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**\*153** COURT RULEMAKING IN UTAH FOLLOWING THE 1985 REVISION OF THE UTAH CONSTITUTION

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## I. Introduction

In 1985, Utah revised its constitution to grant the Utah Supreme Court power to make rules of procedure and evidence for the courts of the State. The new article eight, section four of the Utah Constitution (“Section Four”) provides in part: “The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process.” [FN1] Prior to 1985 and the adoption of Section Four, the legislature possessed authority to adopt rules of procedure and evidence, but delegated that authority to the supreme court. [FN2] Section Four establishes the supreme court, rather than the legislature, as the primary rulemaker for Utah courts.

Section Four is silent, however, concerning the scope of the supreme court's rule-making authority. [FN3] The rule-making power in Utah traditionally has been divided between the supreme court and the legislature based on a substance/procedure dichotomy. [FN4] Under the substance/procedure approach, the legislature enacted laws affecting the substantive rights of litigants and the supreme court created procedural rules for the adjudication of those rights. [FN5] \*154 The substance/procedure distinction has proven ineffective in defining the roles of the legislature and the court because both legislative enactments and court rules contain elements of substance and procedure. [FN6] Because the supreme court and the legislature have continued to rely on the substance/procedure distinction following the adoption of Section Four, their roles in rulemaking remain to be defined.

This Note explores the scope of the supreme court's rulemaking power under Rule Four and proposes a framework for resolving conflicts between the supreme court and the legislature. Part II reviews the history of rulemaking in Utah. Part III discusses the constitutional purposes behind the authorization of the supreme court's rule-making power. Part III also criticizes the substance/procedure distinction and proposes a framework for determining the validity of court and legislative rulemaking. Part III also presents this Note's conclusion that the Utah Supreme Court should adopt a democratic/institutional paradigm to determine the scope of its rule-making authority under Section

Four.

## II. History of Rulemaking in Utah

The history of rulemaking in Utah can be divided into four distinct periods. Prior to 1943, the legislature delegated the power to make procedural rules to the supreme court, while retaining the power to supersede court rules with legislative enactments. From 1943 to 1951, the legislature changed course and declared that court rules would override inconsistent legislative enactments. From 1951 to 1985, the legislature expanded the supreme court's rule-making responsibilities to encompass evidentiary as well as procedural rules. Finally, in 1985, Section Four granted the supreme court constitutional authority to establish evidentiary and \*155 procedural rules. To provide the historical perspective of Section Four, this section briefly discusses each of these four periods.

### A. Legislative Supremacy: Rulemaking in Utah Before 1943

Prior to 1943, the legislature exercised ultimate authority over rulemaking. [FN7] Before Utah gained statehood in 1896, the territorial legislature authorized Utah courts to make rules of procedure for their own use. [FN8] Nevertheless, the territorial legislature retained authority over courts in procedural rulemaking by declaring that legislative enactments superseded inconsistent court rules. [FN9] By designating legislative enactments superior to court rules, the territorial legislature retained the power to establish procedural rules for state courts. [FN10]

Following statehood, the state legislature granted the supreme court the power to “make rules of practice and procedure not in conflict with law . . . .” [FN11] This statute provided the supreme court power to make rules of practice and procedure for state courts subject to the limitation that legislative enactments superseded inconsistent court rules. [FN12] Thus, although the supreme court possessed some power over procedural rulemaking \*156 and the practice of law during this period, the legislature retained ultimate control over establishing procedural rules for Utah courts.

The constitutional basis for the legislature's control over rulemaking during this period is unclear. However, both the legislature and the supreme court deemed this power a legislative function. [FN13] The supreme court explicitly recognized that establishing rules of procedure was a legislative function. [FN14] Because no explicit constitutional provision addressed rulemaking, however, the supreme court and the legislature must have assumed that legislative rule-making authority was inherent within the separation of powers doctrine. [FN15]

### B. The Balance of Power Shifts to the Court: 1943 to 1951

In 1943, the legislature changed course by delegating primary procedural rule-making authority to the supreme court (“1943 Act”). [FN16] Utah was one of several jurisdictions to do so during this period. [FN17] The 1943 Act gave the supreme court “power to prescribe, \*157 alter and revise, by rules, for all courts of the state of Utah, . . . the practice and procedure in all civil actions and proceedings . . . .” [FN18] The legislature, however, did not grant the supreme court the power to regulate criminal procedure and evidentiary rules; therefore implicitly retaining this power for itself.

The 1943 Act signified a major shift in the manner rule-making power was shared in Utah. The legislature expanded the supreme court's power by providing that "all laws in conflict [with court rules] . . . shall be of no further force and effect." [FN19] The legislature limited the supreme court's authority, however, by prohibiting it from making any rule that abridged, enlarged, or modified the substantive rights of any litigant. [FN20] Presumably, court rules affecting substantive rights remained within the legislature's domain because only democratically elected representatives should regulate substantive rights. [FN21]

### C. The Legislature Enlarges the Supreme Court's Rule-Making Power: 1951 to 1985

In 1951, the legislature further expanded the supreme court's rule-making power by authorizing the supreme court to make rules governing criminal proceedings and evidence ("1951 Act"). [FN22] \*158 Under the 1951 Act, court rules continued to supersede inconsistent legislative enactments. [FN23] Like the 1943 Act, the 1951 Act prohibited court rules from affecting "the substantive rights of any litigant." [FN24]

Initially, the 1951 Act did not exclude the legislature from making laws affecting court procedure. For example, in *Lloyd v. Third Judicial District Court*, [FN25] the supreme court, in an opinion by Justice Ellett, held the legislature could create a procedure for serving defendants whose whereabouts were unknown. [FN26] Apparently, the supreme court believed the legislature could regulate court procedure to some degree. [FN27]

As this period progressed, the supreme court expanded its view of its rule-making power, indicating that procedural rule-making was an inherent judicial function. As early as 1973, the American Judicature Society reported in a survey of state high courts that the Utah Supreme Court regarded procedural rulemaking as an inherently judicial function, requiring no legislative authorization. [FN28] This sentiment found its expression three years later in dicta, when Justice Ellett stated in dissent that the supreme court had "inherent power as well as statutory authority to make rules regarding matters of procedure . . . ." [FN29]

Toward the end of this period, the supreme court further expanded its control over procedural rulemaking by ruling that the legislature was excluded from procedural rulemaking. In *Brickyard Homeowners' Association v. Gibbons Realty Co.*, [FN30] the defendants challenged a statute allowing management committees to sue on behalf of condominium owners. The supreme court ruled the \*159 statute affected the substantive right to sue but did not affect procedural interests. [FN31] In so ruling, however, the supreme court reasoned that procedural rulemaking was "the exclusive prerogative of this Court . . . ." [FN32] Thus, the supreme court ruled that the legislature was completely excluded from regulating court procedure.

Utah's Constitutional Revision Commission ("the Commission") agreed with this emerging view that procedural rulemaking was exclusively a judicial function. In 1981, the Commission proposed amending the constitution to explicitly provide that the supreme court possessed the power to make rules of procedure. [FN33] The Commission's proposal (the "1981 Proposal") was part of a revision of the entire judicial article of the Utah Constitution. [FN34] The Commission proposed amending the constitution to read: "The Supreme Court shall adopt rules of procedure to be used in the courts of the state and by rule govern terms of courts." [FN35] The Commission apparently believed the supreme court's rule-making power should be explicitly provided for in the constitution to avoid any confusion

with the legislature over procedural rulemaking. As the Commission indicated in its report delivered in 1982 (“1982 Report”), it “felt that the rulemaking authority of the Supreme Court should be included in the Constitution.” [FN36]

The Commission presented the 1981 proposal before the budget session of the legislature in 1982. [FN37] Although the House adopted the 1981 Proposal verbatim, [FN38] the proposal failed when the Senate refused to act on it. [FN39] The Senate's failure to act stemmed from disagreement over its role in the selection of judges \*160 under the proposed revision of the judicial article. [FN40] Though the legislature failed to pass the 1981 Proposal, it appears the legislature concurred with the Commission's opinion that the constitution should explicitly grant the supreme court power over procedural rulemaking.

The supreme court also indicated during this period that it possessed inherent constitutional authority over evidentiary rulemaking. In enacting the Utah Rules of Evidence in 1977, the supreme court stated that the Utah Constitution implicitly granted the supreme court power to make rules of evidence. [FN41] Evidently, the supreme court believed that separation of powers principles constitutionally require the supreme court, rather than the legislature, to make evidentiary rules for the courts of the State. [FN42]

#### D. The 1985 Revision of the Utah Constitution

In harmony with this burgeoning sense that the power to make procedural and evidentiary rules properly belonged to the supreme court, the Commission presented a second proposal to the legislature in 1984 (the “1984 Proposal”). [FN43] Unlike the 1981 Proposal, the 1984 Proposal empowered the supreme court to make rules concerning evidence as well as procedure. [FN44] The Commission did not explain the inclusion of evidentiary rulemaking power in the 1984 Proposal, but simply concluded that both procedural and evidentiary rule-making power was “derived from inherent judicial authority powers” implicit in the constitution.\*161 [FN45] The Commission apparently believed a separation of powers question existed regarding legislative rulemaking for the state's courts. The Commission resolved this concern by placing the rule-making power in the supreme court because it regarded judicial rule-making authority as “essential to . . . maintaining an independent judiciary.” [FN46]

Before adopting the 1984 Proposal, the legislature modified it to include the legislative power to “amend” court rules by a two-thirds vote of both houses. [FN47] Both houses approved the amended 1984 Proposal along with an entire revision of the judicial article. [FN48] The public ratified the entire revision of the judicial article in the 1984 general election. [FN49] Section Four of the judicial article of the Utah Constitution now provides in relevant part:

The Supreme Court shall adopt rules of procedure and evidence to be used in the courts of the state and shall by rule manage the appellate process. The Legislature may amend the Rules of Procedure and Evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the Legislature. [FN50]

Placing the supreme court's rule-making power in the constitution eliminated any doubt that the power to make procedural and evidentiary rules is a judicial function in Utah.

