The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking

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The Ohio Supreme Court has twice promulgated and the Ohio General Assembly has twice disapproved the proposed Ohio Rules of Evidence. Moreover, the office of the Attorney General has opposed the proposed Rules in an article published in this review. The author examines the arguments against the Rules and concludes that the supreme court has the constitutional authority to prescribe most rules of evidence and that the General Assembly should accept the proposed Rules with amendments.

TABLE OF CONTENTS

INTRODUCTION ....................................... 18

I. PROMULGATION OF RULES OF EVIDENCE: A LEGISLATIVE OR JUDICIAL FUNCTION? .............. 21
   A. The Legislative History of Public Law 93-12 ...... 21
   B. Ohio v. Federal Rulemaking Authority ............... 24
   C. Exclusivity of Article IV, Section 5(B) ............. 27

II. SECTION 5(B): SUBSTANCE AND PROCEDURE .......... 33
   A. Legislative Intent ................................ 37
   B. Other Jurisdictions ................................ 41
      1. Federal Rules of Evidence ...................... 41
      2. State Rules of Evidence ......................... 45
   C. Problem Areas .................................. 46
      1. Privileges .................................... 48
      2. Presumptions .................................. 50
      3. Competency of Witnesses ....................... 51
      4. The Rape Shield Statute ....................... 53
   D. Toward a Resolution ................................ 55

III. NEED FOR THE PROPOSED RULES OF EVIDENCE .... 59
   A. Accessibility and Uniformity ..................... 60
   B. Specific Reforms ................................ 62

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IV. Criticisms of the Proposed Rules .................. 67
   A. Judicial Discretion .................................. 67
      1. Relevancy ......................................... 69
      2. The Residual Hearsay Exceptions ............... 72
      3. Discretion ......................................... 75
   B. Lay Opinion Testimony ............................... 80
   C. The Ultimate Issue Prohibition .................. 82

V. Conclusion .................................................. 84
   A. Disapproval .......................................... 84
   B. Codification by Statute ............................. 85
   C. Approval With Recommendations for Change .... 86
INTRODUCTION

On January 12, 1977, the Supreme Court of Ohio, pursuant to what it believed to be its rulemaking authority under Article IV, Section 5(B) of the Ohio Constitution, transmitted proposed Rules of Evidence to the General Assembly. Although there were several significant differences, the proposed Rules closely fol-

1. Section 5(B) provides:
   The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Ohio Const. art. IV, § 5(B).


Previously, the Supreme Court, pursuant to § 5(B), had promulgated and the General Assembly had accepted the following court rules: (1) Ohio Rules of Civil Procedure, 22 Ohio St. 2d xvi (1970); (2) Ohio Rules of Appellate Procedure, 26 Ohio App. 2d xvii (1971); (3) Ohio Rules of Juvenile Procedure, 30 Ohio St. 2d xix (1972); (4) Ohio Rules of Criminal Procedure, 34 Ohio St. 2d xix (1973); and (5) Ohio Court of Claims Rules, 42 Ohio St. 2d xxv (1975).

3. Federal rule 601 states a general rule of competency: “Every person is competent
allowed the Federal Rules of Evidence. The task of reviewing the proposed Rules in the General Assembly was assigned to a joint subcommittee of both Houses. On April 20, 1977, the Joint Subcommittee recommended that the proposed Rules be disapproved. Consequently, the House and Senate passed a concurrent resolution of disapproval, which, under the provisions of section 5(B), precluded the Rules from taking effect. The General Assembly subsequently created a joint select committee “


study proposals for the adoption of rules of evidence to govern proceedings in the courts of this state.\textsuperscript{7} On January 13, 1978, before the Committee had begun its work, the supreme court resubmitted the proposed Rules to the General Assembly.\textsuperscript{8} Although the General Assembly again disapproved the Rules,\textsuperscript{9} the Committee has continued to consider their adoption.

The General Assembly's original disapproval of the proposed Rules was based on several concerns: (1) that the formulation of rules of evidence is a legislative, rather than a judicial, function; (2) that the promulgation of rules of evidence does not come within the supreme court's authority to prescribe rules of "practice and procedure" pursuant to article IV, section 5(B) of the Ohio Constitution; (3) that the need for rules of evidence had not been demonstrated; and (4) that certain rules, especially those recognizing the exercise of discretion by trial judges, were undesirable.\textsuperscript{10}

\begin{itemize}
\item \textsuperscript{8} Proposed Ohio Rules of Evidence, 51 OHIO B. 181 (1978). The court submitted the Rules unchanged.
\item \textsuperscript{9} H. Con. Res. 43, 112th Gen. Ass., Reg. Sess. (1977-78). The Resolution states:
WHEREAS, The Ohio Supreme Court, under the authority granted by Section 5(B) of Article IV of the Ohio Constitution did, on January 13, 1978, promulgate, and file with the Clerk of the Senate and the Legislative Clerk of the House, proposed Ohio Rules of Evidence to govern proceedings in the courts of this state; and
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\item WHEREAS, The proposed rules are identical to the Rules of Evidence disapproved by Amended House Concurrent Resolution No. 14... and
\item WHEREAS, An extensive study of the proposed rules has been made by the Joint Select Committee... therefore be it
\item RESOLVED, That this 112th General Assembly of the State of Ohio does hereby disapprove the proposed Ohio Rules of Evidence in their entirety; and be it further
\item RESOLVED, That it is the intention of the General Assembly in adopting this Concurrent Resolution of Disapproval to comply with Section 5(B) of Article IV of the Ohio Constitution; and thus to prevent the proposed rules from taking effect.
\end{itemize}
\item \textsuperscript{10} Resolution 14, supra note 6, at 388 app. A. Since the 1978 Resolution of Disapproval did not state reasons for the General Assembly's action, see note 9 supra, this article focuses on the 1977 Resolution, known as Resolution 14.
\end{itemize}

An additional reason for disapproving the Rules, insufficient time for their review, was offered in Resolution 14. The task of review was complicated because the Staff Notes, prepared by the Evidence Rules Advisory Committee of the Supreme Court, were not available in 1977. In addition, a member of the Advisory Committee had written that the Committee did not have the responsibility to determine which statutory provisions relating to evidentiary matters conflicted with the proposed Rules. Miller, supra note 2, at 551. Such statutes, if deemed procedural, would have been superseded by the Rules. Thus, at the time the proposed Rules were under legislative review in 1977, the General Assembly had no way of knowing the effect of the proposed Rules on current law. The Staff Notes
This article examines and critiques these concerns. It concludes that the Ohio Supreme Court does have the authority to promulgate most rules of evidence, subject to review by the General Assembly. And, after demonstrating the need to reform the law of evidence, the article urges the General Assembly to recommend amendments to the court.

I. PROMULGATION OF RULES OF EVIDENCE: A LEGISLATIVE OR JUDICIAL FUNCTION?

In rejecting the proposed Rules of Evidence, the General Assembly questioned the authority of the Ohio Supreme Court to prescribe rules of evidence on grounds that such action by the court violated the separation of powers doctrine. The Resolution of Disapproval stated:

The Congress of the United States has already considered the subject of codification of the law of evidence and determined that such codification is the proper function of the legislative rather than the judicial branch of government, as evidenced by its act of March 30, 1973 (Public Law 93–12, 87 Stat. 1 [9]) which deferred the effective date of the Federal Rules of Evidence promulgated by the United States Supreme Court until such time as they were enacted into law by statute.

Reliance on congressional action with respect to the Federal Rules of Evidence is troublesome for several reasons.

A. The Legislative History of Public Law 93–12

First, Public Law 93–12, which postponed the effective date of the Federal Rules of Evidence, is cited in the Resolution as

became available in 1978, and the Legislative Service Commission was assigned the task of comparing the Rules with the Revised Code.

11. Unlike some state constitutions, e.g., COLO. CONST. art. III, CONN. CONST. art. 2, the Ohio Constitution has no specific provision for the separation of powers. The doctrine, however, is implicit in articles creating separate legislative, executive, and judicial branches. See OHIO CONST. art. II, § 1 (vesting legislative power in the General Assembly); art. III, § 5 (vesting executive power in the Governor); and art. IV, § 1 (vesting judicial power in specified courts). In addition, § 32 of article II provides: "The General Assembly shall grant no divorce, nor, exercise any judicial power, not herein expressly conferred."

In considering the separation of powers issue, it should be remembered that in many areas the branches of government have exercised overlapping powers. See United States v. Nixon, 418 U.S. 683, 707 (1974) ("[T]he separate powers were not intended to operate with absolute independence."). Procedural rulemaking is such an area. See J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 53 (1977); JOINER & MILLER, RULES OF PRACTICE AND PROCEDURE: A STUDY OF JUDICIAL RULE MAKING, 55 MICH. L. REV. 623, 629 (1957).

12. Resolution 14, supra note 6, at 389 app. A.

evidence that Congress had "determined that such codification is the proper function of the legislative rather than the judicial branch of government . . . ." 14 This statement is inaccurate. Although the preamble to Public Law 93-12 15 appears to support the legislative function argument cited in the Resolution, a close analysis of the legislative history of Public Law 93-12 reveals that the purpose of the law was to extend the statutory time limit for congressional consideration of the proposed Federal Rules of Evidence and not to assert legislative hegemony over the promulgation of rules of evidence.

The Federal Rules of Evidence were promulgated by the United States Supreme Court in November 1972 and were transmitted to Congress in February 1973. 16 Under the enabling statutes, Congress had ninety days in which to disapprove the Rules; 17 had Congress failed to act during this period, the Rules would have become effective automatically. On January 29, 1973, Senator Ervin introduced Senate bill 583 (S. 583), 18 which, as amended, subsequently became Public Law 93-12. S. 583 would have extended the time period for congressional review until the adjournment of the first session of the 93d Congress.

Senator Ervin's explanatory remarks introducing S. 583 shed light on the meaning of the preamble language. He described S. 583 as a "bill to promote the separation of constitutional powers by securing to the Congress additional time in which to consider the rules of evidence . . . ." 19 Thus, the separation of powers issue is defined in terms of the extension of the statutory time limits. Senator Ervin's argument in support of the bill is based entirely on the need for additional time to review the Rules. 20 Nowhere in his explanatory remarks does he contend that drafting rules of evidence is a legislative function. 21 Similarly, at the time the Senate

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14. Resolution 14, supra note 6, at 389 app. A.
20. See id at 2395–96.
21. After Public Law 93-12 was enacted, Senator Ervin took the position that the promulgation of rules of evidence was a legislative function. See Federal Rules of Evidence: Hearings Before the Comm. on the Judiciary, United States Senate, 93d Cong., 2d Sess. 2 (1974). It is unknown why, if he held that opinion at the time he introduced S. 583, he did
passed S. 583, the floor debates focused on the need for additional time without mention of the separation of powers issue.\textsuperscript{22}

In the House of Representatives, S. 583 was referred to the Judiciary Committee. By the time the Committee Report was submitted to the House,\textsuperscript{23} a subcommittee had commenced hearings\textsuperscript{24} on the proposed Rules of Evidence and several issues had surfaced. Separation of powers was only one of several issues that the Committee desired additional time to study.\textsuperscript{25} Thus, while the Committee Report mentions separation of powers, it was not the reason the House Committee recommended passage of the bill. The House floor debates on amended S. 583\textsuperscript{26} also support the

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not state it then. Moreover, at the time he did take that position, the Court had acknowledged congressional supremacy in this field. See text accompanying notes 31-32 infra. Perhaps the change in position can be explained in light of Congress' attempt to reassert its position vis-a-vis the other branches of government:

[L]ate 1972 was as unpropitious a time for the Rules [of Evidence] to have gone up to the Hill as could be imagined. As the Watergate scandal began to unravel, the notion of expanded privileges of secrecy for government and elimination of privileges for citizens seemed less attractive. . . . Finally, and perhaps the most significant factor, Congress was preparing to assert its prerogatives, to refute the claim that it was the impotent branch by taking on the President on the issues of impoundment and the conduct of the Viet Nam war. What better way to tune-up for that bout than to take on the Supreme Court in a non-title fight?

21 C. WRIGHT & K. GRAHAM, supra note 4, § 5006, at 104-05. The statements of Representative Podell on the proposed Rules of Evidence support this view:

[This proposal], on the heels of the current assault on Congress' power of the purse, contains what is perhaps the most open and most concerted attack on the powers of Congress in history.

If, through inaction, indifference, or lack of understanding, we allow our authority to be further eroded, and our powers further diminished, we will be desecrating a holy public trust, and we will have no one to blame but ourselves.

Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 9 (1973) [hereinafter cited as House Hearings]. See also 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE viii (1977) ("At this point the relatively smooth passage of the Rules became involved in the maelstrom of Watergate.").


23. The date of submission was March 14, 1973. 119 CONG. REC. 7642 (1973).

24. House Hearings, supra note 21. The subcommittee hearings were held on February 7, 8, 22, 28, and March 9, 15, 1973.

25. In addition to separation of powers, the Committee Report cited the following issues as requiring additional time for review: (1) the effect of the Rules in cases in which state law supplied the rule of decision; (2) whether the Rules fell within the Supreme Court's authority under the enabling acts; (3) whether uniform rules of evidence were desirable; (4) whether the Rules had "enough exposure" prior to adoption by the Court; and (5) whether specific rules, especially the rules relating to privilege, should be changed. H.R. REP. No. 93-52, 93d Cong., 1st Sess. 3-4 (1973).

26. The Committee recommended that S. 583 be amended to require affirmative congressional action before the Rules could become effective. The genesis of the amendment requiring affirmative congressional action may have been based, in part, on a separation of powers argument. On February 7, 1973, the same day that the Senate passed S. 583, Rep-
view that the purpose of the legislation was merely to extend the time period. For example, Representative Rodino, Chairman of the House Judiciary Committee, made the following statement concerning the purpose of S. 583:

[T]he legislation before the House is in no way directed to the substantive issues—constititutional or policy. S. 583 is directed at only one objective—assuring the people of the United States that the Congress will have ample opportunity to review the rules developed by distinguished committees of the Judicial Conference.27

B. Ohio v. Federal Rulemaking Authority

Second and more important, the General Assembly's reliance on congressional action is misplaced because it fails to recognize a critical difference between the source of federal rulemaking authority and the rulemaking authority of the Ohio Supreme Court. The authority of the United States Supreme Court to prescribe rules of "practice and procedure" is statutory.28 Legislative authority is delegated to the Court;29 there is no question that the

27. 119 CONG. REC. 7643 (1973). Other sources also support this view. Representative Hungate, chairman of the subcommittee that reviewed the Federal Rules and the legislator most intimately involved with the Rules in Congress, wrote in a subsequent article on the Federal Rules: "The public law [93-12]... reflected a genuine concern that the Congress needed additional time to act responsibly and sensibly on the [Rules]... transmitted to it by the Chief Justice." Hungate, An Introduction to the Proposed Rules of Evidence, 32 FED. B.J. 225, 227 (1973). In describing the purpose of Public Law 93-12, the Senate Judiciary Report on the Federal Rules of Evidence contained the following statement: "Because of the general importance of these Rules as well as serious questions which were raised with respect to certain Rules of Privilege in particular, the Congress enacted Public Law 93-12 to insure that Congress had a full opportunity to review them." S. REP. NO. 1277, 93d Cong., 2d Sess. 5, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7052.


29. Some commentators and courts have taken the position that the judiciary has inherent power to prescribe procedural rules. The most extreme articulation of this view is found in Wigmore, All Legislative Rules for Judiciary Procedure Are Void Constitutionally, 23 ILL. L. REV. 276 (1928). For a discussion of this subject and a catalog of citations, see 4 C. WRIGHT & A. MILLER, supra note 28, § 1001. For a recent case on the issue, see Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976), discussed in text accompanying notes 74-76 infra.
ultimate rulemaking authority inheres in Congress. As the Court observed in *Sibbach v. Wilson*, "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or constitution of the United States. . . ."31

Congress' ultimate authority was never questioned during the congressional hearings on the Federal Rules of Evidence. Testimony by representatives of both the Judicial Conference and its Advisory Committee consistently acknowledged that authority.32 This acknowledgment of congressional power explains why the separation of powers issue was not a significant factor in either the postponement act33 or subsequent legislation on the Federal Rules of Evidence.34 The hearings on the proposed Rules had commenced a month prior to the enactment of Public Law 93-12. It was during those hearings that the representatives of the Judicial Conference acknowledged Congress' authority in this sphere.

The United States Supreme Court, however, has not relied on the inherent power theory, and it seems unlikely that the Court would do so in the future. See J. WEINSTEIN, supra note 11, at 48 ("In this bicentennial year we reflect back on 185 years of court exercise of rule-making powers pursuant to legislative rather than inherent authority, making it unlikely that the legislature's power can now be successfully challenged.").

30. 312 U.S. 1 (1941).

31. Id. at 9–10 (emphasis added and footnotes omitted); accord, Hanna v. Plumer, 380 U.S. 460, 473 (1965) (acknowledging "the long recognized power of Congress to prescribe housekeeping rules for federal courts . . ."); Tot v. United States, 319 U.S. 463, 467 (1943) ("Congress has power to prescribe what evidence is to be received in the courts of the United States."). See also 4 C. WRIGHT & A. MILLER, supra note 28, § 1001, at 27 ("the weight of authority in this country supports the right of Congress to prescribe rules of judicial procedure for the federal courts.").

32. Judge Albert B. Maris, Chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, and Mr. Albert E. Jenner, Jr., Chairman of the Advisory Committee on Rules of Evidence of the Judicial Conference, commented on this issue in their testimony before the House Subcommittee:

Judge Maris: . . . You gave this power to the Court. You can take back all or any part of it at any time.

Mr. Hogan: But there is no question that we have the power?

Judge Maris: No question of it whatever, in my mind.

Mr. Jenner: I share that view.

*House Hearings*, supra note 21, at 25.

Professor Edward W. Cleary, the Reporter for the Advisory Committee on the Rules of Evidence, also addressed this issue during his testimony: "The Court has consistently conceded the supremacy of Congress in this area; and when Congress has chosen to legislate on a subject in the procedural field, the Court has always recognized that legislation as governing." Id. at 28.


34. The Federal Rules of Evidence were eventually adopted by statute. See note 4 supra.
Thus, by the time Public Law 93–12 was passed by Congress, the separation of powers issue was moot. The Court had conceded—in fact, never contested—congressional supremacy in this area.\textsuperscript{35}

On the other hand, the authority of the Ohio Supreme Court to prescribe procedural rules is \textit{constitutional}. It is not a delegation of legislative authority since article IV, section 5(B) of the Ohio Constitution explicitly empowers the court to prescribe rules of “practice and procedure.” If an evidentiary rule is “procedural,”\textsuperscript{36} the court has the power to prescribe that rule. This is not to say that the court has the “ultimate authority” in the procedural domain. The power is concurrent; the General Assembly retains the power to disapprove court-proposed rules.\textsuperscript{37} Under the Ohio constitutional scheme the court has the “primary responsibility”\textsuperscript{38}—the power to initiate—while the General Assembly has the power to “reassess and evaluate.”\textsuperscript{39} Nevertheless, the authority of the court to prescribe procedural rules is clear, and as one commentator has noted: “When rulemaking authority is based on a

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\item MR. HUTCHINSON. Mr. Chairman, first I would ask the gentleman whether he would agree this bill does not represent any kind of confrontation with the Court. The Court agrees that the power is in the Congress to do as it will with these rules of evidence.
\item MR. HUNGATE. The gentleman makes a point that should be made. The testimony of the Federal judges before us agreed on that, and the members of this distinguished committee unanimously said this province belongs to the Congress and if the Congress chooses to assert it, the judges do not question that power.
\end{itemize}


36. Whether rules of evidence are procedural and thus come within the definition of “rules governing practice or procedure” in article IV, § 5(B) of the Ohio Constitution is a separate issue and is discussed in the text accompanying notes 77–214 infra.

37. Although recognizing the legislative role in the procedural domain, one commentator appears to denigrate that role by stating that the “responsibility for judicial procedure is placed, by the Ohio Constitution, with the Ohio Supreme Court, and the power of the General Assembly is limited to that of a veto.” Note, \textit{Substance and Procedure: The Scope of Judicial Rule Making Authority in Ohio}, 37 OHIO ST. L.J. 364, 382 (1976). Rather, the veto power implies that the General Assembly also has an important “responsibility for judicial procedure.” A comparison of the constitutional provisions relating to the court's rulemaking authority underscores this point. In proposing § 5(A), granting the court a power of superintendence, the General Assembly did not reserve for itself a power of review as it did in § 5(B). The contrast between these two provisions, which were considered at the same time, evidences the General Assembly's determination to play more than an insubstantial role in review of procedural rules.


