procedure."[72] Had the plurality held otherwise, concluding that the rules of practice are not binding on the supreme court, they would have gone against over two hundred years of precedent.

B. *Justice Palmer Concurrence*

In his concurrence, Justice Palmer agreed with the plurality that the Code did not revoke the supreme court's ultimate and traditional common law power over changes to the rules of evidence.[73] Justice Palmer set out two reasons for reaching this conclusion. Like the plurality, he found that because the supreme court had common law authority over evidence law making prior to 1818, its function as evidence rule maker was constitutionally rooted. Second, Justice Palmer concluded that to deny the supreme court the power to make changes to evidence law would violate the court's "inherent supervisory authority."[74]

This supervisory authority is exercised by the supreme court when it lacks constitutional authority to act, but the interests of justice require the court to clarify an issue for the lower courts.[75] Under this doctrine of

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[68] *Id.* at 70.
[69] *Id.* at 71.
[70] *Id.* at 72 (emphasis added).
[71] *Id.*
[72] *Id.* at 90 (Katz, J., dissenting).
[73] *Id.* at 83 (Palmer, J., concurring).
[74] *Id.* at 83–84 (Palmer, J., concurring).
[75] *Id.* at 84 (Palmer, J., concurring). An example of the invocation of this supervisory authority is *State v. Coleman*, 700 A.2d 14, 20 (Conn. 1997). In *Coleman*, the defendant pled guilty and was sentenced to thirty-five years in prison. The defendant, however, had vacated his plea prior to sentencing, and, on appeal, was awarded a new trial by jury where he was found guilty and sentenced to 110 years in prison. *Id.* at 17. The defendant requested, but was denied, an explanation for the

supervisory authority, Justice Palmer rejected the notion that the superior court could hold the ultimate authority over the rules of evidence. To do so would trump the supreme court's inherent power over the administration of justice and would "render that role advisory rather than supervisory."[76] Justice Palmer went on to conclude that this supervisory power even permits the supreme court to change the rules in the Practice Book.[77]

C. *Justice Zarella Concurrence*

This final concurrence provided the most concise argument for why the Code could not take evidentiary rule making away from the supreme court. Unlike the plurality opinion, Justice Zarella saw no need to construe the language, history, or intent of the Code writers. Justice Zarella concluded that the supreme court's authority over the rules of evidence "existed at common law and was incorporated into the 1818 constitution" and so cannot be taken away.[78] In Justice Zarella's words:

> [T]he majority's resolution of this question places too much emphasis on determining the intent of the Superior Court judges, thereby indicating that possession of such an intent could be dispositive of our inquiry. This emphasis, coupled with the majority's repeated reference to this court's "inherent" and "constitutional" authority, creates unnecessary ambiguity as to the actual scope of the Superior Court's authority over the law of evidence.[79]

With regard to the distinction between rules of evidence and rules of practice, Justice Zarella agreed with the majority that the history of these two bodies of law indicates that the final authority rested in separate courts. Justice Zarella's analysis relied on a statute passed in 1808, which gave the superior court judges the power to enact rules of practice.[80]

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sentence increase. *Id.* at 20. The Connecticut Supreme Court invoked its supervisory powers and established a new rule that, if during the criminal sentencing phase of a trial, a defendant asked why his sentence was increased from that established in the previous trial, the judge must provide justification for the increase. *Id*. In reaching this decision, the court held that this was a procedural safeguard, which the court had no constitutional or statutory power to impose, but instead was necessary to promote transparency, fairness, and integrity of the judicial system. The court thus invoked its supervisory powers to ensure public confidence and a fair sentencing process. *Id*. at 23. The concept of supervisory authority is noteworthy and demands further investigation; however, such inquiry is beyond the scope of this Note.

[76] *DeJesus*, 953 A.2d at 84 (Palmer, J., concurring).

[77] *Id.* at 86 (Palmer, J., concurring).

[78] *Id.* at 88 (Zarella, J., concurring).

[79] *Id.*

[80] *Id.* at 89–90 (Zarella, J., concurring) (quoting CONN. GEN. STAT. tit. 42, ch. 15, § 2 (1808)). Justice Zarella referred to CONN. GEN. STAT. tit. 42, ch. 15, § 2 (1808):

> And be it further enacted, [t]hat the judges of the superior court, when constituting a supreme court of errors, or met for any purpose, be, and they hereby are empowered, to institute such rules of practice for the regulation of the said court

However, Justice Zarella pointed out that, at that time, judges of the superior court were the same judges who sat on the supreme court. Accordingly, it is not clear whether these judges enacted the rules of practice as trial judges or as appellate judges. Because of this ambiguity, and because the issue did not need to be resolved under the facts of the case at hand, Justice Zarella left it for another day.[81]

D. *Justice Katz Dissent*

Justice Katz, who sat on both the Law Revision Commission Committee that drafted the Evidence Code and the subsequent Judicial Committee that finalized it,[82] issued a strong and compelling dissent. Justice Katz concluded that the Evidence Code is "the functional equivalent of laws," which cannot be modified by the appellate court.[83] She argued that the superior court is authorized by the Rules Enabling Act, Connecticut General Statutes section 51-14 to be the final arbiter of evidence rules;[84] that the text of the Code made clear that the rules of evidence could only be modified by the Evidence Oversight Committee of the Superior Court Rules Committee; and lastly, that such formal rule making was the most prudent method for procedural evidence rule development.

Justice Katz's analysis began with the purpose of the Code. She disagreed with the plurality's assertion that the Code is a mere restatement of the rules of evidence, arguing that the various drafting committees would not have spent six years creating a restatement that already existed and was regularly updated.[85] Justice Katz then turned to the language of

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> of errors, and of the superior court in the respective circuits, as shall be deemed most conducive to the administration of justice.

Id. (emphasis omitted).

[81] *Id.* at 90 (Zarella, J., concurring).

[82] *See supra* notes 8, 19 and accompanying text.

[83] *DeJesus*, 953 A.2d at 90–91 (Katz, J., dissenting).

[84] Connecticut General Statutes section 51-14 states in pertinent part:

> (a) 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. The rules of the Appellate Court shall be as consistent as feasible with the rules of the Supreme Court to promote uniformity in the procedure for the taking of appeals and may dispense, so far as justice to the parties will permit while affording a fair review, with the necessity of printing of records and briefs. Such rules shall not abridge, enlarge or modify any substantive right or the jurisdiction of any of the courts.

CONN. GEN. STAT. § 51-14 (2009).

[85] *DeJesus*, 953 A.2d at 94 (Katz, J., dissenting). Justice Katz explained that the Code was not enacted as a *handbook* on evidence, but a Code, a title which renders it "the functional equivalent of legislation." *Id.* (quoting TAIT & PRESCOTT, *supra* note 6, at 13).

the Code itself, specifically section 1-2(a), which states, "The purposes of the Code are to adopt Connecticut case law regarding rules of evidence as rules of court and to promote the growth and development of the law of evidence through interpretation . . . and through judicial rule making . . . ."[86] Justice Katz described interpretation as the process of construing language, not changing the meaning of the text or reading something new into the text.[87] She contrasted interpretation with judicial rule making, which she described as a "legal term of art"[88] denoting "the exercise of a legislative type function" where law is established not by the facts of a single case, but by general rules based on a broad scope of considerations.[89] From this express language, Justice Katz concluded that the role of the appellate courts is limited to these two methods of growth and development,[90] and that the Code took away the appellate courts' ability to modify evidence rules.[91]

To further advance this textual argument, Justice Katz analyzed the savings clause in section 1-2(b) of the Code. The savings clause specifically allows courts to make new common law evidence rules where the Code does not include a rule for an evidentiary procedure.[92] Justice Katz asserted that such a clause would be superfluous if the methods of growth and development enumerated in the Code included common law adjudication. She also described how the savings clause was modeled on the Connecticut Statutory Penal Code Savings Code. The purpose of attaching a savings clause to the penal code was to prevent appellate courts from using common law authority to modify the crimes and defenses set forth in the Penal Code, further supporting her argument.[93] Justice Katz went on to illustrate that this interpretation had been adopted in a 2002 Connecticut Supreme Court decision where the court refused to change an evidentiary rule contained within the Code, stating:

> If, as the defendant suggests, we were to read § 4-5(c) as permitting introduction of evidence regarding a victim's specific violent acts, we would be interpreting the code in a manner that would effectuate a substantive change in the law. *Because such a result would be contrary to the express*

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[86] CONN. CODE EVID. § 1-2(a) (2008).