#### \*162 III. The Scope of the Supreme Court's Rule-Making Power Under the Utah Constitution

#### A. The Scope of the Court's Power Under Section Four is Ambiguous

Although Section Four grants the supreme court constitutional rule-making power, the scope of the supreme court's power has yet to be determined. The roles of the supreme court and the legislature in rulemaking are unclear because Section Four does not clearly delineate the manner in which the rule-making power should be exercised in Utah. The legislature's and the supreme court's roles have remained unclear because the supreme court's Section Four power has not been challenged since Section Four was adopted in 1985. Moreover, the history surrounding the adoption of Section Four sheds little light on the roles of the supreme court and the legislature in rulemaking.

The scope of the supreme court's rule-making power is vague because Section Four simply requires the supreme court to make procedural and evidentiary rules. It does not indicate any limits on the supreme court's rule-making power nor does it specify the scope of the supreme court's authority. The scope of the supreme court's rule-making authority is also unclear because Section Four does not limit the supreme court's rule-making power as did the 1943 and 1951 Acts in two important respects. First, it does not explicitly prohibit the supreme court from making rules affecting substantive rights. Second, it fails to indicate whether court rules continue to supersede legislative enactments. Because Section Four is silent concerning these two limitations, it is uncertain whether they continue to limit the supreme court's rule-making power. [FN51]

The history of Section Four provides little help in answering these questions. Neither the 1984 Report nor the minutes of the Commission's meetings address the scope of the supreme court's rule-making authority. These sources also fail to indicate the \*163 significance of the Commission's failure to prohibit the supreme court from making rules affecting substantive rights. They also do not address the question of whether court rules prevail over conflicting statutes as they did prior to the adoption of Section Four.

Section Four's inclusion of the legislative power to amend court rules raises other questions concerning the scope of the supreme court's rule-making power. The legislature indicated that it added the power to amend court rules because it was concerned that it should retain some "oversight" of the supreme court's rule-making power. [FN52] The legislature sought assurances that the supreme court would not possess absolute authority to make procedural and evidentiary rules. [FN53] Therefore, the legislature created its power to amend judicially enacted rules as a means to check the supreme court from abusing its rule-making power. [FN54] The legislature, however, did not define the scope of its amendment power.

The legislature's failure to articulate the scope of this power raises fundamental questions regarding the contours of the separation of powers in Utah. For example, it is unclear whether the legislature can veto a court rule, or merely amend the language of court rules. It is also unclear whether the amendment authority provides the legislature with an independent power to regulate Utah courts. For example, the legislature may argue that a two-thirds majority allows it to sidestep the supreme court's rule-making authority and regulate judicial procedure regardless of the supreme court's position. Such questions leave the distribution of authority under Section Four unresolved. [FN55]

In an attempt to define the roles of the supreme court and the legislature in rulemaking, the supreme court has outlined a process for rulemaking in the Utah Code of Judicial Administration.\*164 [FN56] The process requires proposed court rules to be submitted to the legislature, the governor, and members of the state bar before implemen-

tation. [FN57] The rule-making process also provides for qualifications of rules committee members [FN58] and opportunity for public comment. [FN59] Proposed court rules also are subject to subsequent committee review [FN60] and further review by the supreme court. [FN61] These requirements facilitate communication between the branches of government and allow potential problems to be addressed before implementation of court rules. [FN62]

Although the supreme court's rule-making process could prevent conflicts between the supreme court and the legislature, the process leaves unresolved the uncertainties created by the adoption of Section Four. Specifically, the rule-making process fails to address whether the substance/procedure distinction remains a limitation on rulemaking in Utah and whether court-adopted rules or legislative enactments prevail when conflicts arise. Furthermore, the rule-making process does not define the scope of the legislature's power to amend court rules. This failure of existing mechanisms to resolve Section Four's ambiguities leaves the judiciary, the legislature, and practitioners without a means of resolving conflicts between legislative and judicial control of rulemaking in Utah.

In response to this void, the remainder of this Note examines these issues and proposes a framework for determining the scope of the supreme court's rule-making power. The framework determines whether the supreme court or the legislature should address topics of proposed court rules by assessing the constitutional roles of the judiciary and the legislature in our democratic \*165 form of government. Under this approach, the supreme court and the legislature can prevent conflicts from occurring under Section Four.

## B. The Substance/Procedure Dichotomy in Rulemaking

Although the Commission and the legislature failed to address the substance/procedure distinction, arguably it remains the test for determining the validity of court rules and legislative enactments. [FN63] This distinction, however, is difficult to make in practice because all court rules and legislative enactments contain elements of both substance and procedure. Consequently, courts and legislatures might arbitrarily designate a court rule or legislative enactment as substantive or procedural to achieve a desired result. This Note proposes an alternative to the substance/procedure distinction to provide the supreme court and the legislature some guidance in rulemaking in Utah.

### 1. The Substance/Procedure Dichotomy Survived the Adoption of Section Four

The supreme court and the legislature have indicated that the substance/procedure distinction remains a limitation on rulemaking in Utah. Because the distinction appears to have survived the adoption of Section Four, the supreme court's traditional test for distinguishing substance and procedure remains the touchstone for defining the supreme court's and the legislature's roles in rulemaking. In 1986, after the adoption of Section Four, the supreme court indicated in *State v. Banner* [FN64] that the substance/procedure distinction limited the legislature's and the supreme court's roles in rulemaking. The supreme court upheld the validity of a court rule providing for the admissibility \*166 of evidence concerning witnesses' past criminal history. [FN65] The court relied on its rule-making authority under the 1943 Act, noting that its rulemaking authority was limited only by the requirement that its rules "may not change the substantive rights of any litigant but must be only procedural in nature." [FN66] The supreme court held that because the rule was procedural, its promulgation was a valid exercise of the supreme court's rule-making authority. [FN67] Although the supreme court did not decide the case under Section Four, its very failure to do so, and to recognize a difference in outcome, lends support to the contention that the substance/procedure distinc-

tion remains the benchmark for determining the scope of the supreme court's rulemaking power.

Similarly, the legislature recently affirmed the substance/procedure distinction. In 1989, the legislature repealed the Utah Rules of Criminal Procedure to allow the supreme court to adopt them as procedural rules consistent with its constitutional rulemaking power. [FN68] Before doing so, however, the legislature established a committee “to determine which provisions should be reenacted as codified substantive law under Article VIII, Utah Constitution.” [FN69] The legislature's concern for codifying substantive law indicates the legislature recognized the supreme court lacks power to make rules affecting substantive rights.

Legislative practice following the 1985 passage of Section Four also demonstrates the legislature continues to rely on the distinction. The legislature has continued to enact laws affecting court procedure and evidence that it considers substantive. For example, in 1986, the legislature provided for the admissibility of evidence seized by public school officials. [FN70] That same year, the legislature limited the amount of medical malpractice awards. [FN71] Because Section Four expressly empowers the supreme court to \*167 make evidentiary and procedural rules, the legislature apparently regarded these acts as affecting substantive rights. [FN72]

The substance/procedure distinction traditionally prohibited the supreme court from making any rule that affected the substantive rights of any litigant. [FN73] At the same time, the distinction excluded the legislature from making procedural rules because that power is the “exclusive prerogative of the court.” [FN74] The supreme court formulated the substance/procedure distinction in *Petty v. Clark*. [FN75] The Petty court reasoned:

Substantive law is defined as the positive law which creates, defines and regulates the rights and duties of the parties and which may give rise to a cause for action, as distinguished from adjective law which pertains to and prescribes the practice and procedure or the legal machinery by which the substantive law is determined or made effective. [FN76]

In the *Brickyard Homeowners'* case, the supreme court elaborated on this definition: “practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights . . . ‘Practice and procedure’ may be described as the machinery of the judicial process as opposed to the product thereof.” [FN77] Applying this definition, the *Brickyard Homeowners'* court held that the \*168 Condominium Ownership Act, which allowed management committees to bring suit on behalf of condominium owners, affected the owners' substantive rights. [FN78] The act, therefore, did not “constitute an improper incursion by the legislature into the rulemaking power of the court.” [FN79]

## 2. The Substance/Procedure Dichotomy Inadequately Defines the Supreme Court's and Legislature's Roles in Rulemaking

The difficulty of utilizing the substance/procedure approach in the context of rulemaking has been widely recognized. [FN80] The \*169 difficulty arises because substance and procedure cannot be defined independently of each other, [FN81] rather, they “are inextricably interwoven.” [FN82] Indeed, “a rule may be procedural in one context and substantive in another, depending on the policy that the rule is intended to serve.” [FN83] For example, privilege rules provide for the substantive right to refrain from testifying in court, but also impact procedure by making factfinding more difficult and increasing litigation costs. [FN84]

The blurry line between procedure and substance in rulemaking leads to arbitrary classifications of rules and statutes. [FN85] In *Laudenberger v. Port Authority*, [FN86] for example, the Pennsylvania Supreme Court concluded that a court rule awarding plaintiffs pre-trial interest in cases where defendants make no settlement offer or where the defendant's offer is 25% less than the jury verdict was a procedural rule. [FN87] Although the rule fostered the procedural goal of early settlements, it also created a substantive right to recover interest. The court reasoned that the rule was more procedural than substantive. [FN88] Therefore, the court held it properly exercised its rule-making power over procedural rules. [FN89] However, because the court noted the court rule affected the “substantive rights of both parties,” the court could have classified \*170 the rule as substantive. [FN90]

### 3. Approaches to Distinguishing Substance from Procedure

Because the line between substance and procedure is blurry, courts have grappled to find ways to distinguish the two. Courts have developed guidelines to help distinguish substance from procedure: the primary effects guideline, the purpose guideline, and the public policy guideline. These guidelines provide little help in distinguishing substance and procedure, however, because they are susceptible to subjective interpretations and other weaknesses. These guidelines therefore fail to provide an adequate standard for delineating the roles of the judiciary and the legislature in rulemaking.