39. \textit{Id.}
constitutional provision, arguments against vesting the authority in the judiciary, such as judicial usurpation of legislative function and the unconstitutional delegation of legislative authority, lose their cogency. Not only does section 5(B) settle the separation of powers issue, but the content of that provision meets one of the principal separation of powers objections to judicial rulemaking—"the danger of unchecked power which is presented by the doctrine of judicial supremacy over matters of procedure." Section 5(B) provides for a legislative check.

C. Exclusivity of Article IV, Section 5(B)

If the proposed Ohio Rules of Evidence are rules of "practice and procedure" within the meaning of article IV, section 5(B), the Ohio Supreme Court is empowered to prescribe those rules. If not disapproved by the General Assembly, the Rules would supersede all conflicting prior laws. Moreover, subsequent legislation in

40. 1977 B.Y.U. L. Rev. 493, 495. See also Milligan & Pohlman, The 1968 Modern Courts Amendment to the Ohio Constitution, 29 Ohio St. L.J. 811 (1968), in which the authors state:

The debate over whether the legislature or the judiciary should have jurisdiction in this matter is now settled. The rule-making authority is clearly vested in the Supreme Court.

There should now be no doubt that the authority of the Supreme Court in the rule-making area is plenary. Court action in this area supersedes contradictory legislation. The legislature retains a veto over such court-made rules, but no longer has the primary responsibility.

Id. at 829.


42. The Ohio Constitution also meets another objection to judicial rulemaking—that "final responsibility for making law should rest with the popularly elected legislature." Kay, supra note 41, at 40. See also J. Weinstein, supra note 11, at 78; Levin & Amsterdam, supra note 38, at 14; Warner, The Role of Courts and Judicial Councils in Procedural Reform, 85 U. Pa. L. Rev. 441, 447 (1937) ("Some of the problems of procedural reform touch too closely the liberties of citizens to be decided in a democracy by any body not subject to the popular will."). Unlike the justices of the United States Supreme Court, the justices of the Ohio Supreme Court are popularly elected. See Ohio Const. art. IV, § 6(A)(1).

43. "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Ohio Const. art. IV, § 5(B). In 1970, the General Assembly repealed many statutes that would have been superseded by the Ohio Rules of Civil Procedure. 1970 Ohio Laws 3017. Thus, there have been no instances where the court has had to resolve a conflict between a preexisting procedural statute and a civil rule. Section 5(B) also provides that court rules "shall not abridge, enlarge, or modify any substantive right." When the court has found a rule to be "substantive" in nature, it has invalidated the rule. E.g., Boyer v. Boyer, 46 Ohio St. 2d 83, 346 N.E.2d 286 (1976) (the court found the statute controlled where civil rule 75(P) affected the substantive law of child custody codified in Ohio Rev. Code Ann. § 3109.04 (Page Supp. 1977)); State v.
conflict with the Rules of Evidence would, by implication, be invalid. The question that remains, however, is the extent of legislative authority in the absence of rules of evidence. This question is important because the General Assembly, in creating the Joint Committee to review the law of evidence, directed the Committee to submit recommendations on "the desirability and feasibility of enactment of proposed rules of evidence. . . ." If section 5(B) is held to be the exclusive method of regulating procedure, such a codification would be unconstitutional.

The language of section 5(B) neither supports nor refutes an exclusivity interpretation. There is little legislative history to as-

Hughes, 41 Ohio St. 2d 208, 314 N.E.2d 731 (1975) (appellate rule 4(B) was invalidated because it enlarged the statutory right to appeal afforded the prosecution under Ohio Rev. Code Ann. §§ 2945.67-.70 (Page 1975)). See generally Note, supra note 37.

The allocation of power between the legislative and judicial branches established by § 5(B) would be undermined if the legislature could enact a statute superseding a court rule promulgated under that provision. Had the General Assembly desired such power it could have changed § 5(B) prior to the time it was approved by the electorate to provide explicitly for legislative preemption. See text accompanying notes 53-55 infra. See also Note, supra note 37, at 383 ("From the language of art. IV, § 5(B), it seems certain that the General Assembly cannot change a procedural matter by statute where a court promulgated rule is in force.").


Am. S. J. Res. 25, supra note 7, at 391 app. B. (emphasis added). The General Assembly's citation to the legislative adoption of the Federal Rules of Evidence also supports the view that the General Assembly believes it has the power to enact a code of evidence. See Resolution 14, supra note 6, at 389 app. A. Prior to amendment, Resolution 14 contained the following paragraph that evidenced the same position:

It is the belief of the General Assembly that if the law of evidence in Ohio is to be codified, such codification should properly be by statutory enactment pursuant to Section 1 of Article II of the Ohio Constitution just as the codification of the Federal Rules of Evidence was finally accomplished by an act of the Congress of the United States on January 2, 1975 (Public Law 93-595, 88 Stat. 1926). The General Assembly has also acted on this assumption by enacting legislation that restricts the admissibility of evidence in rape trials, Ohio Rev. Code Ann. § 2907.02(D) (Page Supp. 1977), and that provides certain competency requirements for expert medical witnesses, id. § 2743.43(A)(2).

The one exception would be evidentiary rules relating to expert testimony in criminal cases. See Ohio Const. art. II, § 39.
sist in interpreting the provision, nor is there any authoritative case law on this point. Nevertheless, several arguments in support of an exclusivity interpretation can be made. An understanding of these arguments requires an appreciation of the setting in which the General Assembly considered and adopted section 5(B), as part of the Modern Courts Amendment, in 1968.

Prior to 1968, Ohio was a "code" state; court procedure was governed primarily by statute and virtually controlled by the General Assembly. Thus, in proposing section 5(B), the General Assembly was relinquishing power to the court. At the time the General Assembly was considering section 5(B), the constitutional and statutory schemes of other jurisdictions offered a wide range of choices for the allocation of rulemaking power between the legislative and judicial branches, and the General Assembly pos-

47. There is, however, dictum in an unreported appellate decision, Hearing v. Delnay, No. 76-493 (10th Dist. Ct. App. Dec. 21, 1976), which touches upon the issue. Not only did the majority conclude that § 5(B) does not preclude the General Assembly from acting in the absence of the court-promulgated rules, but it also concluded that court-promulgated rules supersede only legislation in force at the time the rule is adopted. Thus, according to the majority, legislation enacted after the promulgation of a court rule supersedes the rule. The majority's reasoning, based on a textual analysis of § 5(B), is unconvincing. It ignores the entire history of court reform, and as the dissent points out, "effectively emasculat[es] the Modern Courts Amendment . . . ." Id. at 16. The precedential value of the majority's dictum is further eroded because the same judges unanimously agreed the month before Hearing was decided that a court-promulgated rule superseded a subsequently enacted statute. See Jacobs v. Shelly & Sands, Inc., 51 Ohio App. 2d 44, 365 N.E.2d 1259 (10th Dist. 1976). For other cases following the Jacobs view, see note 44 supra.


While the designation as a "code" state is proper, it does not provide a totally accurate description of the allocation of rulemaking power in Ohio prior to the Modern Courts Amendment. An early case held a statute on default judgments superior to a court rule providing a procedure for granting such judgments. Van Ingen v. Berger, 82 Ohio St. 255, 92 N.E. 433 (1910). Later cases, however, subscribed to the theory that courts have inherent rulemaking power, although the scope of that power relative to the legislature was never clearly delineated. See Brown v. Mossop, 139 Ohio St. 24, 37 N.E.2d 598 (1941); Anderson v. Industrial Comm'n, 135 Ohio St. 77, 19 N.E.2d 509 (1939); Meyer v. Brinsky, 129 Ohio St. 371, 195 N.E. 702 (1935); Cleveland Ry. v. Halliday, 127 Ohio St. 278, 188 N.E. 1 (1933); Schario v. State, 105 Ohio St. 535, 138 N.E. 63 (1922). See generally A. Vanderbilt, supra at 120–21, 133; 1 Ohio Legal Center Institute, Reference Manual for Continuing Legal Education Program: Evidence in Ohio, State and Federal 2.13–17 (1978); Ohio Legislative Service Comm'n, Staff Research Rep. No. 47, The Ohio Court System: Its Organization and Capacity 28–30 (1961); Comment, The Rule-Making Power of Ohio Courts, 1 Ohio St. L.J. 123 (1935).

49. See A. Vanderbilt, supra note 48, at 132–36; Levin & Amsterdam, supra note 38,
sessed the power to choose any of these provisions as the model for the Ohio Constitution. It was the General Assembly's selection of the particular scheme set forth in section 5(B), rather than other constitutional or statutory alternatives, that supports the interpretation that section 5(B) is the exclusive method for effecting procedural change.

First, the General Assembly placed the rulemaking provision in the judicial article of the Ohio Constitution, thereby acknowledging the judicial nature of the rulemaking function. This acknowledgment is significant because article II, section 32 of the constitution precludes the General Assembly from "exercis[ing] any judicial power, not herein expressly conferred." The only express legislative power with respect to procedural rulemaking is the veto power specified in section 5(B).

Second, the General Assembly chose a provision that granted the supreme court complete control over the initiation of procedural change, reserving to itself only a veto power. In so doing, it rejected other schemes that would have provided for greater legislative control. This choice is significant. If section 5(B) is not the exclusive method of regulating procedure, the General Assembly would have had the power to disapprove all court-proposed rules—civil, criminal, appellate, and juvenile as well as evidentiary—under section 5(B) and also the power to enact rules on these subjects legislatively. If the General Assembly intended to retain such power, it could have recognized it directly. It could have followed the federal model, delegated rulemaking authority to the court by statute, and thereby retained the power to enact supervening legislation as well as the power to withdraw the rulemaking authority. Or, the General Assembly could have adopted the provisions of other constitutions that provide for supervening legislation. For example, the Alaska Constitution.


50. OHIO CONST. art. XVI, § 1 provides:
   Either branch of the general assembly may propose amendments to this constitution; and, if the same shall be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be . . . submitted to the electors, for their approval or rejection. . . .
   . . . If the majority of the electors voting on the same shall adopt such amendments the same shall become a part of the constitution.

51. See OHIO CONST. art. IV, § 1 (vesting judicial power in specified courts).

52. OHIO CONST. art. II, § 32.

53. See Milligan & Pohlman, supra note 40, at 896.
grants rulemaking authority to the supreme court of that jurisdiction but also provides for supervening legislation enabling the legislature to change court-promulgated rules by a two-thirds vote of each house.  

Similarly, the Puerto Rico Constitution specifies that the legislature may "amend, repeal or supplement any of said [court] rules by a specific law to that effect."  

Third, instead of choosing permissive language, as have some states, the General Assembly chose mandatory language. Section 5(B) provides that the "Supreme Court shall prescribe rules governing practice and procedure." The use of shall "does not merely authorize the court to act—it commands the court to do so." Thus, the court is constitutionally compelled to act, and it has—by promulgating, in turn, Rules of Civil Procedure, Appellate Procedure, Juvenile Procedure, Criminal Procedure, Court of Claims, and now Evidence. The use of mandatory language disposes of one of the most persuasive arguments against an exclusivity interpretation—that such an interpretation would result in the stagnation of procedural reform because, if the court did not act, the legislature could not. This argument fails when, as in Ohio, the court is required to prescribe procedural rules.

It seems reasonable to assume that the General Assembly was

54. ALAS. CONST. art. IV, § 15.
55. P.R. CONST. art. V, § 6. The General Assembly also could have granted the court only supplemental rulemaking authority as in the Nebraska constitution which empowers the court to "promulgate rules of practice and procedure for all courts . . . not in conflict with laws governing such matters." NEB. CONST. art. 5, § 25; accord, CAL. CONST. art. 6, § 1a(5).
56. E.g., Mo. CONST. art. 5, § 5 ("The supreme court may establish rules of practice and procedure for all courts"). accord, Neb. CONST. art. 5, § 25.
57. OHIO CONST. art. IV, § 5(B) (emphasis added). Other constitutional provisions also employ mandatory language. E.g., Colo. CONST. art. VI, § 21; Md. CONST. art. 4, § 18A; Mich. CONST. art. VI, § 5; N.J. CONST. art. 6, § 2, ¶ 3.
58. Peterson, Rule Making in Colorado: An Unheralded Crisis in Procedural Reform, 38 Colo. L. Rev. 137, 159 (1966). In this respect, § 5(B) can be contrasted with the only constitutional provision specifically recognizing legislative authority to enact evidentiary provisions, OHIO CONST. art. II, § 39, which uses permissive language.
59. The Ohio Supreme Court apparently also takes this view of their constitutional obligations. The late Chief Justice O'Neill wrote that § 5(B) "places upon the Supreme Court of Ohio a duty to prescribe rules governing practice and procedure in all Ohio courts." O'Neill, supra note 2, at 515 (emphasis added).
60. See 22 Ohio St. 2d xvii (1970).
61. See 26 Ohio App. 2d xvii (1971).
62. See 30 Ohio St. 2d xix (1972).
63. See 34 id. xix (1973).
64. See 42 id. xxv (1975).
aware of the significance of the above choices since the Modern Courts Amendment "contain[ed] the most sweeping and significant amendments since the adoption of the 1851 constitution. Its passage... came after almost a decade of analysis and study by the bar, the legislature and the judiciary." The Alaskan and Puerto Rican provisions noted above, as well as the rulemaking provisions of other constitutions, appeared in a staff research report prepared in 1965 for the Legislative Service Commission Study Committee on Judicial Administration, which was then reviewing the Modern Courts Amendment. Moreover, conflicts in other jurisdictions between legislatures and courts over the exercise of rulemaking power had received extensive commentary. In fact, the exclusivity interpretation itself had been the subject of legal commentary. For example, a 1966 article examining an

67. OHIO LEGISLATIVE SERVICE COMM'N, STAFF RESEARCH REP. NO. 75, PROBLEMS OF JUDICIAL ADMINISTRATION 59–60 (1965) [hereinafter cited as STAFF REPORT]. Twelve members of the General Assembly, appointed in 1964 by the Speaker of the House, served as members of the Committee. Milligan & Pohlman, supra note 40, at 814. The Modern Courts Amendment was subsequently considered by both the Senate and House Judiciary Committees. Id. at 816.
68. The most celebrated controversy over rulemaking power occurred as a result of the decision in Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406, cert. denied, 340 U.S. 877 (1950). The merits of the case are discussed in Kaplan & Greene, The Legislature's Relation to Judicial Rule-Making: An Appraisal of Winberry v. Salisbury, 65 HARV. L. REV. 234 (1951); Pound, Procedure Under Rules of Court in New Jersey, 66 HARV. L. REV. 28 (1952). See also McCormick, Legislature and Supreme Court Clash on Rule-Making Power in Colorado, 27 ILL. L. REV. 664 (1933). The issue was not unknown in Ohio. See Comment, supra note 48. In 1953, the New Jersey Supreme Court interpreted the mandatory language in its constitution: "The rule-making power of the Supreme Court... is not a privilege to be exercised by it at its option; on the contrary, it is a duty that the justices of the Supreme Court must exercise as part of their constitutional obligations..." State v. Otis Elevator Co., 12 N.J. 1, 14, 95 A.2d 715, 722 (1953).
69. See Kaplan & Greene, supra note 68, at 240 n.28 (noting that Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406, cert. denied, 340 U.S. 877 (1950), suggests "that there is no constitutional grant of power to the legislature generally to regulate procedure even on matters not covered by rules."); Peterson, supra note 58, at 154. But see Joiner & Miller, supra note 11, at 642, 654. See also Note, The Rulemaking Power of the Florida Supreme Court: The Twilight Zone Between Substance and Procedure, 24 U. FLA. L. REV. 87, 94 (1971).
amendment to the Colorado Constitution, similar to section 5(B), warned of this possibility: "Not only has the amendment removed the power of the Court from its prior subordination to the statute, but in addition the new provision has withdrawn the power of the General Assembly to act in this area at all. . . ."

Finally, an exclusivity interpretation would not be a declaration of judicial supremacy over procedural rulemaking since section 5(B) provides for concurrent jurisdiction. Thus, an exclusivity interpretation would not violate separation of powers principles.

While the above arguments are by no means conclusive, courts in other jurisdictions have invalidated legislatively enacted evidentiary rules on far less authority. In Ammerman v. Hubbard Broadcasting, Inc., for example, the Supreme Court of New Mexico recently struck down a legislatively created newsman privilege on separation of powers grounds. The court held that the judiciary had "inherent power," derived from its constitutionally authorized superintending control, to prescribe evidentiary rules while the legislature had none.

II. SECTION 5(B): SUBSTANCE AND PROCEDURE

Section 5(B) authorizes the Ohio Supreme Court to "prescribe

70. COLO. CONST. art. VI, § 21.
71. Peterson, supra note 58, at 154.
72. One commentator has cited § 5(B) as granting the court power "over rules of practice and procedure" that is "exclusive and supreme." Kay, supra note 41, at 29 & n.142. This is an overstatement. The court's power is neither exclusive nor supreme; § 5(B) provides for legislative review. Whether § 5(B) is the exclusive method of regulating procedure, as suggested in the text, has yet to be determined.
73. For a discussion of these principles in this context, see notes 41-42 supra and accompanying text.
75. Superintending control appears to be something other than procedural rulemaking authority. For example, Ohio has procedural rules promulgated pursuant to OHIO CONST. art. IV, § 5(B), and rules of superintendence, promulgated pursuant to art. IV, § 5(A). The rules of superintendence are primarily internal administrative measures of the courts, governing assignment of judges, election of presiding judges, and reporting requirements. See OHIO SUP. CT. R. SUPERINTENDENCE 1-16 (amended 1977). They do not govern the conduct of trials. Thus, the New Mexico court has inferred a broad, inherent power from language that in other jurisdictions implies only limited power. It has then used this inference of power to strike down an evidentiary statute that many jurisdictions would consider substantive because it deals with a matter of privilege. See text accompanying notes 152-60 infra.
76. Other courts have also taken this position. State v. Clemente, 166 Conn. 501, 353 A.2d 723 (1974), noted in 36 CONN. L.J. No. 1 (1974), and discussed in Kay, supra note 41, at 1-4; Newell v. State, 308 So. 2d 71 (Miss. 1975), discussed in 46 Miss. L.J. 849 (1975). For a discussion of this topic and citations to other cases, see J. WEINSTEIN, supra note 11, at 77-87, 183 n.293.
rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right." According to the Resolution of Disapproval, the proposed Rules of Evidence "would, in some cases, substantially abridge, enlarge, or modify substantive rights . . .." in contravention of section 5(B). An evaluation of this position requires an understanding of the terms "substance" and "procedure." If rules of evidence fall within the substantive area, they would indeed contravene the constitutional provision.

Most authorities agree that the line between substance and procedure is a difficult one to draw. Moreover, those terms are used in a variety of contexts in determining: (1) whether state law furnishes the rule of decision in cases tried in federal court,

77. Resolution 14, supra note 6, at 388 app. A.

78. See R. Field & B. Kaplan, Civil Procedure 4 (3d ed. 1973) ("there will be difficulties in assigning particular rules to the category of substance or the category of procedure, difficulties which will sometimes defy the most careful and circumspect attempts to delineate the categories."); A. Vanderbilt, supra note 48, at 92 ("the word ‘procedure’ admittedly has an uncertain content. . . ."); Joiner & Miller, supra note 69, at 635 ("a clear-cut distinction for all purposes is impossible of formulation."); Levin & Amsterdam, supra note 38, at 14–15 ("virtually everyone concedes that ‘rational separation is well-nigh impossible.’” (citation omitted)); Moore & Bendix, Congress, Evidence and Rulemaking, 84 Yale L.J. 9, 12 n.17 (1974) ("Procedure is an elusive word."); Weinstein, The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence, 69 Colum. L. Rev. 353, 356 (1969) ("the boundary between substantive rights and procedure is unclear.").

Because of this ambiguity some commentators have suggested that there are in reality three categories: substance, procedure, and a “twilight zone.” See Curd, Substance and Procedure in Rule Making, 51 W. Va. L. Q. 34, 34–35 (1949); Note, supra note 69, at 87. Another commentator has argued that the terms are so confusing they should be abandoned. Riedl, To What Extent May Courts Under the Rule-making Power Prescribe Rules of Evidence?, 26 A.B.A.J. 601, 604 (1940). As Levin and Amsterdam have pointed out, however, this would not necessarily solve the problem. "[T]o substitute alternatives which come no closer to expressing the limits of that [rulemaking] authority is to run the risk of change which has ‘all the vices of novelty and none of the virtues of lasting improvement.’” Levin & Amsterdam, supra note 38, at 20 (citation omitted).


Erie concerns were considered by the drafters of the Federal Rules of Evidence. The drafters took the position that only presumptions raised an Erie problem. See Advisory Committee’s Note, Fed. R. Evid. 302, 56 F.R.D. 183, 211 (1973). Congress was persuaded, however, that privileges and competency of witnesses, principally Dead Man’s Statutes,
the choice of law in conflicts of law, the retroactivity of a statute, and (4) most important for the purpose of this article, the extent of judicial rulemaking authority under various statutory and constitutional enabling provisions. The meaning of substance and procedure shifts, however, as the context in which it is used varies. As Professor Wright has noted:

Factors that are of decisive importance in making the [substance-procedure] classification for one purpose may be irrelevant for another. To use the same name for all . . . purposes is an invitation to a barren and misleading conceptualism by which a decision holding that a particular issue is substantive for one of these purposes would be thought controlling authority when classification for a different purpose is involved.