[87] To reach this conclusion, Justice Katz relied in part on *Black's Law Dictionary*. *DeJesus*, 953 A.2d at 95, 101 (Katz, J., dissenting).

[88] *Id.* at 101.

[89] *Id.* at 95.

[90] *Id.* at 94.

[91] *Id.* at 110 (Katz, J., dissenting).

[92] CONN. CODE EVID. § 1-2(b) (2008).

[93] *DeJesus*, 953 A.2d at 96–97 (Katz, J., dissenting). The relevant language of the Penal Code reads, "The provisions of this chapter shall not be construed as precluding any court from recognizing other principles of criminal liability or other defenses not inconsistent with such provisions." CONN. GEN. STAT. § 53a-4 (2009).

intention of the code's drafters, we reject it.[94]

To further illustrate that growth and development were limited to judicial rule making, and did not extend to common law adjudication, Justice Katz emphasized that the Evidence Code Oversight Committee was charged with making recommendations to the Superior Court Rules Committee when changes to the Evidence Code were needed.[95]

Finding the Code's language unambiguous, Justice Katz rejected the plurality's inquiry into the judicial history of the Code. She concluded, however, that even if the history is examined, it supports her argument that the Code is binding on the appellate courts. Justice Katz asserted that the superior court judges, experienced in judicial rule making from the Practice Book, understood that they were adopting a binding Code, not a handbook. Justice Katz argued that Justice Borden's failure to specifically state that the Code was binding when presenting the Code to the superior court judges did not warrant the plurality's conclusion that the superior court judges did not understand that they were divesting the appellate courts of their common law adjudicative authority over evidence law.[96]

Justice Katz went on to offer what she called "anecdotal evidence" of the drafters' intent that the Code be binding. For instance, a letter from Justice Borden asked the Evidence Code Committee to consider a rule allowing the supreme court to modify or change rules contained within the Code.[97] Katz concluded that in rejecting this rule, the Code's drafters showed their intention to enact a binding code.[98] She also cited the *Handbook on Evidence*, written by Colin Tait, who sat on the Code's drafting committee, which reads, "The Code could be 'interpreted' through judicial opinions, or the Code could be amended through the judicial rule-making process. *But changes to the Code itself were to be accomplished only through judicial rule-making, not judicial decisions.*"[99] From this history, Justice Katz concluded that the drafters intended to establish a binding code of evidence, which the appellate courts were required to follow except where there was an ambiguous rule,[100] a conflict of rules, or where the Code was silent.[101]

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[94] State v. Whitford, 799 A.2d 1034, 1051 (Conn. 2002) (emphasis added).

[95] *DeJesus*, 953 A.2d at 97–98 (Katz, J., dissenting).

[96] *Id.* at 101–03 (Katz, J., dissenting).

[97] *Id.* at 102, 103 n.14 (Katz, J., dissenting).

[98] In this section of the opinion, Justice Katz did not cite Justice Borden's specific interpretations to which she referred. She did, however, reference Justice Borden's *Connecticut Bar Journal* article and his dissenting opinion in *State v. Sawyer*. *Id.* at 99–100, 102 (Katz, J., dissenting).

[99] TAIT & PRESCOTT, *supra* note 6, at 16–17 (emphasis added); *see also DeJesus*, 953 A.2d at 100 n.12 (noting that Professor Colin Tait also interpreted the rules set forth in the Code as binding upon the appellate courts).

[100] *See DeJesus*, 953 A.2d at 108 (Katz, J., dissenting). The Evidence Code does not include evidentiary laws set forth in statutes or in the Practice Book. TAIT & PRESCOTT, *supra* note 6, at 7–8.

[101] *DeJesus*, 953 A.2d at 100 (Katz, J., dissenting).

Justice Katz argued that there is no pre-constitutional analogy to justify the conclusion that the Connecticut Constitution froze the jurisdiction of the constitutional courts over the rules of evidence. In her words:

> The mere fact that, predating our constitution, this court had set forth rules of evidence in the context of an adjudication simply demonstrates what is undisputed—that this court has authority to do so—it does not answer the question in dispute, that is, whether another judicial body can adopt rules that this court cannot overrule.[102]

Katz compared the Evidence Code to the Practice Book, and concluded that they are functionally equivalent. She noted that the Practice Book has withstood several constitutional challenges—all of which pertain to the separation of powers doctrine and none of which have suggested "that the procedure within the judicial branch itself may be constitutionally suspect."[103]

Additionally, Justice Katz argued that the superior court is authorized to create a binding code pursuant to the Rules Enabling Act.[104] This statute gives the superior, appellate, or supreme court the authority to make rules of pleading, practice, and judicial procedure.[105] Justice Katz noted that, unlike many state constitutions, the Connecticut Constitution does not specifically prescribe that final authority over procedural matters be vested in the supreme court.[106] In light of this absence, the legislature enacted the Rules Enabling Act. It is under this Act that the superior court finds its authority to enact the rules of practice.[107]

Justice Katz also rejected the argument advanced by Justice Palmer that the supreme court maintains the authority to modify and change any rule of evidence under an inherent supervisory authority. She interpreted this supervisory authority as one to be employed only when other procedures or rules were unavailable, not to contravene an existing rule or procedure.[108]

Justice Katz also noted that the superior court judges' proximity to the practical effect of evidence rules makes them best-equipped to make those

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[102] *Id.* at 107 (Katz, J., dissenting).

[103] *Id.* at 104 (Katz, J., dissenting).

[104] *See id.* at 107 (Katz, J., dissenting) ("Thus, given . . . the delegation of authority under § 51-14, I see nothing to indicate that a constitutional conflict would arise by construing the code, as written, to allow the judges of the Superior Court to make rules that bind this court.").

[105] CONN. GEN. STAT. § 51-14(a) (2009).

[106] *DeJesus*, 953 A.2d at 106–07 (Katz, J., dissenting).

[107] *Id.* at 98 (Katz, J., dissenting). These rules of practice are compiled in the Connecticut Practice Book.

[108] *See id.* at 107–09 (Katz, J., dissenting) ("[The court's] authority is exercised in the *absence* of a rule, when there are *gaps* in a rule or *to supplement* procedures under a rule. . . . [T]his court previously has recognized the limits of its inherent supervisory authority when a conflict would arise with an existing rule.").

rules. Lastly, she emphasized the importance of separating the rulemaking process from the adversarial process so that the Code would be broader than single party interests would dictate.[109]

IV. DISSECTING THE CONSTITUTIONAL ARGUMENT[110]

While several analyses and criticisms of the *DeJesus* opinions could be discussed, this Note focuses on the constitutional question raised. The plurality in *DeJesus* argued that the essential functions of the superior and supreme courts, as they existed prior to the Connecticut Constitution, were frozen with the ratification of the constitution in 1818. Under the plurality's interpretation, one such essential function is the making of procedural evidence law. To the plurality, this creates a constitutional grant of "final and binding authority" over evidence law that cannot be taken away short of a constitutional amendment.[111]

This Note reaches the opposite conclusion. It concludes that the Connecticut Constitution does not preclude the superior court from having the final power to promulgate the rules of evidence. Making rules of evidence is not an essential characteristic of the Connecticut Supreme Court. Consequently, that power was not frozen with the constitution of 1818, leaving the legislature the constitutional authority to grant the superior court the power to codify the rules of evidence. However, as discussed below, decades of debate and uncertainty surround this assertion. This Note concludes that a constitutional amendment, defining the judiciary's rulemaking authority, is necessary to resolve this dispute.

A. *Brief History of Connecticut's Constitution*

In order to understand this issue, the historical underpinnings of the Connecticut Constitution must be laid out. "A constitution—our own especially—is the outgrowth of a people's history, the result of past experience and of existing conditions; and it is impossible to ascertain its real meaning without studying the conditions it was framed to meet, and

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[109] *Id.* at 109–10 (Katz, J., dissenting).

[110] This Note does not discuss the plurality's interpretation of the language or intention of the Code's drafters.

> [T]he power of the Supreme Court to alter the rules set forth in the Code by common law adjudication was not discussed in so many words in the Code. The clear inference to be taken from [Connecticut Code of Evidence] §§ 1-2(a) and 1-2(b) . . . negates such a power as being inconsistent with those explicit provisions of the Code.