Recognizing that substance and procedure are interdependent, the first guideline requires the court to determine whether the court rule or legislative enactment primarily affects substance or procedure. This guideline is termed the “primary effects” guideline. In *Ohlhoff v. Ohlhoff*, [FN91] for example, the New Jersey Superior Court held a statute barring retroactive modifications of child support was primarily substantive because the court rule directly impacted the obligation to pay child support. [FN92] Employing similar reasoning, the same court found in *Suchit v. Baxt* [FN93] that a court rule slightly affecting substantive rights did not render that rule invalid—the rule's “primary effect” was substantive, not procedural. [FN94]

To avoid interbranch conflicts, the primary effects guideline allows the judiciary and the legislature to enter slightly the sphere of the other branch. To illustrate, in *Hall v. State*, [FN95] the Mississippi Supreme Court considered the validity of a statute allowing hearsay statements of child abuse victims to be admitted into \*171 evidence. [FN96] The Hall court reasoned that minor legislative invasions into its judicial rule-making power were permissible out of respect for the elected representatives of the people. [FN97] However, the court held the statute was a substantial invasion into its rule-making power and, therefore, struck it down as unconstitutional. [FN98]

The primary effects guideline offers little assistance in distinguishing substance and procedure, however, because it does not provide judges any assistance in determining what weight to accord procedural and substantive aspects of court rules and legislative enactments. Rather, it assumes substantive and procedural goals are easily identifiable when actually the opposite is true. [FN99] Therefore, determining what constitutes a “slight” or “minor” legislative invasion is left to the subjective interpretation of individual judges. Because this determination is susceptible to subjectivity, judges can label a court rule or legislative enactment as a slight or substantial invasion to achieve a desired result.

The primary effects guideline suffers from other weaknesses that render it inadequate. The arbitrary nature of the primary effects guideline means that courts and legislatures cannot rely on whether the court rule or legislative enactment is a valid exercise of power or not. Likewise, absent guidelines as to whether a rule is procedural or substantive, practitioners cannot anticipate how a court will apply the primary effects guideline.

The primary effects guideline does not prevent conflicts from occurring. Rather, it only attempts to resolve conflicts once they have arisen in litigation. One of the objectives of the substance/procedure distinction is to define the roles of the judiciary and the legislature in rulemaking so that conflicts can be avoided. Because the primary effects guideline fails to prevent conflicts and \*172 is susceptible to subjective conclusions, its usefulness is limited.

Courts have also attempted to define the roles of the court and the legislature by looking to the purposes a court rule or statute is meant to serve. In *Suchit v. Baxt*, for example, the court upheld a judicial rule creating a pretrial panel to process medical malpractice claims. [FN100] The court held that if the court rule serves to “effectively aid a court function, it is procedural in nature.” [FN101] Conversely, if a legislative enactment could “determine in and of itself, the outcome of a proceeding, it is generally substantive.” [FN102] Since the purpose of the pretrial panel was to aid the processing of medical malpractice claims, the *Suchit* court found that the rule was a valid exercise of the court's rule-making authority. [FN103]

The purpose approach provides little help, however, in distinguishing between substance and procedure because it assumes a court rule or legislative enactment serves a singular purpose. In fact, a court rule or legislative enactment may further multiple purposes. [FN104] Indeed, rules and statutes are often the product of extensive discussion and debate. Consequently, a statute is unlikely to possess a unified, singular purpose. [FN105]

The purpose guideline also fails to recognize that procedural goals and substantive rights are interdependent. To illustrate, the court rule in *Laudenberger* sought to promote the procedural goal of early settlements by compensating plaintiffs for the loss of the use of money damages where the defendant made no settlement offer prior to trial. [FN106] The court rule simultaneously affected the \*173 parties' substantive rights, however, by enlarging the plaintiff's right to recover as well as the defendant's obligation to pay damages. [FN107] The court concluded that it could classify the rule as “more” procedural than substantive, [FN108] thereby failing to acknowledge fully the court rule's substantive impact. By failing to recognize the interdependency of substance and procedure, the decision demonstrates the inadequacy of the purpose approach.

Finally, courts have attempted to determine whether court rules or legislative enactments address substantive concerns by inquiring whether court rules or legislative enactments reflect broad policy decisions. In *People v. McKenna*, [FN109] the Colorado Supreme Court entertained a challenge to a statute providing that a sexual assault victim's prior sexual history is presumed irrelevant. [FN110] The defendant claimed the statute infringed on the court's constitutional power to make procedural rules. The *McKenna* court found the statute was neither purely procedural nor purely substantive, and held that because the statute “reflect ed a major public policy decision by the general assembly,” the statute did not “unconstitutionally intrude into matters exclusively judicial.” [FN111] The court agreed with the legislature that protecting victims of sexual assault was more important than access to evidence.

The public policy approach also inadequately defines judicial and legislative roles in rulemaking because it compromises court rulemaking. [FN112] For instance, although a statute may reflect a legislative policy choice, it also may conflict with equally valid goals of judicial efficiency and thus infringe on the judiciary's rulemaking power. [FN113] Furthermore, all rules and statutes can be construed as reflecting public policy choices. [FN114] Therefore, litigants\*174 would be unable to rely on a court rule's or a statute's validity under the public policy approach because the litigants cannot prospectively determine what public policy a court might focus on. [FN115]

These guidelines fail to distinguish substance from procedure because they provide no concrete principles for distinguishing the two. Thus, they lead to arbitrary conclusions. Because they fail to distinguish substance from procedure, the guidelines provide little help in determining the roles of the supreme court and the legislature in rulemaking. The supreme court, therefore, should not employ these guidelines to determine the scope of its rule-making power under Section Four. Instead, the next section of this Note argues the court should adopt a democratic/institutional approach to determine the scope of its rule-making power.

### C. Democratic and Institutional Goals Define the Role of the Supreme Court and the Legislature in Rulemaking

#### 1. The Democratic and Institutional Principles Underlying the Substance/Procedure Distinction

The failure of the substance/procedure distinction to define the roles of the judiciary and the legislature in rulemaking stems from the failure to focus on the principles underlying the distinction. Courts and legislatures have relied on the labels "substance" and "procedure" to define their roles in rulemaking without examining the democratic and institutional principles prompting use of these terms. Once courts and legislatures understand the democratic and institutional purposes behind the substance/procedure distinction, they properly can define their roles in rulemaking. This Note explores these purposes and proposes a framework based thereon to determine the supreme court's and the legislature's roles in rulemaking.

\*175 The substance/procedure distinction attempts to define the roles of the judiciary and the legislature based on the doctrine of the separation of powers. [FN116] The separation of powers doctrine arises from the concept that each branch of government is suited to make certain types of decisions; therefore, each branch should not intrude into the decision-making power of the other branches of government. [FN117] The doctrine further attempts to limit the power of the branches of government so that one branch will not become too powerful and usurp power from a co-equal branch of government. [FN118] Thus, the substance/procedure distinction limits the judiciary to making procedural rules and the legislature to making laws affecting substantive rights. When courts fail to understand that the terms "substance" and "procedure" represent a number of principles underlying the separation of powers doctrine, however, the dichotomy fails. [FN119] An examination of the separation of powers principles underlying the substance/procedure distinction illustrates the proper roles of the judiciary and the legislature in rulemaking.

Initially, when properly applied the substance/procedure dichotomy protects the majoritarian principle that democratically elected representatives of the people, rather than appointed officials, should regulate substantive rights. [FN120] Under the American democratic tradition, elected representatives govern as surrogates of the people. A representative form of democracy seeks to ensure that elected representatives are held directly accountable to the people they represent. With respect to substantive rights, this notion of accountability constrains the behavior of

elected representatives because regulating substantive rights has a profound effect on individuals. Thus, the people should have the opportunity to ensure their elected representatives carefully consider any decision to regulate substantive rights. The judiciary, however, lacks effective democratic restraints. Therefore, the \*176 supreme court should abstain from addressing substantive rights in rulemaking because it is not elected and does not represent or answer to the people. The supreme court's lack of accountability also insulates it from public pressure. Therefore, the supreme court has more latitude to abuse its rule-making power than an elected body that is accountable to the people. [FN121]

Furthermore, the legislature is better equipped than the judiciary to determine substantive issues. The legislature possesses more resources than the judiciary to investigate and determine which substantive rights benefit the people. [FN122] Moreover, because the legislature's main duty is to promote public well being, it has more expertise to anticipate social problems. [FN123] Courts, on the other hand, primarily address individual fact situations involving specific controversies. [FN124] Courts, therefore, are less capable of determining the needs and wishes of the people as a whole. Because of these democratic and institutional concerns, the legislature should regulate substantive rights. [FN125]

Commentators have suggested that a legislative power to amend court rules by a two-thirds majority adequately checks potential judicial regulation of substantive rights. [FN126] Although this legislative power to amend court rules under Section Four may check potential judicial abuse, the required two-thirds vote denies the legislature its democratic role because the legislature properly needs only a simple majority to regulate substantive rights. Furthermore, even though a court rule affects substantive \*177 issues, two-thirds of the legislature might be unwilling to amend the rule, even where a majority of the legislature wishes to limit the court to making procedural rules. Because the supreme court has primary constitutional responsibility for procedural rules, the legislature may defer to the supreme court's judgment, thereby allowing the judiciary to inappropriately regulate substantive rights. [FN127] These reasons demand that the supreme court be limited in its rulemaking activities.