In this context the substance-procedure issue determines whether the law of the forum or the otherwise applicable law will apply. The forum state will apply local law to procedural matters and the otherwise applicable law to substantive matters. Restatement (Second) of Conflict of Laws § 350 (Introductory Comment) (1971). Most rules of evidence have been considered procedural. Id. § 137 (witnesses), § 138 (admissibility of evidence). The otherwise applicable law will govern rebuttable presumptions only where the presumption can affect the outcome of the case. Id. §§ 133, 134. The principle governing privileges generally favors the admissibility of privileged evidence where only one state affords a privilege. Id. § 139.


In Ohio this problem has arisen in the interpretation of Ohio Const. art. II, § 28, which provides: "The general assembly shall have no power to pass retroactive laws. . . ." This provision has been interpreted to apply only to substantive and not to remedial or procedural legislation. See Gregory v. Flowers, 32 Ohio St. 2d 48, 290 N.E.2d 181 (1972).

82. C. Wright, supra note 79, ¶ 59, at 272. See also Hanna v. Plumer, 380 U.S. 460,
Defining substance and procedure has proved as difficult in Ohio as it has in other jurisdictions. In disapproving the proposed Rules of Evidence in 1977, for example, the General Assembly attempted neither to define those terms nor to specify which of the proposed Rules it considered substantive. The 1977 Committee Report recommending disapproval contains the following comment: "It is not possible at this time to state clearly what, in law, constitutes a matter of practice and procedure and what, in contrast, constitutes a matter of substantive right." Moreover, court decisions interpreting section 5(B) provide little guidance on this issue: they have either relied on a substance-procedure formula that works only where the dichotomy is clear, or they have simply categorized a rule or statute with little or no explanation. It is not surprising, therefore, that the drafters of the

471 (1965) ("The line between 'substance' and 'procedure' shifts as the legal context changes."); W. Cook, supra note 80, at 163–67; Joiner & Miller, supra note 69, at 635; Morgan, supra note 81, at 467. Other commentators, while recognizing the different contexts in which the terms are used, find a "core meaning" to the terms. Green, supra note 81, at 483; Moore & Bendix, supra note 78, at 12 n.17.

The Ohio Supreme Court and the General Assembly have both acknowledged the importance of context. In Gregory v. Flowers, 32 Ohio St. 2d 48, 57 n.9, 290 N.E.2d 181, 187 n.9 (1972), the court approvingly quoted Justice Frankfurter's majority opinion in Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945): "But, of course, 'substance' and 'procedure' are the same key-words to very different problems. Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used." The 1977 Committee Report cited Gregory with approval. Joint Subcommittee Report, supra note 5, at 395 app. C.

83. See, e.g., Curd, supra note 78 (West Virginia); Peterson, supra note 58 (Colorado); Note, supra note 69 (Florida); Note, supra note 49 (Illinois).

84. The Resolution of Disapproval merely states that "in some cases" the proposed Rules would "substantially abridge, enlarge, or modify substantive rights . . . ." Resolution 14, supra note 6, at 388 app. A.


86. See text accompanying notes 146–51 infra.

87. State v. Hughes, 41 Ohio St. 2d 208, 324 N.E.2d 731 (1975), is an example of such a conclusory opinion. In Hughes, the Ohio Supreme Court had to decide whether a statute which required a bill of exceptions as a prerequisite for appeal was superseded by an appellate rule requiring only notice of appeal. The court concluded without citation that the statute was substantive and therefore was not superseded by the rule. The court's analysis was aptly described by one commentator as "stating a conclusion without offering any explanation." Note, supra note 37, at 371. The court's other opinions on this issue also fail to provide a meaningful standard. See Boyer v. Boyer, 46 Ohio St. 2d 83, 346 N.E.2d 286 (1976); State v. Wallace, 43 Ohio St. 2d 1, 330 N.E.2d 697 (1975); State ex rel. Safeco Ins. Co. v. Kornowski, 40 Ohio St. 2d 20, 317 N.E.2d 920 (1974); Morrison v. Steimer, 32 Ohio St. 2d 86, 290 N.E.2d 841 (1972). Similarly, lower court decisions provide little guidance.
proposed Rules were “plagued” by this problem and were forced to draw “a sometimes precarious and tenuous line between those matters that are procedural and those of substance.” Nevertheless, several avenues of approach—for example, examining the intent of the General Assembly in proposing section 5(B), the experiences of other jurisdictions that have adopted rules of evidence through comparable enabling provisions, and the policy reasons underlying judicial rulemaking—may serve to clarify the issue of whether rules of evidence are substantive or procedural in Ohio.

A. Legislative Intent

Since the General Assembly proposed the adoption of section 5(B), legislative intent is relevant in determining whether rules of evidence are rules of “practice and procedure” within the meaning of this provision. While the scarcity of recorded legislative history hinders this approach, several points are noteworthy. First, in 1964 the Legislative Service Commission Study Committee on Judicial Administration was appointed by the Speaker of the House to study the then-proposed Modern Courts Amendment. In 1965, a staff report prepared for the Committee included a chapter on judicial rulemaking. That Report specifically mentioned that rulemaking “may encompass even the admissibility of evidence. . . .” The Report, citing to the position espoused by


88. Miller, supra note 2, at 550. Professor Miller served on the Advisory Committee that drafted the proposed Rules.


90. The legislative intent argument is particularly important because it was raised by the General Assembly in rejecting the proposed Rules of Evidence in 1977. Prior to amendment, the Resolution of Disapproval had contained the following statement: “It was not the General Assembly’s intent in the adoption of the Modern Courts Amendment to the Ohio Constitution, and specifically, Section 5(B) of Article IV of said Constitution, to grant the Ohio Supreme Court the authority to promulgate rules codifying the law of evidence.” Quoted in Walinski & Abramoff, The Proposed Ohio Rules of Evidence: The Case Against, 28 CASE W. RES. L. REV. 344, 356 n.45 (1978). The relevance of a legislative statement of intent made 10 years after legislative action, when the composition of the General Assembly had changed drastically, would appear to be slight.

91. Milligan & Pohlman, supra note 40, at 814.

92. STAFF REPORT, supra note 67, at 47–63.

93. Id. at 47.
Professors Levin and Amsterdam in a law review article, also contained the following passage: "[Levin and Amsterdam] agree with the view that evidence, because it relates to the 'how' of a law-suit rather than with the creation of rights, is properly procedure, but that courts should not necessarily have ultimate authority to make rules of evidence." The Staff Report shows, at the very least, that rules of evidence were not overlooked when the General Assembly was considering section 5(B). The Report also highlighted the view that rules of evidence were considered "procedural" by some authorities.

Second, a law review article by two persons, one of whom was Chairman of the Legislative Study Committee, was published immediately after section 5(B) became effective. In commenting on the substance-procedure dichotomy in that provision, the authors wrote:

There will always be cases on the borderline of substance and procedure. Since the Supreme Court, in its judicial capacity, will have the ultimate authority to determine the boundary line between procedural and substantive matter, it may be presumed that any rules promulgated by the Supreme Court will fall within the procedural rather than the substantive area. An example of the borderline area is the rules of evidence. In certain states rules of evidence are considered to be procedural, in other states substantive.

It is reasonable to infer from the discussion of evidence in the Staff Report, written before the adoption of the Modern Courts Amendment, and from the quoted statement written immediately after adoption, that the legislative committees that reviewed the constitutional amendment were aware that evidentiary rules could be considered procedural and thus within the ambit of section 5(B). Because several members of the Legislative Service Commission Study Committee on Judicial Administration, which first reviewed section 5(B), held leadership positions in the General Assembly at the time section 5(B) was adopted, it is also reason-

94. Levin & Amsterdam, supra note 38.
95. STAFF REPORT, supra note 67, at 62.
96. Milligan & Pohlman, supra note 40. One of the authors, Representative William W. Milligan, was Chairman of the Legislative Service Commission Study Committee on Judicial Administration and Co-chairman of the Modern Courts Committee of the Ohio State Bar Association. The other author, James E. Pohlman, was Secretary of the Bar Association Committee. Id. at 811. The Bar Association played an influential role in the adoption of the Modern Courts Amendment. Id. at 813-14; Harper, supra note 48, at 468.
97. Milligan & Pohlman, supra note 40, at 832.
98. At the time § 5(B) was adopted by the General Assembly, three Committee members had been promoted to leadership positions in the General Assembly—Speaker of the
able to conclude that the General Assembly knew of this interpretation of "practice and procedure." 99

Third, the prospect that procedural enabling provisions included evidentiary rules had been a much discussed topic in the federal sphere for at least three decades prior to the 1968 adoption of section 5(B). The subject was raised as soon as Congress had passed the enabling statute 100 for the Civil Rules in 1934. 101 It again surfaced several years later when the United States Supreme Court was in the process of adopting the Federal Rules of Civil Procedure. 102 Numerous articles on the subject appeared in the legal literature between 1934 and 1968. 103 Moreover, in 1958 the American Bar Association adopted a resolution recommending that the Supreme Court draft rules of evidence pursuant to its rulemaking authority. 104 A 1961 study on the adoption of federal rules of evidence concluded that the United States Supreme Court had authority under the federal enabling statutes to promulgate

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99. When the Ohio Civil Rules of Procedure were adopted in 1970, the prospect that rules of evidence were within the court's rulemaking power was again noted. Harper, supra note 48, at 816.


The Federal Rules of Civil Procedure were promulgated by the Court in 1937. 308 U.S. 645 (1937). They became effective in 1938.


Other articles are noted in F. KLEIN, supra note 68, and in Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts, 30 F.R.D. 73, 102 n.125, 104 n.138 (1962) [hereinafter cited as Feasibility Report]. The subject also received comment because of efforts to codify the law of evidence by the American Law Institute, MODEL CODE OF EVIDENCE (1942), and by the National Conference of Commissioners on Uniform State Laws, UNIFORM RULES OF EVIDENCE (1953).

rules of evidence. Following the recommendations of this study, Chief Justice Warren in 1965 appointed the Advisory Committee on Rules of Evidence. Thus, in 1968, when the General Assembly was considering section 5(B), the Advisory Committee was drafting federal rules of evidence pursuant to the Supreme Court’s authority under the federal enabling statutes. Since section 5(B) was modeled after the federal statute, which also uses the phrase “practice and procedure,” it would seem that the General Assembly would have been aware of these developments. In light of this background, it can be argued that if the General Assembly had intended to exclude rules of evidence from the purview of section 5(B), it would have done so explicitly.

105. "[T]oday the power of the Supreme Court to issue rules of court regulating evidence in the district courts appears to be unquestioned." Feasibility Report, supra note 103, at 105.


108. “[T]he Ohio constitutional provisions have been borrowed directly from an Act of Congress . . .” Joint Subcommittee Report, supra note 5, at 398 app. C.

109. In addition to the events mentioned in the text, the Model State Judicial Article was adopted by the A.B.A. House of Delegates in 1962. Section 9 of that Article contains the following provision: “The Supreme Court shall have the power to prescribe rules governing appellate jurisdiction, rules of practice and procedure, and rules of evidence, for the judicial system.” Reprinted in 47 J. Am. Jud. Soc’y 8, 12 (1963). The comment to § 9 states:

The provision giving to the Supreme Court the power to promulgate rules of evidence is a more controversial issue than the other rule making powers . . . . The Committee follows the recommendation of the American Bar Association as most consistent with the proper concept of rules of evidence as procedural and most conducive to the effective administration of justice in the court system.

Id. Thus, the comment not only highlights the view that evidentiary rules are “procedural,” it also highlights the “controversial” nature of this view.

110. For example, the Missouri Constitution provides: “The supreme court may establish rules of practice and procedure for all courts. The rules should not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal.” Mo. Const. art. 5, § 5. This provision was quoted verbatim in the Staff Report. Staff Report, supra note 67, at 60.

Congress excluded rules of evidence in § 7453 of the Internal Revenue Code: “[T]he proceedings of the Tax Court . . . shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Tax Court may prescribe . . . .” I.R.C. § 7453 (emphasis added).

Other enabling provisions, both constitutional and statutory, have explicitly included rules of evidence. E.g., P.R. Const. art. V, § 6; Minn. Stat. Ann. § 480.0591 (West Supp. 1978); Utah Code Ann. § 78-2-4 (1953); Wyo. Stat. §§ 5-18, -19 (1957). In their 1958 article, Levin and Amsterdam included a comment that has perhaps become a prophecy for Ohio: “Specific mention of evidence should be included in the constitutional provision to avoid futile, barren disputation over the authority to deal with evidence as a whole.” Levin & Amsterdam, supra note 38, at 23.
Finally, the General Assembly's subsequent action with respect to the Ohio Civil and Criminal Rules of Procedure is of some relevance. Both sets of Rules contain evidentiary provisions—admissibility of depositions,\textsuperscript{111} authentication of documents,\textsuperscript{112} exceptions to evidence,\textsuperscript{113} and harmless error.\textsuperscript{114} Thus, the Ohio Supreme Court has already prescribed some evidentiary rules pursuant to section 5(B), and the General Assembly has, at least tacitly, recognized the authority of the court to do so by failing to disapprove those rules.\textsuperscript{115}

B. Other Jurisdictions

1. Federal Rules of Evidence

The experience of other jurisdictions in adopting rules of evidence is also instructive in determining whether evidentiary rules are rules of "practice and procedure." Most of the commentators who have grappled with the issue have focused on the authority of the United States Supreme Court under the federal enabling statutes. Like its Ohio constitutional counterpart, this authority is limited to rules of "practice and procedure." The overwhelming number of commentators have concluded that \textit{most} rules of evidence are procedural.\textsuperscript{116} The Supreme Court obviously shared this view.\textsuperscript{117} When the Court promulgated the Federal Rules of Evidence, however, Congress intervened and the Federal Rules eventually became operative in statutory form.\textsuperscript{118} The Ohio Attor-

\textsuperscript{111} OHIO R. CIV. P. 32; OHIO R. CRIM. P. 15.
\textsuperscript{112} OHIO R. CIV. P. 44; OHIO R. CRIM. P. 27.
\textsuperscript{113} OHIO R. CIV. P. 46; OHIO R. CRIM. P. 51.
\textsuperscript{114} OHIO R. CIV. P. 61; OHIO R. CRIM. P. 52.
\textsuperscript{115} The force of this argument is undercut to some extent because the major evidentiary rules in the Federal Rules of Civil and Criminal Procedure, former Fed. R. Civ. P. 43 and Fed. R. Crim. P. 26, were "Reserved" when Ohio adopted those sets of rules. \textit{See} 22 Ohio St. 2d 55 (1970); 34 Ohio St. 2d Ixviii (1973). (Both Rules have since been superseded by the Federal Rules of Evidence). On the other hand, the General Assembly scrutinized the Civil and Criminal Rules more extensively than did the Congress. In fact, the General Assembly recommended changes to the Civil Rules, Harper, \textit{supra} note 48, at 470, and delayed the adoption of the Criminal Rules for a year.
\textsuperscript{116} \textit{E.g.}, \textit{Moore's Federal Practice}, \textit{supra} note 4, \S\ 35; C. WRIGHT & K. GRAHAM, \textit{supra} note 4, at 39; Callahan & Ferguson, \textit{supra} note 102; Degnan, \textit{supra} note 103; Degnan, \textit{supra} note 79; Green, \textit{supra} note 103; Joiner, \textit{supra} note 103; Joiner & Miller, \textit{supra} note 11, at 651; Ladd, \textit{supra} note 103; Levin & Amsterdam, \textit{supra} note 38; Moore & Bendix, \textit{supra} note 78, at 11-12; Morgan, \textit{supra} note 81; Riedl, \textit{supra} note 71; Santarelli, \textit{The Supreme Court's Proposed Federal Rules of Evidence: The Authority and Necessity for Codification in Retrospect}, 32 FED. B.J. 257 (1973); Sunderland, \textit{supra} note 81. Additional authorities are listed in \textit{Feasibility Report}, \textit{supra} note 103, at 102 n.125, 104 n.138.
\textsuperscript{117} 409 U.S. 1132, 1132-33 (1972) (Douglas, J., dissenting).
\textsuperscript{118} \textit{See} note 4 \textit{supra}. 
ney General's office has cited this intervention as evidence of a congressional determination that the Court "had exceeded its power to promulgate rules of 'practice and procedure.'"\textsuperscript{119} This does not accurately reflect the legislative history of the congressional intervention.

The issue of the Court's authority to promulgate evidentiary rules pursuant to the enabling statutes was raised during House consideration of the Federal Rules.\textsuperscript{120} The strongest congressional statement against the Court's authority appears in the House Report on House bill 5463 (H.R. 5463), which eventually became the Federal Rules of Evidence. According to the House

\begin{quote}
\textsuperscript{119} Walinski & Abramoff, \textit{supra} note 90, at 346.

In the footnote to the statement quoted in the text, the authors note that "[s]ubstantial criticism has been leveled at the wisdom of courts exercising broad rulemaking power, especially in the area of evidence." \textit{Id.} at 346 n.8. This is simply not true. As the list in note 116 \textit{supra} indicates, the nearly unanimous view of the commentators is that evidentiary rules are procedural. Two of the three articles cited by the Attorney General's office do not support this conclusion. Former Justice Goldberg, following his congressional testimony, \textit{House Hearings, supra} note 21, at 142–58, argued only that rules of privilege are not procedural. Goldberg, \textit{The Supreme Court, Congress, and Rules of Evidence}, 5 \textit{SETON HALL L. REV.} 667 (1974). Mitchell, \textit{supra} note 102, merely notes that "there is a difference of opinion" on whether the federal enabling act encompassed evidentiary rules. \textit{Id.} at 782–83. In fact, Attorney General Mitchell was the chairman of the original Advisory Committee that drafted the Federal Rules of Civil Procedure. Those Rules included numerous evidentiary provisions. \textit{See} Moore & Bendix, \textit{supra} note 78, at 12 n.9 ("Almost a quarter of the Civil Rules dealt with evidence . . ."). Furthermore, Chairman Mitchell stated:

There was a tremendous pressure brought on the Advisory Committee by those familiar with the subject of evidence insisting that there was a need for reform, which we did not meet, and some day, some other advisory committee should tackle the task of revising the rules of evidence and composing them into a new set of rules to be promulgated by the Supreme Court.


\textsuperscript{120} The Court's authority to promulgate rules of evidence under the enabling statutes was commented upon during the hearings before the House Subcommittee. The witnesses who believed that the Court had gone beyond its statutory authority focused on the rules relating to privileges and presumptions. \textit{See House Hearings, supra} note 21, at 142, 155–58 (Former Justice Goldberg—privileges); \textit{id.} at 159, 169, 171 (Washington Council of Lawyers—privileges); \textit{id.} at 215, 218 (Comm. of New York Trial Lawyers—privileges and presumptions); \textit{id.} at 295–96 (Ass'n of Trial Lawyers of America—presumptions). Other witnesses, however, believed that the Court had acted within its authority. \textit{See id.} at 16, 76 (Judge Maris); \textit{id.} at 65–67 (Prof. Cleary); \textit{id.} at 439–40 (Mr. Alan Morrison, Director of Litigation, Public Citizen, Inc.).