COLIN C. TAIT & ELIOT D. PRESCOTT, TAIT'S HANDBOOK OF CONNECTICUT EVIDENCE 2 (4th ed. Supp. 2009). That the plurality did find the language ambiguous, however, indicates that it may not be such a "clear inference" that the Code was intended to divest the Connecticut Supreme Court of its rulemaking authority. The merits of such statutory interpretation as well as the supervisory authority argument raised by Justice Palmer are beyond the scope of this Note.

[111] *DeJesus*, 953 A.2d at 71.

the fundamental principles it was adopted to secure."[112] Unlike most states, Connecticut did not ratify a constitution immediately after the American Revolution. When Connecticut did ratify its constitution, eighteen states had already done so, leaving only Connecticut and Rhode Island without constitutions.[113] It has been argued that the Revolution had little impact on Connecticut's system of governance because, even prior to the Revolution, Connecticut had been mostly self-governing. For example, when passing statutes, the Connecticut legislature did not need to seek approval from the King of England and the legislature did not follow acts passed by the British Parliament.[114] One of Connecticut's greatest early legal scholars, Zephaniah Swift, described Connecticut's pre-revolutionary relationship with England as a "nominal allegiance to the British crown" recognized only for purposes of defense and protection.[115] Instead of ratifying a constitution, Connecticut continued to operate under the laws created by the Royal Charter.[116]

The pre-constitutional judicial system in Connecticut consisted of a supreme court, a superior court, and inferior courts—the court of common pleas, justices of the peace, and the probate courts.[117] The superior court was established in 1711 and originally consisted of five judges appointed by the legislature.[118] This was a court of general jurisdiction, with appellate jurisdiction over the decisions of the three inferior courts and the power to issues writs of mandamus to those courts.[119] The Connecticut Supreme Court was established seventy-three years later in 1784 and consisted of twelve judges,[120] mostly practicing attorneys. It sat once a year to review decisions of the superior court. In 1808, there was a reorganization of the Connecticut Supreme Court. Politicians, who previously could sit on the supreme court, were no longer permitted, and as Connecticut constitutional scholar Wesley Horton describes, this was the "start of a truly judicial supreme court."[121] Judicial decisions, however,

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[112] Styles v. Tyler, 30 A. 165, 168 (Conn. 1894).

[113] *Id.* at 168; WESLEY W. HORTON, THE HISTORY OF THE CONNECTICUT SUPREME COURT 29 (2008).

[114] HORTON, *supra* note 113, at 10; *see* HENRY C. ROBINSON, CONSTITUTIONAL HISTORY OF CONNECTICUT 1–2 (1897) (describing Connecticut's unique form of governance: "Unlike all the other colonists, and greatly in advance of them, the Connecticut founders disclosed to history a new vision of democracy. . . . [T]hey were democrats of democrats.").

[115] ZEPHANIA SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 57 (1795).

[116] Jarvis M. Morse, *Under the Constitution of 1818: The First Decade*, *in* TERCENTENARY COMMISSION OF THE STATE OF CONNECTICUT, COMMITTEE ON HISTORICAL PUBLICATIONS 3–4 (1933).

[117] *See* SWIFT, *supra* note 115, at 58–60.

[118] From 1800–06, the superior court consisted of six judges who sat in panels of three; from 1806–18, the court was composed of nine judges who also sat in panels of three. HORTON, *supra* note 113, at 14.

[119] *See* HORTON, *supra* note 113, at 11; SWIFT, *supra* note 115, at 60.

[120] The judges were the Governor, the Lieutenant Governor, and the Council. SWIFT, *supra* note 115, at 60.

[121] HORTON, *supra* note 113, at 13.

even those of the Connecticut Supreme Court, were not final, as the legislature retained plenary authority to review and reverse court decisions.[122]

Gradually, a movement formed in Connecticut that pushed for the adoption of a constitution.[123] The constitutional proponents argued that the Charter of 1662 granted by King Charles, had not been democratically adopted by the people of Connecticut.[124] Since Connecticut was no longer under the control of the crown, operating under this charter was questionable.[125] The legislature's supreme power over all three branches of government, with no defined separation of powers and the need for separation of church and state also drove the enactment of the constitution.[126] Additionally, a "major force behind the convening of the constitutional convention 'was the growth of the Jeffersonian party and its desire to reform the electoral process and to disestablish the Congregational Church.'"[127]

The catalyst to the constitutional convention was *Lung's Case* of 1815.[128] The defendant, Peter Lung, was sentenced to death by the superior court, and his conviction was affirmed by the Connecticut Supreme Court. Lung then petitioned the General Assembly for reconsideration of the verdict. The legislature found the trial was procedurally improper, reversed the verdict, and ordered a new trial.[129] This intrusion by the legislative branch into a purely judicial matter furthered the momentum toward a constitutional convention.

Three years later, a constitutional convention was held in Hartford from August 26 to September 15, 1818, to draft the constitution. By referendum, the people of Connecticut ratified the state constitution.[130]

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[122] *See id.* at 29.

[123] Morse, *supra* note 116, at 1; ROBINSON, *supra* note 114, at 13.

[124] One of the earliest calls for a constitution came in 1804 at a meeting of Republican delegates from ninety-seven Connecticut towns who met and asserted "'as the unanimous opinion of this meeting that the people of this State are at present without a constitution of civil Government.'" At this meeting were five magistrates and justices of the peace who had their commissions revoked thereafter by the Governor and legislature for making such an assertion. ROBINSON, *supra* note 114, at 13.

[125] As mentioned earlier, another school of thought asserted that Connecticut was unique in that it never followed British rule anyway, so the system of governance established prior to the Revolution was still in place after the Revolution. *See supra* text accompanying notes 112–16.

[126] Connecticut had become a state dominated by Congregationalists. ROBINSON, *supra* note 114, at 13–14.

[127] Kinsella v. Jaekle, 475 A.2d 243, 250–51 n.12 (Conn. 1984) (quoting Richard S. Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1, 6 n.27 (1975)).

[128] Lung's Case, 1 Conn. 428 (1815).

[129] HORTON, *supra* note 113, at 29; William M. Maltbie, *The Unconstitutional Period of Connecticut History*, 14 CONN. B.J. 22, 32 (1940).

[130] Morse, *supra* note 116, at 4.

B. Plain Meaning Interpretation of Connecticut Constitution Article V, Section 1 as It Relates to the Separation of Powers Within the Judicial Branch and Between the Legislature and Judiciary

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation . . . ."[131] Beginning with a plain meaning interpretation of article II and article V, section 1, it is difficult to understand the plurality's argument that the constitution forever froze the supreme court's power to make rules of evidence. Instead, the text only requires there to be a superior court of general jurisdiction, a supreme court of appellate jurisdiction, and three separate branches of government. The text of articles II and V neither defines nor limits the extent to which each branch has procedural judicial rulemaking power.

Article V, section 1 of the 1818 Connecticut Constitution reads, "The judicial power of the state shall be vested in a Supreme Court of Errors, a Superior Court, and such inferiour courts as the General Assembly shall, from time to time, ordain and establish: the powers and jurisdiction of which courts shall be defined by law."[132] This section of the constitution has remained largely unchanged; however, it was amended in the 1965 constitutional convention—the term "inferiour courts" was replaced by "lower courts" and the colon was replaced by a period so that the phrase, "the powers and jurisdiction of these courts shall be defined by law," now stands alone. Lastly, the term "of errors" was removed from the title of the Connecticut Supreme Court. The clause now reads, "The judicial power of the state shall be vested in a supreme court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law."[133]

This language does specifically name two courts—a supreme court and a superior court. The text does not specify the names of the lower courts, but instead uses the term "inferior courts." Because of this textual distinction, the supreme and superior courts are considered constitutional courts while the inferior courts are not.[134] The powers of the constitutional courts are defined by the constitution itself and such powers cannot be changed by the courts or by the legislature short of a constitutional amendment. Inferior courts, however, have no such limitation. Their jurisdiction can be altered if such changes do not significantly erode the

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[131] Baker v. Carr, 369 U.S. 186, 211 (1962).

[132] CONN. CONST. art V, § 1 (1818).

[133] CONN. CONST. art V, § 1 (2008); *see also* Szarwak v. Warden, 355 A.2d 49, 58 (Conn. 1974).