Balanced against these considerations is the need for some limitation to prevent legislative incursions into the supreme court's constitutional domain. In Utah, Section Four establishes procedural and evidentiary rulemaking as judicial functions. Because the text of the constitution specifically grants the supreme court, and not the legislature, power over such rulemaking, the supreme court should be given deference in establishing procedural and evidentiary rules. In fact, even absent a constitutional provision, procedural rulemaking is a judicial function. [FN128] The legislature would risk violating separation of powers principles and act unconstitutionally if it attempted to overextend itself in rulemaking. Therefore, the legislature needs to be restrained in rulemaking to allow the supreme court to fulfill its constitutional role.

Moreover, the judiciary has more expertise than the legislature in determining the method or manner in which cases should be tried. [FN129] In fact, the judiciary's familiarity and expertise with the judicial system is a principal argument for transferring the rule-making power from the legislature to the judiciary. [FN130] The judiciary, therefore, should regulate court procedure and evidence because it is better able to promote judicial administration and efficiency due to its expertise in these areas.

#### \*178 2. A Democratic/Institutional Approach to Judicial Rulemaking

This Note proposes a democratic/institutional framework for determining judicial and legislative roles in rulemaking under Section Four. The framework recognizes that court rules and legislative enactments contain elements of both substance and procedure, thus avoiding the weaknesses of the substance/procedure dichotomy. Under the proposed framework, the proper inquiry is whether the legislature or the supreme court has intruded impermissibly—based on democratic and institutional principles—into the sphere of the other branch.

The democratic/institutional approach to rulemaking establishes accountability in rulemaking by ensuring that the legislature regulates the substantive rights of individuals. The democratic/institutional approach also incorporates the respective expertise of the supreme court and the legislature in rulemaking. The approach balances the substantive and procedural aspects of court rules and legislative enactments and then determines whether the supreme court or the legislature properly should address the issue. The democratic/institutional approach will allow the supreme court to define judicial and legislative roles in rulemaking, thus providing for increased protection of democratic principles in rulemaking under Section Four.

Analyzing democratic and institutional considerations reveals several principles that should guide the supreme court and the legislature in rulemaking. First, the supreme court's primary role in rulemaking should be improvement of the administration of justice. Court rules should improve the judicial system by increasing the speed of litigation, decreasing court costs, improving fact finding, and promoting the ascertainment of truth. [FN131] If a court rule improves judicial efficiency and the rule's improved efficiency outweighs any effect on substantive rights, the supreme court has acted within Section Four. Presumably, the only reason courts would decrease judicial efficiency would be to promote a substantive goal or objective. Therefore, the supreme court should be prohibited from making rules diminishing court efficiency. For \*179 example, privilege rules promote the substantive goal of protecting some class of persons as well as create a substantive right not to testify in court. At the same time, they decrease judicial efficiency because they prevent disclosure of truth and make fact finding more difficult. Therefore, the supreme court should be prohibited from creating privileges because they create a substantive right and impede the ascertainment of truth. [FN132]

The second principle of the democratic/institutional approach recognizes that if a proposed court rule improves judicial administration, the rule's procedural benefits must outweigh the rule's effect on substantive rights. [FN133] For example, if a proposed court rule limits damage awards, the procedural or administrative benefits of decreased court costs must outweigh the effect the rule will have on the substantive right to recover damages. If the improved judicial administration fails to outweigh the detrimental effect on substantive rights, the court rule exceeds the scope of the supreme court's authority. [FN134]

The third principle of the democratic/institutional approach is the legislature should make laws affecting court procedure only if the enactment's substantive benefits outweigh any diminution \*180 in procedural efficiency. [FN135] For example, a statute excluding evidence of a rape victim's sexual history would be upheld because the substantive goal of protecting the rape victim's privacy outweighs the evidentiary loss concerning the victim's past sexual history. [FN136] Legislative enactments in which substantive goals outweigh lost judicial efficiency are valid exercises of legislative power because democratically elected representatives should regulate substantive rights. Therefore, substantive laws affecting procedure, such as the protection of rape victims, should be within the legisla-

ture's role under Section Four.

The second and third principles of the democratic/institutional approach are similar to the primary effects guideline discussed above. [FN137] The democratic/institutional approach, however, provide courts and legislatures more guidance than the primary effects guideline in defining the roles of the judiciary and the legislature in rulemaking. The focus of the second and third principles is on the democratic and institutional roles of the judiciary and the legislature rather than the vague concepts of substance and procedure. Thus, unlike the primary effects guideline, these two principles focus the inquiry on the relevant separation of powers considerations. Because the inquiry focuses on the roles of the judiciary and the legislature under the separation of powers doctrine, the potential for judges interjecting subjective interpretations is reduced.

The fourth principle of the democratic/institutional approach is the supreme court should defer to the legislature if the legislature seeks to improve procedural efficiency and the supreme court has not addressed that issue. [FN138] However, the legislature should respect the judiciary's rule-making authority by regulating procedure only when necessary to advance strong substantive goals. Moreover, statutes should not unreasonably interfere with \*181 the orderly functioning of the courts. [FN139] Strong substantive concerns should support any legislative intrusion into the judicial sphere. Indeed, inter-branch conflicts might ensue if the legislature regulated court procedure absent significant substantive demands. Rather, the legislature should encourage the supreme court to adopt rules that the legislature feels are needed.

These four democratic and institutional principles provide the supreme court and the legislature the guidance lacking under the substance/procedure approach to rulemaking. The democratic/institutional approach diminishes the opportunity for judges to interject their subjective interpretations because it focuses on the democratic and institutional roles of the judiciary and the legislature in rulemaking. In any question involving the separation of powers a certain degree of subjectivity will come into play. However, the democratic/institutional approach reduces the possibility for subjectivity because it focuses the inquiry on the roles of the judiciary and the legislature under the separation of powers doctrine rather than on vague concepts. The democratic/institutional approach also addresses the concerns for accountability in rulemaking by ensuring that the legislature addresses substantive issues. The approach further ensures that the supreme court utilizes its expertise in regulating procedure in the courts of the State.

Because of these advantages, the supreme court and the legislature should consider these four principles before taking any action regarding the regulation of the judicial system. Before making court rules, the supreme court should apply this approach to determine whether the proposed court rules are appropriate subjects for the supreme court to address.

If a conflict arises and the supreme court and the legislature both determine that the issue is appropriately theirs, the supreme court ultimately must resolve the conflict because Section Four designates the supreme court as the primary rulemaker in Utah. The legislature, however, should provide input through the normal rule-making process under the Judicial Code of Administration. [FN140] Finally, the supreme court should employ the democratic\*182 /institutional approach to determine the constitutionality of court rules and legislative enactments.

#### D. Conflicts Between Court Rules and Statutes

The democratic/institutional approach could also provide answers to other questions concerning the scope of the supreme court's rule-making power. For example, Section Four does not directly address whether a court rule or legislative enactment should prevail when the supreme court and the legislature have addressed the same issue and their views conflict. An analysis based on the democratic/institutional approach provides an answer to this question.

Unfortunately, most courts have relied on the substance/procedure distinction to resolve conflicting legislative and judicial pronouncements. [FN141] The prevailing view is that if the issue is procedural, the court rule should prevail. [FN142] In contrast, if the issue is substantive the legislative enactment should supersede the court rule. [FN143] The Utah Supreme Court followed this approach shortly after the adoption of Section Four. The court declared that it “adopts all existing statutory rules of procedure and evidence . . . not inconsistent with or superseded by \*183 rules of procedure and evidence heretofore adopted by this Court . . .” [FN144]

As indicated above, however, relying on the substance/procedure distinction is problematic due to the difficulties in distinguishing substance from procedure. The discussion concerning the substance/procedure distinction illustrates, however, that the democratic and institutional goals underlying the distinction are helpful in determining the roles of the judiciary and the legislature in rulemaking. [FN145] The supreme court, therefore, should apply the democratic/institutional paradigm to conflicting court rules and legislative enactments. If the supreme court finds that either the rule or the statute is an invalid exercise of institutional authority, the inquiry ends and the conflict is resolved.

If the supreme court determines that the court rule and the legislative enactment are within the authority of each branch, the democratic/institutional paradigm requires the supreme court to give effect to the conflicting legislative enactment. All court rules and legislative enactments contain substantive elements. Thus, if any doubt exists over a rule's substantive effects, the concern for accountability in regulating substantive rights demands the supreme court defer to democratically elected representatives. Deferring to the legislature in conflicts ensures that elected, rather than appointed, officials regulate substantive rights. [FN146]

#### E. The Legislature's Power to Amend Court Rules

The inclusion of the legislative power to amend court rules in Section Four raises questions concerning the legislature's power over the supreme court's rule-making authority. The first question \*184 is whether the legislature can veto or simply amend court rules. Second, the legislature's power to amend any court rule by a two-thirds majority vote raises the question of whether the legislature can side step the supreme court's rule-making process and directly regulate court procedure. Finally, regardless of the specific rule at issue, Section Four is silent as to what course of action the court should take after the legislature amends or vetoes a court rule.

Addressing the first question, the purpose of providing the legislature the means to amend a court rule is to constrain the judiciary from abusing its rule-making power. [FN147] The legislature's ability to check court rulemaking would be severely impaired, however, if the legislature only could amend the language of court rules. If the legislature is to effectively check the court for abuses, it must have the power to veto court rules, in addition to amending the specific language of court rules. [FN148] A practical interpretation of Section Four supports allowing the legis-

lature to veto, as well as amend, court rules. Under Section Four, the legislature could indirectly veto a court rule simply by amending the language to render the rule ineffective. If the legislature effectively could veto a court rule by amending it, the legislature should be permitted to veto a court rule directly.