The House Committee Report on Public Law 93–12, which postponed the effective date of the Rules, mentions the enabling acts issue. H.R. \textit{Rep.} No. 93–52, 93d Cong., 1st Sess. 3 (1973). It was, however, only one of several criticisms directed at the Rules during the initial hearings which prompted the Committee to recommend further study. \textit{See} note 25 \textit{supra}.\end{quote}
Report, the "rules of evidence are in large measure substantive in their nature or impact . . . [and are] not within the scope of the enabling acts which authorize the Supreme Court to promulgate rules of 'practice and procedure.'"121 This passage, however, should not be read in isolation but must be viewed in light of other developments.122

First, the Rules of Evidence as proposed by the Supreme Court were introduced as H.R. 5463 before the postponement legislation, Public Law 93-12, was passed.123 During the debates on that law, some congressmen questioned whether postponing the effective date of the Rules until Congress acted "might mean that the rules would never emerge."124 When assurances were provided that Congress would act, these congressmen voted for the postponing legislation.125 Once it became obvious that the Rules of Evidence would "emerge" legislatively, there was no reason for Congress to be concerned about the Supreme Court's authority. Thus, the introduction of H.R. 5463 rendered the enabling acts issue moot: the House wanted to change some of the Rules, and the method selected to accomplish that result was the introduction of the Court-promulgated Rules as a bill.126

The view that Congress did not act in response to the enabling acts issue is supported also by Senate action on the bill. The Senate Judiciary Committee decided to use the House-passed bill rather than the Court-promulgated Rules as the basis for its work.127 While the enabling acts issue is mentioned in the Senate

122. Representative Hungate, the chairman of the subcommittee that studied the Rules, made the following statement about H.R. 5463: "The purpose was twofold—to give the Congress a vehicle on which to work its will, and to moot the technical question raised by Mr. Justice Douglas . . . as to whether the Supreme Court has authority to promulgate rules of evidence." Hungate, supra note 27, at 227 (emphasis added). Referring to the enabling acts issue as "technical" suggests that the House did not consider the issue important.
125. Id at 7649–51.
126. In his testimony before the Senate Judiciary Committee, Representative Hungate characterized H.R. 5463 as "a working tool." Federal Rules of Evidence: Hearings Before the Comm. on the Judiciary, supra note 21, at 5.
127. S. REP. No. 1277, 93d Cong., 2d Sess. 8, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7054 ([R]ather than returning to the Rules as promulgated as a work basis for Senate action, your committee focused upon the subject bill as passed by the House.").
Committee Report, these references are carefully prefaced with statements that it was the House view that the Court lacked authority to promulgate evidentiary rules. In fact, the Senate Committee Report reaffirms the principle of judicial rulemaking: "The general principle that day-to-day judicial procedure and practice is best regulated by the courts, subject only to general oversight by legislative bodies, is a principle which is firmly rooted in Federal statutory law and dates back to the Judiciary Act of 1789."

Finally, congressional treatment of the amendment provisions of Public Law 93–595, the Federal Rules of Evidence, also undercut the position espoused in the House Committee Report. Under the provisions of section 2 of the Act, the "Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence." Such amendments become effective should Congress not intervene; rules of privilege, however, require affirmative congressional approval. Congress singled out privileges for special treatment because it viewed them as substantive, all other evidentiary rules were again entrusted to the Court. If Congress viewed the rules of evidence (other than privileges) as substantive rather than procedural, it would not have granted the Supreme Court this authority. Therefore,

128. Id. at 23, reprinted in [1974] U.S. CODE CONG. & AD. NEWS at 7069 ("The House believed that the Rules of Evidence involve policy judgments as to which it is appropriate for the Congress to play a greater role than that provided in the present Enabling Acts.").

129. Id. at 8, reprinted in [1974] U.S. CODE CONG. & AD. NEWS at 7055.


131. "Any such amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress." Id.

132. The House Judiciary Committee added a statutory procedure for amending the Rules of Evidence because the "Committee believed that many of the Rules of Evidence, particularly in the privilege and hearsay fields, involve substantive policy judgments as to which it is appropriate that the Congress play a greater role than that provided for in the present Enabling Acts." H.R. REP. No. 650, 93d Cong., 2d Sess. 18, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7075, 7091.

The requirement of affirmative congressional approval for privileges was added on the floor of the House in an amendment offered by Representative Holtzman. 120 CONG. REC. 2391 (1974). The rationale for the amendment, as stated by Representative Dennis, was that "the subject of privilege comes more in the field of substantive law than some of these other matters." Id. at 2392. The Senate Judiciary Committee deleted the provision. S. REP. No. 1277, 93d Cong., 2d Sess. 23, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7054, 7070. The House provision was restored by the Conference Committee. CONF. REP. No. 1597, 93d Cong., 2d Sess. 14, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7098, 7107.

the most that can be gleaned from the legislative history is that Congress determined only that the law of privilege was substantive and perhaps beyond the Supreme Court's rulemaking authority.134

2. State Rules of Evidence

The treatment of rules of evidence in other states may also aid in determining whether such rules are substantive or procedural.135 Fifteen jurisdictions have adopted rules of evidence based upon the Federal Rules,136 while six jurisdictions have adopted rules based upon the Uniform Rules of Evidence (1953).137 In some of these jurisdictions rules have been adopted legislatively;138 in others, they have been promulgated pursuant to en-

134. One commentator, however, disagrees with this view of congressional intent. "Finally, although the House of Representatives found the privilege rules to be substantive and thus beyond the rulemaking power of the Supreme Court, Congress has apparently chosen not to resolve this issue." Note, Separation of Powers and the Federal Rules of Evidence, 26 Hastings L.J. 1059, 1073 (1975) (footnotes omitted).

Interpreting the congressional treatment of privileges is difficult because Congress permitted the Court to promulgate rules of privilege but retained complete control by requiring affirmative congressional approval before rules of privilege could become effective.

135. The rulemaking authority varies considerably from state to state. The area is summarized in two studies by the American Judicature Society. See American Judicature Society, Uses of Judicial Rule-Making Power (1974); J. Parness & C. Korbakes, supra note 68.


Different versions of the Federal Rules have been used as the model for the state adoptions. Some states have used Supreme Court drafts, either preliminary or final, while others have used the federal statute. Still others have adopted the 1974 version of the Uniform Rules of Evidence which were patterned after the Supreme Court's final draft. See J. Weinstein & M. Berger, supra note 21, at T-1, T-2 (1975).


The fact that Florida enacted its evidence rules legislatively sheds little light on the substance-procedure issue since procedure is specifically illustrated and thus limited by a restrictive rulemaking provision in its constitution. The court may promulgate rules of practice and procedure "including the time for seeking appellate review, the administrative supervision of all courts, the transfer . . . [of] jurisdiction . . . , and a requirement that no cause shall be dismissed because an improper remedy has been sought." Fla. Const. art.
abling provisions, either statutory or constitutional. The terms "practice and procedure" appear in all the statutory enabling provisions. Several of these statutes, however, also specifically mention rules of evidence. The terms "practice and procedure" or their equivalent also appear in the constitutions of the four states that have adopted the Federal Rules of Evidence pursuant to constitutional enabling provisions. That these states have adopted rules of evidence pursuant to statutory or constitutional procedural rulemaking provisions is persuasive authority that evidentiary rules properly fall within the terms "practice and procedure."

C. Problem Areas

Based upon the General Assembly's apparent legislative intent

5, § 2 (1968 rev.). The legislature may also override these rules by a two-thirds vote of each house. Id.


Utah adopted the Uniform Rules of Evidence (1953) pursuant to Utah Code Ann. § 78–24 (1953). New Jersey, which adopted the Uniform Rules by court rule and statute, has both a statutory, N.J. Stat. Ann. § 2A:84A–33 to 49 (West 1976), and a constitutional enabling provision, N.J. Const. art. 6, ¶ 2, ¶ 3. Because of the legislative history of its constitution, the rulemaking provision that grants the New Jersey Supreme Court power to make rules governing "practice and procedure" does not encompass rules of evidence. Rybeck v. Rybeck, 141 N.J. Super. 481, 499, 358 A.2d 828, 843 (1976). It is likely that, as a result of the controversy over rulemaking authority sparked by Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 367, 370 (1950), the legislature, the court, and the executive branches agreed to a process whereby the rules of evidence would be a product of joint effort. "The plain purpose was to avoid a constitutional confrontation on the matter and to find a practical course by which the administration of justice could best be served." Rybeck v. Rybeck, 141 N.J. Super. 481, 499, 358 A.2d 828, 843 (1976). Because of this unique history, it is difficult to draw any definitive conclusions as to the substantive or procedural nature of evidence rules in New Jersey. See Busik v. Levine, 63 N.J. 351, 367, 307 A.2d 571, 580, appeal dismissed, 414 U.S. 1106 (1973). For a discussion of the history of the adoption of the rules of evidence in New Jersey, see J. Weinstein, supra note 11, at 77–82.


142. Ariz. Const. art. 6, § 5 (amended 1960) (supreme court has authority "to make rules relative to all procedural matters in any court"); Mich. Const. art. VI, § 5 ("Supreme Court shall by general rules establish, modify, amend and simplify practice and procedure in all courts of this state"); Mont. Const. art. VII, § 2 (supreme court "may make rules . . . governing practice and procedure . . ."); S.D. Const. art. V, § 12 ("Supreme Court . . . may make rules of practice and procedure. . .").
in proposing section 5(B),\textsuperscript{143} the overwhelming view of the commentators who have considered the issue,\textsuperscript{144} and the experiences of other jurisdictions,\textsuperscript{145} it seems safe to conclude that most rules of evidence are procedural and therefore within the Ohio Supreme Court's authority to prescribe. The Ohio "definition" of substance and procedure, found in \textit{Krause v. State},\textsuperscript{146} also supports this conclusion.

The word "substantive," as used in Section 5(B) of Article IV, is in contradistinction to the words "adjective" or "procedural" which pertain to the method of enforcing rights or obtaining redress. "Substantive" means that body of law which creates, defines and regulates the rights of the parties. . . . The word substantive refers to common law, statutory and constitutionally recognized rights.\textsuperscript{147}

Under the \textit{Krause} definition, which is a typical definition of procedure and substance,\textsuperscript{148} most rules of evidence would be classified as procedural. Evidentiary rules "are concerned with probative qualities of proof, its relationship to substantive issues in dispute, and safeguards to prevent triers of fact from being misled, making mistakes or becoming prejudiced."\textsuperscript{149} Thus, rather than creating rights, rules of evidence only prescribe the method of enforcing them. This conclusion, however, is the first step in

\textsuperscript{143} See text accompanying notes 90-115 \textit{supra}.
\textsuperscript{144} See note 116 and accompanying text \textit{supra}.
\textsuperscript{145} See text accompanying notes 136-42 \textit{supra}.
\textsuperscript{146} 31 Ohio St. 2d 132, 285 N.E.2d 736, \textit{cert. denied}, 409 U.S. 1052 (1972). Plaintiffs claimed that the Ohio General Assembly, through Civil Rules prescribing the method of serving process on the state, OHIO R. Crv. P. 1(a), 2(10), 4, had consented to the state being sued. The Ohio Supreme Court disagreed, holding that the Civil Rules, being procedural, could not change the law as to sovereign immunity, a substantive right of the state. The court used the "definition" quoted in the text accompanying note 147 \textit{infra} to determine the effect of the Civil Rules.

This definition is the only formula that emerges from Ohio cases dealing with substance-procedure in the context of court-prescribed rules. Later cases have drawn the substance-procedure distinction but have not provided the reasoning. See note 87 \textit{supra}.

\textsuperscript{147} 31 Ohio St. 2d at 145, 285 N.E.2d at 744. A comparable definition was used by the court in an early F.E.L.A. case. Jones v. Erie R.R., 106 Ohio St. 408, 412, 140 N.E. 366, 368 (1922) ("The substantive law relates to rights and duties which give rise to a cause of action. Procedure is the machinery for carrying on the suit.").

\textsuperscript{148} See, e.g., Sibbach v. Wilson, 312 U.S. 1, 14 (1941) ("The test must be whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."); Poyser v. Minors, 7 Q.B.D. 329, 333 (1881) ("It has been said that 'procedure' . . . denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from its product."). See \textit{Feasibility Report}, \textit{supra} note 103, at 101–02 n.124.

\textsuperscript{149} Ladd, \textit{supra} note 103, at 713.
analyzing the substance-procedure issue, not the last.\textsuperscript{150} There is disagreement whether certain evidentiary rules can be readily classified as procedural. Since presumably it is these rules that troubled the General Assembly,\textsuperscript{151} they are examined in detail in this section.

1. \textit{Privileges}

The authorities disagree whether rules of privilege should be classified as substantive or procedural.\textsuperscript{152} Of all the proposed Rules (with the possible exception of presumptions), the most compelling argument for legislative control can be made with respect to the law of privilege.\textsuperscript{153} "Privileges . . . are established to serve a policy purpose other than truth-testing. Here the objective is to accomplish a social end, even though truthful evidence may be suppressed."\textsuperscript{154}

The Ohio Supreme Court has apparently acceded to the substantive view of privileges. One of the drafters of the proposed

\textsuperscript{150} This first step is nevertheless important because some members of the General Assembly have argued that all rules of evidence are substantive. \textit{See} Walinski \& Abramoff, supra note 90, at 356 n.45.

\textsuperscript{151} Resolution 14, supra note 6, at 388 app. A, states: "The proposed rules would, in some cases, substantially abridge, enlarge, or modify substantive rights . . . ." (emphasis added). Thus, the General Assembly has apparently acknowledged the court's authority to prescribe certain rules of evidence.

\textsuperscript{152} It is important to note the context in which the commentators have reached their conclusions on this issue. For example, Professor Wright recognizes the substantive aspect of privilege in the \textit{Erie} context. C. WRIGHT, \textit{LAW OF FEDERAL COURTS} § 93 (3d ed. 1976). He dismisses the enabling acts issue, however, in a footnote, stating that arguments against the Federal Rules of Evidence in this context "were probably insubstantial in any event." \textit{Id.} at 458 n.26.

The following commentators have argued that the law of privilege is procedural: Advisory Committee's Note, \textit{FED. R. EVID.} 501, 56 F.R.D. 183, 233 (1973); Clapp, \textit{Privilege Against Self-Incrimination}, 10 RUTGERS L. REV. 541, 570-71 (1956); \textit{House Hearings}, supra note 21, at 25, 87 (statement of Prof. Cleary); Moore \& Bendix, supra note 78, at 22-23; Morgan, supra note 81, at 483-84.

The following authorities have recognized the substantive aspects of privileges, at least for certain purposes: Degnan, supra note 79, at 286-87; Goldberg, supra note 119, at 678; Joiner \& Miller, supra note 11, at 651; Levin \& Amsterdam, supra note 38, at 22; Louisell, \textit{Confidentiality, Conformity and Confusion: Privileges in Federal Court Today}, 31 TUL. L. REV. 101, 101 (1956); Louisell \& Crippin, \textit{Evidentiary Privileges}, 40 MINN. L. REV. 413, 414 (1956); Weinstein, \textit{Reform of Federal Court Rulemaking Procedure}, 76 COLUM. L. REV. 905, 963 (1976); Weinstein, supra note 78, at 370-73.

\textsuperscript{153} Most rules of evidence apply only to trials; privileges, however, apply in other forums as well. For example, rules of privilege apply in administrative hearings. \textit{See} Galloway v. Industrial Comm'n, 27 Ohio L. Abs. 697 (10th Dist. Ct. App.), aff'd, 134 Ohio St. 496, 17 N.E.2d 918 (1938). The Ohio Supreme Court, of course, has no authority to prescribe rules for administrative agencies.

\textsuperscript{154} Ladd, supra note 103, at 714.
Rules has written: "[T]he final determination not to create various rules relating to privilege resulted due to the fact that 'privilege' was deemed to be substantive in nature, since privileges are based on public policy considerations." The content of proposed rule 501 demonstrates that the Ohio Supreme Court accepted this position. Instead of attempting to enumerate specific rules of privilege as had their federal counterparts, the Ohio drafters opted for a general rule. The Staff Notes state that the rule "leaves the matter of privileges essentially undisturbed." Since most of the current Ohio law of privilege is statutory, this passage indicates that the court intended to defer to the General Assembly in this area.

Nevertheless, the phrasing of the rule raises the substance-procedure issue. Proposed rule 501 reads:

The privilege of a witness, person, state, or political subdivision thereof shall be governed by statute enacted by the General Assembly not in conflict with an existing rule of the Supreme Court of Ohio or by principles of common law as interpreted by the courts of this state in the light of reason and experience.

The italicized phrase suggests that the court would have the authority to prescribe rules of privilege in the future, and under section 5(B) such rules would supersede conflicting statutory provisions. Any question of authority could be eliminated by adopting a rule that read: "Privilege is governed by the common law, except as modified by statute." This change would resolve

155. Miller, supra note 2, at 550. Another drafter has written: "Rules relating, for example, to privileges . . . were considered by the advisory committee to be laden with policy judgments bordering on the legislative domain, and the resulting drafts reflect in some measure that concern." Blackmore, supra note 89, at 541 n.50.

156. As proposed by the United States Supreme Court, the Federal Rules of Evidence contained provisions for eight rules of privilege: rule 503 (attorney-client); rule 504 (psychotherapist-patient); rule 505 (husband-wife); rule 506 (clergyman-penitent); rule 507 (political vote); rule 508 (trade secrets); rule 509 (state secrets and official information); rule 510 (identity of informer). Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 235-58 (1973). Congress deleted these provisions, substituting a general provision comparable to proposed Ohio rule 501. See Fed. R. Evid. 501.

157. Staff Notes, Proposed Ohio R. Evid. 501.

158. E.g., OHIO REV. CODE ANN. § 2305.24, .251 (Page Supp. 1977) (certain hospital records); id. § 2317.02(A) (attorney-client); id. § 2317.02(B) (physician-patient); id. § 2317.02(C) (cleric-penitent); id. § 2317.02(D) (husband-wife); id. § 2739.04 (broadcasters); id. § 4732.19 (psychologist-patient); id. § 2739.12 (Page 1954) (newsmen).


160. Cf. Mich. R. Evid. 501 ("Privilege is governed by the common law, except as modified by statute or court rule.").
the substance-procedure issue in favor of substance as the court apparently intended.

2. Presumptions

Commentators\(^{161}\) have recognized the substantive nature of rebuttable\(^{162}\) presumptions. Proposed rule 301,\(^{163}\) the only provision on presumptions, adopts the Thayer view under which a presumption shifts only the burden of production.\(^{164}\) Two points are noteworthy. First, the rule does not create presumptions, it merely governs their effect in civil cases.\(^{165}\) According to the Staff Notes, the creation of a presumption “is a matter of substantive law [to be] determined by the legislature or by court decision.”\(^{166}\) Second, the rule explicitly recognizes legislative authority over the effects of presumptions. The rule commences: “In all civil actions and proceedings not otherwise provided for by statute or by these rules. . . .”\(^{167}\) Thus, the General Assembly retains the power to determine the effect of presumptions as well as the power to create presumptions.

\(^{161}\) E.g., C. WRIGHT, supra note 152, § 92; Levin & Amsterdam, supra note 38, at 19 & n.84. As with privileges, care must be taken to ascertain the context in which the commentators are addressing the issue. In analyzing the substance-procedure issue with respect to presumptions some commentators distinguish between a rule creating a presumption and one merely governing its effect. See Degnan, supra note 79, at 283 n.35; Gard, The New Uniform Rules of Evidence, 2 KAN. L. REV. 333, 338 (1954); Santarelli, supra note 116, at 267 n.44. Others focus on the purpose for which a particular presumption is created—whether it is based on policy considerations or convenience. See Weinstein, supra note 78, at 207–08; Ladd, supra note 103, at 698.

For Erie purposes, Federal Rule of Evidence 302 treats presumptions relating to a claim or defense, but not tactical presumptions, as substantive. Advisory Committee’s Note, Fed. R. Evid. 302, 56 F.R.D. 183, 211 (1973).

\(^{162}\) Conclusive or irrebuttable presumptions are generally considered rules of substantive law. E. MORGAN, BASIC PROBLEMS OF EVIDENCE 31 (1963); 9 J. WIGMORE, EVIDENCE § 2493 (3d ed. 1940). Conclusive presumptions are not treated in the proposed Rules.


\(^{164}\) This view takes its name from Professor James Bradley Thayer. See J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT COMMON LAW 337 (1898). The other principal theory is named after Professor Edmund Morgan; under this view a presumption would shift the burden of persuasion as well as the burden of production. See Morgan, Instructing the Jury Upon Presumptions and Burden of Proof, 47 HARV. L. REV. 59, 83 (1933). For a discussion of these theories, see I J. WEINSTEIN & M. BERGER, supra note 21, at ¶ 300[01].

\(^{165}\) Criminal presumptions are not treated in the proposed Rules. Staff Notes, Proposed Ohio R. Evid. 301. See generally C. MCCORMICK, EVIDENCE § 344 (2d ed. 1972).

\(^{166}\) Staff Notes, Proposed Ohio R. Evid. 301. See also Blackmore, supra note 89, at 541 n.50 (“Rules relating, for example, . . . to the effects of presumptions (OHIO R. EVID. 301) were considered by the advisory committee to be laden with policy judgments bordering on the legislative domain . . . .”).

3. Competency of Witnesses

Proposed rule 601, governing the competency of witnesses, would abolish the Ohio Dead Man's Statute. While it has been argued that such statutes embody "an expression of public policy"—the protection of the estates of deceased or incompetent persons against fraudulent claims—most commentators consider Dead Man's Statutes procedural because they serve the same function as rules of credibility—truth-testing. The Ohio Dead Man's Statute was drafted to serve the truth-testing function. Moreover, there is virtually unanimous agreement that Dead Man's Statutes should be abolished. This agreement, coupled with the weakness of the substantive argument, makes Dead Man's Statutes poor terrain on which to wage a constitutional battle. The General Assembly should, therefore, leave this aspect of

168. If, for example, the General Assembly desired a particular presumption to shift the burden of persuasion as well as the burden of production, it could so legislate under the proposed rule.