[134] These courts are also described as "lower courts" as a result of the 1965 change made during the constitutional convention.

jurisdiction granted to the supreme or superior court by the constitution.[135]

Certainly there is significance in the fact that the Connecticut Constitution specifically named a supreme and superior court. The inclusion of the term "supreme court of errors" indicates that there must be an appellate court, while the inclusion of the term "superior court" indicates that there must be a court of general jurisdiction.[136] This interpretation is reinforced by the 1818 *Journal of the Proceedings* of the Constitutional Convention of Connecticut. The journal includes a motion to amend article V, section 1 "by striking out the words 'of errors, a superior court,' and inserting in lieu thereof these words: 'which shall consist of a chief judge, and not more than four other judges.'"[137] Such a change would have created one constitutional court—a supreme court, without any jurisdictional distinction between it and the superior court. The motion was rejected, [138] strengthening the theory that the intention of the drafters of article V was to create two distinct constitutional courts.

It seems to be a great leap, however, to interpret the inclusion of these courts' names as an indication that their powers, in every aspect, were to forever remain the same as in 1818. While the clause does specifically state there will be "*a* supreme court" and "*a* superior court,"[139] the clause does not read "*the* supreme court" or "*the* superior court." Analyzing the grammatical choice of the article "a" instead of "the" leads to a conclusion contrary to that reached by the *DeJesus* plurality. The use of "*a* superior/supreme court" suggests that the functions of these courts were not frozen; rather, the framers intended for these courts to grow and develop while maintaining their essential characteristics—one court with appellate jurisdiction and one with general jurisdiction. Had the drafters instead written "*the* superior/supreme court," the frozen jurisdiction argument would be more plausible.

Additionally, the last sentence of article V, section 1, asserting that the powers and jurisdiction of these courts shall be defined by law,[140] suggests that the legislature was granted the power to alter the procedural powers of the constitutional courts.[141] This clause has been a source of great

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[135] *See* Walkinshaw v. O'Brien, 32 A.2d 547, 554–55 (Conn. 1943).

[136] *See* WILLIAM BONDY, THE SEPARATION OF GOVERNMENTAL POWERS: IN HISTORY, IN THEORY AND IN THE CONSTITUTIONS 31 (1998) (stating that where "constitutions confer the judicial power upon certain *specified* courts, this must be understood to embrace the whole judicial power, and the legislature cannot in such case pass a statute abolishing any such courts, or vest any portion of such power elsewhere"). General clauses giving courts judicial power does not give them all judicial powers but only the power to "determine and protect legal rights." *Id.* at 77.

[137] JOURNAL OF THE CONSTITUTIONAL CONVENTION OF CONNECTICUT 67 (Hartford, Case, Lockwood & Brainard 1873).

[138] *Id.*

[139] CONN. CONST. art V, § 1.

[140] *Id.*

[141] CONN. GEN. STAT. § 51-14(a) (2009).

controversy and debate among Connecticut legal scholars.[142] The dispute is whether this last sentence applies to the inferior courts only or also to the two constitutional courts. In *Styles v. Tyler*, a prominent case examining this issue, the majority concluded that while this last sentence of article V, section 1 grants legislative authority to define certain judicial powers and procedures, that authority is limited when the "jurisdiction [is] substantially described" by the constitution.[143] Accordingly, the *Styles* court found that the constitution precludes the legislature from altering an essential characteristic of the judiciary.[144] From this, the court held that the statute in question did not intend to extend the jurisdiction of the supreme court to the review of factual findings because such an extension of power would violate the constitution.[145] In his dissenting opinion, however, Justice Baldwin asserted:

> If the ordinary rules of grammar are to be respected, the last clause in section 1 of article 5, both as originally punctuated and as finally engrossed and adopted, qualifies each member of the preceding clause. Its construction must be the same as if it read thus: "The judicial power of the state shall be vested in a supreme court of errors, the powers and jurisdiction of which shall be defined by law; a superior court, the powers and jurisdiction of which shall be defined by law; and such inferior courts as the general assembly shall, from time to time, ordain and establish, the powers and jurisdiction of which shall be defined by law."[146]

Under Justice Baldwin's interpretation, the legislature reserves the authority to make laws governing judicial procedure, and therefore, the powers and structure of the courts as they existed in 1818 were not frozen.

The broadly defined distribution of powers set forth in the Connecticut Constitution further supports the argument that the legislature has the constitutional power to prescribe procedural judicial functions. Article II reads: "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."[147] Unlike twenty-eight other

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[142] *See, e.g.*, Styles v. Tyler, 30 A. 165, 177–78 (Conn. 1894) (Baldwin, J., dissenting); Kay, *supra* note 127, at 7.

[143] *Styles*, 30 A. at 172.

[144] *Id.*

[145] *Id.* at 173–75.

[146] *Id.* at 178 (Baldwin, J., dissenting).

[147] CONN. CONST. art. II. The text of this article has been amended by article XVIII, which in full reads:

> The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative,

state constitutions,[148] Connecticut's constitution does not include any clause specifically limiting the branches from overlapping. Also, unlike many state constitutions, Connecticut's constitution does not specifically grant rulemaking authority to the courts.[149] Since the framers did not specifically distinguish the functions of these branches, functions such as judicial procedure may overlap. The extent of this overlap is limited by the powers specifically granted to each branch by the constitution. For example, the constitution empowers the Connecticut Supreme Court to be the court of appellate jurisdiction, so the legislature is constitutionally barred from overturning supreme court decisions as they had done prior to the constitution.[150]

Nevertheless, in Connecticut, "[s]ome doubt exists as to the constitutionality of such statutory rules [governing judicial procedure], because of the line of cases culminating in the opinion of the Connecticut Supreme Court in *State v. Clemente*" in 1974.[151] The *Clemente* court held that a statute prescribing a rule of discovery was unconstitutional because the legislature was involving itself in an exclusively judicial procedural matter, thus violating the separation of powers doctrine.[152] The *Clemente* court recognized that the separation of powers is not to be "rigidly applied" and that the

> great functions of government are not divided in any such way that all acts of the nature of the functions of one department can never be exercised by another department. Such a division is impracticable, and, if carried out, would result in the paralysis of government. Executive, legislative, and judicial powers of necessity overlap each other, and cover many acts which are in their nature common to more

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> to one; those which are executive, to another; and those which are judicial, to another. The legislative department may delegate regulatory authority to the executive department; except that any administrative regulation of any agency of the executive department may be disapproved by the general assembly or a committee thereof in such manner as shall by law be prescribed.

CONN. CONST. art. XVIII.

[148] John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1236–41 (1993).

[149] The South Carolina Constitution, for instance, grants its supreme court the exclusive power to make rules governing the administration of all state courts, the rules of practice and procedure and the power to regulate attorney conduct. S.C. CONST. art. V, § 4. Other state constitutions including such provisions include VA. CONST. art. VI, § 5 (stating that the supreme court makes rules of practice and procedure but these cannot conflict with any legislative rules); MD. CONST. art. IV, § 18 (stating that the court of appeals makes rules governing the administration of appellate court practice and procedure, but these rules can be modified otherwise by law); W.VA. CONST. art. VIII, § 3 (stating that courts have the power to make rules of practice and procedure); and N.C. CONST. art. IV, § 13(2) (stating that the supreme court has exclusive power over rules of practice and procedure for appellate courts).

[150] *See* text accompanying notes 126 and 131–38.

[151] TAIT, *supra* note 6, at 10.

[152] State v. Clemente, 353 A.2d 723, 729–31 (Conn. 1974).

than one department.[153]

The court devised a two-part test for determining whether a statute is unconstitutional for violating the separation of powers provision: first the statute must involve a judicial subject matter, and second, that subject matter must be under the exclusive control of the judiciary.[154] Following *Clemente*, all statutes involving procedural rule making considered to be exclusively judicial are constitutionally questionable.[155]

It is not clear from *Clemente* whether or not rules of evidence fall in this exclusively judicial procedural realm. In *State v. James*, the Connecticut Supreme Court held that "[u]nlike the practices and principles relating to discovery, which were deemed in *Clemente* to be within the exclusive power of the courts, the rules of evidence, including those relating to the competency of witnesses, have never in this state been regarded as exclusively within the judicial domain."[156] In *James*, the defendant, relying on *Clemente*, asserted that an evidentiary statute enacted by the legislature was unconstitutional on the grounds that the legislature violated the separation of powers provision in the constitution. The court disagreed and found that, unlike rules of practice and procedure, the legislature and judiciary have historically shared rulemaking authority over the rules of evidence and the courts have recognized that legislative authority as legitimate. The court concluded that rules of evidence are not exclusively judicial in nature, but instead, the legislature has the constitutional power to enact rules of evidence.[157] From this holding it could follow that if the legislature and judiciary share power over evidence rule making, the legislature could have the authority to delegate power over such rules exclusively to the superior court. Since the *James* court asserted that evidentiary rule making is not exclusively judicial, it left open the ability of the legislature to grant final and binding authority to the superior court over rules of evidence.