The second question concerning the legislature's amendment power addresses whether the legislature can sidestep court rulemaking if it is acting with a two-thirds majority. For example, the legislature may reason that if two-thirds of its members agree on an issue, it should be allowed to regulate court procedure, even if no strong substantive arguments support the legislature's view.

The text of Section Four argues against allowing the legislature to sidestep court rulemaking. Section Four makes procedural and evidentiary rulemaking a judicial function in Utah. The legislature's amendment power under Section Four admittedly grants the legislature some power in procedural and evidentiary rulemaking. However, the text provides that the legislature may amend court rules once they are "adopted by the Supreme Court." [FN149] Thus, Section Four's text indicates the legislature's \*185 amendment power is limited to amending or vetoing existing court rules and does not allow the legislature to sidestep the supreme court's rule-making process, even if acting with a two-thirds majority.

Respect for the separation of powers doctrine supports this conclusion. The separation of powers doctrine attempts to curb the potential for one branch to usurp the power of another branch. [FN150] Allowing the legislature to sidestep court rulemaking and unilaterally regulate court procedure in the face of Section Four's mandate usurps the rule-making power of the supreme court. Furthermore, if the legislature were allowed to act in such a manner, discussion regarding rulemaking between the supreme court and the legislature would decrease because the legislature would be less concerned with the supreme court's views. Less discussion between the branches could lead to the undesirable result of important procedural and substantive concerns not being considered before statutes are enacted. Because of Section Four's clear mandate and the separation of powers doctrine, the legislature should not sidestep the supreme court's rule-making process, even if acting with a two-thirds majority.

The adoption of Section Four also raises the question of what action the supreme court and the legislature should take once the legislature amends or vetoes a court rule. The legislature could reason that once it has amended or vetoed a court rule the supreme court should be excluded from regulating the subject. On the other hand, the supreme court might assume responsibility for developing a new rule even given the legislature's reasons for amendment or rejection.

To resolve this question, the supreme court should adopt the democratic/institutional approach to rulemaking to determine which branch properly should regulate the subjects of amended or vetoed court rules. The supreme court should employ this approach because it addresses the relevant factors in determining which branch is suited to make certain decisions. The supreme court should make this determination, however, in light of the legislature's objections to the court rule. For example, the legislature may have objected to the court rule because it believed the rule addressed substantive matters. The supreme court should be \*186 aware of any concerns that may have been overlooked in originally creating the rule. With the legislature's objections in mind, the supreme court can properly determine which branch should address the subjects of amended or vetoed court rule.

The supreme court—and not the legislature—should make this determination because under Section Four the supreme court is primarily responsible for rulemaking in Utah. It therefore seems appropriate that the supreme court should determine which branch is best suited to address the subjects of vetoed or amended court rules. [FN151] Allowing the legislature to determine which branch should address amended or vetoed court rules seems to violate the letter and spirit of Section Four's mandate making the supreme court responsible for procedural and evidentiary rule-making. The supreme court, however, should only retain authority over amended or vetoed court rules if democratic and institutional principles demand. [FN152]

#### IV. Conclusion

Section Four of the Utah Constitution grants the Utah Supreme Court power to make rules of procedure and evidence for the state's courts. Section Four raises several important questions, however, concerning the scope of the supreme court's rule-making power. Although not expressly mentioned in Section Four, the supreme court and the legislature continue to rely on the substance/procedure dichotomy in rulemaking. The dichotomy provides that, in cases of conflict, procedural court rules supersede inconsistent legislative enactments. Additionally, though the legislature may enact statutes affecting procedure and evidence, they must primarily be substantive in effect.

Because substance and procedure are interdependent, distinguishing these terms has proven a difficult task. Consequently,\*187 the supreme court's and the legislature's roles in rulemaking are unclear. The supreme court should, therefore, define the roles of the supreme court and the legislature based on democratic and institutional principles found in the separation of powers doctrine. The democratic/institutional approach to rulemaking would provide the supreme court and the legislature guidance in defining their roles and, thus, allow them to promote stability in rule-making.

The democratic/institutional approach also should be applied to conflicting court rules and legislative enactments. The supreme court should first determine whether the court rule and the conflicting statute are valid exercises of authority under the democratic/institutional approach. If both the court rule and the legislative enactment are valid, the statute should supersede the court rule to ensure that elected representatives of the people regulate substantive issues.

Finally, Section Four provides for a legislative power to “amend” court rules. Section Four fails, however, to define the scope of the legislature's amendment power. Because the legislature could effectively negate a court rule by amending the rule's language, the legislature should have authority to explicitly veto court rules. However, the legislature's amendment power does not provide it an independent power to regulate court procedure even if the legislature has garnered a two-thirds majority concerning an issue. Allowing the legislature to sidestep court rulemaking offends the language of Section Four and violates the separation of powers doctrine. Lastly, the supreme court should determine which branch should address the subjects of vetoed or amended court rules using the democratic/institutional approach. The supreme court should make this determination because Section Four makes the supreme court responsible for rulemaking in Utah. The supreme court, however, should be certain to consider the legislature's objections to the amended or vetoed court rule in making its determination.

[FN1]. Utah Const. art. VIII, § 4. The constitution also provides power to a judicial council to make rules to govern

the administration of the state courts. See *id.* [art. VIII, § 12](#).

[FN2]. Rules of procedure and evidence prescribe the method or manner in which litigants proceed before and during trial. See [Brickyard Homeowners' Ass'n v. Gibbons Realty Co.](#), 668 P.2d 535, 539 (Utah 1983) (citing [Avila South Condominium Ass'n, Inc. v. Kappa Corp.](#), 347 So. 2d 599 (Fla. 1977)). This Note uses the term “court rules” to describe rules promulgated by a court that purport to prescribe the method by which cases are administered.

[FN3]. This Note uses the term “rulemaking” to refer to court-created rules or legislative enactments that regulate the courts of the State. “Procedural rules” or “rulemaking” refer to court rules or legislative enactments purporting to regulate the method or manner in which cases are tried. “Substantive rules” or “rulemaking” refer to legislative attempts to regulate the substantive rights of litigants. “Evidentiary rules” or “rulemaking” refer to court rules or legislative enactments addressing the presentation of evidence.

[FN4]. See *infra* notes 7-42 and accompanying text (discussing history of rulemaking in Utah).

[FN5]. See *infra* notes 7-32 and accompanying text (discussing legislature's grant of procedural rule-making power and reservation of substantive rule-making power).

[FN6]. See *infra* notes 80-90 and accompanying text (discussing difficulty of distinguishing substance and procedure).

[FN7]. Until it was amended in 1985, the Utah constitution was silent concerning which branch possessed the power to make procedural and evidentiary rules. Nationally, state legislatures began to exercise control over court procedure around the turn of the century in response to confusion resulting from courts developing complex common law rules. See Dooley, *The Regulation of the Practice of Law, Practice and Procedure, and Court Administration in Vermont—Judicial or Legislative Power?*, 8 Vt.L.Rev. 211, 237-38 & n.141 (1983).

[FN8]. The territorial legislature gave every court of record power to “make rules, not inconsistent with the laws of th[e] [Utah] Territory, for its own government and the government of its officers . . .” Act of Mar. 13, 1884, ch. 15, § 53, 1884 Utah Laws 154, 163-64 (repealed by Enabling Act of July 16, 1894, ch. 138, § 20, 28 Stat. 107, 112).

[FN9]. See *id.*

[FN10]. The legislature did not specify which branch governed the practice of law, including attorney and judicial conduct.

[FN11]. Act of Feb. 3, 1896, ch. 7, 1896 Utah Laws 81, 84 (repealed by Act of Mar. 8, 1951, ch. 58, 1951 Utah Laws 150, 247).

[FN12]. See *id.* Presumably, evidentiary rulemaking was reserved to the legislature. The legislature also continued to allow trial courts to make rules for the cases before them, if the legislature had not already prescribed the proper

procedure. See generally *In re Evans*, 42 Utah 282, 299, 130 P. 217, 224 (1913) (courts have inherent power to make rules for regulation of business before them).

[FN13]. See, e.g., *Salt Lake City v. Redwine*, 6 Utah 335, 338, 23 P. 756, 756-57 (1890) (statutes prescribing rules for filing papers on appeal are “usual” exercises of legislative power); Act of Mar. 10, 1937, ch. 143, § 1, 1937 Utah Laws 254, 254 (act specifying contents of complaints before magistrates).

[FN14]. See *Evans*, 42 Utah at 299, 130 P. at 224; see also *State v. Johnson*, 100 Utah 316, 328, 114 P.2d 1034, 1039 (1941) (legislature has power to prescribe courts' “mode of trial”).

[FN15]. For a discussion of the separation of powers doctrine, see *infra* notes 113-15.

[FN16]. See Act of Mar. 6, 1943, ch. 33, 1943 Utah Laws 33 (repealed by Act of Mar. 8, 1951, ch. 58, 1951 Utah Laws 150, 247).