170. Riedl, supra note 78, at 604.

171. Id.


173. Ladd, supra note 103, at 715 ("[T]he only reason for the statute is fear of temptation of an interested witness to be untruthful. . . ."); Moore & Bendix, supra note 78, at 28–29 ("Rules of competency are essentially legal formulations of credibility. . . . Credibility is undeniably a matter of procedure.").

174. The Ohio Dead Man's Statute was enacted in 1853. The drafters explained the purpose of that provision as follows: "We regard the presence of the adverse party as an important check against deception and a safeguard to truth. Hence we would not permit a party to testify where the adverse party is dead, and the action is carried on by his representatives." Report of the Commissioners on Practice and Pleadings, Code of Civil Procedure 129 (1853).

175. See text accompanying notes 250–54 infra.
Proposed rule 601(B) is, however, subject to valid criticism. Based upon an Ohio statute, it provides that one spouse is incompetent to testify against the other spouse in a criminal trial except in cases of "crimes against the testifying spouse or the children of either. . . " This testimonial privilege should be distinguished from the privilege that covers confidential communications between spouses and that applies in civil as well as criminal cases. The proposed Rules treat the testimonial privilege as a rule of competence, a matter of procedure, and treat the rule on confidential communications as a rule of privilege, a matter of substance. Although historically the testimonial privilege has been associated with the common law rule of spousal incompetence or disqualification, the two rules are distinct. The spousal incompetence rule prevented a spouse from testifying \textit{in behalf} of his or her spouse; the testimonial privilege prevented a spouse from testifying \textit{against} the other spouse. Moreover, the testimonial privilege is based upon extrinsic policy judgments—protecting the marital relationship from "dissension" and expressing the "natural repugnance" for convicting a defendant upon the testimony of his or her "intimate life

\begin{itemize}
\item 176. The following states have adopted rules of evidence which abolished the state Dead Man's Statute in the process: ARK. STAT. ANN. § 28-1001 (Noncum. Supp. 1976); ME. R. EVID. 601; MONT. R. EVID. 601; N.D. R. EVID. 601. See also UNIFORM RULE OF EVIDENCE, Rule 601. Minnesota has both a general rule of competency, MINN. R. EVID. 601, and a rule specially repealing its Dead Man's Statute, MINN. R. EVID. 616. Two states have incorporated a Dead Man's Statute into the rules of evidence: FLA. STAT. ANN. § 90.602 (West 1978); WIS. STAT. ANN. § 906.01 (West 1975). See 3 J. Weinstein & M. Berger, \textit{supra} note 21, § 601[05] (Cum. Supp. 1977).
\item 179. OHIO REV. CODE ANN. §§ 2317.02(D), 2945.42 (Page Supp. 1977).
\item 180. \textit{See Staff Notes, Proposed Ohio R. Evid. 601(B)}.
\item 181. \textit{See text accompanying notes 152-60 supra}.
\item 182. \textit{See C. McCormick, \textit{supra} note 165, at 144; 8 J. Wigmore, \textit{supra} note 162, § 2227 (McNaughten rev. 1961)}.
\item 183. 2 J. Wigmore, \textit{supra} note 162, § 601.
\item 184. C. McCormick, \textit{supra} note 165, § 66, at 144 ("Doubtless we should classify . . . the rule enabling the party spouse to prevent the husband or wife from testifying \textit{against} the party as a privilege."); 8 J. Wigmore, \textit{supra} note 162, §§ 2227-2228 (McNaughten rev. 1961). Dean Ladd has distinguished rules of competency from rules of privilege as follows: "Competency of a witness is based upon the capacity of a witness to tell the truth, accompanied with a consciousness of the obligation to do so. . . . Privileges, on the other hand, are established to serve a policy purpose other than truth-testing." Ladd, \textit{supra} note 103, at 714.
\end{itemize}
partner." Whether these rationales are supportable is beside the point; what matters is that the testimonial privilege is based upon extrinsic policy. The testimonial privilege should therefore be treated like other rules of privilege which the drafters considered a legislative matter.

4. The Rape Shield Statute

The 1977 Committee Report recommending disapproval of the proposed Rules cited Ohio's recently enacted rape shield statute as an example of a substantive right. That statute provides: "Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves . . . the victim's past sexual activity with the offender. . . ." This statute, according to the Report, was based upon a legislative determination that "law enforcement processes were abusing and demeaning sexual crime victims, violating their rights of personal privacy, and encouraging rapists by discouraging rape victims from reporting offenses." Ordinarily, a rule governing character evidence, a matter of relevancy, could be readily classified as procedural. Here, however, it can be argued that the statute embodies an "extrinsic policy" being "tagged as a rule of relevance" and is thus rationally classifiable.

185. 8 J. WIGMORE, supra note 162, at 217.
187. In an early case, the Ohio Supreme Court recognized the policy aspect of the spousal privilege. Steen v. State, 20 Ohio St. 333, 334 (1870) ("But the incompetency of husband and wife as witnesses for or against each other is founded upon considerations of public policy.").
188. Perhaps the Advisory Committee believed the testimonial privilege should be classified as a rule of competence because it appears in a section of the Revised Code labelled "Competency of witnesses." OHIO REV. CODE ANN. § 2945.42 (Page Supp. 1977). That provision, however, contains the confidential communication privilege as well as the testimonial privilege.
189. JOINT SUBCOMMITTEE REPORT, supra note 5, at 395 app. C.
192. See Weinstein, supra note 78, at 362.
193. Id. at 370. Judge Weinstein employed the quoted phrases to describe evidentiary rules that exclude evidence of subsequent remedial measures and offers of compromise. See notes 205 & 206 infra.
as a matter of substance.

The principal objection to the proposed Rules, however, may have been the drafters' apparent failure to incorporate into the Rules a legislative solution so recently enacted, rather than the drafters' failure to defer completely to the legislature in this area.\textsuperscript{194}

Proposed rule 404(A)(2) permits a criminal defendant to introduce evidence of a pertinent character trait of the victim.\textsuperscript{195} Thus, in rape cases, evidence of the victim's promiscuity would be admissible to show the likelihood of consent.\textsuperscript{196} Under proposed rule 405(A) such a character trait could be proved by reputation or opinion evidence.\textsuperscript{197} This treatment of evidence of a victim's character conflicts with the statute in two respects. First, the statute limits character evidence to sexual activity between the victim and defendant; the rule contains no such limitation. Second, by implication, the statute would permit specific instances of conduct to be introduced; rule 405(A) limits the methods of proof to reputation and opinion evidence.\textsuperscript{198}

The Advisory Committee was of the opinion, however, that no conflict existed. This opinion is expressed in the Staff Notes,\textsuperscript{199} which were not available to the General Assembly in 1977. The expressed opinion of the Advisory Committee is not, in any event, part of the rule, and the rule will supersede the statute in case of conflict.\textsuperscript{200} The better solution would be to forestall any possible

\begin{itemize}
  \item \textsuperscript{194} The drafters of the Federal Rules encountered similar difficulties with respect to the original provisions on impeachment by prior conviction. \textit{See} 3 J. Weinstein \& M. Berger, supra note 21, § 609[01].
  \item \textsuperscript{195} \textit{Proposed Ohio Rules of Evidence,} 51 Ohio B. 181, 186 (1978).
  \item \textsuperscript{196} \textit{See Advisory Committee's Note, Fed. R. Evid.} 404, 56 F.R.D. 183, 220 (1973); 2 D. Louisell \& C. Mueller, \textit{supra} note 79, § 139, at 111; 2 J. Weinstein \& M. Berger, \textit{supra} note 21, § 404(06).
  \item Proposed rule 404(A)(2) was patterned after federal rule 404 (a)(2). Congress has subsequently changed the federal treatment of character evidence in rape cases. \textit{See} Fed. R. Evid. 412.
  \item \textsuperscript{197} \textit{Proposed Ohio Rules of Evidence,} 51 Ohio B. 181, 186 (1978).
  \item \textsuperscript{198} Proposed Ohio Evidence Rule 405(B) allows specific instances of conduct to be admitted in cases in which "character or a trait of character of a person is an essential element of a charge, claim, or defense. . . ." \textit{Id.} at 185-87. Since lack of consent, but not promiscuity, is an essential element of rape, this provision is inapplicable.
  \item \textsuperscript{199} Staff Notes, Proposed Ohio R. Evid. 404(A)(2) ("This provision is deemed not to supersede [the statute] relating to the admissibility of a victim's character as to sexual activity in rape cases since, except under the provisions authorized by the statute, the character trait of promiscuity would not be pertinent as required by 404(A)(2).")
  \item \textsuperscript{200} \textit{See} Ohio Const. art. IV, § 5(B) and text accompanying notes 43-44 \textit{supra}. That a conflict exists becomes evident when the Federal Advisory Committee's Note is examined. That Note cites "consent in a case of rape" as an example of a pertinent trait
\end{itemize}
conflict by adding another subsection to rule 404(A)201 explicitly incorporating the statutory solution. This may avoid a constitutional stalemate over this issue.

D. Toward a Resolution

The rape shield law not only illustrates the problem that certain evidentiary rules can be classified as either substantive or procedural, but it also underscores the possible consequences of a failure of the legislative and judicial branches to reach an accommodation. The General Assembly could continue to disapprove the proposed Rules because they contain "substantive" provisions such as the shield law, and the court, in the appropriate case, could declare that same statute unconstitutional because it is "procedural."202 This would leave rules of evidence in "a sort of no man's land between court and legislature" as each branch vied in a "scramble for the last word."203 The public interest, however, requires an accommodation. As noted earlier, most of the proposed Rules can be classified as procedural.204 Privileges and presumptions, on the other hand, have been recognized by the court to be substantive. This leaves as the area of dispute an interstitial category that includes a small number of rules—the rape shield law, offers of compromise,205 subsequent remedial measures,206 impeachment with juvenile adjudications,207 and perhaps some


201. See, e.g., KAN. STAT. § 60-447a (1976); MICH. R. EVID. 404(a)(3); MINN. R. EVID. 404(c); NEV. REV. STAT. § 48.069 (1977). See also FED. R. EVID. 412.

202. See text accompanying notes 43-76 supra. In People v. McKenna, 24 CRIM. L. RPTR. (BNA) 2170 (Colo. Oct. 10, 1978), the Colorado Supreme Court held that a similar Colorado statute was neither "purely substantive" nor "purely procedural" and that therefore either branch could adopt such a provision.

203. Levin & Amsterdam, supra note 38, at 8 n.36.

204. See text accompanying notes 143-49 supra.


207. Proposed rule 609(D) permits juvenile adjudications to be used for impeachment under certain circumstances. Proposed Ohio Rules of Evidence, 51 OHIO B. 181, 192-93 (1978). Section 2151.358, on the other hand, provides: "The disposition of a child under
competency statutes.\textsuperscript{208}

In reaching a solution to the rules in this category, it seems clear that the definitional approach to the substance-procedure dilemma is unsatisfactory.\textsuperscript{209} Under such an approach, it could be argued that the rules in this category are procedural because they do not create substantive rights; for example, no cause of action accrues from these provisions. In addition, by excluding evidence at trial, these rules affect the truth-determining function and thus have a procedural effect.\textsuperscript{210} On the other hand, it could be argued that the purpose of these rules is to influence out-of-court conduct in order to promote policy objectives and that therefore they are substantive.\textsuperscript{211} Thus, the result under the definitional approach depends on how one constructs the definition.

\textsuperscript{208} See \textit{Ohio Rev. Code Ann.} § 2743.43(A)(2) (Page Supp. 1977) (specifying the necessary qualifications of medical experts in liability cases); \textit{id.} §§ 4549.14, .16 (Page 1973) (disqualifying police officers under certain circumstances in traffic cases). For a discussion of proposed rule 601, see note 3 \textit{supra}. Proposed rule 706, governing the appointment of expert witnesses by the court, also contains a provision that may be considered substantive in Ohio—treating expert witness compensation as costs. \textit{See} Staff Notes, Proposed Ohio R. Evid. 706(B).

In an ambiguous reference, the House Committee Report on the Federal Rules cited the hearsay rule as involving "substantive policy judgments." \textit{H.R. Rep.} No. 650, 93d Cong., 2d Sess. 18 (1973), \textit{reprinted in} [1974] \textit{U.S. Code Cong. & Ad. News} 7075, 7091. There is no authority for this position. \textit{Cf.} Degnan, \textit{supra} note 103, at 345–46 (hearsay rule is procedural); Ladd, \textit{supra} note 103, at 709 (hearsay rule is procedural for \textit{Erie} purposes); Weinstein, \textit{supra} note 78, at 361–62 (hearsay rule has truth determination as its objective).

\textsuperscript{209} \textit{See} Curd, \textit{supra} note 78, at 45 ("[These terms] do not seem to be very helpful, whether as definitions, as formulas, or in arriving at any determination as to whether any statute or law is substantive or procedural for rule-making purposes."). \textit{See also} the discussion of various definitions in Levin & Amsterdam, \textit{supra} note 38, at 20–24.

\textsuperscript{210} Dean Ladd, in discussing the substance-procedure distinction as it relates to privileges in the \textit{Erie} context, made the following comments which could also apply to the interstitial rules in the rulemaking context:

\texttt{Is their function procedural or substantive? The assertion of a privilege does not make or change any issue concerning the rights and duties involved in fixing legal responsibility. . . . [I]n operation and use a privilege does just one thing, it keeps relevant and otherwise admissible evidence out of trial and deprives the triers of fact of full knowledge of the facts upon which in the performance of their constitutional duty they are required to decide. Thus privileges, though established to attain some objective unrelated to trials, in their functional operation are totally procedural.}

Ladd, \textit{supra} note 79, at 569–70.

\textsuperscript{211} Substantive rules are those that "affect or regulate the primary, out-of-court activities of people . . . do so in order to promote social policies which the state deems
A more productive approach would be to focus on the policy considerations underlying section 5(B). Under this approach, the rules in the interstitial category should be considered procedural. Implicit in the adoption of section 5(B) is the assumption that the judicial, rather than the legislative, branch is better situated to exercise initial responsibility over court rules. The policies supporting judicial rulemaking have been persuasively argued elsewhere.\(^2\) For present purposes, it is necessary only to highlight several points. First, if the proposed Rules are adopted, the courts will be immersed in the process of applying and interpreting them. If the Rules are deficient, the courts will be the first to know and the amendment procedure offers an effective remedial method.\(^2\) In contrast, the legislative amendment process is less effective. As Professors Levin and Amsterdam have noted:

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\text{[A] very large part of maintaining maximum effectiveness in the courts does not lie in drastic wholesale procedural reform, but in the necessary minor alterations of single rules from time to time as experience dictates, and such small matters as these inevitably fare badly when they must compete for legislative attention.}\quad \text{\(2\)}
\]

This would seem especially true in Ohio, where the General Assembly has been confronted in recent years with such diverse and intractable problems as the energy crisis, public school financing, and industrial growth versus environmental protection. Amending a rule of evidence should not and would not divert legislative attention from these issues.

Finally, classifying this interstitial category as procedural would not exclude the General Assembly. Under section 5(B) the General Assembly has responsibility for evaluating the proposed Rules, including subsequent amendments. Its power to disapprove the Rules in toto ensures that its recommendations for changing rules will be given careful consideration by the court. The General Assembly lacks only the power to initiate amendments in the future. If, however, the General Assembly became concerned with an evidentiary issue, it could adopt a joint resolution recommending an amendment. It cannot be assumed that the

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213. "[C]ourts are generally in a better position than the legislative branch to determine their procedural and evidentiary needs." J. Weinstein, supra note 11, at 21.

214. Levin & Amsterdam, supra note 38, at 11.
recommendation of an equal and coordinate branch would be ignored by the court, especially since the two branches must function together on a number of issues, including all future rule amendments.

One other point deserves comment. The 1977 Committee Report raised a traditional objection to court rulemaking when it stated that the legislature "has means for obtaining information that could not be brought before a court in the judicial process." It is true that the judicial process is not as effective as the legislative process in investigating and determining what the report refers to as "legislative facts." The legislative and judicial processes are not, however, the only models for governmental decisionmaking—the administrative process is also available. Indeed, rulemaking is more akin to the administrative than to the judicial process. The strength of judicial rulemaking modeled on this process would depend on two factors: First, the utilization of the professional expertise of an advisory committee composed of judges, practitioners, and law professors, and second, the widespread dissemination of proposed drafts including staff notes. Dissemination should go beyond mere publication in the bar association journal. The Advisory Committee should actively solicit the comments of the Judicial Conference, the Attorney General, the bar associations, the prosecutors' and defenders' organizations, law professors, and any other group that may have an interest. Public hearings should be held by the advisory committee. The comments and criticisms received from this process

215. See id. at 12.
217. Id. at 394–95. Professor Davis coined the phrase "legislative facts" in order to distinguish such facts from "adjudicative facts" in the judicial notice context. See Davis, Judicial Notice, 55 Colum. L. Rev. 945 (1955); Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364 (1942). Courts, however, must also determine legislative facts. See generally 1 J. Weinstein & M. Berger, supra note 21, ¶ 200.
218. Publication of staff notes along with proposed drafts is critical. In many cases, the full impact of a proposed rule cannot be appreciated without the accompanying staff notes. For example, it is not obvious from the language of proposed rule 601 that the rule would abolish the Dead Man's Statute.
should then be compiled along with the staff notes and submitted to the court and later to the General Assembly. 221

III. NEED FOR THE PROPOSED RULES OF EVIDENCE

The need for reform of the law of evidence has been recognized by Wigmore, 222 Morgan, 223 McCormick, 224 Ladd, 225 and other authorities. 226 The American Bar Association, 227 the American Law Institute, 228 the Commissioners on Uniform State.


222. See 1 J. Wigmore, supra note 162, §§ 8-8c. See also Report of the Comm. on Improvements in the Law of Evidence, 63 A.B.A. REPS. 570, 576 (1938), reprinted in A. Vanderbilt, supra note 48, at 558 (1949). Dean Wigmore was Chairman of the A.B.A. Committee.


226. E.g., J. Thayer, supra note 164, at 508-38; Davis, Evidence Reform: The Administrative Process Leads the Way, 34 MINN. L. REV. 581 (1950); Degnan, supra note 103; Gard, supra note 161; Moore & Bendix, supra note 78, at 11; Weinstein, supra note 78, at 354-55.


228. See MODEL CODE OF EVIDENCE (1942). When the ALI undertook the task of clarifying the common law through its Restatement of Law project, the law of evidence was considered. The ALI abandoned this project, however, because "however much that law needs clarification in order to produce reasonable certainty in its application, the Rules
Laws, the Congress, the United States Supreme Court, and the legislatures and courts of other states have also acknowledged this need. Codification has been the method advocated by these authorities to effect reform. The proposed Ohio Rules would improve the law of evidence by making that law accessible and uniform and by incorporating specific reforms.

A. Accessibility and Uniformity

In 1942 Professor McCormick wrote:

In any practical system of trial procedure, the rules of proof should be simple enough to be applied with fair accuracy on the spur of the moment by judges and lawyers of reasonable skill and learning, but this is not true with us today. With the multiplication of rules, exceptions and distinctions through thousands of decisions upon evidence points each year, the system has become so elaborate that no lawyer, however studious, can carry in his head a detailed familiarity with this body of learning.

McCormick's observation accurately describes the present state of evidence law in Ohio. Evidentiary rules are found scattered throughout judicial decisions, statutes, and court rules. The common law development in some areas, such as res gestae, is beyond repair. Moreover, the law is not uniform; a decision by one court of appeals or court of common pleas is not necessarily controlling in other courts. The statutes range from carefully considered provisions of recent origin, such as the rape shield stat-

themselves in numerous and important instances are so defective that instead of being the means of developing truth, they operate to suppress it.” Id. at viii.


230. The enactment of the Federal Rules of Evidence demonstrated congressional belief in the need for reform. See Hungate, supra note 27, at 228 (congressional subcommittee determined that “a code of evidence is practicable and desirable. . .”).

231. This is implicit in the promulgation of the Federal Rules of Evidence.

232. For states that have adopted rules of evidence legislatively, see note 138 supra.

233. For states that have adopted rules of evidence by court rule, see notes 139-40 supra.


235. Most of the evidence law of Ohio is common law. In addition, numerous court decisions interpreting statutory provisions exist.