An alternative argument, however, could be made that while the legislature reserves the power to enact statutes containing evidence rules, the power to vest sole authority over writing those rules to the superior court is a *Clemente*-type procedural matter that falls under the exclusive control of the judiciary. Such uncertainty illustrates the need for judicial clarification or a constitutional amendment clearly delineating the boundaries between the legislative and judicial powers over judicial procedure.

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[153] *Id.* at 728 (quoting *In re* Application of Clark, 31 A. 522, 527 (Conn. 1894)).
[154] *Id.* at 729.
[155] For a critical examination of the holding in *Clemente*, see generally Kay, *supra* note 127.
[156] State v. James, 560 A.2d 426, 430 (Conn. 1989).
[157] *Id.* at 431.

C. *Historical Interpretation of Article V as It Relates to the Separation of Powers Within the Judicial Branch and Between the Legislature and Judiciary*

In addition to the textual argument above, the history of the Connecticut Constitution illustrates that the framers did not intend to freeze the powers of the courts as they existed before 1818 or to create a strict separation of powers. When the constitution was ratified in 1818, the supreme court had only existed for thirty-four years in contrast to the 107-year-old superior court.[158] During this brief era, the supreme court had been restructured twice, first in 1808 and then in 1818 with the constitution.[159] It is hard to believe that the framers would intend for a system that existed for such a brief amount of time, which was still in a state of flux, to be forever frozen. Instead, it seems that the framers anticipated the law's need for change, growth, and development. To accommodate such change, the powers of the Connecticut Supreme and Superior Courts were left largely undefined, establishing only the idea that there must always be a court of general jurisdiction and a court of appellate jurisdiction.

The main concern of the framers with regard to the separation of powers was to prevent the legislature from making judicial decisions, which it had done in *Lung's Case*.[160] That the framers did not intend for the constitution to take away the legislature's role in determining the jurisdiction and procedures of the constitutional courts can be seen in the enactment of statutes following ratification of the constitution. The Public Statute Laws of Connecticut, revised and enacted by the General Assembly in 1821, just three years after the constitution was ratified, illustrate that the legislature retained power over judicial procedure even after the branches were constitutionally separated.[161] Therefore, it is unlikely that the powers of the pre-constitutional courts were intended to be frozen in perpetuity.

In the preface to these statutes, those charged with redrafting the laws,

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[158] HORTON, *supra* note 113, at 12, 29.

[159] *Id.* at 13, 30–31.

[160] *See* Lung's Case, 1 Conn. 428 (1815); PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT, AS REVISED AND ENACTED BY THE GENERAL ASSEMBLY, tit. 21, § 41 n.1 (1821) ("Though the legislature, from time to time, had stripped themselves of their judicial power, by delegating it to other tribunals . . . [a]n opinion seems to have been entertained, that, as they were not limited in their power, like a judicial tribunal, they could, acting, on more elevated and extended principles, do more complete justice, than could be obtained in a court of law, or even in a court of equity . . . . Experience demonstrated, that nothing could be more improper or dangerous, than the exercise of such an arbitrary discretion, by the legislature. Accordingly, the constitution has now, in conformity to correct principles, divided the powers of government into three distinct departments, and confided each of them to a separate magistracy: of course, the legislature cannot interpose in matters of a private nature, between parties, without infringing that instrument.").

[161] PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT, *supra* note 160.

including Connecticut legal scholar Zephaniah Swift,[162] explain that this set of statutes was revised and certain statutes repealed or rewritten specifically for the purpose of making the laws consistent with the newly ratified constitution.[163] These statutes were revised at a time when the constitution and its purpose were fresh in the minds of these re-drafters and thus are good evidence of the constitution's meaning as understood at the time of the drafting.

Of these statutes, the most important to this Note are title 21, sections 1–41, "An Act for Constituting and Regulating Courts, and for Appointing the Times and Places of Holding the Same."[164] This Act sets forth the powers and jurisdiction of both constitutional courts and the inferior courts. The supreme court was given final jurisdiction over all cases asserting an error of law or equity.[165] The Connecticut Supreme Court was also given the power to institute rules of practice for that court and for the superior court,[166] to assign judges of the Connecticut Supreme Court to certain counties,[167] to establish rules for when court can be adjourned,[168] and to publish the rationale behind their decisions.[169] In these revised statutes, the superior court was given general jurisdiction over the trial of criminal and civil causes,[170] was required to appoint a clerk, could order pleadings, and was given the power to adjourn sessions.[171]

The legislature's delineation of the roles, procedures, and jurisdiction of these two constitutional courts, combined with the fact that this set of statutes was revised specifically to ensure their conformity with the constitution, indicate that the constitutional framers did not intend to limit the functions of the constitutional courts to those of 1818. Instead, this history suggests that the framers envisioned a more flexible system of governance with room for growth and development, under the control of the legislature. It has been argued that these early statutes should not be considered when interpreting the constitution because the full import and meaning of the separation of powers was not understood until the late nineteenth century,[172] with judicial decisions such as *Styles v. Tyler* and *Appeal of Norwalk Street Railway Co.*[173] It is argued that these later

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[162] The redrafters were Zephaniah Swift, Lemuel Whitman, and Thomas Day. *See id.* at x.
[163] *Id.* at viii.
[164] *Id.* tit. 21 §§ 1–41.
[165] *Id.* tit. 21 § 3.
[166] *Id.* tit. 21 § 5.
[167] *Id.* tit. 21 § 4.
[168] *Id.* tit. 21 § 6.
[169] *Id.* tit. 21 §§ 7–8.
[170] *Id.* tit. 21 § 9.
[171] *Id.* tit. 21 §§ 13–15.
[172] *See* Adams v. Rubinow, 251 A.2d 49, 55 (Conn. 1968) ("In the period from 1818 until the decision in *Norwalk Street Railway Co.'s Appeal* in 1897. . . there was a failure to appreciate the full import and application of Article 2." (internal citation omitted)).
[173] 37 A. 1080 (Conn. 1897).

judicial decisions "clearly determined that (1) the constitution represented a grant of power from the people, in whom all power originally resided, and (2) the powers granted to the General Assembly are legislative only and those granted to the judiciary are judicial only."[174] This rationale, which still stands as good law, is unpersuasive, as it is difficult to argue that those involved in the framing of the constitution would not understand the meaning of the document they themselves had drafted.

D. *The Rules Enabling Act*

From the textual and historical interpretation above it can be concluded that the legislature is constitutionally granted the power to allocate procedural rulemaking authority to the superior court. Through the Rules Enabling Act, Connecticut General Statutes section 51-14, the legislature has done just that and vested in the superior court the authority to make rules of procedure.[175] Assuming an evidence code is procedural in nature,[176] this statute can be interpreted as granting the superior court the power to adopt a binding code of evidence. Neither the plurality nor concurring opinion, however, address this legislative grant of power when reaching their decisions in *DeJesus.*

The Rules Enabling Act, first enacted in 1957, currently reads in part:

> (a) 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. . . . (b) . . . The chief justice shall report any such rules to the general assembly for study at the beginning of each regular session.[177]

Rather than discussing this Act, the plurality, in dicta, crafted an argument about a procedural separation of powers within the judicial branch. The plurality asserted that the essential characteristics, powers, and jurisdiction of the constitutional courts were forever frozen as they existed when the constitution was ratified in 1818. The plurality concluded that evidentiary rule making is one such essential characteristic. The plurality found that the supreme court had the common law authority to

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[174] Szarwak v. Warden, 355 A.2d 49, 59 (Conn. 1974); Morse, *supra* note 116, at 15, 19.
[175] CONN. GEN. STAT. §51-14 (2009).
[176] *See supra* note 33 and accompanying text.
[177] CONN. GEN. STAT. §51-14.

make rules of evidence at the constitution's inception, and so concluded that it must continue to have such authority in perpetuity.[178]

This argument assumes constitutional limits on the interference with or invasion into procedural rule making by each constitutional court. The case law cited by the plurality fails to support this proposition because it pertains to the separation of powers between the legislature and judiciary and to the essential functions of the judicial branch, but not to any separation of procedural powers within the judicial branch itself.