[FN17]. See D. Pugh, C. Korbakes, J. Alfini & C. Grau, *Judicial Rulemaking: A Compendium* (1984) (listing authority for each states' high court to make rules); see also Levin & Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem In Constitutional Revision*, 107 U.Pa.L.Rev. 1, 3-4 (1958) (discussing history of movement granting rule-making power to judiciary). This reform movement began during the 1920s following the work of Roscoe Pound and John Henry Wigmore. See *id.* at 10-11; Pound, *The Rule-Making Power of the Courts*, 12 A.B.A.J. 599 (1926); Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 Ill.L.Rev. 276 (1928); see also Comment, *The Limits of the Mississippi Supreme Court's Rule-Making Authority*, 60 Miss.L.J. 359, 373-74 (1990) (discussing reform movement). The reformers argued that legislatures were slow to act, subject to political pressures, and not viewed as responsible by the public for efficient judicial administration. See Levin & Amsterdam, *supra*, at 10. They also claimed the judiciary was more competent than the legislature to make rules of procedure because it was more experienced and familiar with the operation of court rules. See *id.*; see also Carrington, “*Substance*” and “*Procedure*” in the Rules Enabling Act, 1989 Duke L.J. 281, 299-307 (noting rationale behind enactment of Federal Rules Enabling Act of 1934).

[FN18]. Act of Mar. 6, 1943, ch. 33, 1943 Utah Laws 33 (repealed by Act of Mar. 8, 1951, ch. 58, 1951 Utah Laws 150, 247).

[FN19]. *Id.*

[FN20]. See *id.* This qualification likely was based on the federal Rules Enabling Act of 1934. See 28 U.S.C. § 2072 (1988). That Act authorized Congress to enact the Federal Rules of Civil Procedure subject to the limitation that the “rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.” *Id.*

[FN21]. United States Supreme Court Justices Hugo Black and William O. Douglas probably were the most famous expounders of this view. Both Justices opposed the Supreme Court's exercise of its rule-making power because, in their view, court rules often affect substantive rights. See, e.g., *Federal Civil Judicial Procedure and Rules* 9 (West

Rev.Ed. 1991) (setting forth opposition to Federal Rules of Civil Procedure). Black and Douglas contended that many of the rules determined matters that substantively affected the rights of litigants and were tantamount to legislation. See *id.* Therefore, they argued, Congress and not the judiciary should formulate the rules. See *id.*

[FN22]. See Act of Mar. 8, 1951, ch. 58, 1951 Utah Laws 150, 152 (repealed by Act of Feb. 26, 1986, ch. 47, § 42, 1986 Utah Laws 115, 135).

[FN23]. See *id.*

[FN24]. *Id.*; see also *Brickyard Homeowners' Ass'n v. Gibbons Realty Co.*, 668 P.2d 535, 539 (Utah 1983) (supreme court lacks power to make rules affecting substantive rights).

[FN25]. 27 Utah 2d 322, 495 P.2d 1262 (1972).

[FN26]. See *id.* at 324, 495 P.2d at 1263.

[FN27]. The legislature passed other laws affecting court procedure during this period. In 1977, for example, the legislature enacted a statute providing that no specific dollar amount need be specified in products liability complaints. See Utah Products Liability Act, ch. 149, § 3, 1977 Utah Laws 643, 645 (codified as amended at [Utah Code Ann. § 78-15-4 \(1987\)](#)). The legislature may have believed, however, that in enacting these statutes it was making substantive, rather than procedural, laws.

[FN28]. See J. Parness & C. Korbakes, *A Study of the Procedural Rule-Making Power in the United States* 56-57 (1973).

[FN29]. *State Tax Comm'n v. Meier*, 547 P.2d 1333, 1334 (Utah 1976) (Ellett, J., dissenting).

[FN30]. 668 P.2d 535 (Utah 1983).

[FN31]. See *id.* at 539.

[FN32]. *Id.* (quoting *Avila South Condominium Ass'n, Inc. v. Kappa Corp.*, 347 So. 2d 599, 608 (Fla. 1977)) (emphasis added).

[FN33]. See Constitutional Revision Commission, Report to the Governor and the 44th Legislature 21 (1982) [hereinafter 1982 Report].

[FN34]. See Constitutional Revision Commission, Report to the Governor and the 45th Legislature 15-16 (1984) [hereinafter 1984 Report]. Discussion about revising the judicial article began as early as 1975. However, the Commission's first written proposals did not emerge until 1981. See *id.*

[FN35]. 1982 Report, *supra* note 33, at 21.

[FN36]. *Id.*

[FN37]. See 1984 Report, *supra* note 34, at 16.

[FN38]. See H.R.J. 10, 44th Leg., Bud. Sess., 1982 Utah House J. 310-12.

[FN39]. See H.J.R. 10, 44th Leg., Bud. Sess., 1982 Utah House J. 536; 1984 Report, *supra* note 34, at 16.

[FN40]. See 1984 Report, *supra* note 34, at 16. The Senate believed it should confirm judicial appointments. See *id.*

[FN41]. See Utah R. Evid. preliminary note. The preliminary note contends that “the power to promulgate rules is within the general judicial powers conferred by [Article VIII, section 1](#).” *Id.* At the time the rules of evidence were adopted, article eight, section one provided: “The Judicial power of the State shall be vested in the Senate sitting as a court of impeachment, in a Supreme Court, in district courts, in justices of the peace, and such other courts inferior to the Supreme Court as may be established by law.” [Utah Const. art. VIII, § 1 \(1985\)](#) (amended 1985).

[FN42]. Cf. Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 *Conn.L.Rev.* 1, 38-41 (1975) (discussing separation of powers as basis for court rulemaking).

[FN43]. See 1984 Report, *supra* note 34, at 16-17.

[FN44]. See *id.* at 27.

[FN45]. *Id.* at 19. The Commission probably added the power to make rules of evidence to make the supreme court's constitutional rule-making power consistent with its statutory authority to make procedural rules. Compare Utah Const. at VIII, § 4 with Act of Mar. 8, 1951, ch. 58, 1951 Utah Laws 150, 152 (repealed by Act of Feb. 26, 1986, ch. 47, § 42, 1986 Utah Laws 115, 135). In other words, the Commission intended to make the supreme court's then existing power constitutional.

[FN46]. 1984 Report, *supra* note 34, at 27.

[FN47]. S.J.R. 1, 45th Leg., 2d Spec. Sess., 1984 Utah Laws 268, 269.

[FN48]. See *id.*

[FN49]. See *id.*; see also Utah Const. art. VIII compiler's note (discussing procedural history of revision).

[FN50]. [Utah Const. art. VIII, § 4.](#)

[FN51]. But see *infra* notes 64-72 and accompanying text (discussing continued reliance on substance/procedure distinction by supreme court and legislature).

[FN52]. Floor Debate, comments by Sen. C.E. Peterson, 45th Utah Leg., 2d Spec. Sess. (Mar. 27, 1984) (Sen. Recording No. 6, Side 2).

[FN53]. See Floor Debate, comments by Rep. Lyle W. Hillyard, 45th Utah Leg., 2d Spec. Sess. (Mar. 27, 1984) (House Recording No. 11, Side 1).

[FN54]. It should be noted that the legislature's amendment power requires a two-thirds vote of all members of the legislature, not simply a two-thirds vote of a quorum. See [Utah Const. art. VIII, § 4.](#)

[FN55]. But see *infra* notes 68-72 and accompanying text (discussing continued legislative reliance on substance/procedure distinction).

[FN56]. See Utah Code [Jud. Admin. R. 11-101.](#)

[FN57]. See *id.* § (2)(D)(i), (iii).

[FN58]. See *id.* § (1)(C).

[FN59]. See *id.* § (2)(D)(iv).

[FN60]. See *id.* § (2)(D)(vi).

[FN61]. See *id.* § (3)(B).

[FN62]. This open form of rulemaking outlined by the supreme court also addresses the concerns of several commentators that an insulated, closed rule-making process leads to judicial abuse and violates separation of powers principles. See Parness & Keller, *Increased and Accessible Illinois Judicial Rulemaking*, 8 N.Ill.Univ.L.Rev. 817, 833-38 (1988); Spitzer, *Court Rulemaking in Washington State*, 6 U. Puget Sound L.Rev. 31, 59-67 (1982); Note, *Court Rule-Making in Connecticut Revisited—Three Recent Decisions: State v. King, Steadwell v. Warden and State v. Canady*, 16 Conn.L.Rev. 121, 127-28 (1983).

[FN63]. See *infra* notes 64-72 and accompanying text (discussing continued reliance on substance/procedure distinction by supreme court and legislature).

[FN64]. [717 P.2d 1325 \(Utah 1986\).](#)

[FN65]. See *id.* at 1333 (citing [Utah R.Evid. 609\(a\)\(1\)](#)).

[FN66]. *Id.*

[FN67]. See *id.*

[FN68]. See Act of Feb. 22, 1989, ch. 187, 1989 Utah Laws 479.

[FN69]. *Id.*, 1989 Utah Laws at 486.

[FN70]. See Act of Feb. 26, 1986, ch. 96, 1986 Utah Laws 242, 243 (codified at [Utah Code Ann. § 78-3e-4 \(1987\)](#)). This act allows for the admissibility of evidence school authorities seize “acting alone and on their own authority.” *Id.*

[FN71]. See Act of Feb. 17, 1986, ch. 205, 1986 Utah Laws 637, 637-38 (codified at [Utah Code Ann. § 78-14-7.1 \(1987\)](#)).

[FN72]. Because neither statute passed with a two-thirds majority in the House, the legislature's Section Four amendment power is not in question. See 1986 Utah House J. 619-20, 633-34.

[FN73]. See Act of Mar. 8, 1951, ch. 58, 1951 Utah Laws 150, 152 (repealed by Act of Feb. 26, 1986, ch. 47, § 42, 1986 Utah Laws 115, 135); see also [21 C.J.S. Courts § 126 \(1990\)](#) (court rules cannot deprive persons of substantive rights). Evidentiary rules generally are considered to be procedural in nature; therefore, they are within the procedural rulemaking power of the judiciary. See Gianelli, *The Proposed Ohio Rules of Evidence: The General Assembly, Evidence, and Rulemaking*, 27 *Case W.Res.L.Rev.* 16, 44-50 (1978); Moore & Bendix, [Congress, Evidence and Rulemaking](#), 84 *Yale L.J.* 9, 11-12 (1974). However, because procedure and substance are interwoven, evidentiary rules probably contain elements of both. See *infra* notes 80-90 and accompanying text (discussing interdependence of substance and procedure).