236. See text accompanying notes 111-15 supra.

237. See text accompanying notes 270–77 infra.

238. For example, prior to the Ohio Supreme Court's decision in State v. Souel, 53 Ohio St. 2d 123, 372 N.E.2d 1318 (1978), appellate courts divided on the admissibility of polygraph evidence upon stipulation. Compare State v. Hill, 40 Ohio App. 2d 16, 317 N.E.2d 233 (2d Dist. 1963), with State v. Towns, 35 Ohio App. 2d 237, 301 N.E.2d 700 (10th Dist. 1973). Another example of the lack of uniformity is manifested by the Ohio
ute,\textsuperscript{239} to obscure and absurd provisions such as one which provides that neither party may call more than three witnesses in an appeal to the probate court to determine damage done by a dog.\textsuperscript{240}

While not a comprehensive code, the proposed Rules provide a readily accessible starting point that will answer many, if not most, evidentiary objections that arise during the course of a trial. The Rules will also provide substantial uniformity throughout the state, making it easier for litigants and attorneys to try cases statewide.\textsuperscript{241} Other advantages have been summarized by Judge Weinstein:

> At the least, well-drafted rules should save judges and lawyers expensive case-law research time. A good set of rules should—in theory—also reduce appeals and reversals on non-substantive points. By providing more efficient court procedures, they allow courts and lawyers to accomplish more with the same expenditure of energy, enabling us to better meet the pressures of more, and more complex, litigation.\textsuperscript{242}

After initially questioning the need for the rules,\textsuperscript{243} the General Assembly has apparently recognized these advantages. The resolution creating the Joint Select Committee states that the adoption of rules of evidence "would provide a convenient and authoritative reference for use in trial practice, thus eliminating extensive research among scattered cases and statutes, expediting the trial of cases, and helping to assure the uniform administration of justice throughout the state."\textsuperscript{244}

\textsuperscript{239} See text accompanying notes 342–51 infra.

\textsuperscript{240} OHIO REV. CODE ANN. § 2907.02(D) (Page Supp. 1977). See text accompanying notes 189–201 supra.

\textsuperscript{241} There would also be substantial uniformity between state and federal trial courts in Ohio. See note 3 supra and accompanying text.

\textsuperscript{242} J. WEINSTEIN, supra note 11, at 14.

\textsuperscript{243} See Resolution 14, supra note 6, at 388 app. A ("Such proposed rules of evidence . . . effectuate numerous changes in the law of evidence currently recognized in this state which has for years well-served the interests of impartial justice and has evolved from the experience of several centuries.").

\textsuperscript{244} Am. S.J. Res. 25, 112th Gen. Ass., Reg. Sess., (1977–78), reprinted in Walinski & Abramoff, supra note 7, at 390 app. B. The resolution goes on to state: "Numerous other benefits would accrue to the citizens, business entities, and governmental units of this state by virtue of having ready access to understandable and comprehensive rules of evidence that would be relevant to their daily living, business transactions, and performance of government function . . . ." \textit{Id.}
B. Specific Reforms

Although the proposed Rules are neither "radical"\textsuperscript{245} nor "revolutionary,"\textsuperscript{246} they do contain many reforms that have been advocated by commentators and adopted in other jurisdictions. While a detailed examination of all these reforms is beyond the scope of this article,\textsuperscript{247} some reforms deserve comment. As noted earlier, the Rules abolish the Dead Man's Statute.\textsuperscript{248} That statute renders a party incompetent to testify where the adverse party is the legal representative of a deceased or legally incompetent person.\textsuperscript{249} The authorities have been virtually unanimous in their condemnation of such statutes,\textsuperscript{250} describing them as a "blind and brainless technique,"\textsuperscript{251} a "disrespected relic of antiquity,"\textsuperscript{252} and a product of "a fallacious and exploded principle."\textsuperscript{253} Dead Man's Statutes have been the target of every major evidentiary reform effort during the last fifty years.\textsuperscript{254} The statute rests upon the assumption that a party-witness' interest in a case will result in

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\item \textsuperscript{245} E. Morgan, Basic Problems of State and Federal Evidence at x (5th ed. Weinstein 1976) ("The Federal Rules of Evidence are in the classic tradition of American rules of evidence. They constitute no radical departure from the rules heretofore applied.") (emphasis in original).
\item \textsuperscript{246} Moore & Benedix, supra note 78, at 13 ("The [Federal] Rules of Evidence, as a whole, are neither revolutionary nor novel and will be applied by a bench and bar whose professional training in this area tends toward caution and moderation.").
\item \textsuperscript{248} Ohio Rev. Code Ann. § 2317.03 (Page Supp. 1977).
\item \textsuperscript{249} The statute is more complex than the text might suggest. For a discussion, see R. Markus, Trial Handbook For Ohio Lawyers §§ 134-138 (1973).
\item \textsuperscript{250} See Morgan, Foreword, supra note 223, at 16-20 (1942); C. McCormick, supra note 165, § 65; 10 Moore's Federal Practice § 601.02 (1976); 2 J. Wigmore, supra note 162, § 578; Green, supra note 103, at 185; Ladd, Witnesses, 10 Rutgers L. Rev. 523, 525-26 (1956); Ladd, The Dead Man Statute, 26 Iowa L. Rev. 207, 208 (1941); Morgan, Practical Difficulties Impeding Reform in the Law of Evidence, 14 Vand. L. Rev. 725 (1961); Ray, Dead Man's Statutes, 24 Ohio St. L.J. 89 (1963). For a discussion of the various statutes, see A. Vanderbilt, supra note 48, at 334-41.
\item \textsuperscript{251} C. McCormick, supra note 165, at 143 (using Bentham's phrase).
\item \textsuperscript{252} Ladd, supra note 172, at 238.
\item \textsuperscript{253} 2 J. Wigmore, supra note 162, § 65, at 697.
\item \textsuperscript{254} In 1927, the Commonwealth Fund Committee recommended the abolition of Dead Man's Statutes as one of five recommendations for the improvement of the law of evidence. E. Morgan, et al., supra note 223, at 23-35. An ABA committee, chaired by Dean Wigmore, made the same recommendation. Report of the Committee on Improvements in the Law of Evidence, 63 A.B.A. Reps. 570 (1938), reprinted in A. Vanderbilt, supra note 48, at 572. Model Code of Evidence, rule 101 (1942) and Uniform Rule of Evidence 7 (1953) abolish such statutes. Although there has never been a federal Dead
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fraudulent testimony which, because of death or legal incompetence, cannot be rebutted by the adverse party. This assumption has been criticized on several grounds. First, the statute is ineffective; it will not prevent a dishonest party from introducing false testimony. "One who would not balk at perjury will hardly hesitate at suborning a third person, who would not be disqualified, to swear to the false story." Second, the statute is unnecessary; the jury can easily comprehend the obvious bias of the party-witness and "cross-examination and other safeguards for truth are sufficient guaranty against frequent false decisions." Third, "[b]ecause of the enumerated exceptions in the statute as well as the option of waiver by the representative, the rule has proven difficult to understand and apply." Fourth, and most important, the statute works an injustice upon an honest party who is disqualified by the statute. Finally, there are other mechanisms that would protect the estates of deceased and legally incompetent persons. For example, proposed rule 804(B)(5), following the practice in other jurisdictions, creates a hearsay exception for the statements of the deceased or incompetent person. Thus, this provision, along with the abolition of the Dead Man's Statute, would permit the jury to receive more information, not less, and would avoid the injustices of the statute.

As another reform, proposed rule 607 permits the "credibility of a witness [to be] attacked by any party, including the party calling [the witness]." This would abolish the Ohio "voucher rule" which prohibits a party from impeaching his own witness. The

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255. C. McCormick, supra note 165, at 143.

256. 2 J. Wigmore, supra note 162, § 65, at 696.

257. Phillips, supra note 247, at 44. See also Morgan, Foreword, supra note 223, at 16 (Dead Man's Statutes "have almost without exception been the source of much useless litigation.").

258. "The practical consequence of these statutes is that if a survivor has rendered services, furnished goods or lent money to a man whom he trusted, without an outside witness or admissible written evidence, he is helpless if the other dies and the representative of his estate declines to pay." C. McCormick, supra note 165, at 143.

259. Some jurisdictions require corroboration; others leave to the trial judge discretion to admit the survivor's testimony. See id.; 2 J. Wigmore, supra note 162, § 65, at 697.


underlying rationale of the voucher rule is that "[w]here a party calls a witness for examination he presents such witness to the court and jury as one whose testimony is to be relied upon. . . ." This rationale is not persuasive because "except in a few instances such as character witnesses or expert witnesses, the party has little or no choice of witnesses. He calls only those who happen to have observed the particular facts in controversy." Furthermore, the rule is riddled with exceptions. It does not apply if the calling party is "surprised" by the witness' testimony, if the witness is the adverse party, or if a deposition is used to impeach the witness. Moreover, the validity of the voucher rule operating to prevent a defendant in a criminal case from impeaching a witness is constitutionally suspect.

One of the major improvements of the proposed Rules is the elimination of the troublesome term "res gestae." Courts and commentators have vigorously criticized decisions employing

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264. The commentators have uniformly criticized the rule. C. McCORMICK, supra note 165, at 73 (the voucher rule is "a serious obstruction to the ascertainment of truth"); E. MORGAN, supra note 162, at 70 (the rule "has no place in any rational system of investigation in modern society."); 3A J. WIGMORE, supra note 162, §§ 896-918 (Chadbourn rev. 1970); Ladd, Impeachment of One's Own Witness—New Developments, 4 U. CHI. L. Rev. 69 (1936).

265. C. MCCORMICK, supra note 165, at 75.

266. Under Ohio practice, a party is only permitted to refresh the witness's recollection with a prior inconsistent statement. See State v. Minneker, 27 Ohio St. 2d 155, 217 N.E.2d 821 (1971); State v. Spriner, 165 Ohio St. 182, 134 N.E.2d 150 (1956); Hurley v. State, 46 Ohio St. 320, 21 N.E. 645 (1888); State v. Johnson, 112 Ohio App. 124, 165 N.E.2d 814 (8th Dist. 1960). The effect on the jury, however, is impeachment if the witness refuses to repudiate his in-court testimony.


268. OHIO R. CIV. P. 32(a)(1).

269. In Chambers v. Mississippi, 410 U.S. 284 (1973), the Supreme Court held that the combined effect of the state's voucher rule and hearsay exception on declarations against penal interests precluded the admission of critical and reliable defense evidence and thus violated due process. The Court's language leaves little doubt, however, that in the appropriate case the application of the voucher rule by itself may violate due process. "The voucher rule, as applied in this case, plainly interfered with Chambers' right to defend the State's charges." Id. at 298.

270. E.g., United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944) (L. Hand, J.) ("as for 'res gestae,' . . . if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms."); Estate of Henry B. Gleason, 164 Cal. 756, 762, 130 P. 872, 875 (1913) ("Definitions of res gestae are as numerous as the prescriptions for the cure of rheumatism and generally about as useful.").

271. C. McCORMICK, supra note 165, § 288; E. MORGAN, supra note 162, at 328–43; 4 J. WEINSTEIN & M. BERGER, supra note 21, ¶ 803(1)(01); 6 J. WIGMORE, supra note 162, § 1767 (Chadbourn rev. 1976); Morgan, Res Gestae, 12 WASH. L. REV. 91 (1937); Morgan, A Suggested Classification of Utterances Admissible as Res Gestae, 31 YALE L.J. 229 (1922);
this term as a justification for admitting evidence. The term is a source of confusion because it has been used to admit statements that are not hearsay as well as those that fall within four separate exceptions to the hearsay rule—present sense impressions, excited utterances, state of mind, and state of bodily condition. Each of these exceptions is supported by a different rationale that is thought to provide a sufficient guaranty of reliability to warrant admission. Res gestae, with its imprecise and ambiguous meaning, allows evidence to be admitted without analyzing admissibility in terms of these rationales, thus defeating the purposes underlying the hearsay rule and its exceptions.

Other significant reforms include admitting expert testimony without the requirement of a hypothetical question, including factual statements in the exclusion of offers of compromise, per-

Thayer, Bedingfield's Case—Declarations As Part of the Res Gestae, 15 Amer. L. Rev. 1 (1881).


274. See Proposed Ohio R. Evid. 803(2), id.

275. See Proposed Ohio R. Evid. 803(3), id.

276. See Proposed Ohio R. Evid. 803(3)-803(4), id.


278. Proposed Ohio R. Evid. 703, reprinted in Proposed Ohio Rules of Evidence, 51 Ohio B. 181, 196 (1978). The rule does not abolish the hypothetical question; it merely makes its use optional. This tracks the position advocated by Wigmore, who criticized the hypothetical question requirement:

The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth. In the first place, it has artificially clamped the mouth of the expert witness, so that his answer to a complex question may not express his actual opinion on the actual case. This is because the question may be so built up and contrived by counsel as to represent only a partisan conclusion. In the second place, it has tended to mislead the jury as to the purport of actual expert opinion. This is due to the same reason. In the third place, it has tended to confuse the jury, so that its employment becomes a mere waste of time and a futile obstruction.

2 J. Wigmore, supra note 162, § 686, at 812. See also Rabata v. Dohner, 45 Wis. 2d 111, 129, 172 N.W.2d 409, 417 (1969) ("Rather than inducing a clear expression of expert opinion and the basis for it, [the hypothetical question] inhibits the expert and forecloses him from explaining his reasoning in a manner that is intelligible to a jury."); C. McCormick, supra note 165, § 17, at 36 (The hypothetical question "is a failure in practice and an obstruction to the administration of justice."); Ladd, Expert Testimony, 5 Vand. L. Rev. 414, 427 (1952).

279. Proposed Ohio R. Evid. 408, reprinted in Proposed Ohio Rules of Evidence, 51 Ohio B. 181, 188 (1978). Existing Ohio law excludes evidence of offers of compromise or settlement. Nevertheless, there is an exception for "independent statements of fact which are material to the issue, even though made by a party while negotiations for a compromise are pending.

mitting the use of opinion evidence to prove character,280 expanding the types of documents that are self-authenticating,281 and admitting duplicate originals on the same basis as originals under most circumstances.282 All these reforms have been advo-

(6th Dist. 1920); Weyant v. McCurdy, 12 Ohio App. 491, 151 N.E. 804 (10th Dist. 1920). The exception, however, could be avoided by stating factual admissions in hypothetical form. Proposed rule 408 would change this by excluding evidence of statements or conduct made in compromise negotiations as well as offers of compromise. The change is supported by two arguments: First, the exception for factual admissions is thought "to hamper free communication between parties and thus to constitute an unjustifiable restraint upon efforts to negotiate settlements—the encouragement of which is the purpose of the rule. [Second], by protecting hypothetically phrased statements, it constitutes a preference for the sophisticated and a trap for the unwary." S. REP. No. 1277, 93d Cong., 2d Sess. 10, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7057.

280. Proposed Ohio R. Evid. 405(A), 608(A), reprinted in Proposed Ohio Rules of Evidence, 51 OHIO B. 181, 186, 191 (1978). Reputation evidence has been the traditional method of proving character in Ohio. The proposed Rules would also permit character to be proved by opinion evidence. This change was advocated by Wigmore who argued that opinion evidence was far superior to reputation evidence:

The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development; but they have never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly can be known about the character of another, and have still admitted the secondhand, irresponsible product of multiplied guesses and gossip which we term "reputation."

7 J. WIGMORE, supra note 162, § 1986, at 244 (Chadbourn rev. 1978). In addition, "[m]uch reputation evidence—especially in today's urban communities filled with strangers and transients—is opinion evidence in disguise." 2 J. WEINSTEIN & M. BERGER, supra note 21, at 405-31. The Model Code, the Uniform Rules, and the California Evidence Code contain provisions similar to the proposed Ohio Rules. MODEL CODE OF EVIDENCE rule 306 (1942); UNIFORM RULE OF EVIDENCE 47 (1953); CAL. EVID. CODE § 1102 (West 1966).


In the case of innumerable writings which almost invariably correctly show their origins on their face, the slight obstacle to fraud presented by authentication requirements is far outweighed by the time and expense of proving authenticity. The danger of injustice and delay is greater than the danger of forgery. Rule 902 covers such documents which experience has proved generally reliable in showing their own authenticity.

5 J. WEINSTEIN & M. BERGER, supra note 21, at 902-09.

The rule does not prohibit the opposing party from challenging authenticity to the trier of fact; it only governs the admissibility of self-authenticating documents. Even if a document meets the authentication requirement of rule 902, the document may still be objectionable on other grounds, such as hearsay. A thorough discussion of this provision is found in OHIO LEGAL CENTER INSTITUTE, REFERENCE MANUAL FOR CONTINUING LEGAL EDUCATION PROGRAM, EVIDENCE IN OHIO, STATE AND FEDERAL ch. 8 (1978).

282. Proposed Ohio R. Evid. 1003 provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." Proposed Ohio Rules of Evidence, 51 OHIO B. 181, 209 (1978). The current Ohio rule places the burden on the offering party to show "that he cannot produce the original . . . ." Hine v. Dayton Speedway Corp., 20 Ohio App. 2d 185, 187, 252 N.E.2d 648, 650 (10th Dist. 1969). Rule 1003 shifts the burden to the opposing party to show a genuine
cated by evidence scholars and adopted in other jurisdictions.

IV. CRITICISMS OF THE PROPOSED RULES

The proposed Rules have been criticized at the hearings before the Joint Select Committee and in the literature. The critics have focused on drafting problems, trial judge discretion, and the merits of specific rules. Some of the criticisms, while valid, can be readily met—the drafting problems fall into this category.\(^{283}\) Other criticisms are more serious and require closer examination.

A. Judicial Discretion

A repeated criticism of the proposed Rules is that they "create new areas of broad, virtually unreviewable discretion."\(^{284}\) *United States v. Batts*\(^^{285}\) has been cited as an example of such discretionary power based on federal rule 102.\(^{286}\) In *Batts*, the Court of Appeals for the Ninth Circuit held that a criminal defendant could be impeached with extrinsic evidence of prior conduct not question of authenticity or unfairness. This change merely recognizes the accuracy of modern methods of reproduction. The term "duplicate" is defined in rule 1001(4) in such a way that a duplicate is identical to the original. *Proposed Ohio Rules of Evidence, supra.* This, according to the Federal Advisory Committee's Note, "virtually eliminates the possibility of error." 56 F.R.D. 183, 341 (1973).

283. Proposed rule 612, governing the use of writings to refresh a witness' recollection, has been criticized for poor draftsmanship. Walinski & Abramoff, *supra* note 90, at 357–59. Under rule 612 the opposing party is entitled, as a matter of right, to inspect writings used at trial to refresh recollection. This follows current Ohio law. See State v. Taylor, 83 Ohio App. 76, 77 N.E.2d 279 (10th Dist. 1947); State v. Moore, 74 Ohio L. Abs. 116, 139 N.E.2d 381 (C.P. Licking County 1956). Inspection of writings used to refresh recollection prior to trial is discretionary with the trial judge. This may also follow current Ohio law. See note 338 *infra.* Unfortunately, proposed Ohio rule 612, unlike its federal counterpart, is printed in such a way that the discretionary authority could be interpreted to apply to trial as well as pretrial refreshment. This was not the intent of the drafters. See Staff Notes, Proposed Ohio R. Evid. 612 ("Rule 612 restates Ohio law in providing that the opposing party has the right to examine a document used to refresh recollection while testifying and to cross-examine on that document."). This drafting problem can be easily corrected.

Proposed rules 402 and 802 also raise problems that can be readily corrected. Rule 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by Act of Congress. . . ." *Proposed Ohio Rules of Evidence, 51 Ohio B. 181, 185 (1978)* (emphasis added). The phrase "by Act of Congress" also appears in rule 802 which excludes hearsay evidence and then specifies exceptions. The phrase should be deleted since it seems to include all acts of Congress and not just those statutes that were intended to preempt state law.

284. Resolution 14, *supra* note 6, at 388 app. A. See also Walinski & Abramoff, *supra* note 90, at 367 ("the strongest objection of the Attorney General's Office is to the vast unprecedented discretion granted to trial judges by the proposed Rules.").

285. 558 F.2d 513 (9th Cir. 1977), withdrawn, 573 F.2d 599 (9th Cir. 1978).

286. See Walinski & Abramoff, *supra* note 90, at 369–70.
resulting in a conviction, even though federal rule 608(b) expressly prohibits the use of "extrinsic evidence." 287 The court based its result, in part, on rule 102 which reads: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined." 288 Batts raised the spectre, according to critics, that a "trial judge [has] discretion to ignore a rule of evidence, even one that Congress chose to make mandatory, if he believes that the whole 'truth' as he perceived it, might not be served." 289 The original Batts opinion, however, has been withdrawn, 290 the new opinion mentions neither rule 608(b) nor rule 102. 291

Even if the original Batts opinion had not been withdrawn, it hardly seems justifiable to cite that opinion for the proposition that trial judges would be permitted under the proposed Ohio Rules to ignore the Rules whenever they wished. First, the original Batts decision did not purport to give trial judges such power. The court explicitly limited the decision to the facts presented in Batts 292 and rested its decision as much on its interpretation of the legislative history of rule 608(b) as it did on rule 102. 293 Second, the critics assume Ohio judges would blindly follow this one poorly reasoned decision, ignoring the legislative history of the Federal and Ohio Rules as well as other decisions interpreting rule 608. 294 Third, if the critics are correct, most pro-

287. FED. R. EVID. 608(b) provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility . . . may not be proved by extrinsic evidence."