The series cited by the plurality begins with the well-known 1894 case, *Styles v. Tyler*.[179] In *Styles*, Justice Hamersley, writing for the majority, held that the supreme court is an appellate court limited to the review of errors of law, and so cannot review purely factual errors. The rationale was that by specifically naming two courts within article V, the constitution designated the jurisdiction of the courts—"one with a supreme jurisdiction of the trial of causes and one with a supreme and final jurisdiction in determining in the last resort the principles of law involved in the trial of causes."[180] It held that only these essential characteristics of the two constitutional courts were frozen upon ratification of the constitution.

Walkinshaw v. O'Brien, the next case in the series cited by the *DeJesus* plurality for the proposition that "'[t]here can be no doubt that it was the intent of the [1818] constitution that [the superior court] should continue, with the essential characteristics it had previously possessed,'"[181] considered the constitutionality under article V, section 1 of a legislative act establishing a Court of Common Pleas as an inferior court.[182] The issue was whether the legislature had the constitutional authority to determine and extend the jurisdiction of an inferior court, or if in doing so they were infringing upon the powers vested in the superior courts by the Connecticut Constitution. The *Walkinshaw* court asserted that deeming a statute unconstitutional is of "very grave concern" and that under the Connecticut Constitution the legislature has authority over all state affairs, unless it is limited by other provisions of the constitution.[183] The court found the statute constitutional because while almost altering the essential characteristics of the superior court, the change was not significant enough

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[178] State v. DeJesus, 953 A.2d 45, 72 (Conn. 2008).

[179] *Id.* at 70 (citing Styles v. Tyler, 30 A. 165 (Conn. 1894)).

[180] *Styles*, 30 A. at 171.

[181] *DeJesus*, 953 A.2d at 69–70 (quoting Walkinshaw v. O'Brien, 32 A.2d 547, 549 (Conn. 1943)).

[182] *Walkinshaw*, 32 A.2d at 549. The legislative act in question established one single court of common pleas, whereas previously there existed six courts throughout the state that had exclusive jurisdiction over appeals from justices of the peace and municipal courts when those appeals did not by law have to go before the superior court.

[183] *Id.* at 552 (citations omitted).

to justify overturning the statute.[184]

The final case cited by the plurality to support the frozen jurisdiction argument was *Szarwak v. Warden*.[185] In *Szarwak*, the court found unconstitutional a statute that gave the circuit courts jurisdiction over crimes punishable by fines of less than $5000 or imprisonment of less than five years because this transfer of jurisdiction took away the essential characteristics of the superior court. The court asserted that "[t]he test determinative of the constitutionality of a statute granting jurisdiction to a lower court is then, one of degree."[186] Finding that the legislature had disregarded the mandate in *Walkinshaw* to stop eroding the jurisdiction of the superior court, the court held that this statute went too far and altered the essential characteristics of the superior court.[187]

None of the cases cited interpret the constitution as freezing all the procedural powers of the courts. In *Styles*, Justice Hamersley described the extent of these "essential characteristics":

> The description of jurisdiction contained in the constitution determines only the essential characteristics of that jurisdiction, and *does not deal with the procedure by means of which the jurisdiction is called into exercise* . . . the exercise of that jurisdiction may practically be limited or extended in consequence of changes of procedure not inconsistent with such characteristics.[188]

Under the *Styles* rationale, evidence rule making may rest solely with the superior court because this is a "change of procedure, not inconsistent with such [essential] characteristics"[189] of the supreme court. By placing the Evidence Code in the hands of the superior court, the supreme court still has final say on constitutional issues which may arise from the Code[190]—just like the supreme court reviews statutes for constitutionality, so does it retain the power to review the Evidence Code for constitutional infringements. Therefore, the Evidence Code can rest with the superior court without violating the state constitution because it does not take the court's appellate jurisdiction on constitutional matters, but instead is only

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[184] *Id.* It is interesting to note that one of the citations used here to support the proposition that the essential characteristics previously possessed by the constitutional courts were frozen with the constitution is a statute enacted three years after the ratification of the state constitution. *Id.* at 549. It seems to run contrary to logic that the *DeJesus* plurality would not rely on the Rules Enabling Act to give the superior court judges the final power over evidence rules, but would rely on a case that uses a statute delegating judicial powers to make their argument that the powers of the constitutional courts were frozen in 1818.

[185] 355 A.2d 49 (Conn. 1974).

[186] *Id.* at 62.

[187] *Id*. at 62–65.

[188] Styles v. Tyler, 30 A. 165, 173 (Conn. 1894) (emphasis added).

[189] *Id.*

[190] For example, a due process challenge or confrontation clause argument.

controlling the rulemaking mechanism for the enforcement of that substantive law. Such a procedural change does not alter the essential characteristics of the supreme court.

As observed by Professor Richard Kay in his article about separation of powers in Connecticut, Hamersley's subsequent actions and judicial decisions further suggest the limitations of his decision in *Styles* and support the constitutional argument for legislative participation in procedural judicial matters. Hamersley served on committees that drafted and recommended court rules and practice acts to the General Assembly. In his later judicial decisions, such as in *Ockershausen v. New York*, *New Haven & Hartford Railroad*, the court held that when rules of court conflict with a statute, the statute prevails.[191]

Furthermore, neither *Walkinshaw* nor *Szarwak* supports the argument that making procedural rules of evidence is an essential characteristic of the Connecticut Supreme Court. Instead, these cases stand for the proposition that the essential characteristics of the *jurisdiction* of the superior court cannot be impaired by a legislative act apportioning excessive jurisdiction to the lower courts because doing so would alter the essential character of the superior court.[192] "Jurisdiction" is defined by *Black's Law Dictionary* as "a court's power to decide a case or issue a decree."[193] In *DeJesus*, the question presented was not about jurisdiction, but a procedural matter. As mentioned earlier, this Note does not assert that the supreme court can be divested of its power to hear cases where the constitutionality of the rules of evidence contained within the Code is questioned. Such a conclusion would violate the constitution, as an essential characteristic of the Connecticut Supreme Court is to hear appeals on matters of law. However, the conclusion in *DeJesus*, that an essential characteristic of the Connecticut Supreme Court is to make procedural rules of evidence, cannot be sustained by these two cases because they do not discuss procedural characteristics inherent to the constitutional courts.

The author of the *Walkinshaw* opinion, Justice William M. Maltbie, would not likely have been of the opinion that the jurisdiction of the constitutional courts was completely frozen in 1818, or that the legislature was not permitted to make procedural rules under the state constitution. This can be seen in articles written by Maltbie in the *Connecticut Bar Journal*. In his article entitled "The Courts and Constitutions of Connecticut," Maltbie described the constitution as containing "broad definitions and limitations upon the agencies of government, leaving it largely to the Legislature by its own acts to adapt their functions and

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[191] Ockershausen v. N.Y., New Haven & Hartford R.R., 42 A. 650, 651 (Conn. 1899); Kay, *supra* note 127, at 15–18.

[192] *Szarwak*, 355 A.2d at 63; Walkinshaw v. O'Brien, 32 A.2d 547, 553 (Conn. 1943).

[193] BLACK'S LAW DICTIONARY 927 (9th ed. 2009).

determine their powers in view of the needs of the particular time."[194] In another article, Maltbie asserted that the Connecticut Supreme Court was given rulemaking power over the rules of the practice and procedure not by the constitution, but by the statutes of 1821.[195] If Maltbie thought that procedural rule making was an essential characteristic of the judiciary, frozen with the ratification of the Connecticut Constitution, he would have found such an allocation of power unconstitutional.

This series of decisions illustrates the dangers of the slippery slope. What started in *Styles v. Tyler* as an interpretation of article V as granting *general* jurisdiction to the superior court over the trial of causes and *appellate* jurisdiction to the supreme court in resolving errors of law or errors of mixed fact and law, has culminated in *DeJesus*'s radical departure from the text of the constitution. The holding in *DeJesus*, that procedural evidentiary rule making is an essential and constitutionally prescribed characteristic of the supreme court that cannot be shifted solely to the superior court, is not supported by the case law cited by the plurality for this proposition. Such an interpretation extends the powers of the Connecticut Supreme Court beyond their constitutional scope.