[FN74]. [Brickyard Homeowners' Ass'n v. Gibbons Realty Co.](#), 668 P.2d 535, 539 (Utah 1983) (quoting [Avila South Condominium Ass'n, Inc. v. Kappa Corp.](#), 347 So.2d 599, 608 (Fla. 1977)).

[FN75]. 113 Utah 205, 192 P.2d 589 (1948).

[FN76]. *Id.* at 214, 192 P.2d at 593-94.

[FN77]. [Brickyard Homeowners' Ass'n](#), 668 P.2d at 539 (quoting [Avila South Condominium Ass'n](#), 347 So. 2d at 608).

[FN78]. See *id.* at 541.

[FN79]. *Id.* at 540. Utah courts have addressed the substance/procedure distinction in other contexts. See, e.g., *Stephens v. Henderson*, 741 P.2d 952, 953-54 (Utah 1987) (act eliminating liability affects substantive rights); *Pilcher v. State*, 663 P.2d 450, 455-56 (Utah 1983) (statute facilitating recovery of child support is procedural); *Washington Nat'l Ins. Co. v. Sherwood Assoc.*, 795 P.2d 665, 668-70 (Utah Ct.App. 1990) (change in statutory remedy or defense is substantive if it eliminates contractual rights); *Bagshaw v. Bagshaw*, 788 P.2d 1057, 1060 (Utah Ct.App. 1990) (refusing to apply court rules retroactively if they impair substantive rights).

Several states have limited the scope of their high court's rulemaking power under their state constitution by adopting the substance/procedure distinction. See *Ex parte Ward*, 540 So. 2d 1350, 1351 (Ala. 1988); *People v. Deitchman*, 695 P.2d 1146, 1156 (Colo. 1985); *Z & O Realty Ass'n v. Lakow*, 519 So. 2d 3, 5 (Fla.Dist.Ct.App. 1987); *Commonwealth v. Reneer*, 734 S.W.2d 794, 796 (Ky. 1987); *Twenty-First Judicial Dist. Court v. State*, 548 So. 2d 1208, 1209 (La. 1989); *Glasby v. State*, 739 S.W.2d 769, 771 (Mo.Ct.App. 1987); *Schempp-Cook v. Cook*, 455 N.W.2d 216, 217 (N.D. 1990). Some courts have ruled their constitution grants the judiciary exclusive authority to establish procedural rules. See, e.g., *Winberry v. Salisbury*, 5 N.J. 240, 74 A.2d 406, 410, cert. denied, 340 U.S. 877 (1950); *Laudenberger v. Port Auth.*, 469 Pa. 52, 436 A.2d 147, 152 (1981), appeal dismissed sub nom., *Buchheit v. Laudenberger*, 456 U.S. 940 (1982); see also *White v. Fisher*, 689 P.2d 102, 106-07 (Wyo. 1984) (supreme court has plenary power over rulemaking).

The courts of other states have concluded the power to establish procedural rules is inherent to the judiciary even absent a constitutional provision. See *Slayton v. Shumway*, 166 Ariz. 87, 800 P.2d 590, 594 (1990); *Smith v. Smith*, 433 Mich. 606, 447 N.W.2d 715, 720 (1989); *State v. Batzer*, 448 N.W.2d 565, 567 (Minn.Ct.App. 1989); *Hall v. State*, 539 So. 2d 1338, 1345-46 (Miss. 1989); *State v. Connery*, 99 Nev. 342, 661 P.2d 1298, 1300 (1983); *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354, 1357 (1976); *Haynes v. McKenzie Memorial Hosp.*, 667 S.W.2d 497, 498 (Tenn.Ct.App. 1984). The Hall court, for example, held that under the doctrine of the separation of powers the judicial power to make procedural and evidentiary rules was “as much a part of our constitution as the doctrine of judicial review . . . .” *Hall*, 539 So. 2d at 1345-46.

[FN80]. See Joiner & Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 Mich.L.Rev. 623, 628-30, 635 (1957); Levin & Amsterdam, *supra* note 17, at 13-20; Means, *The Power to Regulate Practice and Procedure in Florida Courts*, 32 U.Fla.L.Rev. 442, 468-69 (1980); see also Risinger, “Substance” and “Procedure” Revisited With Some Afterthoughts on the Constitutional Problems of “Irrebuttable Presumptions,” 30 U.C.L.A.L.Rev. 189 (1982) (discussing difficulty of distinguishing substance from procedure).

[FN81]. See Matheson, *Procedure in Public Person Defamation Cases: The Impact on the First Amendment*, 66 Tex.L.Rev. 215, 223 (1987).

[FN82]. Levin & Amsterdam, *supra* note 17, at 14; see also *Ohlhoff v. Ohlhoff*, 246 N.J. Super. 1, 586 A.2d 839, 844 (Ct.App.Div. 1991) (noting “line between procedural and substantive law is blurry”).

[FN83]. *State v. Coats*, 165 Ariz. 154, 797 P.2d 693, 696 (Ct.App. 1990); see also Parness, *Choices About Attorney Fee-Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere*, 49 U.Pitt.L.Rev. 393, 401 (1988) (fee-shifting laws are procedural if they govern conduct during litigation and substantive if they encourage

compliance with laws).

[FN84]. See Matheson, *supra* note 81, at 225; Gallant, *Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers*, 38 Okla.L.Rev. 447, 459-61 (1985); see also *Busik v. Levine*, 63 N.J. 351, 307 A.2d 571, 580 (1973) (privileges create rights of a “substantive cast,” but also “smack[]” of procedure in many respects).

[FN85]. See Gallant, *supra* note 84, at 453.

[FN86]. 496 Pa. 52, 436 A.2d 147 (1981).

[FN87]. See *Laudenberger*, 436 A.2d at 151-55.

[FN88]. See *id.* at 154-55.

[FN89]. See *id.*

[FN90]. *Id.* at 155.

[FN91]. 246 N.J. Super. 1, 586 A.2d 839 (Ct.App.Div. 1991).

[FN92]. See *Ohlhoff*, 586 A.2d at 844.

[FN93]. 176 N.J. Super. 407, 423 A.2d 670 (Ct. Law Div. 1980).

[FN94]. See *Suchit*, 423 A.2d at 680.

[FN95]. 539 So. 2d 1338 (Miss. 1989).

[FN96]. See *id.* at 1340.

[FN97]. See *id.* at 1345-46 & n. 20. Similarly, the *Laudenberger* court ruled it would allow “slight” invasions by either the courts or the legislature. See *Laudenberger v. Port Auth.*, 496 Pa. 52, 436 A.2d 147, 155 (1981) (quoting *State v. Leonardis*, 73 N.J. 360, 375 A.2d 607, 614 (1977)).

[FN98]. See *Hall*, 539 So. 2d at 1346. The Utah Court of Appeals upheld a similar statute in *Layton City v. Bennett*, 741 P.2d 965 (Utah Ct.App.) (per curiam), cert. denied, 765 P.2d 1277 (Utah 1987). The court of appeals ruled the legislature could create exceptions to the hearsay rule under *Utah Rule of Evidence 802*, which provides that hearsay is inadmissible “except as provided by law . . . .” *Id.* at 967 (citing *Utah R.Evid. 802*).

[FN99]. See *supra* notes 80-90 and accompanying text (substance and procedure are difficult to distinguish).

[FN100]. See [Suchit v. Baxt](#), 176 N.J.Super. 407, 423 A.2d 670, 680 (Ct. Law Div. 1980).

[FN101]. *Id.*

[FN102]. *Id.* The *Laudenberger* court similarly held that a court rule's purpose and function determine whether it is a valid exercise of court rulemaking authority. See [Laudenberger v. Port Auth.](#), 496 P. 52, 436 A.2d 147, 155 (1981); see also [Maples v. State](#), 110 N.M. 34, 791 P.2d 788, 793 (1990) (Montgomery, J., dissenting) (conflicts between court rules and statute should be resolved by referring to statute's purpose); *Carrington*, *supra* note 17, at 308 (rule is procedural if court rule's purpose provides for efficient resolutions of disputes); Cook, “[Substance](#)” and “[Procedure](#)” in the Conflict of Laws, 42 *Yale L.J.* 333, 335-43 (1933) (substance and procedure ought to be determined by purpose behind statutes); *Joiner & Miller*, *supra* note 80, at 629-30 (courts have inherent rule-making power if purpose of court rule promotes judicial efficiency and court rule does not conflict with policy goals).

[FN103]. See [Suchit](#), 423 A.2d at 680.

[FN104]. See [Sunstein](#), *Interpreting Statutes in the Regulatory State*, 103 *Harv.L.Rev.* 405, 427 (1989).

[FN105]. See *id.*

[FN106]. See [Laudenberger](#), 436 A.2d at 150-51.

[FN107]. See *id.* at 151-54.

[FN108]. See *id.* at 155.

[FN109]. 196 *Colo.* 367, 585 P.2d 275 (1978).

[FN110]. See [McKenna](#), 585 P.2d at 276.

[FN111]. *Id.* at 278.

[FN112]. See [State v. Sypult](#), 304 *Ark.* 5, 800 S.W.2d 402, 404-07 (1990).

[FN113]. See [Sypult](#), 800 S.W.2d at 407 (Turner, J., concurring); *Levin & Amsterdam*, *supra* note 17, at 21-22.