288. FED. R. EVID. 102.

289. Walinski & Abramoff, supra note 90, at 369–70.

290. 573 F.2d 599 (9th Cir. 1978).

291. The new opinion again affirmed the defendant's conviction, holding evidence of prior activity in drugs admissible under Federal Rule of Evidence 404(b) to rebut the defendant's claim of lack of knowledge. Id. at 603.

292. "We must emphasize that our holding today is based solely on the facts of the present case and the trial judge's discretionary powers in response to those facts. This decision should not be read as creating a new rule of evidence or a new approach to the Rules of Evidence." 558 F.2d at 518.

293. See id. at 517–18. In fact, the rule 102 aspect of the case appears to be no more than a makeweight argument used to buttress the court's rule 608(b) analysis. In addition, the court cited rule 404(b) as an alternative ground for admissibility.

cedural rules in Ohio are in jeopardy since civil rule 1(B), crim-
inal rule 1(B), and juvenile rule 1(B) contain comparable
provisions. Similarly, the Ohio Revised Code contains such pro-
visions. Finally, the Batts result could have been reached
under the common law simply by grafting a rule 102-type factor
onto the present common law rule. In effect, the Batts argu-
ment proves too much. The problem does not lie with the pro-
posed Rules but rather with the analysis of one court, an analysis
subsequently repudiated by that same court.

1. Relevancy

Another aspect of the proposed Rules that has come under at-
tack is rule 403. That rule reads: “Although relevant, evidence
may be excluded if its probative value is substantially outweighed
by the danger of unfair prejudice, confusion of the issues, or mis-
leading the jury, or by considerations of undue delay, waste of
time, or needless presentation of cumulative evidence.” In criti-
cizing this rule, the Attorney General’s office has argued that be-
cause of the discretion it entrusts to the trial judge “Rule 403
eliminates the entire body of evidence law.” This comment is
both baffling and invalid. It is baffling because rule 403 is merely
a restatement of current Ohio law, more clearly expressed. An
Ohio appellate court, using words almost identical to proposed
rule 403, recently stated: “[E]vidence, though relevant, should be
excluded when its probative value is substantially outweighed
by the risk that its admission will cause undue or unfair
prejudice.”

Mich. R. Evid. 608(b)); State v. McKelvy, 91 N.M. 384, 574 P.2d 603 (1978) (construing
N.M. R. Evid. 608(b)).
295. OHIO R. CIV. P. 1(B).
296. OHIO R. CRIM. P. 1(B).
297. OHIO R. JUV. P. 1(B).
298. “The magistrate or judge of the trial court shall control all proceedings during a
criminal trial and shall limit the introduction of evidence and argument of counsel to rele-
vant and material matters with a view to expeditious and effective ascertainment of truth
regarding the matter in issue.” OHIO REV. CODE ANN. § 2938.07 (Page 1975) (emphasis
added). See also OHIO REV. CODE ANN. § 2901.04(B) (Page 1975).
299. The Ohio cases on this issue are conflicting. See text accompanying notes 343–51
infra.
301. Walinski & Abramoff, supra note 90, at 380 n.142.
The court went on to hold that the trial court had “not abuse[d] its discretion in its decision
to admit the [evidence].” Id. Since undue prejudice was the only issue in the case, there
was no need for the court to specify the other factors enumerated in rule 403. See also
The criticism offered by the Attorney General’s office is invalid because it is premised on an erroneous perception of trial practice. Rule 403 is one of three general rules governing relevancy. Proposed rule 401 defines relevant evidence. Rule 402 makes relevant evidence admissible in the absence of a rule of exclusion and irrelevant evidence inadmissible. Rule 403 recognizes the traditional balancing that a trial judge is required to perform in considering the admissibility of relevant evidence. The rule is stated in broad terms because it cannot be stated any other way.

In some areas discretion can be eliminated or confined. For example, proposed rule 404(A) excludes character evidence except for three specified instances. In contrast, rule 403 cannot be limited because it involves an area of “indefinability” or “nonamenability to fixed legal rules.” A common example illustrates the point. In a homicide prosecution, the prosecutor typically attempts to introduce crime-scene photographs, which in many cases are gruesome. If the defense objects, the trial judge is...

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State v. Strodes, 48 Ohio St. 2d 113, 116, 357 N.E.2d 375, 378 (1976) (trial court “acted within its discretion” because the “probative value of [the evidence] was not outweighed by danger of prejudicial effect . . . .”); Whiteman v. State, 119 Ohio St. 285, 298, 164 N.E. 51, 54-55 (1928) (“It was the province of the court to determine . . . whether under the circumstances of the case [the evidence] would be essentially misleading or too remote.”).

One factor in rule 403—waste of time—has been singled out for criticism. Walinski & Abramoff, supra note 90, at 367. This factor, however, is considered in current practice. A typical example is a “jury view,” transporting the jury to the scene of the crime or accident. It is a time consuming and expensive enterprise that would be impracticable in every case, even if the view was of some value. This decision has to be left to the discretion of the trial judge—some jury views are extremely helpful but in many cases they are a “waste of time.” See Dunkle v. Standard Life & Accident Ins. Co., 114 Ohio App. 65, 67, 180 N.E.2d 198, 200 (4th Dist. 1961) (“It is entirely within the discretion of the judge whether a view by the jury should be allowed.”).

See also Staff Notes, Proposed Ohio R. Evid. 403 (“Under this rule as under prior Ohio law, the trial court has discretion in determining admissibility when one of the enumerated potential dangers or considerations is present.”); Phillips, supra note 247, at 34 (“Rule 403 would accord with existing Ohio law in giving the trial court the discretion to exclude probative evidence where it will cause undue prejudice, mislead the jury, cause undue delay, be cumulative, or confuse the issues.”).

303. Early drafts of federal rule 403 made exclusion mandatory when the danger of unfair prejudice, confusion of issues, or misleading the jury substantially outweighed the probative value of the evidence. Exclusion for undue delay, waste of time, or cumulative evidence was discretionary. 51 F.R.D. 345 (1971). The difference between this approach and current rule 403 is one of form, not substance. Even when exclusion is mandatory, it is the trial judge who must make the critical judgments: How probative is the evidence? How great are the dangers? Do the dangers “substantially outweigh” the probative value? These ad hoc decisions have to be entrusted to the trial judge, and the same abuse of discretion standard will be used on appellate review under either a mandatory or discretionary formulation. See 1 J. WEINSTEIN & M. BERGER, supra note 21, ¶ 403[02].

faced with the problem of weighing the probative value of the photographs against the undue prejudice that they may produce— the jury may be so inflamed by the photographs that it may convict the defendant even though the evidence of his involvement is weak. Any number of factors could properly influence the trial judge’s decision on admissibility. If the photographs show powder burns on the victim’s back, and the defendant claims self-defense, the probative value increases because powder burns indicate an entrance wound, and their presence is therefore inconsistent with a self-defense claim. If, on the other hand, the prosecution theory is that the defendant was the driver of the getaway car, and there is no controversy that a homicide occurred, then the need for the photographs decreases. If the defendant offers to stipulate to the cause of death or if there is other available evidence of death, the trial judge may handle the objection differently. It is impossible to draft a rule to cover all these situations; every case is different. As one court has noted: “[M]any hundreds of potential relevancy issues [pass] before the trial judge. It is neither desirable nor possible for this court to lay down any general rule that will serve as a solution for every issue, for it is a different question of experience and common sense in each instance . . . .”

Far from being deficient, rule 403 is one of the most attractive provisions in the proposed Rules. It clearly indicates the factors that the trial judge may consider and expresses a bias for admissibility by requiring that those factors substantially outweigh the probative value of the proffered evidence before exclusion is proper.

305. State v. Woodards, 6 Ohio St. 2d 14, 25, 215 N.E.2d 568, 577, cert. denied, 385 U.S. 930 (1966) (“The real question is whether the probative value of such photographs is outweighed by the danger of prejudice to the defendant.”).
309. Wigmore, McCormick, and other authorities have recognized the soundness of such a provision. 2 D. Louisell & C. Mueller, supra note 79, § 125; C. McCormick, supra note 165, § 185; 1 J. Weinstein & M. Berger, supra note 21, § 403[02]; 1 J. Wigmore, supra note 162, § 29a; 6 id. §§ 1864–1865, 1904–1906 (Chadbourn rev. 1976); James, Relevancy, Probability and the Law, 29 Calif. L. Rev. 689 (1941); Slough, Relevancy Unraveled, 5 U. Kan. L. Rev. 1, 12–15 (1956); Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 Vand. L. Rev. 385, 392 (1952). A further indication of the acceptabil-
2. **The Residual Hearsay Exceptions**

The discretionary aspects of proposed rules 803(24) and 804(B)(6), the residual hearsay exceptions, have also been criticized. Those provisions allow a trial judge to admit, under certain circumstances, hearsay statements found to be trustworthy even though they do not fall within the enumerated exceptions of rules 803 and 804.

The drafters of the Federal Rules included the residual exceptions because "[i]t would . . . be presumptuous to assume that all possible desirable exceptions to the hearsay rule have been catalogued and to pass the hearsay rule to oncoming generations as a closed system." They also stated that these provisions "do not contemplate an unfettered exercise of judicial discretion . . . ." The drafters cited *Dallas County v. Commercial Union Assurance Co.* as support for their position. In that case the plaintiffs contended that a courthouse collapsed because it was struck by lightning. The defendant insurance company, however, argued that structural deterioration had caused the collapse. Evidence of charred timbers was offered to support the plaintiffs' theory. In rebuttal the insurance company offered a 1901 newspaper account of a fire to explain the charring. The appellate court upheld the admissibility of the newspaper account, even though it constituted hearsay and did not fall within any recognized exception, because it was reliable: "[I]t is inconceivable to us that a newspaper reporter in a small town would report there was a fire in the dome of the new courthouse—if there had been no fire." *Dallas County* demonstrates the value of a residual exception; the newspaper account was both reliable and necessary for a fair determination of the case.

Nevertheless the residual exceptions ran into opposition in...
Congress. The House deleted these provisions; the Senate restored them with qualifications. Before such a statement could be admitted, the trial judge had to determine that "(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." In conference, the Senate version was adopted with a further qualification: the offering party was required to provide advance notice of its intention to use the residual exceptions, including the name and address of the declarant. As enacted, the residual exceptions seemed an acceptable compromise—hearsay exceptions would not be frozen, but safeguards had been added.

The federal cases interpreting the residual exceptions have differed, however, on the extent of the trial judge's discretion. Some courts have stated that the exceptions are available only in "exceptional circumstances," others have rejected this view. The area of most concern has been the use of residual exceptions by the prosecution in criminal cases—a use which also raises constitutional problems. The sixth amendment guarantees a criminal defendant the right "to be confronted with the witnesses against

317. FED. R. EVI D. 803(24), 804(b)(5).
319. The significant safeguards are advance notice and lack of other available evidence. The other provisions are redundant. Rule 401 already requires that the evidence be material, and rule 102 provides that the Rules be construed in the interests of justice.
The confrontation standard, however, is no more precise than the standard set forth in the residual exceptions. Recent decisions have admitted under the residual exceptions unsworn statements taken by law enforcement officials, as well as grand jury testimony, because the courts thought there was sufficient reliability. These cases raise significant confrontation problems under both the sixth amendment and the Ohio Constitution, which guarantees a criminal defendant the right "to meet the witnesses face to face."

There are several possible approaches to dealing with the residual hearsay exceptions in Ohio. One is to delete them altogether, as have some state codifications of the Federal Rules. This may, however, stultify the future development of hearsay exceptions. In addition, it may result in either the exclusion of reliable evidence or a tortured analysis of the enumerated exceptions. A better solution would be to amend the rule to prohibit the use of the residual exceptions against criminal defendants. This would deal with the confrontation concerns and would per-

323. U.S. CONST. amend. VI.
324. The last major Supreme Court case on this issue was Dutton v. Evans, 400 U.S. 74 (1970). Dutton appears to establish a reliability standard in the confrontation context. Id. at 88-89 (hearsay statements with sufficient "indicia of reliability" are not violative of the confrontation clause). The Court again focused on "reliability" in a subsequent case. Mancusi v. Stubbs, 408 U.S. 204, 213 (1972). See generally C. McCORMICK, supra note 165, § 252; 4 J. WEINSTEIN & M. BERGER, supra note 21, ¶ 800[04]; 5 J. WIGMORE, supra note 162, ¶ 1397 (Chadbourn rev. 1974).
325. See United States v. West, 574 F.2d 1131, 1137 n.7 (4th Cir. 1978) (The "analysis under both Rule 804(b)(5) and under the Confrontation Clause must begin by focusing on the reliability and trustworthiness of the challenged statement."). Cf. Park v. Huff, 493 F.2d 923, 930 (5th Cir. 1974), cert. denied, 423 U.S. 824 (1975) (case-by-case approach); 5 J. WIGMORE, supra note 162, ¶ 1397, at 185 (Chadbourn rev. 1974) (case-by-case).
328. OHIO CONST. art. I, § 10; see State v. Tims, 9 Ohio St. 2d 136, 224 N.E.2d 348 (1967) (hearsay violative of state as well as federal constitution).
329. For example, Florida, Nevada, and Maine have all omitted these provisions. FLA. STAT. ANN. §§ 90.803, .804(2) (West Supp. 1978); NEV. REV. STAT. §§ 51.075–375 (1977); ME. R. EVID. 803, 804(b).
330. See S. REP. NO. 1277, 93d Cong., 2d Sess. 19, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7051, 7065 ("[W]ithout a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstance which they were intended to include . . . .").
331. This approach would be consistent with the approach taken in proposed rule 803(8) which limits the use of the official records exception against a criminal defendant
mit the hearsay exceptions to develop in civil cases and in criminal cases if proffered by the defendant.\textsuperscript{332}

3. \textit{Discretion}

As the above discussion suggests, the appropriateness of granting trial judge discretion must be evaluated in the context of the particular rule in which that discretion operates. The criticism that discretion is inappropriate is invalid with respect to rule \textit{403}.\textsuperscript{333} In other areas reasonable people may disagree\textsuperscript{334} whether a blanket rule or a discretionary rule will best serve a particular purpose.\textsuperscript{335}

A spin-off argument has been that the discretionary aspects of the proposed Rules would make the law of evidence unpredictable and that therefore the common law is preferable.\textsuperscript{336} This argument is not persuasive because it overlooks several points. First, there is considerable discretion in the common law rules.\textsuperscript{337} Only a few of the rules cited by the Attorney General's office as being discretionary actually introduce new areas of discretion.\textsuperscript{338}
Second, the common law because of its evolutionary nature is,

1936 (witness examined through question and answer form in an out-of-court hearing to determine admissibility of testimony).

Proposed rule 104(C) permits the trial court to conduct out-of-court hearings on preliminary matters. This does not change existing practice. See id.; cf. State v. Spahr, 47 Ohio App. 221, 353 N.E.2d 624 (2d Dist. 1976) (motion in limine).

Proposed rule 106 grants discretion to the parties, not to the trial judge. When one party introduces a writing or recorded statement, the other party may require "any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it" to be introduced also. Proposed Ohio Rules of Evidence, 51 Ohio B. 181, 184 (1978). This does not change existing law. See Industrial Comm'n v. Link, 34 Ohio App. 174, 182, 170 N.E. 594, 596 (8th Dist. 1929) ("It is a well-known rule of evidence that, when a part of a document is offered in evidence by either side, the opposing side may call for the entire contents of the document."). Ohio Rule of Civil Procedure 32(A)(4) contains the same provision with respect to depositions.

Proposed rule 201 makes the taking of judicial notice discretionary under certain circumstances. This does not change existing law. See Zimmerman v. Rockford Stone Co., 93 Ohio L. Abs. 47, 49 (C.P. Van Wert County 1963) ("The taking of judicial notice in situations such as this [the boundaries of the county of court's location] is discretionary with the court."). If there is a change in existing law contained in rule 201, it is § (D), which makes the taking of judicial notice mandatory upon the request of a party. This, of course, limits discretion.

Proposed rule 403 permits the trial court to exclude relevant evidence if the probative value of such evidence is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by the considerations of undue delay, waste of time, or needless presentation of cumulative evidence. This does not change existing law. See note 302 supra and accompanying text.

Proposed rule 404(B) permits the introduction of evidence of other crimes, wrongs, and acts to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. This does not change existing law. See Ohio Rev. Code Ann. § 2945.59 (Page 1975).

Proposed rule 608(B) permits a witness, in the discretion of the court, to be impeached with specific instances of conduct on cross-examination. The few cases on this issue are contradictory. See text accompanying notes 343–51 infra. Thus, it is difficult to determine whether this rule represents a change in existing practice.

Proposed rule 611(A) provides: "The court shall exercise reasonable control over the mode of interrogating witnesses and presenting evidence . . . ." Proposed Ohio Rules of Evidence, 51 Ohio B. 181, 193 (1978). General control over the conduct of the trial rests with the trial judge by statute. Ohio Rev. Code Ann. §§ 2945.03, 07 (Page 1975). Control over the order of proof is vested in the trial judge by statute and case law. Id. § 2945.10(D) ("[T]he court, for good reason in furtherance of justice, may permit evidence to be offered by either side out of its order."). The last sentence of § 2945.10 states: "The court may deviate from the order of proceedngs listed in this section;" id. §§ 2315.01, 2938.11(C); Cities Serv. Oil Co. v. Burkett, 176 Ohio St. 449, 200 N.E.2d 314 (1964) ("the order in which evidence shall be produced . . . lies within the sound discretion of the court . . . ").

Proposed rule 611(C) permits a party to examine a hostile witness by leading questions. This does not change existing law. See State v. Minneker, 27 Ohio St. 2d 155, 158, 271 N.E.2d 821, 824 (1964) ("Declaring a witness hostile is a matter of discretion on the part of the trial court.").

Proposed rule 612 permits the trial court to require the production of a writing used prior to trial to refresh recollection. Whether this provision changes existing law is unclear. The Staff Notes state: "The Ohio cases are not specific as to the refreshing of recollection
in one sense, the antithesis of predictability.\footnote{Erion v. Timken}

which took place before the giving of testimony." Staff Notes, Proposed Ohio R. Evid. 612. One unreported case, State v. Finley, No. 27997 (8th Dist. Ct. App. July 13, 1967), makes production mandatory. The issue, however, is not well settled in Ohio. For a further discussion of rule 612, see note 283 \textit{supra}.


Proposed rule 615 permits the trial court on its own motion to exclude witnesses so that they cannot overhear the testimony of other witnesses. This does not change existing law. \textit{See} Piening v. Titus, Inc., 113 Ohio App. 532, 537, 179 N.E.2d 374, 378 (2d Dist. 1960) (exclusion of witnesses "rest[s] in the sound discretion of the court. . ."). If there is a change in existing law contained in this provision, it is that part of rule 615 which makes exclusion mandatory upon the request of a party. This, of course, limits discretion.

Proposed rule 701, governing lay opinion testimony, changes the formulation of the Ohio opinion rule. Whether it changes the trial court's discretion seems doubtful. \textit{See} text accompanying notes 352-67 \textit{infra}. \textit{See also} State v. Auerbach, 108 Ohio St. 96, 98, 140 N.E. 507, 508 (1923) ("It rests within the sound discretion of the court whether the [lay] witness may express an opinion or not.").

Proposed rule 702 entrusts the trial court with the decision to determine the qualifications of experts. This does not change existing law. \textit{See} Bronhaugh v. Harding Hosp., Inc., 12 Ohio App. 2d 110, 114, 231 N.E.2d 487, 491 (10th Dist. 1967) ("To rule upon the qualifications of an expert is within the sound discretion of the trial court. . .").

Proposed rule 706(A) recognizes the trial court's power to appoint expert witnesses. There is little law on this issue in Ohio. One trial court, citing proposed rule 706, has indicated that it has the power to appoint experts. State v. Sims, 52 Ohio Misc. 31, 69-70, 369 N.E.2d 24, 26 (C.P. Cuyahoga County 1977). Several arguments support this position. First, the power of appointment is well recognized in other jurisdictions. As the Federal Advisory Committee's Note states: "The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned." 56 F.R.D. 183, 287 (1973). \textit{See also} 2 J. Wigmore, \textit{supra} note 162, § 563; Annot., 95 A.L.R.2d 383 (1958). Second, the power to appoint experts is a specialized application of the court's power to call witnesses on its own motion (proposed rule 614(A)), a power that has been recognized. \textit{See} State v. Weind, 50 Ohio St.2d 224, 235-36, 364 N.E.2d 224, 232-33 (1977). Third, Ohio law recognizes such a power in certain instances. Section 2945.40 provides for such appointments when insanity is an issue in a criminal case. \textit{Ohio Rev. Code Ann.} § 2945.40 (Page 1975).