Perhaps most interesting about the series of decisions upon which the plurality's constitutional argument rests is that each case cited addresses the separation of powers between branches, but no case addressed the question of a separation of powers within the judicial branch itself. As Justice Katz said in her dissenting opinion in *DeJesus*, "This court has considered constitutional challenges regarding separation of powers concerns via legislative intrusion into the court's authority to adopt rules of practice, without *ever* suggesting that the procedure within the judicial branch itself may be constitutionally suspect."[196]

This Note concludes that, because evidentiary rule making is not an essential characteristic of the Connecticut Supreme Court, the constitutional issue in *DeJesus* is not the separation of procedural powers within the judicial branch, but the separation of powers between the legislative and judicial branch. As stated above, the text and history of the Connecticut Constitution support the assertion that the legislature has the authority to allocate rulemaking authority to the superior court under Connecticut General Statutes section 51-14, or the Rules Enabling Act, so allowing the judges of the superior court to adopt a binding code of evidence.

The case law regarding the separation of powers as related to judicial procedural rule making, however, has called into question the

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[194] William M. Maltbie, *The Courts and Constitutions of Connecticut*, 9 CONN. B.J. 269, 278 (1935).

[195] William M. Maltbie, *The Supreme Court of Errors*, 26 CONN. B.J. 357, 370 (1952).

[196] State v. DeJesus, 953 A.2d 45, 104 (Conn. 2008) (Katz, J., dissenting) (emphasis added).

constitutionality of this statute.[197] In 1976, the Connecticut Legislature revised section 51-14, likely as a response to the *Clemente* holding.[198] The revised language limited the rulemaking authority of the courts by stating that they could only promulgate rules of practice and procedure in "courts in which they have the constitutional authority to make rules."[199] Considering the lack of consensus on the constitutional authority of the legislature to allocate procedural rule making, the addition of this language neither clarified nor resolved this issue**.**

The constitutional questions surrounding the Rules Enabling Act remain today. In February 2009, the House introduced a bill to amend subsection (b) of the Rules Enabling Act to read as follows:

> The Chief Justice shall report any rules adopted and promulgated, or modified, superseded or suspended, by the Justices of the Supreme Court, the Judges of the Appellate Court or the Judges of the Superior Court pursuant to the provisions of this section to the General Assembly for study at the beginning of each regular session.[200]

The bill also proposes several changes to various judicial procedural

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[197] *See* State v. Clemente, 353 A.2d 723, 730–31 (Conn. 1974) (holding that Connecticut General Statutes section 54-86b impaired an essential function of the courts and, therefore, was an unconstitutional violation of the separation of powers by the legislature); Adams v. Rubinow, 251 A.2d 49, 56 (Conn. 1968) ("[T]he General Assembly has no power to make rules of administration, practice or procedure which are binding on either of the two constitutional courts and that any attempt on its part to exercise such power is dependent for its efficacy, upon the acquiescence of the constitutional court involved.").

[198] The amendment to Connecticut General Statutes section 51-14 was part of a much larger bill restructuring the Connecticut courts. H.B. 5605, 1976 Gen. Assem., Feb. Sess. (Conn. 1976). The Joint Committee on Judicial Modernization, a coalition between the Connecticut Citizens for Judicial Modernization and the Connecticut Bar Association was established in 1971—before *Clemente*—to study the state of the judicial system and to draft statutory improvements. Specifically, the Commission focused on the overlapping jurisdiction of the probate courts, the courts of common pleas, and the superior court. FIRST REPORT OF THE JOINT COMMITTEE ON JUDICIAL MODERNIZATION, H. Reg. Sess., at 2–7 (Conn. 1972). The bill that followed, "An Act Transferring All Trial Jurisdiction to the Superior Court," exceeded five hundred pages and includes the revision to Connecticut General Statutes section 51-14. H.B. 5605, Feb. Sess. (Conn. 1976). The legislative history is silent with regard to the revision of section 51-14. The rulemaking authority of the judicial branch is referenced, but not discussed in depth. *An Act Transferring All Trial Jurisdiction to the Superior Court: Hearing on H.B. 5605 Before the H. Comm. on the Judiciary*, Reg. Sess. 258 (Conn. 1976) (statement of James F. Bingham) ("The rule-making powers will remain in the courts and the judges shall establish by rule parts and divisions of the said court as they determine necessary."); *see also* CONNECTICUT CITIZENS FOR JUDICIAL MODERNIZATION AND CONNECTICUT BAR ASSOCIATION, FIRST REPORT OF THE JOINT COMMITTEE ON JUDICIAL MODERNIZATION 103 (1972) ("The subcommittee is dealing with matters which fall primarily within the present existing rule-making power of the courts and which do not require legislative change.").

[199] CONN. GEN. STAT. § 51-14 (1975); An Act Transferring All Trial Jurisdiction to the Superior Court, Pub. Act No. 76-436, 1976 Conn. Acts 1 (Reg. Sess.).

[200] H.B. 6340, 2009 Gen. Assem., Jan. Sess. (Conn. 2009). This language was not included in the Substitute House Bill. Substitute H.B. 6340, 2009 Gen. Assem., Jan. Sess. (Conn. 2009). The statute currently reads, "The chief justice shall report any such rules to the general assembly for study at the beginning of each regular session." CONN. GEN. STAT. §51-14(b) (2009).

statutes. For example, the bill proposes to amend section 51-51k, which addresses the role and responsibility of the judicial review council; section 51-51q, which addresses the reappointment process for judges; section 51-1b, which addresses the function of the court administrator; section 53a-39a, regarding the public record when a defendant is sentenced to an alternate to incarceration; and section 54-56d, which addresses the procedure for determining competency of defendants.[201]

At the public hearing for House Bill 6340, Barbara Quinn, the Chief Court Administrator, submitted testimony on behalf of the judicial branch. In her testimony, Quinn stated that the judicial branch approves of all the bills' contents except for those relating to court rules. Specifically, Quinn stated:

> For the past thirty years, the Judicial Branch has been providing copies of all of the rules changes made during the preceding year to the General Assembly in order to promote cooperation and avoid a constitutional confrontation. This does not mean that the judiciary has acquiesced and ceded its authority with regard to the adoption of procedural rules for the courts. During that time, the Judiciary Committee has never held a hearing on the rules submitted, as required by the statute, nor has the Legislature ever declared a rule to be void pursuant to this statute. If those events were to occur, the Judicial Branch might very well raise the issue of this statute's constitutionality. If you decide that the Legislature should have control over the procedural rules, I would submit that a constitutional amendment is necessary.[202]

Why the judicial branch considers legislative involvement to be constitutionally permissible in certain judicial procedural matters, but not in others, remains unclear. Such inconsistency illustrates the need for clarity in the law.

IV. IMPLICATIONS OF THE *DEJESUS* DECISION

The four-and-a-half-year effort, intended to provide an authoritative statement of Connecticut evidence law, one on which parties, practitioners, and judges could rely, has been defeated. In *Tait's Handbook of Connecticut Evidence*, Professor Colin Tait wrote:

> Attorneys and judges at trial who rely on the Code may do so at their peril. The net effect of [the *DeJesus*] holding is that

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[201] H.B. 6340, 2009 Gen. Assem., Jan. Sess. (Conn. 2009).

[202] *Rules Enabling Act: Hearing on H.B. 6340 Before the Judiciary Comm.*, 2009 Gen. Assem., Reg. Sess. (Conn. 2009) (statement of Barbara M. Quinn, Chief Court Adm'r).

> litigators are free to challenge on appeal any trial court ruling relying on the Code of Evidence, even if the ruling is not constitutional in nature.[203]

Now that these rules can be changed by the appellate courts, they are not authoritative or binding. Since the Code itself will need to be changed every time any appellate decision changes a Code provision, the Code will, in a sense, always be "out-of-date."[204] Any common law changes will have to be drafted, approved, and then added to the Code. As this is a time-consuming process, there will inevitably be times when the Code does not include all evidence rules, so those in need of assurance that a rule is what it purports to be cannot depend on the Code. Also, parties cannot rely on a rule from the Code when arguing on appeal because the appellate courts can now change the rules of evidence as they see fit.