[FN114]. See [Sypult](#), 800 S.W.2d at 407 (Turner, J., concurring). Previously, the Arkansas Supreme Court had held that its rule-making power was supreme if the court rule provides for efficient judicial administration and it does not “conflict[] with a fixed public policy . . . .” [Curtis v. State](#), 301 *Ark.* 208, 783 S.W.2d 47, 49 (1990). The court subsequently rejected this view in *Sypult* and endorsed a view similar to the purpose guideline. See [Sypult](#), 800 S.W.2d

at 404.

[FN115]. See [Sypult](#), 800 S.W.2d at 407-08 (Turner, J., concurring); Sunstein, *supra* note 104, at 416.

[FN116]. See Note, *supra* note 62, at 127-28

[FN117]. See [Rusch](#), [Separation of Powers Analysis as a Method For Determining the Validity of Federal District Courts' Exercise of Local Rule-making Power: Application to Local Rules Mandating Alternative Dispute Resolution](#), 23 Conn.L.Rev. 483, 497 (1991).

[FN118]. See *id.*

[FN119]. See Note, *supra* note 62, at 127-28.

[FN120]. See [Levin & Amsterdam](#), *supra* note 17, at 13-14; [Parness & Copeland](#), [Access to Judicial Rulemaking Procedures](#), 1982 Ariz.St.L.J. 641, 645-46.

[FN121]. In Utah, judges are subject to a retention election. See [Utah Const., art. VIII, § 9](#). This provision, however, creates little public accountability because judges are rarely denied retention.

[FN122]. See [Laudenberger v. Port Auth.](#), 496 Pa. 52, 436 A.2d 147, 158 (1981) (Roberts, J., dissenting).

[FN123]. See *id.*

[FN124]. See *id.*

[FN125]. In states that popularly elect their judges, the increased public accountability of the judiciary allows less potential for judicial abuse of democratic principles. Therefore, one could argue that in these states judges should be allowed to regulate, by rule, the substantive rights of individuals. However, legislators have more resources than do judges to determine public opinion and grapple with complex policy issues. See *id.* Furthermore, if courts regulate substantive rights they would become a lawmaking, rather than an adjudicative, body. Such a result offends separation of powers principles. Therefore, even in states that elect their judges, substantive rulemaking power should be limited to the legislature.

[FN126]. See [Gallant](#), *supra* note 84, at 477; [Levin & Amsterdam](#), *supra* note 17, at 39-40; [Parness & Keller](#), *supra* note 62, at 837-40.

[FN127]. See [Gallant](#), *supra* note 84, at 477-78. The rationale behind the two-thirds vote is to create legislative oversight without providing an opportunity for the legislature to influence judicial rulemaking through a simple majority vote. See [Spitzer](#), *supra* note 62, at 60-61. The Utah House of Representatives addressed this issue while debating the 1984 proposal. See Floor Debate, comments by Reps. Pace & Hillyard, 45th Utah Leg., 2d Spec. Sess. (Mar. 27,

1984) (House Rec. No. 10, Side 1). The House defeated an amendment that would have replaced the two-thirds vote with a majority vote. See *id.* The amendment failed because the House believed conflicts were likely to result between the court and the legislature under a simple-majority system. See *id.*

[FN128]. See *supra* note 79 (states consider procedural rulemaking judicial function).

[FN129]. See Levin & Amsterdam, *supra* note 17, at 10.

[FN130]. See *id.*

[FN131]. See *State v. Reidhead*, 152 Ariz. 231, 731 P.2d 126, 128 (Ct.App. 1986); Matheson, *supra* note 81, at 228; Rusch, *supra* note 117, at 504.

[FN132]. The Supreme Court's Advisory Committee on Evidence discussed revising Utah's privilege rules in 1990. See *Utah R.Evid.* 501 (proposed May 1990). The committee note to proposed rule 501 indicates the committee debated whether the supreme court could invalidate all statutorily created privileges deemed not important enough to be included in the rules. See *id.* The committee concluded that because statutory privileges are a significant truth-impeding device and reflect democratically determined policy choices, the legislature should decide whether privileges should be preserved. See *id.*

The committee's deferential approach to repealing privileges should be followed in future controversies involving the substantive rights of individuals. The supreme court should follow the Ohio Supreme Court's view in *State v. Smorgala*, 50 Ohio St. 3d 222, 553 N.E.2d 672 (1990). The Smorgala court refused to provide an exception to a statute that established a patient-physician privilege, stating that “[j]udicial policy preferences may not be used to override valid legislative enactments . . . .” *Id.* at 674. The substantive choices of democratically elected representatives should be given effect unless they unreasonably affect the functioning of the judiciary. See *infra* notes 135-36 (legislative enactments' substantive benefits must outweigh any diminution in procedural efficiency); *Commonwealth v. Reneer*, 734 S.W.2d 794, 797 (Ky. 1987); see also *Ex parte Ward*, 540 So. 2d 1350, 1351-52 (Ala. 1988) (courts should not suspend valid legislative enactments); *Jenkins v. First Baptist Church*, 166 Ariz. 243, 801 P.2d 478, 481 (Ct.App. 1990) (subsequently created procedural rules cannot repeal substantive rights created by preceding statute).

[FN133]. See Matheson, *supra* note 81, at 237-41.

[FN134]. An indication a court is acting impermissibly is when the court weighs competing substantive rights in making its decision. See *id.* at 228-31.

[FN135]. See Levin & Amsterdam, *supra* note 17, at 23-24; Matheson, *supra* note 81, at 230; Rusch, *supra* note 117, at 504; see also *Schempp-Cook v. Cook*, 455 N.W.2d 216, 217 (N.D. 1990) (if procedure and substance are mixed, court “will respect the clearly expressed intent of the Legislature when to do so will not compromise or unreasonably impede justice”).

[FN136]. See *People v. McKenna*, 196 Colo. 367, 585 P.2d 275, 276-79 (1978).

[FN137]. See *supra* notes 91-99 and accompanying text (discussing primary effects guideline).

[FN138]. See *State v. Mitchell*, 234 Kan. 185, 672 P.2d 1, 19 (1983).

[FN139]. See *Commonwealth v. Reneer*, 734 S.W.2d 794, 797 (Ky. 1987). The Reneer court upheld a statute that prescribed sentencing procedures in felony cases, reasoning the procedures aided the courts. See *id.* at 795-97.

[FN140]. See Utah Code Jud. Admin. § 2(D)(iii). If the supreme court enacts a court rule in the face of legislative opposition, the legislature may, of course, amend the court rule by a two-thirds vote, or legislators individually could challenge the rule as unconstitutional through the courts.

[FN141]. See *Daou v. Harris*, 139 Ariz. 353, 678 P.2d 934, 939 (1984); *Z & O Realty Ass'n v. Lakow*, 519 So.2d 3, 5 (Fla. Dist. Ct. App. 1987); *State v. Currington*, 108 Idaho 539, 700 P.2d 942, 944 (1985); *People v. Felella*, 131 Ill. 2d 525, 546 N.E.2d 492, 498 (1989); *State v. Mitchell*, 234 Kan. 185, 672 P.2d 1, 9 (1983); *Crist v. Director of Family Servs.*, 775 S.W.2d 266, 267 (Mo. Ct. App. 1989); *State v. Connery*, 99 Nev. 342, 661 P.2d 1298, 1300 (1983); *Maples v. State*, 110 N.M. 34, 791 P.2d 788, 790 (1990); *State v. Greer*, 39 Ohio St. 3d 236, 530 N.E.2d 382, 395 (1988); *Mid-South Pavers, Inc. v. Arnco Constr., Inc.*, 771 S.W.2d 420, 422 (Tenn. Ct. App. 1989); *Layton City v. Bennett*, 741 P.2d 965, 967-68 (Utah Ct. App.) (per curiam), cert. denied, 765 P.2d 1277 (Utah 1987).

Oklahoma has taken the view that legislative enactments prevail. See *Hulsey v. Mid-America Preferred Ins. Co.*, 777 P.2d 932, 936 n.9 (Okla. 1989); *Oklahoma County Sheriff v. Hunter*, 615 P.2d 1007, 1008 (Okla. 1980). The Oklahoma Supreme Court relies on a legislative delegation rather than a constitutional provision for its authority to make rules. See *Okla. Stat. tit. 12, § 74* (1988).

[FN142]. See *Z & O Realty*, 519 So. 2d at 5; *Nearing v. Golden State Foods Corp.*, 114 Wash. 2d 817, 792 P.2d 500, 502 (1990).

[FN143]. See *Z & O Realty*, 519 So. 2d at 5.

[FN144]. Utah R. Crim. Proc. compiler's note.

[FN145]. See *supra* notes 116-30 and accompanying text (discussing separation of powers principles underlying substance/procedure distinction).

[FN146]. See *Mid-South Pavers, Inc. v. Arnco Constr., Inc.*, 771 S.W.2d 420, 422 (Tenn. Ct. App. 1989); *Nearing*, 792 P.2d at 502-03; see also *Felella*, 546 N.E.2d at 498 (“where a legislative enactment establishes a public policy preference not involving judicial administration this court has sought to reconcile any conflicts between our rules and statute[s]”).

[FN147]. See *supra* notes 52-54 and accompanying text (discussing legislature's reasons for creating legislative

power to amend court rules).

[FN148]. See Levin & Amsterdam, *supra* note 17, at 39-41.

[FN149]. Utah Const. art. VIII, § 4.

[FN150]. See Rusch, *supra* note 117, at 501.

[FN151]. See *supra* note 140 and accompanying text (designating supreme court as branch to determine which should initially address issues concerning court procedure when supreme court and legislature disagree).

[FN152]. For example, the legislature recently amended the rules of evidence to allow adult victims of crime to testify when prosecutors do not object. See Act of Feb. 25, 1991, ch. 24, 1991 Utah Laws 100 (amending Utah R.Evid. 615).

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