Proposed rules 803(24) and 804(B)(6) permit the trial court to admit reliable hearsay statements even though they do not fall within an enumerated exception. This may not change existing law. \textit{See} note 310 \textit{supra}.

Proposed rule 1006 permits, as an exception to the best evidence rule, the "contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court" to be "presented in the form of a chart, summary, or calculation." \textit{Proposed Ohio Rules of Evidence, supra} at 210. The rule also permits the trial court to order production of the originals or duplicates in court. The exception follows existing law. \textit{See} Petticrew v. Petticrew, 98 Ohio App. 260, 265-68, 129 N.E.2d 194, 198-99 (2d Dist. 1953); McNaughton v. Presbyterian Church, 35 Ohio App. 443, 447, 172 N.E. 561, 562 (5th Dist. 1930); \textit{Ohio Rev. Code Ann.} § 2317.36 (Page 1953). Making in-court production discretionary rather than mandatory may be a minor change.

Based upon these cases, it appears that the claim by the Attorney General's office that the proposed Rules grant "unprecedented discretion" to trial judges, Walinski &
illustrates this evolutionary development. In *Erion*, the court incorporated the residual hearsay exceptions into the "common law" of Ohio. Since prior case law did not recognize this exception, the attorneys in the case would have had difficulty "predicting" that holding.

Third, in many instances predictability is lacking in current practice because evidence rules are neither uniform nor accessible. Take, for example, the evidentiary issue raised in *United States v. Batts*—impeachment by specific instances of conduct not resulting in a conviction. What is the current Ohio rule on this type of impeachment? In a 1950 case, *Fawick Airflex Co. v. United Electrical, Radio & Machine Workers*, the Court of Appeals for the Eighth District considered the rule so clear that it did not have to cite any authority in stating: "It has long been the law of this state that a witness on cross-examination may be asked questions tending to disclose his own character and may be interrogated on specific acts . . . in his past life if they have a legitimate bearing upon his credit as a witness." In 1974, however, the same court declared in *State v. Schecter*: "A witness can never be impeached through evidence of specific instances of bad character whether

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Abrahamoff, *supra* note 90, at 367, is exaggerated. In some cases the cited rules limit discretion that is currently recognized.

It should also be pointed out that there are discretionary aspects to rules not mentioned by the Attorney General's office. For example, proposed rule 601 (competency of witnesses) and proposed rule 1002 (best evidence rule) require the exercise of discretion. This merely follows the existing law. See *State v. Wildman*, 145 Ohio St. 379, 386, 61 N.E.2d 790, 793 (1945) ("the question of competency lies in the sound discretion of the trial judge . . . ."); *Hine v. Dayton Speedway Corp.*, 20 Ohio App. 2d 185, 188, 252 N.E.2d 648, 651 (10th Dist. 1969) ("The quantum and quality of proof required for the admission of secondary evidence is not gauged by any uniform rule, but rests largely within the discretion of the trial court."). See also *Fidelity & Guar. Ins. Underwriters, Inc. v. Gary Douglas Elec., Inc.*, 48 Ohio App.2d 319, 324, 357 N.E.2d 388, 392 (9th Dist. 1974) ("further redirect examination is a matter of discretion in the trial court, which is exercised in the interest of justice.").

339. In commenting on common law rules of evidence, one authority has noted: "[W]hile molding rules to fit particular facts may do justice in individual cases, it makes practicing law ever so much more difficult because the lawyer has difficulty predicting precisely what the court will say about the rules of evidence in any given case." K. Redden & S. Saltzberg, *Federal Rules of Evidence Manual* 1 (1975).

340. 52 Ohio App. 2d 123, 368 N.E.2d 312 (10th Dist. 1976). See note 310 supra.


342. 558 F.2d 513 (9th Cir. 1977), withdrawn, 573 F.2d 599 (9th Cir. 1978). *Batts* has been a center of controversy on discretion. See text accompanying notes 285–99 supra.


344. *Id.* at 421, 92 N.E.2d at 433.

related to truthfulness or otherwise.\textsuperscript{346} Its 1950 decision was not mentioned, instead the court relied on \textit{Brice v. Samuels},\textsuperscript{347} a 1938 decision by the Court of Appeals for the First District. \textit{Brice} held impeachment by specific instances of conduct on cross-examination improper: "[W]e know of no rule under which specific acts of wrongdoing may be admitted to affect the credibility of a witness."\textsuperscript{348} Authority for a different rule from the First District, however, could have been found in \textit{State v. Browning},\textsuperscript{349} decided in 1954. In \textit{Browning}, the First District overturned a conviction because the defense was not permitted to impeach a prosecution witness through instances of misconduct—episodes of drunkenness and false accusations: "Evidence of . . . habits of sobriety, . . . associations in life, similar accusations, and general habits in general could be quite pertinent as reflecting on [the witness'] credibility . . . ."\textsuperscript{350} Moreover, the impeachment technique in \textit{Browning} involved proof by extrinsic evidence as well as by evidence developed on cross-examination. Thus, there may be three different rules in Ohio on the issue of impeachment by specific instances of conduct not resulting in a conviction: (1) specific instances of conduct are inadmissible—\textit{Brice} and \textit{Schecter}; (2) specific instances of conduct may be raised on cross-examination—\textit{Fawick Airflex Co.}; and (3) specific instances may be proved by extrinsic evidence as well as raised on cross-examination—\textit{Browning}. An attorney faced with these decisions could not possibly "predict" which precedent will control.\textsuperscript{351}

\textsuperscript{346} \textit{Id} at 121, 352 N.E.2d at 624.
\textsuperscript{347} 59 Ohio App. 9, 17 N.E.2d 280 (1st Dist. 1938).
\textsuperscript{348} \textit{Id} at 14, 17 N.E.2d at 282.
\textsuperscript{349} 98 Ohio App. 8, 128 N.E.2d 173 (1st Dist. 1954).
\textsuperscript{350} \textit{Id} at 14, 128 N.E.2d at 176.
\textsuperscript{351} The Attorney General's office cites Wigmore as supporting its view of discretion. Walinski & Abramoff, \textit{supra} note 90, at 382. The citation is misleading for several reasons. First, the article cited—Wigmore, \textit{The American Law Institute Code of Evidence Rules: A Dissent}, 28 A.B.A.J. 23 (1942)—contains Wigmore's criticisms of the Model Code of Evidence. The Federal Rules are significantly different from the Model Code. See 21 C. WRIGHT & K. GRAHAM, \textit{supra} note 4, § 5005, at 86 ("While some of the changes [embodied in the Model Code] would ultimately appear in the Federal Rules of Evidence, many have not yet been accepted."). Second, Wigmore supported many of the proposed Rules that the Attorney General's office attacks as granting excessive discretion. See text accompanying notes 365-66 infra (proposed rule 701) and note 309 \textit{supra} (proposed rule 403). Compare 2 J. WIGMORE, \textit{supra} note 162, § 563 (recommending appointment of experts by court) with Walinski & Abramoff, \textit{supra} note 90, at 368 n.100 (apparently criticizing such discretion). Compare J. WIGMORE, \textit{Code of Evidence} 269 (3d ed. 1942) (proposing a residual hearsay exception) with Walinski & Abramoff, \textit{supra} note 90, at 373-78 (attacking such a provision).
B. Lay Opinion Testimony

Proposed rule 701, governing lay opinion testimony, has also received adverse comment. Rule 701 limits lay opinion testimony "to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." The present Ohio formulation of the opinion rule is "[t]hat witnesses shall testify to facts and not opinions . . . ." There is, however, an ill-defined exception for "cases where it is not practicable to place before the jury all the primary facts . . . ." In examining the present and proposed formulations, the function of the opinion rule must be kept in mind. The rule is not designed to exclude testimony that is merely speculation or conjecture on the part of the witness. The firsthand knowledge rule serves that function. Rule 701 incorporates that rule by requiring that an opinion be "rationally based on the perception of the witness." The opinion rule is designed to encourage witnesses to relate their knowledge in concrete rather than abstract terms, to relate primary sensory perceptions rather than inferences or conclusions drawn from those perceptions. Such a purpose has merit. If the witness includes both primary perceptions and inferences in his testimony, the latter will be superfluous in many cases because the jury is as capable as the witness to draw the inference. If only the inference is provided, the jury may be misled since it may have drawn a different inference had it been presented with the underlying perceptions. Nevertheless, the application of the opinion rule has been criticized on several grounds.

First, the application of the rule has tended to turn on an illusory fact-opinion dichotomy. This has proved unworkable because "there is no distinction in kind between fact and opinion; the distinction is one of degree." For example, a witness who

353. Railroad Co. v. Schultz, 43 Ohio St. 270, 282, 1 N.E. 324, 331 (1885).
354. Id.
355. See Proposed Ohio R. Evid. 602, reprinted in Ohio Rules of Evidence, 51 Ohio B. 181, 190 (1978). The relationship between the opinion rule and the firsthand knowledge requirement is historically significant. Wigmore has argued that the genesis of the opinion rule is a misunderstanding of the personal knowledge requirement. 7 J. Wigmore, supra note 162, § 1917 (Chadbourn rev. 1978).
356. See C. McCormick, supra note 165, at 25.
357. See 7 J. Wigmore, supra note 162, § 1917, at 10 (Chadbourn rev. 1978).
358. E. Morgan, supra note 162, at 216. See also J. Maguire, Evidence, Common
testifies that a defendant had "slurred speech" and "staggered" when he walked, is using inferences as much as the witness who testifies that the defendant was "intoxicated."

Second, witnesses frequently use inferences while testifying since it is the natural way to tell a story. "Opinions are constantly given. A case can hardly be tried without them. Their number is so vast, and their use so habitual, that they are not noticed as opinions distinguished from other evidence." A strict application of the opinion rule would stultify the presentation of testimony. As Judge Learned Hand commented:

Every judge of experience in the trial of causes has again and again seen the whole story garbled, because of insistence upon a form with which the witness cannot comply, since, like most men, he is unaware of the extent to which inference enters into his perceptions. He is telling the 'facts' in the only way that he knows how, and the result of nagging and checking him is often to choke him altogether, which is, indeed, usually its purpose.

The recognition of these defects in the fact-opinion rule forced courts to carve out the exception. "In matters more within the common observation and experience of men, non-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinions from such facts . . . ."

Third, the rule is unnecessary in most instances because the adversary system has built-in mechanisms that mitigate the undesirable effects of opinion testimony. Because "the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage," counsel will tend to elicit concrete rather than abstract testimony. Furthermore, opposing counsel can expose the weaknesses in opinion testimony through cross-examination.

Because of the above considerations, the modern trend has

361. Railroad Co. v. Schultz, 43 Ohio St. 270, 282, 1 N.E. 324, 332 (1885).
363. Id.
been to treat the opinion rule as a rule of preference, rather than a rule of exclusion.\textsuperscript{364} Primary sensory perceptions are preferred to inferences or conclusions drawn from those perceptions. If, however, an opinion will assist the jury or is the best available evidence, it will not be excluded. Opposing counsel, of course, retains the right to cross-examine the witness on the basis of the opinion. This is the approach adopted in rule 701.

The Attorney General's office has argued that rule 701 is "open-ended."\textsuperscript{365} The implication of this statement is that the present rule, based upon the fact-opinion dichotomy, is not "open-ended," that it is precise and easily applied. This is simply not true. Dean Wigmore, in arguing for "the entire abolition of the [opinion] rule," commented: "Add, finally, the utter impossibility of a consistent application of the rule, and the consequent uncertainty of the law, and we understand how much more it makes for injustice rather than justice. It has done more than any one rule of procedure to reduce our litigation towards a state of legalized gambling."\textsuperscript{366} Thus, the standard expressed in rule 701—whether the opinion is "helpful to a clear understanding of [the witness'] testimony or the determination of a fact in issue"—is no more "open-ended" than the fact-opinion formulation\textsuperscript{367} and has the virtue of being consistent with the modern view of treating the opinion rule as a rule of preference.

C. The Ultimate Issue Prohibition

Closely related to the opinion rule is the so-called "ultimate issue prohibition." This rule is often justified on the ground that opinions on ultimate issues in controversy "invade the province of the jury" or "usurp the function of the jury."\textsuperscript{368} Proposed rule 704

\textsuperscript{364} C. McCormick, supra note 165, at 25 ("It seems fair to observe that the prevailing practice in respect to the admission of the opinions of non-expert witnesses may well be described, not as a rule excluding opinions, but as a rule of preference. The more concrete description is preferred to the more abstract.").

\textsuperscript{365} Walinski & Abramoff, supra note 90, at 362.

\textsuperscript{366} 7 J. Wigmore, supra note 162, § 1929, at 27 (3d ed. 1940) (emphasis in original).

\textsuperscript{367} Under the fact-opinion formulation, the judge must decide whether the testimony involves fact or opinion. Since this distinction is a matter of degree, the judge must be given some leeway. Moreover, even if the testimony involves an opinion, the judge must decide whether the opinion falls within the exception. The discretionary aspects of these decisions have been recognized by the Ohio Supreme Court. See State v. Auerbach, 108 Ohio St. 96, 98, 140 N.E. 507, 508 (1923) ("It rests within the sound discretion of the court whether the witness may express an opinion or not.").

\textsuperscript{368} See United States v. Cairns, 434 F.2d 643, 644 (9th Cir. 1970) (defendant argued that witness' opinion "invade[s] the province of the jury"); Linden v. United States, 254
would abolish this rule. Abolition, according to testimony presented to the Joint Select Committee, would permit a criminologist to testify that a criminal defendant "had committed a crime." Assuming that a criminologist would be qualified to testify on this issue,\textsuperscript{369} such testimony nevertheless would be inadmissible. Exclusion, however, would be based on rule 702 which limits expert testimony to matters that will assist the trier of fact.\textsuperscript{370} This illustrates the principal defect in the ultimate issue prohibition—it requires the judge to ask the wrong question.\textsuperscript{371} The question should be whether the opinion, lay or expert, assists the jury and not whether it relates to the ultimate issue. In many instances, the jury needs an opinion on the ultimate issues. For example, in a forgery case the only contested issue may be whether the defendant forged a check. A handwriting expert's training and experience may enable him to answer that question. In such a case, an opinion on the ultimate issue is desirable. The expert, however, would be permitted to testify only that, based on his examination, he was of the opinion that known exemplars and the check were written by the same person.\textsuperscript{372}

\textsuperscript{369} The term "criminologist" probably was meant to refer to an expert in criminal investigations rather than an expert in the causes of crime or the treatment of convicts.

\textsuperscript{370} The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702 opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurance against the admission of opinions which would merely tell the jury what result to reach . . . . They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria.


\textsuperscript{371} There are additional problems with the ultimate issue prohibition. First, difficult questions of application are involved in distinguishing "ultimate facts" from other "facts." See generally C. McCormick, supra note 165, § 12; Ladd, supra note 277, at 423. Second, the witness can never usurp the function of the jury because the jury is not bound to accept the witness' opinion. 7 J. Wigmore, supra note 162, § 1920 (Chadbourn rev. 1978); Ladd, supra note 277, at 424-25. There is, of course, a danger that the jury may be unduly influenced by the opinion of a particular witness, especially an expert, but this problem exists whether the witness is offering an opinion or testifying about observed facts. Note, Opinion Testimony, "Invading the Province of the Jury," 20 U. Cin. L. Rev. 484, 488 (1951).

\textsuperscript{372} Proposed rule 704 would not substantially alter Ohio law. The Ohio cases have permitted expert witnesses to express an opinion on ultimate issues. State Auto Mut. Ins. Co. v. Chrysler Corp., 36 Ohio St. 2d 151, 304 N.E.2d 891 (1973); McKay Mach. Co. v. Rodman, 11 Ohio St. 2d 77, 228 N.E.2d 304 (1967); Shepard v. Midland Mut. Life Ins. Co., 152 Ohio St. 6, 87 N.E.2d 156 (1949); Fidelity & Guar. Ins. Underwriters, Inc. v. Gary Douglas Elec., Inc., 48 Ohio App. 2d 319, 357 N.E.2d 388 (9th Dist. 1974).

The cases involving lay opinion testimony on ultimate issues are not as clear. Several
V. Conclusion

The question whether the promulgation of rules of evidence is a legislative or judicial function is settled by article IV, section 5(B) of the Ohio Constitution. This section provides for concurrent jurisdiction over the promulgation of procedural rules; the Ohio Supreme Court is empowered to prescribe rules of "practice and procedure" subject to review by the General Assembly. Most evidentiary rules have been classified as procedural, and the available evidence indicates that the General Assembly was aware of this at the time section 5(B) was adopted. The need for reform of the law of evidence has been documented, and although reasonable people may disagree about particular rules, the proposed Rules, on the whole, would substantially improve the law of evidence in Ohio.

The General Assembly has several options with respect to the proposed Ohio Rules of Evidence: (1) continue to disapprove the Rules if they are resubmitted by the court, (2) attempt to codify the law of evidence legislatively, or (3) recommend amendments to the court.

A. Disapproval

Although the General Assembly recognized the advantages of adopting rules of evidence, disapproval without further action remains a possibility. Even if such a course were pursued, Ohio evidence law would not remain static. Most of the present law of evidence has been judicially created under the common law, and courts would probably continue to incorporate many of the pro-
posed Rules on a case-by-case basis. Attorneys who perceive a proposed rule as being advantageous in a particular case will argue for a change in the common law. Their prospects of success on appeal would appear to be considerable since the Ohio Supreme Court has already endorsed the change by proposing the Ohio Rules of Evidence.

There are obvious drawbacks to this eclectic approach. It does nothing to increase the accessibility of the rules of evidence. Nor does it achieve the uniformity that would be possible under the proposed Rules. Moreover, reform of some areas of evidence, such as res gestae, requires a clean slate, a result which is difficult to achieve through a case-by-case approach. As the United States Supreme Court has stated in response to an argument for alteration of a common law rule of evidence: "to pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice." Finally, this approach may preclude legislative review.

B. Codification by Statute

As another alternative, the General Assembly could attempt to codify the law of evidence legislatively. There are several disadvantages to such an approach. First, the entire project would be overshadowed by the possibility that the court would later find section 5(B) to be the exclusive means of regulating procedure and declare such legislation unconstitutional. Second, legislative codification raises the possibility that needed amendments would

374. Erion v. Timken Co., 52 Ohio App. 2d 123, 368 N.E. 312 (10th Dist. 1977), demonstrates that this process has already commenced. See note 310 supra.

Other Ohio cases that have cited the Federal Rules or proposed Ohio Rules are: State v. Williams, 43 Ohio St. 2d 88, 92, 330 N.E.2d 891, 894 (1975) (federal rule 804(b)(3)); State v. Gavin, 51 Ohio App. 2d 49, 54, 365 N.E.2d 1263, 1266 (8th Dist. 1977) (proposed rule 609); State v. Sims, 52 Ohio Misc. 31, 69-70, 369 N.E.2d 24, 46 (C.P. Cuyahoga County 1977) (proposed rule 706).

375. See text accompanying notes 234–44 supra.

376. Id.

377. See text accompanying notes 270–77 supra.


379. Remedial legislation may be unconstitutional if § 5(B) is deemed the exclusive method of regulating procedure. See text accompanying note 43–76 supra.

380. See text accompanying notes 43–76 supra.
be lost in the press of more important legislative matters. Finally, this approach is unnecessary. Codification would in all probability commence with a model since failure to do so would be unwise, time-consuming, and expensive. At present, the Federal Rules offer the best model on which modifications could be made. The General Assembly could accomplish the same result, however, by recommending changes to the court-promulgated Rules. Section 5(B) contemplates such legislative recommendations by specifically providing for amendments after the Rules have been submitted to the General Assembly. This approach is consistent with the view espoused in this article that section 5(B) provides for concurrent jurisdiction over procedural rules. In effect, section 5(B) envisions a dialectic between the General Assembly and the court.

C. Approval With Recommendations for Change

The best course would be for the General Assembly to recommend changes in the proposed Rules. These recommendations

381. See text accompanying notes 212-14 supra.


383. Two other models—the Model Code of Evidence (1942) and the Uniform Rules of Evidence (1953)—could be used. The Model Code, however, has never been adopted in any jurisdiction. Even today some of its provisions would be unacceptable to substantial numbers of practitioners. See generally C. McCormick, supra note 165, at 753. The Uniform Rules were revised in 1974 to conform with the Federal Rules. In addition, the Federal Rules incorporate many of the provisions of the 1953 version of the Uniform Rules.

384. The General Assembly followed this course when it reviewed the Civil Rules. Harper, supra note 48, at 470.

385. OHIO CONST. art. IV, § 5(B) provides: "Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session."
could be based on the merits of particular rules or on a view that certain rules involve substantive matters. The procedural rules prescribed thus far by the court have greatly improved the administration of justice. It is submitted that the proposed Rules of Evidence would have a similar beneficial effect.