Also troubling about the *DeJesus* holding is the four-and-a-half-year waste of legislative and judicial resources expended to develop the Code. The lack of cooperation between the judicial branch and the legislative branch caused this and will continue to do so until the debate is resolved. For the sake of saving resources, the law must be predictable. To accomplish this, the limits of the legislature's powers in the judicial context need be defined more precisely than the current law provides. Judges, legislators, and private parties need to know where constitutional authority ends and begins. In *DeJesus*, an arguably constitutional allocation of power from the Rules Enabling Act authorized the superior court to make this an authoritative code, but the supreme court did not address this. The Rules Enabling Act directs the superior, appellate, and supreme courts to adopt procedural rules when they have *the constitutional authority* to do so.[205] Following *DeJesus*, that constitutional authority is unclear—a binding evidence code is now considered beyond the superior court's constitutional scope, and possibly the rules of practice and procedure also.

This ambiguity has resulted in an unreliable code of evidence and countless hours of taxpayer-funded work wasted. Reconciliation is needed between these two branches over who has the power to make rules regulating court procedure: the legislature and the courts, or the courts alone. Otherwise, this waste of resources and time will continue, stalling progress on more pressing substantive issues.

Since the Connecticut Legislature is not likely to cede its rulemaking power, and the courts do not seem likely to recognize that rulemaking authority, a more drastic approach seems necessary. A constitutional

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[203] TAIT & PRESCOTT, *supra* note 6, at 3.
[204] *Id*. at 3–4.
[205] CONN. GEN STAT. § 51-14 (2009).

amendment may serve as the best means to resolve the difference of opinion on the subject.[206] Since this debate over procedural authority has lasted for several years, the respective branches do not seem likely to resolve this issue on their own. Accordingly, it is time to put the issue to rest, and turn it over to the electors to decide. Currently, there is a pending resolution to amend article V.[207] The amendment proposes the language be changed to read:

> The judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The general assembly shall prescribe by law the powers, procedures and jurisdiction of these courts.[208]

While it is beyond the scope of this Note to analyze the specific language of a constitutional amendment, it seems the amendment should not wholly exclude the judicial branch from the rulemaking process, as this proposal does.

It has been argued that amending article V is not warranted because the procedural rule making dispute does not rise to the level of extraordinary circumstances required for amending the constitution. Both Wesley Horton and Justice Zarella made this assertion in their testimony at the public hearing on the proposed amendment. According to Horton, "[U]nless there were some enormous crisis going on that you need to change the balance of powers—and there's no crisis out there; there's no major reason for this—you shouldn't be putting up a constitutional amendment."[209] Similarly, Justice Zarella asserted, "In my view, and in the view of the branch, amending any constitution is an extraordinary act. It should be done only as a last resort. The constitution should be amended when a significant recurring problem has been identified and the only solution is a constitutional amendment."[210] While this premise is accurate, this Note illustrates that the ongoing conflict between the legislature and the judiciary does indeed warrant such an amendment. This constitutional dispute has resulted in wasted time and resources, as illustrated by the

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[206] *But see* Wesley W. Horton & Kenneth J. Bartschi, *2006 Connecticut Appellate Review*, 81 CONN. B.J. 1, 13, 15–16 (2007) (concluding that reconsideration of the *Clemente* holding is the solution to the uncertainty surrounding the separation of powers and judicial procedure).

[207] S.J. Res. 46, 2009 Gen. Assem., Jan. Sess. (Conn. 2009).

[208] *Id.* The current article V, section 1 reads, "The judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law." CONN. CONST. art. V, § 1.

[209] *Resolution Proposing an Amendment to the Constitution of the State Concerning the Procedures of the Courts: Hearing on S.J. Res. 46 Before the Judiciary Comm.*, Jan. Sess. 132 (Conn. 2009) (statement of Wesley Horton, Conn. Bar Association).

[210] *Id.* at 137–38 (statement of Justice Peter T. Zarella).

dismantling of the Evidence Code. If the issue were resolved, courts and legislators could direct their work toward more important law making. Furthermore, as stated by Senator McDonald, "I don't necessarily agree that the only time you entertain constitutional amendment questions is when there's an uproar about a particular subject. You can actually do it in a non-volatile situation as well."[211]

In the meantime, the legislature could enact the Evidence Code as a statute. In doing so, the time and resources expended on making the Code would not be futile because the legislature could essentially adopt the Code as is, adding to it the rule from *DeJesus*.[212] If the legislature does this, it should also add other Connecticut statutory evidence laws to the Code.[213] While sorting through the statutes will be a resource-consuming project, it would result in an even better product than the initial Code. The concern with this solution is that the Connecticut Supreme Court would find such an act unconstitutional based on the holding in *DeJesus*, again illustrating the problems caused by unpredictable law.

A legislative takeover of the Evidence Code has its disadvantages. First, the same concerns that prompted the legislature to relinquish authority over the Code to the judiciary in 1998 still exist today. As discussed earlier, these concerns are that the Code should be responsive to judicial concerns, isolated from politically motivated changes, and should be easier to amend than it would be under legislative restraints.[214] Second, such a takeover will continue to widen the divide between courts and the legislature instead of these two branches working cooperatively to solve procedural issues. Additionally, there is the looming question of whether the courts would recognize such a legislative code, or instead deem it unconstitutional. The *DeJesus* plurality opinion[215] and Justice Palmer's concurring opinion[216] both quote *State v. James* for the proposition that the legislature has enacted statutes governing evidence procedure which have not been found to violate the separation of powers but have instead been accepted by the courts. Additionally, the original intent of the judiciary was for the Code to be a legislative compilation, as illustrated by Chief Justice Ellen Peters's 1984 biannual report asking the legislature to codify evidence rules.[217] There remains the possibility, however, that the courts would not find such a legislative code of evidence constitutional. Since the

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[211] *Id.* at 133 (statement of Sen. Andrew J. McDonald, member, Judiciary Comm.).

[212] The legislature could add this rule, along with any other new common law rules that may come forth following *DeJesus*.

[213] The legislature should also repeal all evidence statutes so as to eliminate any conflicts between a statutory evidence code and any pre-existing statutory rules of evidence.

[214] *See supra* Part II.A.

[215] State v. DeJesus, 953 A.2d 45, 72 n.31 (Conn. 2008).

[216] *Id.* at 85 n.7 (Palmer, J., concurring).

[217] *See supra* note 6 and accompanying text.

DeJesus court held that control over evidence rule making is a constitutionally prescribed function of the appellate courts, the court could assert that, just as this function cannot be taken away by the superior court, neither can it be taken away by the legislature. Also, the question of whether a judicial rule of evidence trumps a statutory rule has yet to come before Connecticut courts. As the court wrote in *James*, "We leave to another time the question whether our constitutional authority to make rules governing court 'administration, practice or procedure' extends also to the creation of a code of evidence and the resolution of possible conflicts between its provisions and legislative enactments affecting the same matters."[218]

V. CONCLUSION

The purpose of condensing Connecticut's common law evidence rules into a code was to increase courtroom efficiency by eliminating the time and resources wasted by judges and practitioners trying to decipher common law rules. Unfortunately, the Evidence Code has been reduced to an outdated restatement of evidence law, one that cannot be relied upon as it does not include this latest common law rule and because the rules it does contain can be altered by appellate courts as they please. The Connecticut Supreme Court, unable to agree on one rationale to justify this departure from the Code's purpose, put forth three different ways of reaching the same conclusion, illustrating the unstable foundation on which this holding stands. This Note concludes that the constitutional argument not only fails, but also sets a dangerous precedent. To limit the jurisdiction of the two constitutional courts to not only their essential functions, but also the non-essential functions of their eighteenth and nineteenth century predecessors, freezes for eternity a judiciary that was intended to grow and develop over time. This has resulted in a split judiciary that cannot agree on an evidence code, the success of which would simplify procedure so that courts can focus on substantive issues and not squander their time on procedural disputes. The result of this is a split judiciary that cannot agree on something like an evidence code, the success of which would have simplified procedure so that courtrooms could focus on substantive issues instead of squandering time on procedural disputes.

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[218] State v. James, 560 A.2d 426, 431 (Conn. 1989) (quoting Adams v. Rubinow, 251 A.2d 49, 56 (Conn. 1968)).